

# ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

## TITLE 1. ADMINISTRATION

### PART 3. OFFICE OF THE ATTORNEY GENERAL

#### CHAPTER 55. CHILD SUPPORT ENFORCEMENT

##### SUBCHAPTER I. STATE DIRECTORY OF NEW HIRES

###### 1 TAC §55.302

The Office of the Attorney General, Child Support Division, adopts this amendment to the Texas Administrative Code §55.302(4), regarding the State Directory of New Hires pursuant to the Texas Family Code §§231.003, 234.101(1) and 234.104. The amendment is adopted without changes to the proposed text as published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9403).

The adopted amendment to the Texas Administrative Code will provide guidance to employers who are deciding whether a particular individual falls under the definition of employee as defined by Texas Family Code §234.101.

This amendment clarifies the definition of independent contractor by limiting the term to those whose income would be reported by employers on Form 1099-MISC.

No comments were received regarding adoption of the amendment.

The adopted amendment is authorized under Texas Family Code §231.002(a)(2), which provides the Office of the Attorney General with the authority to adopt rules for the provision of child support services and by Texas Family Code §231.003, which authorizes the Title IV-D agency to promulgate by rule any forms and procedures necessary to comply fully with the intent of this chapter. The adopted amendment is also authorized under Texas Family Code §234.104, which provides the Office of the Attorney General with the authority to establish procedures for reporting employee information and for operating a state directory of new hires meeting the requirements of federal law.

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

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### PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

#### CHAPTER 354. MEDICAID HEALTH SERVICES

##### SUBCHAPTER D. TEXAS HEALTHCARE TRANSFORMATION AND QUALITY IMPROVEMENT PROGRAM

##### DIVISION 5. ACTIONS IN PREPARATION FOR EXTENSION OF THE DSRIP PROGRAM

###### 1 TAC §§354.1641, 354.1643, 354.1645, 354.1647, 354.1649

The Texas Health and Human Services Commission (HHSC) adopts new Division 5, concerning Actions in Preparation for Extension of the DSRIP Program, including new §354.1641, concerning Definitions; §354.1643, concerning Medicaid and Low-income or Uninsured (MLIU) Quantifiable Patient Impact (QPI); §354.1645, concerning Electing to Continue a DSRIP Project in the Waiver Extension Period; §354.1647, concerning Requests for Adjustments to Certain DSRIP Projects; and §354.1649, concerning Certain Requirements for the Planned Transition Year and their Exceptions. The new rules are adopted with changes to the proposed text published in the March 25, 2016, issue of the *Texas Register* (41 TexReg 2268) and will be republished.

###### BACKGROUND AND JUSTIFICATION

New Division 5 describes the actions that performing providers ("performers") in the Delivery System Reform Incentive Payment (DSRIP) program must take to prepare for the transition year.

In April 2016, HHSC proposed a 15-month extension of the Texas Healthcare Transformation and Quality Improvement Program, a Section 1115 Waiver, to the Centers for Medicare & Medicaid Services (CMS). The current 1115 Waiver expires on September 30, 2016. As part of the extension proposal, HHSC proposed to extend the DSRIP program. DSRIP is a program for hospitals and certain other performers to propose and implement transformative projects that increase access to care and improve quality of care. CMS approved this extension request in May 2016.

To prepare for expected changes in the structure of DSRIP, HHSC proposed to CMS a transition year to coincide with the first demonstration year (DY) of the extension period (or sixth DY overall). DSRIP performers must take certain steps to prepare for the transition year. These adopted new rules describe the steps expected of performers.

HHSC received many comments and made changes to the rules based on those comments. In addition, HHSC made several clarifications. First, although the term "performing provider" is widely used by HHSC and stakeholders, the DSRIP rules use the term "performer." In the adopted rules, HHSC changed "performing provider" to "performer" to conform to the rest of the DSRIP rules. Second, HHSC clarified two definitions. Third, HHSC revised §354.1645(a) to clarify that a project deemed ineligible to continue may either elect to create a new DSRIP project in the seventh DY or take some sort of next step in the logical progression of its operation. Fourth, HHSC added a withdrawal window between the second payment period for the seventh DY and the first reporting period for the eighth DY. If a performer withdraws a DSRIP project during this withdrawal window, HHSC will not recoup any prior extension period DSRIP payments associated with the DSRIP project due to withdrawal. Fifth, HHSC removed the requirement for performing providers to submit the Medicaid IDs for Medicaid-enrolled individuals served by the DSRIP project.

HHSC is currently negotiating with CMS on the policies surrounding the transition year. HHSC will update these rules, as necessary, in accordance with CMS guidance.

#### COMMENTS

The 30-day comment period ended April 25, 2016. During this period, HHSC received comments regarding the proposed new rules from several commenters, including the Texas Council of Community Centers, Tenet Healthcare Corporation, Midland County Hospital District, Rice Medical Center, the Hospital Corporation of America, Memorial Hermann, Central Health, CHRISTUS Health, Baptist Hospitals of Southeast Texas, and Harris Health System. A summary of comments and HHSC's responses follows.

*Comment:* Several commenters requested that HHSC revise proposed §354.1643 to state that performers may adopt flexible approaches approved by HHSC to document that an individual is low-income (i.e., the individual is below 200 percent of the federal poverty level). The commenters further requested that these detailed requirements be specified in the Program Funding and Mechanics (PFM) protocol, and that they be deemed acceptable under a compliance review.

*Response:* HHSC is developing the requirements for documenting that an individual is low-income, and will include those requirements in the final PFM protocol language. However, the section at issue describes the standards for which individuals qualify as either Medicaid or low-income or uninsured, not the documentation necessary to properly make such a determination. No changes were made in response to this comment.

*Comment:* One commenter asked if §354.1645(c) should be interpreted to mean that if a performer withdraws a project during the transition year (between October 1, 2016, and September 30, 2017), then the performer is no longer eligible to use those project funds for a replacement project in DY7. In which case, as long as the performer withdraws the project at any time prior to October 1, 2016, they would be eligible to use those project funds for a replacement project in DY7.

*Response:* HHSC revised §354.1645(c) to clarify that if a performer indicates to HHSC, by a date to be determined by HHSC, that it chooses to discontinue the DSRIP project in the transition year (i.e., that it does not wish to continue the project into the transition year), the performer may not propose any new DSRIP projects for the entirety of the extension period with funds associated with the discontinued DSRIP project.

*Comment:* Several commenters opposed the language in §354.1645(e), which provides for the recoupment of DY6 funds from performers that indicated they would continue or replace a DSRIP project, but later decide not to continue or replace the project. The commenters argue that performers will have to decide whether to continue a DSRIP project without knowing what the project requirements will be in the future, and therefore should not be penalized if, once the requirements are finalized, they find they cannot continue the project.

*Response:* HHSC agrees with the concerns raised by the commenters. HHSC revised §354.1645 to provide for a withdrawal window between the second payment period for DY7 and the first reporting period for DY8. If a performer withdraws a DSRIP project during this withdrawal window, HHSC will not recoup any prior extension period DSRIP payments associated with the project due to withdrawal. However, DSRIP payments may be recouped if projects are withdrawn outside of that window. In addition, as is currently the practice, DSRIP payments may be recouped for reasons other than withdrawal.

*Comment:* Several commenters recommended that an exception be made to §354.1645(e), which provides for the recoupment of DY6 funds from performers that indicated they would continue or replace a project, but later decide not to continue or replace the project. They requested that an exception be made in cases where a private hospital intends to continue a project into the extension period, but is unable to continue because the affiliated governmental entity refuses to provide the non-federal share of a DSRIP payment for the project after DY6.

*Response:* A performer would not be required to withdraw or terminate a DSRIP project due to lack of non-federal share, therefore an exception is not needed. No changes were made in response to this comment.

*Comment:* One commenter asked if performers would have an opportunity to adjust their total Quantifiable Patient Impact (QPI) milestone goals in the transition year.

*Response:* HHSC understands this concern and will discuss with CMS the potential for a limited number of projects to adjust their total QPI milestone goal if they have a strong justification for doing so. No changes were made in response to this comment.

*Comment:* One commenter recommended that HHSC "develop a process that allows all providers the opportunity to make adjustments to Medicaid and Low-income or Uninsured (MLIU) goals in the transition period, based on historical project data." The commenter states that the original MLIU goal estimates were made without access to data about the patient population the project ultimately served; therefore, performers should have the opportunity to establish new MLIU goals based on more recent utilization data.

*Response:* HHSC believes the rule already provides sufficient opportunity for performers with strong justification to request an adjustment to a DSRIP project's transition year MLIU QPI goal. No changes were made in response to this comment.

*Comment:* Two commenters requested that HHSC provide an opportunity for DSRIP projects to combine beginning in DY7.

*Response:* HHSC will consider allowing projects under a certain value to combine beginning in DY7 and amending the appropriate rule(s) as needed at a later date. No changes were made in response to this comment.

*Comment:* Several commenters agreed with the language in proposed §354.1647 to allow some performers to adjust their DY6 MLIU QPI goals, as long as the performer will not be penalized for making such a request, such as by reducing their DY6 value. The commenters also indicated that in evaluating such requests, HHSC should give "credit" to a performer whose total QPI achievement was higher than their total QPI goal, and whose MLIU percentage achievement was lower than the MLIU percentage goal, if the performer would have met the MLIU percentage goal had their total QPI achievement been equal to the total QPI goal. In addition, the commenters indicated that HHSC should consider how the DSRIP project's MLIU percentage compares to MLIU percentages for similar DSRIP projects across the state in evaluating these requests.

*Response:* Performers will be required to submit a form in Summer 2016 that includes the information for each of their projects in DY6. Performers will be able to request an adjustment to a project's DY6 MLIU QPI goal through this form. If a performer requests an adjusted goal that puts a DSRIP project's value per MLIU individual/encounter at a much higher value than that of other projects, the performer may accept a lower project value or enter an updated goal in the form that results in a value per MLIU individual/encounter that is similar to other projects. No changes were made in response to this comment.

*Comment:* With respect to §354.1649(a)(1), several commenters expressed concern that it would be onerous to identify each patient's MLIU status with a checkbox. They requested that HHSC allow flexible approaches to satisfy MLIU individual level reporting requirements that are not overly burdensome on providers.

*Response:* The method by which performing providers would need to identify MLIU individuals is not proposed as part of this rule. HHSC will continue to work with stakeholders to find the most appropriate method by which to identify MLIU individuals for the extension period. No changes were made in response to this comment.

*Comment:* Several commenters opposed the requirement in §354.1649(a)(2) for performing providers to submit the Medicaid IDs for Medicaid-enrolled individuals served by the DSRIP project because it would pose a significant administrative burden. The commenters argue that in some cases, Medicaid IDs may not be easily available to providers or included in their medical record data. Submitting Medicaid ID data to HHSC could require additional system changes for certain providers. Some Medicaid MCOs assign their members a number that is different than the patient's Medicaid ID. In these cases, the provider may not have Medicaid IDs for each patient served by the DSRIP project because the MCO did not provide or require the Medicaid ID for payment.

*Response:* HHSC agrees with the concerns raised by the commenters. HHSC revised §354.1649 to remove the Medicaid ID reporting requirement.

*Comment:* Several commenters requested that §355.8203(h)(2)(B) continue to apply in the transition year.

This rule states that "If a governmental entity does not transfer the maximum amount referenced in paragraph (1) of this subsection on behalf of each performer owned by or affiliated with that governmental entity, each performer owned by or affiliated with that governmental entity will receive a portion of the value associated with that milestone or quality measure (as specified in the RHP plan) that is proportionate to the total value of all milestones that are completed and eligible for payment for that period by all performers owned by or affiliated with that governmental entity." The intent of this provision is to encourage broad-based public and private entity participation in DSRIP.

*Response:* Section 355.8203(h)(2)(B) is not a subject of these adopted rules. However, HHSC currently intends for this provision to continue to apply in the transition year. No changes were made in response to this comment.

*Comment:* Several commenters requested that HHSC continue "the broad hospital participation targets as required by Attachment J of the current Program Funding and Mechanics Protocol and continue the current IGT requirements in a manner that continues to promote private hospital participation in DSRIP."

*Response:* HHSC assumes that the commenters are requesting to continue the policy outlined in paragraph 30(c)(v)(3) of the PFM protocol. This policy is not addressed in this first transition year rule packet, but HHSC understands this concern, and will take it under consideration in the development of further extension period policies. No changes were made in response to this comment.

*Comment:* Two commenters recommended that HHSC revise the rule to allocate leftover transition year funds first to new performers that are not currently participating in DSRIP for DSRIP projects in the extension period.

*Response:* HHSC disagrees with the comments. The purpose of the extension period is to extend the amount of time that current DSRIP projects have to assess their effectiveness in improving healthcare quality and reducing costs. HHSC is in the process of negotiating with CMS on the potential uses of leftover funds and will continue to work with stakeholders to further the goals of the 1115 Waiver. No changes were made in response to this comment.

#### STATUTORY AUTHORITY

The new rules are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

#### §354.1641. Definitions.

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

(1) Extension period--The period of time, as approved by the Centers for Medicare & Medicaid Services (CMS), for which the waiver is extended beyond the initial demonstration period.

(2) Federal poverty level--The household income guidelines issued annually and published in the *Federal Register* by the United States Department of Health and Human Services.

(3) Initial demonstration period--The first five demonstration years (DYs) of the waiver, or December 12, 2011, through September 30, 2016.

(4) Medicaid and Low-income or Uninsured (MLIU) Quantifiable Patient Impact (QPI)--The number of MLIU individuals served or encounters provided to MLIU individuals during an applicable DY that are attributable to the DSRIP project.

(5) Medicaid and Low-income or Uninsured (MLIU) Quantifiable Patient Impact (QPI) Goal--The number of MLIU individuals that a performer intends to serve, or the number of MLIU encounters that a performer intends to provide, during an applicable DY that are attributable to the DSRIP project.

(6) Transition year--As it relates to DSRIP, the first DY of the extension period.

§354.1643. *Medicaid and Low-income or Uninsured (MLIU) Quantifiable Patient Impact (QPI).*

(a) To qualify as a Medicaid individual for purposes of MLIU QPI, the individual must be enrolled in Medicaid at the time of at least one DSRIP project encounter during the applicable demonstration year (DY).

(b) To qualify as a low-income or uninsured individual for purposes of MLIU QPI, the individual must either be below 200 percent of the federal poverty level or must not have health insurance at the time of at least one DSRIP project encounter during the applicable DY.

(c) If an individual was enrolled in Medicaid at the time of one DSRIP project encounter during the applicable DY, and was low-income or uninsured at the time of a separate DSRIP project encounter during the applicable DY, that individual is classified as a Medicaid individual for purposes of MLIU QPI.

§354.1645. *Electing to Continue a DSRIP Project in the Waiver Extension Period.*

(a) If HHSC determines that a DSRIP project is ineligible to continue in its current form, that DSRIP project may not participate in the transition year. A performer affected by such a determination will have the opportunity to use the funds associated with the DSRIP project beginning in DY7.

(b) For each DSRIP project that HHSC determines is eligible to continue, the performer must indicate, by a date to be determined by HHSC, whether it chooses to:

- (1) discontinue the DSRIP project in the transition year; or
- (2) continue the DSRIP project in the transition year.

(c) If a performer indicates to HHSC, by a date to be determined by HHSC, that it chooses to discontinue the DSRIP project in the transition year, the performer may not propose any new DSRIP projects for the entirety of the extension period with funds associated with the discontinued DSRIP project.

(d) If a performer indicates to HHSC, by a date to be determined by HHSC, that it chooses to continue the DSRIP project in the transition year, the performer must indicate, by a date to be determined by HHSC, whether it chooses to:

- (1) continue the DSRIP project for the remainder of the extension period; or
- (2) replace the DSRIP project with a new DSRIP project to commence at the beginning of the second DY of the extension period.

(e) If a DSRIP project is withdrawn prior to the second payment period for DY7, HHSC will recoup all prior extension period DSRIP payments associated with the DSRIP project.

(f) If a DSRIP project is withdrawn after the second payment period for DY7, but before the first reporting period for DY8, no prior extension period DSRIP payments associated with the DSRIP project will be recouped due to withdrawal.

(g) If a DSRIP project is withdrawn after the first reporting period for DY8, any DSRIP payments made after that period will be recouped.

§354.1647. *Requests for Adjustments to Certain DSRIP Projects.*

(a) Certain DSRIP projects are eligible for an adjustment to the DSRIP project's transition year MLIU QPI goal. These DSRIP projects include:

(1) a DSRIP project that HHSC identifies as underperforming on MLIU in the initial demonstration period;

(2) a DSRIP project that is reporting on individuals or encounters that meet the MLIU definition for the initial demonstration period, but will not meet the MLIU definition for the extension period; and

(3) any other DSRIP project that HHSC determines has a strong justification for an adjustment.

(b) Performers of a DSRIP project as described in subsection (a) of this section may, by a date to be determined by HHSC, request an adjustment to the DSRIP project's transition year MLIU QPI goal.

(c) Performers with a total value less than \$250,000 in demonstration year (DY) 5 may increase their total value to up to \$250,000 for each subsequent DY across Categories 1-4. Categories 1-4 are each increased proportionately if a performer chooses this option. Performers eligible for such an option must make this choice by a date to be determined by HHSC.

§354.1649. *Certain Requirements for the Planned Transition Year and their Exceptions.*

(a) To be eligible for the MLIU QPI milestone payment, beginning in the transition year, performers must report for each DSRIP project the MLIU individuals served or encounters provided at the individual or encounter level as opposed to the percentage of total QPI.

(b) There are limited exceptions to this requirement. Performers may request an exception to this requirement by a date to be determined by HHSC. DSRIP projects eligible for an exception include:

(1) a DSRIP project for which the performer did not assess the DSRIP project participants' health insurance coverage or financial status prior to September 30, 2015, and instead used a proxy to estimate the MLIU population served in their October DY4 QPI Reporting Template, and:

(A) utilizes an intervention site that is a school, non-medical social service office (i.e., shelter), or community health fair;

(B) is in Project Area 1.6 (Enhance Urgent Medical Advice), 2.6 (Implement Evidence-based Health Promotion), or 2.7 (Implement Evidence-based Disease Prevention Programs); or

(C) the performer is a Local Health Department that does not bill Medicaid for the types of services provided through the DSRIP project; or

(2) any other DSRIP project that HHSC determines has a strong justification for an exception.

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 May 27, 2016.

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**TITLE 4. AGRICULTURE**

**PART 2. TEXAS ANIMAL HEALTH  
COMMISSION**

**CHAPTER 41. FEVER TICKS**

**4 TAC §41.1, §41.8**

The Texas Animal Health Commission (commission) adopts amendments to §41.1, concerning Definition of Terms, and a new §41.8, concerning Dipping, Treatment, and Vaccination of Animals, with changes to the proposed text as published in the March 11, 2016, issue of the *Texas Register* (41 TexReg 1767). The text of the rules will be republished.

Elsewhere in this issue of the *Texas Register*, the commission contemporaneously adopts the repeal of the existing §41.8, concerning Dipping and Treatment of Livestock.

The purpose of the amendments to §41.1 is to add a fever tick vaccine definition. The purpose of new §41.8 is to add a fever tick vaccine requirement for beef cattle located in a control purpose quarantine area, temporary preventative quarantine area or tick eradication quarantine area, and other beef cattle or premises epidemiologically determined by the commission to be at an increased risk for fever ticks. New §41.8 will also clarify and better organize the different requirements for dipping, treatment, and vaccination. The title of §41.8 is being changed to accurately capture that the requirements apply to animals capable of hosting or transporting ticks capable of carrying *Babesia* and includes vaccination requirements.

The purpose of the Texas Cattle Fever Tick Eradication Program (CFTEP) is to eradicate fever ticks through the management of a permanent quarantine zone, as well as through temporary quarantine areas, created to address the presence of ticks outside the permanent zone.

The USDA Cattle Fever Tick Eradication Program, USDA Agriculture Research Service, and the commission have developed a vaccine for the purpose of acting as a preventative to be used against fever ticks. Collaboratively, they worked with a major pharmaceutical company for five years to get the vaccine through the approval process by USDA Center for Veterinary Biologics (CVB) approval process with the intent for the fever tick vaccine to be integrated into the eradication program.

The fever tick vaccine was developed and manufactured by a major pharmaceutical company with extensive experience in livestock products. The vaccine contains a recombinant protein derived from the epithelial lining of the fever tick gut. The vaccine has been developed using recombinant DNA technology and has no live, modified live, nor killed bacterial or viral components. It is derived from epithelial lining of the fever tick gut. Cattle vaccinated with this antigen produce an antibody response at high levels in blood. Fever ticks which

feed on immunized cattle consume high levels of the antibody in blood meal. The antigen-antibody response occurs in the stomach of the tick and effectively destroys the gut lining of the tick, reducing the tick's capabilities to produce offspring and potentially killing the tick.

The fever tick vaccine requires two priming doses 28 days apart. The maximum protection requires boosters every 6 months. This is administered by intramuscular injection in the neck region of cattle. The vaccine is approved for use in beef cattle two months or age and older. There is insufficient safety data for use of the vaccine in dairy cattle and, as such, the vaccine is not authorized for use in dairy cattle at this time. The USDA CVB requires a slaughter withholding period of 60 days following administration of the vaccine and that is provided for in the proposal.

There are numerous benefits of the fever tick vaccination, with the most significant benefit being the potential to eradicate ticks from infested premises. The vaccine provides long-term protection against re-infestation; after the initial inoculations cattle only need, at most, two inoculations per year and premises are protected continuously because cattle are fever tick immune. In this regard, the vaccine substantially prevents re-establishment of ticks when new incursions occur from stray livestock and wildlife from Mexico in US premises stocked with immunized cattle. The vaccine is simple to administer and works synergistically with treatment to promote more efficient elimination of fever ticks on premises with less dependency on chemical and systemic acaricides.

It is also noted that although the vaccine is over 95% effective against *Rhipicephalus* (*Boophilus*) *annulatus*, it is only 70% effective against *Rhipicephalus* (*Boophilus*) *microplus* but, the booster effect over a 2-3 year period is predicted to improve the control of ticks in the pastures by suppressing the overall tick population following reduced fertility of the ticks. Additional research is being carried out to improve the efficacy of this vaccine against *Rhipicephalus* (*Boophilus*) *microplus*, and results of which will be forthcoming.

The commission received one comment letter from Texas and Southwestern Cattle Raisers Association (TSCRA). TSCRA raised a number of issues related to the inspection and treatment practices for cattle located within an area restricted for cattle fever ticks. The commission provides a response to the various questions and issues raised in the letter. The primary purpose and focus of new §41.8 was to add a fever tick vaccine requirement for beef cattle. Section 41.8 was also reorganized to allow the vaccine requirement to be better integrated into the section with the established treatment options, but no changes were proposed to the established treatment and inspections. The commission appreciates the comment and opportunity to explain the program.

TSCRA stated that the 100% requirement to gather, treat, and inspect livestock is unattainable and, therefore, impossible for operators to comply with the currently proposed rule. The commenter requests that the commission include flexibility in the gathering frequency and treatment regime required for livestock based on fever tick prevalence of the premises, pasture size, labor available, livestock temperament, time since last gathered, and other unique gathering challenges of the quarantined property. The CFTEP is the oldest eradication program in the state and the 100% treatment schedule for infested premises has historically been the requirement. For premises known to be infested with cattle fever ticks this requirement has been the most effective method of eradicating ticks from the premises

with the fewest treatments and in the shortest period of time. The commission does allow for some flexibility in compliance with the 100% gather and treatment provision when supported by sound pest control and eradication principles and when authorized by the CFTEP Director and State Veterinarian. When circumstances warrant such deviations from policy, the special provisions are documented in the herd plan prescribed for the particular property. Also, it should be noted that the approved methods of treatment do provide some flexibility in gathering frequency in that the Coumaphos treatment option provides for treatment at 7-14 day intervals with an additional 3 days beyond 14 days when circumstances beyond control of the owner prevail. In addition, the Doramectin treatment option provides for gathering at 25-28 day intervals.

The basic biology of the tick relative to its life cycle on the host animal requires that treatments occur prior to completion of its life cycle on the host. The time period from when the ticks first attach to the host, feed on the host, molt on the host from larvae to nymph to adult, successfully breed and engorge with blood from the host so that the eggs carried by the female tick are developed to the point that the female tick drops off to the ground to deposit eggs for the next generation of ticks to begin is generally accepted to be from 18-21 days in duration. In addition, the basic pharmacology of the treatment products relative to the duration of effect also plays an important role in the establishment of treatment frequencies. For example, although Coumaphos (CoRal®) applied topically has significant knock-down effect, it is not a systemic product and does not have significant residual properties. Considering that fever ticks may complete their life cycle on cattle in 18-21 days, it is required that treatments occur at an interval shorter than that in order to prevent perpetuation of a new generation of ticks.

Prior to 2008, Coumaphos was the only product approved for use in the program. In response to an increasing proportion of cattlemen who could not comply with its schedule for treatments and remain profitable, the TAHC and CFTEP worked closely with the Agricultural Research Services (ARS) in investigating other products which had longer residual effect and a less frequent treatment schedule but retained similar levels of efficacy. As a result, we began using Doramectin routinely in 2008. Doramectin (Dectomax®) is a systemic product and does provide significantly greater residual effect which allows this product to be effective in breaking the life cycle of the tick attached to the host when administered at 25-28 day intervals. We believe it has decreased the number of treatments to achieve eradication by 50% over the duration of a quarantine period, and at the same time increased the proportion of cattlemen who are able to leave cattle on systematic treatment as opposed to destocking.

We continue to investigate other products as well, to find additional options with comparable efficacy, greater residual effect, and less frequent treatments to achieve eradication. Several such products include an ivermectin medicated molasses supplement, 10% moxidectin injectable (Cydectin Onyx), and eprinomectin injectable (Longrange®). As these products are proven out through laboratory and field trials they will be integrated into the program if they meet accepted efficacy standards. The tick vaccine has been through this rigorous process, and for the first time in the history of the program it offers a method to prevent establishment of a fever tick infestation on properties in many cases rather than responding with treatment after the infestation has become established.

TSCRA also asked if an infested premises can be subdivided into prevalence levels that require a more practical and less frequent number of gatherings at lower prevalence levels. The commission believes that once an infestation has been detected on a premises, failure to recognize the life cycle of the tick along with accepted pest management principles by administration of treatments prior to completion of the life cycle on the host will only allow the infestation to continue to increase; and at the same time provide treatment exposure to ticks at less than therapeutic levels of the product which over time will generate profound resistance of the tick population to the product. In a control rather than an eradication approach with sub therapeutic use of topical and systemic products it can result in tick populations which are now resistant to topical and systemic products known worldwide and this is a concern for us.

TSCRA requested that for premises classified as either adjacent or check that we allow producers to present their livestock for treatment and inspection according to a schedule that is more practical for monitoring livestock herds for cattle fever tick presence. It is important to note that this schedule is done through policy rather than rules to specify gathering schedules for check premises. As such, current policy calls for inspections to occur at 90 day intervals. Treatments at the time of inspection are not required. However, we encourage producers to consider preventative treatments when they believe it is economical for them to do so. Should the dynamics of the spread of ticks in the area indicate that the risk to adjacent and check premises is marginalized, we do consider less frequent gathering to monitor the herds, where appropriate, and document those exceptions to policy in the herd plan agreement for such properties.

TSCRA urged the TAHC to classify the treatment of livestock as an official treatment according to Chapter 41 of the Texas Administrative Code if 100% of gathered livestock are treated. TSCRA defines gathered livestock as livestock gathered for treatment and/or inspection if number of head presented is a reasonable percentage of livestock on a premises given pasture size, labor available, livestock temperament, time since last gathering, and other unique gathering challenges of the quarantined property. The commission would note that the gathering requirement for premises where fever ticks have been detected, and classified as infested premises, requires all cattle to be gathered, inspected, and treated, in order to effect eradication of the infestation. This requirement is based on widely accepted pest management principles and has been shown by field experience to be highly effective. We also know that animals which are not gathered and treated will continue to play a role in perpetuating the infestation on the property. There is currently no scientifically accepted model that describes the predicted outcome with the variables identified in the comments above, that allows us to set a standard to effect eradication with a defined proportion of cattle treated.

However, we do understand the challenges faced by producers particularly with respect to gathering herds on large south Texas pastures. As such, by policy, we have structured herds plans to accommodate slightly less than 100% gatherings throughout the duration of a quarantine period when we believe that the risk of perpetuating or spreading tick infestations to premises in the immediate area is minimal. For adjacent and check premises, we do not require all cattle to be gathered for inspection to determine if an infestation has occurred. By policy, we require a sufficient number of cattle to detect a 1% infestation rate (with 95% confidence levels). For example, in a herd with an inventory of approximately 300 animals, we require inspection of at

least 190 members of the herd in order to comply with our efforts to monitor the herd for cattle fever ticks.

TSCRA also asked that if an animal is not originally presented during the first official treatment then it should not reset the date for determining when the animal is determined to be clean of ticks. This is something that the commission will discuss with the CFTEP program to determine how this is best evaluated and options rule.

TSCRA asks if the rule can be amended to allow cattle to be held at a non-contiguous quarantine area other than the premises of origin until the withdrawal period has passed for the injectable Doramectin and/or injectable tick vaccination and the cattle can be safely transported. Cattle have been allowed to move to other quarantined premises operated by the producer, but the CFTEP has been cautious about movement to premises where movement is not restricted since we have no method to assure compliance and no penalty if they moved prematurely. It is also important to note animals need to be restricted during the withholding period for certain treatment options because it is required by other entities.

Lastly, TSCRA asks for clarity regarding which government agency is responsible for enforcing compliance and eventually releasing a premises from quarantine. The statutory authority for the CFTEP is located in Chapter 167 of the Texas Agriculture Code. The commission promulgates rules for the program, which are located in Chapter 41 of the Texas Administrative Code. The CFTEP is staffed by the USDA and they manage the day-to-day activities in the permanent quarantine zone. The commission supports their activities as requested. For areas outside of the permanent quarantine zone, the commission has employees work with the CFTEP employees to support the work and uses a Unified Incident Command system.

#### STATUTORY AUTHORITY

The amendments and new rule are adopted under the following statutory authority as found in Chapters 161 and 167 of the Texas Agriculture Code. The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized, through §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock.

Pursuant to §161.005 entitled "Commission Written Instruments", the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire commission.

Pursuant to §161.007 entitled "Exposure or Infection Considered Continuing", if a veterinarian employed by the commission determines that a communicable disease exists among livestock, domestic animals, or domestic fowl or on certain premises or that livestock, domestic animals, or domestic fowl have been exposed to the agency of transmission of a communicable disease, the exposure or infection is considered to continue until the commission determines that the exposure or infection has been eradicated through methods prescribed by rule of the commission.

Pursuant to §161.048 entitled "Inspection of Shipment of Animals or Animal Products", the commission may require testing, vaccination, or another epidemiologically sound procedure be-

fore or after animals are moved. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease.

Pursuant to §161.054 entitled "Regulation of Movement of Animals", the commission, by rule, may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce.

Pursuant to §161.057 entitled "Classification of Areas", the commission by rule may prescribe criteria for classifying areas in the state for disease control. The criteria must be based on sound epidemiological principles. The commission may prescribe different control measures and procedures for areas with different classifications.

Pursuant to §161.061 entitled "Establishment", if the commission determines that a disease listed in §161.041 of this code or an agency of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state or livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place.

Pursuant to §161.081 entitled "Importation of Animals", the commission by rule may regulate the movement, including movement by a railroad company or other common carrier, of livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl into this state from another state, territory, or country.

Pursuant to §167.003 entitled "General Powers and Duties of the Commission", the commission shall eradicate all ticks capable of carrying Babesia in this state and shall protect all land, premises, and livestock in this state from those ticks and exposure to those ticks. In carrying out this chapter, the commission may adopt necessary rule.

Pursuant to §167.004 entitled "Classification of Animals or Premises as Infested, Exposed or Free from Exposure", the commission by rule shall define what animals and premises are to be classified as exposed to ticks. The commission shall classify as exposed to ticks livestock that have been on land or in an enclosure that the commission determines to be tick infested or exposed to ticks or to have been tick infested or exposed to ticks before or after the removal of the livestock, unless the commission determines that the infestation or exposure occurred after the livestock were removed and that the livestock did not become infested or exposed before removal.

#### §41.1. *Definition of Terms.*

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

(1) **Adjacent premise**--A premise that borders an exposed or infested premise, including premises separated by roads, double fences, or fordable streams. A premise that would normally be classified as adjacent may be exempted from adjacent premise requirements by a State or Federal epidemiologist if the premise is separated from the exposed or infested premise by double fencing, sufficient to prevent the spread of ticks, with one of the fences being game-proof.

(2) Animal--Any domestic, free-range, or wild animal capable of hosting or transporting ticks capable of carrying Babesia, including livestock; zebras, bison, and giraffes; and deer, elk, and other cervid species.

(3) Certificate--A document authorizing movement of livestock issued by an authorized representative of the commission after the livestock have been treated in a manner prescribed by the commission for the area and premise from which they originate.

(4) Check premise--A premise located in a tick eradication quarantine area, temporary preventative quarantine area, or control purpose quarantine area that is not classified as an infested, exposed, or adjacent premise.

(5) Control purpose quarantine area--A premise or property designated by the commission for a systematic inspection of livestock and premises and control of the movement of livestock in order to investigate and control a suspected exposure of animals to ticks outside the tick eradication quarantine area. The boundaries of the area will be determined by evaluation of the barriers to the potential spread of ticks.

(6) Designated Fever Tick Epidemiologist (DFTE)--A State or Federal epidemiologist designated to make decisions concerning the use and interpretation of exposure to fever ticks and to manage the Fever Tick program. The DFTE must be selected jointly by the Executive Director of the commission and the USDA-APHIS, VS representative for Texas. The DFTE has the responsibility to determine the scope of epidemiologic investigations, determine the status of herds, assist in development of individual herd plans, and coordinate fever tick surveillance and eradication programs within his or her geographic area of responsibility. The DFTE has authority to make independent decisions concerning the management of herds and use of property and limiting the impact of wildlife when those decisions are supported by sound fever tick eradication principles.

(7) Dipping or treating--If the commission requires livestock to be dipped, the livestock shall be submerged in a vat. A spray-dip machine may be used in areas where a vat is not reasonably available. Careful hand spraying may be used for easily restrained horses and show cattle, and when specifically authorized, certain zoo or domestic animals. Livestock unable to go through a dipping vat because of size or physical condition may be hand sprayed. The treatment must be paint marked so that it can be identified for at least 17 days. If the commission determines that free-ranging wildlife and exotic animals, which are capable of hosting fever ticks, require treatment, they shall be treated by methods and for the duration of time approved by the commission.

(8) Exposed livestock--Any of the following factors shall constitute livestock as being exposed:

(A) Livestock that have entered an infested or exposed premise and have not been dipped and removed from the infested or exposed premise within 14 days after entry.

(B) Livestock that have occupied an exposed premise and have not completed treatment required for movement from an exposed premise.

(C) Livestock that have entered Texas from Mexico without a certificate from the United States Department of Agriculture.

(9) Exposed premise--A premise shall be considered exposed if systematic treatment has not been completed and if either of the following conditions apply:

(A) Ticks have been found on livestock that have been on the premise for less than 14 days.

(B) A premise that has received exposed livestock, or equipment or material capable of carrying ticks from an infested or exposed premise.

(10) Fever Tick Vaccine--A biological treatment administered by injection to an animal that stimulates a potent immune response against fever tick proteins, which prevents the infestation of ticks capable of carrying Babesia.

(11) Free area--An area designated by the commission as being free of ticks or exposure to ticks. The extent of the area will be determined by the appropriate barriers to the potential spread of ticks.

(12) Game proof fence--A fence that has a minimum height of eight feet, consisting of wire mesh of sufficiently small size to prevent or impede the movement of domestic or exotic wildlife over, under, or through the fenced area.

(13) Individual herd plan--A written disease management plan that is developed by the herd or land owner(s) and/or their representative(s), and a State or Federal DFTE to eradicate fever ticks or potential exposure to fever ticks from an affected herd or property. The herd plan will include appropriate treatment frequencies, treatments to be employed, and any additional fever tick management or herd management practices, including vaccination, deemed necessary to eradicate fever ticks from the herd or on an infested or exposed premise in an efficient and effective manner. The plan must be approved by the Executive Director of the commission and the USDA-APHIS, VS representative for Texas, and have the concurrence of the DFTE.

(14) Infested livestock--Livestock shall be considered infested if eradication treatment for movement from an infested premise has not been completed and if either of the following conditions apply:

(A) Ticks have been found on livestock.

(B) Livestock which occupy a premise where ticks have been found on livestock that have been on the premise more than 14 days.

(15) Infested premise--A premise where ticks have been found on livestock that have been on the premise for more than 14 days, and systematic treatment has not been completed.

(16) Livestock--Any domestic animal or any free ranging animals found on a premise or captured wild animal that is capable of hosting or transporting ticks capable of carrying babesia (the causative agent of cattle tick fever), including, but not limited to, cattle, horses, mules, jacks, jennets, zebras, buffalo, giraffe, and deer.

(17) Permit--A document issued by an authorized representative of the commission allowing specified movement of livestock.

(18) Premise--An area which can be defined by boundaries of recognizable physical barriers that prevent livestock from crossing the boundaries under ordinary circumstances; or an area that livestock do not ordinarily inhabit that the commission defines by recognizable features.

(19) Premise inspection--A routine inspection by an authorized representative of the commission of premise boundaries and the livestock within for the purpose of documenting exposure of the premise.

(20) Premise under vacation--A premise from which all livestock have been removed as prescribed by the commission.

(21) Range inspection of livestock--An inspection of livestock to see the animal close enough to detect ticks on the animal.

(22) Scratch inspection of livestock--An inspection of livestock by an authorized representative of the commission in an approved

facility that allows the inspector to touch and see all parts of the livestock.

(23) Temporary preventative quarantine area--An area designated by the commission for systematic inspection and treatment of livestock and premises, and control of movement of livestock, in order to detect and eradicate infestation and exposure from infested or exposed premises outside the tick eradication quarantine area. The extent of the area will be determined by evaluating the barriers to the potential spread of ticks. This is also designated as a "Blanket Disease Quarantine."

(24) The commission--The Texas Animal Health Commission.

(25) Tick--Any tick capable of transmitting bovine Babesiosis (cattle tick fever or bovine piroplasmosis).

(26) Tick eradication quarantine area--An area designated by the commission for systematic inspection and treatment of livestock and premises, and control of movement of livestock, in order to detect and eradicate infestation from infested or exposed premises. The extent of the area will be determined by evaluating the barriers to the potential spread of ticks. This is the permanent quarantine area which is designated in §§41.14 - 41.22 of this chapter (relating to Quarantine Line; Defining and Establishing Tick Eradication Areas), and in the United States Department of Agriculture Code of Federal Regulations Part 72.5, parallel to the Rio Grande River, commonly known as the buffer zone or systematic area.

(27) Treatment--A procedure or management practice used on an animal to prevent the infestation of, control or eradicate ticks capable of carrying Babesia.

#### *§41.8. Dipping, Treatment, and Vaccination of Animals.*

##### (a) General Requirements:

(1) All scratch inspections, dipping, treatment, and vaccination prescribed in this section must be done under the supervision of a representative authorized by the commission.

(2) All scratch inspections, dipping, treatment, or vaccination must be done under instructions issued by the commission. All requirements will be in written form directed to the owner or caretaker. An inspector for the commission will deliver the instructions in person along with a copy of these regulations. All premise boundaries will be listed in the instructions.

(3) The owner or caretaker of livestock on infested and exposed premises must comply with the TAHC approved Quarantine Schedule as follows:

(A) The starting date for infested premises for Table I (Pasture Treatment or Vacation Schedule, South of Highway 90) and Table II (Pasture Treatment or Vacation Schedule, North of Highway 90), is the date of the first clean dipping of 100% of the livestock.

(B) The starting date for exposed premises for Table I and Table II is when 100% of the livestock on the premise have been dipped.

(C) Copies of Table I (Pasture Treatment or Vacation Schedule, South of Highway 90) and Table II (Pasture Treatment or Vacation Schedule, North of Highway 90) may be obtained from the Texas Animal Health Commission, P.O. Box 12966, Austin, Texas 78711-2966.

Figure: 4 TAC §41.8(a)(3)(C)

(4) The owner or caretakers must gather and present all livestock for scratch inspection, dipping, treatment, or vaccination required by the commission. The owner or caretaker is responsible for

all costs associated with and labor necessary for presenting the owner or caretaker's cattle for scratch inspection, dipping, treatment, or vaccination at the location prescribed by the commission.

##### (b) Requirements for Dipping, Treatment, or Vaccination:

###### (1) Dipping Requirements:

(A) The owner or caretaker of livestock on infested or exposed must present the livestock to be scratch inspected and dipped with subsequent dipping every seven to 14 days until the livestock are moved from the premise in accordance with these regulations, except as provided in subsection (a)(3) of this section.

(B) The 14-day interval may be extended due to circumstances beyond the control of the owner upon approval by an authorized representative of the commission. In no event will the extension be more than three days. If the extension is granted, no certificate for movement will be issued after the 14th day, and the next dip must be on the original 14-day schedule.

(C) The scratch inspection and first dip must be within 14 days from the date infestation or exposure is discovered unless otherwise approved by the commission.

(D) A dip is not official unless 100% of the livestock within the premise affected are dipped on schedule.

(E) The commission will authorize for use in dipping only those dips that have been approved by the Animal and Plant Health Inspection Service of the United States Department of Agriculture and the Texas Animal Health Commission for use in official dipping to rid animals of the tick.

(F) The concentration of the dipping chemical used must be maintained in the percentage specified for official use by means of the approved vat management techniques established for the use of the agent; or, if applicable, by an officially approved vat side test or field test of the commission.

(G) If the commission requires livestock to be dipped, the livestock shall be submerged in a vat. A spray-dip machine may be used in areas where a vat is not reasonably available.

(H) Careful hand spraying may be used for easily restrained horses and show cattle, and when specifically authorized by a commission representative, certain zoo or domestic animals.

(I) Livestock unable to go through a dipping vat because of size or physical condition, as determined by a commission representative, may be hand sprayed.

(J) The dip treatment must be paint marked on the animals so that it can be identified as treated for at least 17 days after the treatment.

###### (2) Authorized Treatment Requirements:

(A) Following the first clean dipping of 100% of the livestock, the cattle may be treated with injectable doramectin in lieu of systematic dipping. The owner or caretaker of cattle on an infested or exposed premise must present the livestock to be scratch inspected and treated with injectable doramectin every 25-28 days until the livestock are moved from the premises in accordance with these regulations, except as provided in subsection (a)(3) of this section.

(B) Treatment of doramectin shall be administered by subcutaneous injection by a representative of the commission.

(C) The owner or caretaker must comply with the slaughter withholding period (35 days) of doramectin by holding cattle at the premise of origin until the withdrawal period is completed.

(D) A treatment is not official unless 100% of the livestock within the premise affected are treated on schedule.

(E) Free-ranging wildlife or exotic livestock that are found on infested or exposed premises, and which are capable of hosting fever ticks will be treated by methods approved by the commission and for the length of time specified by the commission.

(i) Ivermectin medicated corn may be administered to free-ranging wildlife or exotic livestock by a representative of the commission following the close of the hunting season, provided that treatment is terminated at least 60 days prior to the beginning of the next hunting season to comply with the required withdrawal period.

(ii) Permethrin impregnated roller devices may be used for topical treatment of free-ranging wildlife or exotic livestock during periods when ivermectin medicated corn is not administered. The commission may specify the use of other pesticides for treatment of wildlife or exotic livestock when deemed necessary to control and eradicate fever ticks.

(3) Vaccination Requirements:

(A) The fever tick vaccine shall be administered by employees or authorized agents of the USDA/APHIS/Veterinary Services or the commission.

(B) The owner or caretaker must comply with the 60 day slaughter withholding period, or other slaughter withholding time-frame as specified by the label. The owner or caretaker must hold vaccinated cattle at the premise of origin until the withdrawal period is completed.

(C) In addition to any dipping or treatment required by this section, beef cattle two months of age or older located within the tick eradication quarantine area shall be vaccinated with the fever tick vaccine at intervals prescribed by the commission. The vaccine must be administered when cattle are gathered and presented for annual inspection as required by §41.9 of this chapter (relating to Vacation and Inspection of a Premise) and at other times specified by the commission.

(D) In addition to any dipping or treatment required by this section, the commission may require fever tick vaccination of beef cattle two months of age and older located within the temporary preventative quarantine area, control purpose quarantine area or other beef cattle or premises epidemiologically determined by the commission to be at an increased risk for fever ticks. The cattle shall be vaccinated at intervals prescribed by the commission.

(c) Herd Plan and Protest. Each premise within a tick eradication quarantine area, temporary preventative quarantine area, or control purpose quarantine area will be classified by the commission as an infested, exposed, adjacent, or check premise and is required to execute a herd management plan and remain under restrictions until no evidence of fever ticks is disclosed or a complete epidemiologic investigation fails to disclose evidence of exposure to fever ticks, with the concurrence of the DFTE. A person may protest an initial test or a herd plan for each premise classified as increased risk for fever ticks.

(1) To protest, the responsible person must request a meeting, in writing, with the Executive Director of the commission within 15 days of receipt of the herd plan or notice of an initial test and set forth a short, plain statement of the issues that shall be the subject of the protest, after which:

(A) the meeting will be set by the Executive Director no later than 21 days from receipt of the request for a meeting;

(B) the meeting or meetings shall be held in Austin; and

(C) the Executive Director shall render his decision in writing within 14 days from date of the meeting.

(2) Upon receipt of a decision or order by the executive director which the herd owner wishes to appeal, the herd owner may file an appeal within 15 days in writing with the Chairman of the commission and set forth a short, plain statement of the issues that shall be the subject of the appeal.

(3) The subsequent hearing will be conducted pursuant to the provisions of the Administrative Procedure and Texas Register Act, and Chapter 32 of this title (relating to Hearing and Appeal Procedures).

(4) If the Executive Director determines, based on epidemiological principles, that immediate action is necessary, the Executive Director may shorten the time limits to not less than five days. The herd owner must be provided with written notice of any time limits so shortened.

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 May 26, 2016.

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Gene Snelson

General Counsel

Texas Animal Health Commission

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Proposal publication date: March 11, 2016

For further information, please call: (512) 719-0722



#### 4 TAC §41.8

The Texas Animal Health Commission (commission) adopts the repeal of §41.8, concerning Dipping and Treatment of Livestock, without changes to the proposed text as published in the March 11, 2016, issue of the *Texas Register* (41 TexReg 1771). The text of the rule will not be republished.

Elsewhere in this issue of the *Texas Register*, the commission adopts new §41.8, concerning Dipping, Treatment, and Vaccination of Animals, which replaces the repealed section in its entirety.

No comments were received regarding adoption of the repeal.

#### STATUTORY AUTHORITY

The repeal is authorized by the Texas Agriculture Code §161.046, which provides the commission with authority to adopt rules relating to the protection of livestock, exotic livestock, domestic fowl or exotic fowl, as well as Texas Government Code §2001.039, which authorizes a state agency to repeal a rule.

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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Gene Snelson  
General Counsel  
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## TITLE 7. BANKING AND SECURITIES

### PART 7. STATE SECURITIES BOARD

#### CHAPTER 115. SECURITIES DEALERS AND AGENTS

##### 7 TAC §115.20

The Texas State Securities Board adopts new §115.20, concerning Texas crowdfunding portal registration and activities of small business development entities, without changes to the proposed text as published in the February 19, 2016, issue of the *Texas Register* (41 TexReg 1192).

New §115.20 implements Section 44 of the Texas Securities Act, which was added by House Bill 1629 passed during the last legislative session. The bill permits an authorized small business development entity to register and operate a Texas crowdfunding portal ("Section 44 portal").

Section 44 portals are generally subject to the same conditions and requirements as other Texas crowdfunding portals with a few exceptions. As a registered Texas crowdfunding portal, an authorized small business development entity can facilitate the capital raising efforts of local small business issuers who want to utilize the Texas intrastate crowdfunding exemption.

An authorized small business development entity desiring to act as a Texas crowdfunding portal pursuant to Section 44 will be able to use a simplified registration process. To register as a Texas crowdfunding portal, an authorized small business development entity files new Form 133.20, which is being concurrently adopted.

A comment letter was received from [texascrowdfundboard.com](http://texascrowdfundboard.com). The letter questioned what portal an issuer would use if it is located in an area where no authorized small business development entity has registered as a Texas crowdfunding portal pursuant to §115.20. The Staff responded that the issuer would need to use a portal registered under existing §115.19 as that rule does not have a similar restrictive geographic service area requirement relating to issuers other than the issuer must be a Texas entity. A Texas crowdfunding portal registered under §115.20 is not permitted to list offerings from issuers outside its service area because to do so would be in violation of Section 44 of the Texas Securities Act. The Board agreed with Staff and adopted the rule as published.

The new rule is adopted under Texas Civil Statutes, Articles 581-28-1 and 581-44. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 44 provides the Board with the authority to adopt rules to regulate and facilitate online

intrastate crowdfunding by authorized small business development entities.

The new rule affects Texas Civil Statutes, Articles 581-12, 581-13, 581-14, 581-15, 581-18, and 581-44.

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 May 25, 2016.

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John Morgan

Securities Commissioner

State Securities Board

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Proposal publication date: February 19, 2016

For further information, please call: (512) 305-8301



#### CHAPTER 123. ADMINISTRATIVE GUIDELINES FOR REGISTRATION OF OPEN-END INVESTMENT COMPANIES

##### 7 TAC §123.3

The Texas State Securities Board adopts an amendment to §123.3, concerning conditional exemption for money market funds, without changes to the proposed text as published in the February 19, 2016, issue of the *Texas Register* (41 TexReg 1195).

The amendment aligns the Texas rule for money market funds to the federal definition of money market fund in SEC Rule 2a-7 under the Investment Company Act of 1940. The federal rule was updated as part of the SEC's money market fund reforms enacted in July 2014 in Release IC-31166.

Money market funds meeting SEC Rule 2a-7 may continue to take advantage of the fee relief provided by the Texas rule.

A comment letter was received from the Investment Company Institute in support of the proposal. The letter noted that the revision is important to ensure that money market funds that are not in compliance with the SEC's rules cannot rely on Texas's conditional exemption. The Board agreed and adopted the rule as published.

The amendment is adopted under Texas Civil Statutes, Articles 581-5.T and 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The adopted amendment affects Texas Civil Statutes, Articles 581-5, 581 7, and 581-35.

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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John Morgan  
Securities Commissioner  
State Securities Board  
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For further information, please call: (512) 305-8301



## CHAPTER 133. FORMS

### 7 TAC §133.20

The Texas State Securities Board adopts new §133.20, which adopts by reference a form concerning Texas crowdfunding portal registration by an authorized small business development entity, without changes to the proposed text as published in the February 19, 2016, issue of the *Texas Register* (41 TexReg 1195). The form would be used by an authorized small business development entity to apply for and amend its registration as a Texas crowdfunding portal under new §115.20, which is being concurrently adopted.

As a registered Texas crowdfunding portal, an authorized small business development entity can facilitate the capital raising efforts of local small business issuers who want to utilize the Texas intrastate crowdfunding exemption.

Authorized small business development entities can use a simplified form to register and amend their registration as Texas crowdfunding portals.

No comments were received regarding adoption of the new rule.

The new rule is adopted under Texas Civil Statutes, Articles 581-28-1 and 581-44. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 44 provides the Board with the authority to adopt rules to regulate and facilitate online intrastate crowdfunding by authorized small business development entities.

The new rule affects Texas Civil Statutes, Articles 581-12, 581-13, 581-14, 581-15, 581-18, and 581-44.

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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John Morgan  
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For further information, please call: (512) 305-8301



## CHAPTER 139. EXEMPTIONS BY RULE OR ORDER

### 7 TAC §139.25

The Texas State Securities Board adopts an amendment to §139.25, concerning intrastate crowdfunding exemption, without changes to the proposed text as published in the February 19, 2016, issue of the *Texas Register* (41 TexReg 1196).

Subsection (l) of the intrastate crowdfunding exemption is being amended to implement new Section 44 of the Texas Securities Act.

The amendment to §139.25 and new §115.20, which is being concurrently adopted, permit certain small business development entities registered as Texas crowdfunding portals to have a financial interest in an issuer listed on its Internet website.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Articles 581-5.T, 581-12.C, 581-28-1, and 581-44. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.C provides the Board with the authority to prescribe new dealer, agent, investment adviser, or investment adviser representative registration exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 44 provides the Board with the authority to adopt rules to regulate and facilitate online intrastate crowdfunding by authorized small business development entities.

The adopted amendment affects Texas Civil Statutes, Articles 581-7, 581-12, 581-13, 581-14, 581-15, 581-18, and 581-44.

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 May 25, 2016.

TRD-201602647  
John Morgan  
Securities Commissioner  
State Securities Board  
Effective date: June 14, 2016  
Proposal publication date: February 19, 2016  
For further information, please call: (512) 305-8301



## TITLE 16. ECONOMIC REGULATION

### PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

#### CHAPTER 35. ENFORCEMENT SUBCHAPTER A. TRANSPORTATION OF LIQUOR

### 16 TAC §35.5

The Texas Alcoholic Beverage Commission adopts amendments to §35.5, relating to Private Carrier Permit Requirements, without

changes to the proposal as published in the April 8, 2016, issue of the *Texas Register* (41 TexReg 2558).

Section 35.5 addresses insurance requirements for holders of Private Carrier Permits under Chapter 42 of the Alcoholic Beverage Code. The amendments require that private carriers maintain a \$500,000 liability insurance policy to cover bodily injury and property damage.

Subsection (a) exempts from coverage vehicles below a certain weight, which is consistent with Texas Department of Motor Vehicles regulation of other types of carriers. Subsection (c) requires the permit holder to file an affidavit that it is in compliance with the requirements for insurance coverage in this section.

Section 35.5 was reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for re adoption each of its rules. The commission determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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

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TRD-201602665

Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



## CHAPTER 41. AUDITING

### SUBCHAPTER C. RECORDS AND REPORTS BY LICENSEES AND PERMITTEES

#### 16 TAC §41.21

The Texas Alcoholic Beverage Commission adopts amendments to §41.21, relating to Industrial Permits and Local Industrial Manufacturer's Permits, without changes to the proposed text as published in the April 8, 2016, issue of the *Texas Register* (41 TexReg 2559).

Section 41.21 addresses reporting requirements for holders of Industrial Permits under Chapter 38 of the Alcoholic Beverage Code. The title of the section is changed to reflect that the amendments include reporting requirements for holders of Local Industrial Alcohol Manufacturer's Permits under Chapter 47 of the Alcoholic Beverage Code, as well as record-keeping requirements for both types of permit holders. The amendments require that the monthly report shall be on a form prescribed by the executive director. Subsection (b)(3) clarifies that the required reports must account for all types of alcohol except denatured alcohol.

Subsection (c) provides that holders of Industrial Permits and of local Industrial Alcohol Manufacturer's Permits shall maintain

records of daily operations and make such records available to the commission upon request.

Section 41.21 was reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for re adoption each of its rules. The commission determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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

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TRD-201602594

Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



#### 16 TAC §41.25

The Texas Alcoholic Beverage Commission adopts amendments to §41.25, relating to Records and Invoice Requirements, without changes to the proposal as published in the April 8, 2016, issue of the *Texas Register* (41 TexReg 2561).

Section 41.25 requires alcoholic beverage invoices to have the exact trade names of issuing and receiving permittees or licensees; requires permittees or licensees owning more than one business operating under separate permits or licenses, or a single business operating at two or more locations, to keep separate records for each business or place of business; requires permittees and licensees who are also engaged in any other kind of business to keep separate records for the alcoholic beverage business; requires permittees and licensees to keep records for two years, and make them available for inspection by the commission during reasonable office hours; and provides that making a false entry or alteration in records is a violation of the section.

The amendments change the title of the section to reflect its scope. Subsection (d) clarifies that the two-year record retention requirement applies unless the Alcoholic Beverage Code or some other rule provides otherwise.

Section 41.25 was reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for re adoption each of its rules. The commission determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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

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Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



### 16 TAC §41.27

The Texas Alcoholic Beverage Commission adopts amendments to §41.27, relating to Wine Processing, without changes to the proposal as published in the April 8, 2016, issue of the *Texas Register* (41 TexReg 2562).

Section 41.27 addresses wine processing requirements for holders of Wine Bottler's Permits under Chapter 18 of the Alcoholic Beverage Code and Winery Permits under Chapter 16 of the Alcoholic Beverage Code. The amendments delete provisions applicable to claiming tax credits because that subject is addressed elsewhere in the commission's rules. Subsection (a) addresses what wine each of these permit holders may bottle. Subsections (b) and (c) address the minimum size of containers from which bottling may occur and which may be possessed by these permittees on their premises. The title of the section has been changed to more accurately reflect its content.

Section 41.27 was reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The commission determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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

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TRD-201602667

Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



### 16 TAC §41.29

The Texas Alcoholic Beverage Commission adopts the repeal of §41.29, relating to Bonded Warehouse Breakage, without changes to the proposal as published in the April 8, 2016, issue of the *Texas Register* (41 TexReg 2562).

Section 41.29 addresses the requirement that bonded warehouses must store liquor in full and unbroken case lots, as well as well as procedures to be followed in the event of actual breakage of stored liquor. The commission reviewed the section pursuant to Government Code §2001.039 and determined that the need for a rule addressing these issues continues to exist but that the issues are more appropriately addressed elsewhere. Therefore, the commission repeals this section and addresses the issues in its proposed amendments to §41.39, relating to Warehouse Report.

No comments were received.

The repeal is adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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

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TRD-201602599

Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



### 16 TAC §41.31

The Texas Alcoholic Beverage Commission adopts amendments to §41.31, relating to Excise Tax, without changes to the proposal as published in the April 8, 2016, issue of the *Texas Register* (41 TexReg 2563).

Section 41.31 addresses the excise taxes due from manufacturers, wholesalers and distributors on the first sale of all alcoholic beverages, including the due date for the taxes and the appropriate references to the Alcoholic Beverage Code. The amendments allow payments to be made by electronic funds transfers, checks and money orders, and provide that payments be made to the Texas Alcoholic Beverage Commission. The title of the section has been changed to more accurately reflect its content.

Section 41.31 was reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The commission determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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

Filed with the Office of the Secretary of State on May 26, 2016.

TRD-201602668

Martin Wilson  
Assistant General Counsel  
Texas Alcoholic Beverage Commission  
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For further information, please call: (512) 206-3489



### 16 TAC §41.37

The Texas Alcoholic Beverage Commission adopts the repeal of §41.37, relating to Industrial Alcohol Report, without changes to the proposal as published in the April 8, 2016, issue of the *Texas Register* (41 TexReg 2564).

Section 41.37 addresses the monthly reporting requirement for holders of Industrial Permits under Chapter 38 of the Alcoholic Beverage Code. The commission reviewed the section pursuant to Government Code §2001.039 and determined that the need for a rule addressing this reporting requirement continues to exist but that it is more appropriately addressed elsewhere.

Therefore, the commission repeals this section and addresses the reporting requirement for holders of Industrial Permits in amendments to §41.21, relating to Industrial Permits, that are being adopted simultaneously.

No comments were received.

The repeal is adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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

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TRD-201602584  
Martin Wilson  
Assistant General Counsel  
Texas Alcoholic Beverage Commission  
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For further information, please call: (512) 206-3489



### 16 TAC §41.38

The Texas Alcoholic Beverage Commission adopts amendments to §41.38, relating to Carrier Report, without changes to the proposal as published in the April 8, 2016, issue of the *Texas Register* (41 TexReg 2564).

Section 41.38 addresses the reporting requirements for holders of Carrier Permits under Chapter 41 of the Alcoholic Beverage Code. The amendments eliminate the requirement that car number and initials be given on the monthly report. The amendments also change the reference from "the administrator" to "the executive director" consistent with Alcoholic Beverage Code §5.11(b) and commission practice.

Section 41.38 was reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The

commission determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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

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Martin Wilson  
Assistant General Counsel  
Texas Alcoholic Beverage Commission  
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For further information, please call: (512) 206-3489



### 16 TAC §41.39

The Texas Alcoholic Beverage Commission adopts amendments to §41.39, relating to Bonded Warehouse Report, without changes to the proposal as published in the April 8, 2016, issue of the *Texas Register* (41 TexReg 2565).

Section 41.39 addresses reporting requirements for holders of Bonded Warehouse Permits under Chapter 46 of the Alcoholic Beverage Code. The title of the section has been changed to more accurately reflect which warehouses are affected by the rule. As amended, reports are required monthly. The amendments also require that bonded warehouses must store liquor in full and unbroken case lots, and address the procedures to be followed in the event of actual breakage of stored liquor.

Subsection (b)(4) adds a new requirement that the holder of a Bonded Warehouse Permit affirm on the monthly report that the permittee is in compliance with Alcoholic Beverage Code §46.03, which requires the holder of a Bonded Warehouse Permit to derive at least 50 percent of its gross revenue in a bona fide manner during each three month period from the storage of goods or merchandise other than liquor.

Section 41.39 was reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The commission determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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

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TRD-201602606

Martin Wilson  
Assistant General Counsel  
Texas Alcoholic Beverage Commission  
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For further information, please call: (512) 206-3489



### 16 TAC §41.43

The Texas Alcoholic Beverage Commission adopts amendments to §41.43, relating to Required Signature, without changes to the proposal as published in the April 8, 2016, issue of the *Texas Register* (41 TexReg 2566).

As amended, §41.43 requires that certain reports filed with the commission be signed and affirmed to be true and correct by the permittee or licensee or a duly authorized representative. The title of the section has been changed to more accurately reflect the text of the section.

Section 41.43 was reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The commission determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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

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TRD-201602676  
Martin Wilson  
Assistant General Counsel  
Texas Alcoholic Beverage Commission  
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For further information, please call: (512) 206-3489



### 16 TAC §41.44

The Texas Alcoholic Beverage Commission adopts amendments to §41.44, relating to Report Retention, without changes to the proposal as published in the April 8, 2016, issue of the *Texas Register* (41 TexReg 2567).

As amended, §41.44 requires that copies of certain reports that are required to be filed with the commission be retained by the permittee or licensee for two years. The title of the section has been changed to more accurately reflect the text of the section.

Section 41.44 was reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The commission determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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

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TRD-201602677  
Martin Wilson  
Assistant General Counsel  
Texas Alcoholic Beverage Commission  
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For further information, please call: (512) 206-3489



## TITLE 22. EXAMINING BOARDS

### PART 15. TEXAS STATE BOARD OF PHARMACY

#### CHAPTER 283. LICENSING REQUIREMENTS FOR PHARMACISTS

##### 22 TAC §§283.4, 283.7, 283.8, 283.11

The Texas State Board of Pharmacy adopts amendments to §283.4, concerning Internship Requirements, §283.7 concerning Examination Requirements, §283.8 concerning Reciprocity Requirements, and §283.11 concerning Examination Retake Requirements. The amendments are adopted without changes to the proposed text as published in the March 11, 2016, issue of the *Texas Register* (41 TexReg 1789).

The amendments to §§283.4, 283.7, and 283.8 eliminate the provisions allowing individuals who are unable to obtain a social security number to provide an individual taxpayer identification number in lieu of a social security number because a social security number is required in order to process criminal background checks. The amendments to §283.11 implement provisions of S.B. 460 passed during the 84th Texas Legislative session allowing applicants who apply for a Texas pharmacist license who fail to achieve the minimum passing grade to retake the NAPLEX and MPJE examinations four additional times for a total of five times.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

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

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Gay Dodson, R.Ph.  
Executive Director  
Texas State Board of Pharmacy  
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Proposal publication date: March 11, 2016  
For further information, please call: (512) 305-8028



## CHAPTER 291. PHARMACIES

### SUBCHAPTER A. ALL CLASSES OF PHARMACIES

#### 22 TAC §291.5, §291.14

The Texas State Board of Pharmacy adopts amendments to §291.5, concerning Closing a Pharmacy, and §291.14, concerning Pharmacy License Renewal. The amendments are adopted without changes to the proposed text as published in the March 11, 2016, issue of the *Texas Register* (41 TexReg 1795).

The amendments to §291.5 clarify the requirements for closing a pharmacy and eliminate the requirements for a pharmacy to transfer records to a pharmacy within a reasonable distance. The amendments to §291.14 implement provisions of S.B. 460 passed during the 84th Texas Legislative session which change the expiration date for a pharmacy license that has expired from one year to 91 days and allow the board to not renew the license of a pharmacy if the board determines that the pharmacy is not located or no longer exists at the pharmacy's address of record.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

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

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Gay Dodson, R.Ph.  
Executive Director  
Texas State Board of Pharmacy  
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For further information, please call: (512) 305-8028



### SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

#### 22 TAC §291.34

The Texas State Board of Pharmacy adopts amendments to §291.34 concerning Records. The amendments are adopted without changes to the proposed text as published in the March 11, 2016, issue of the *Texas Register* (41 TexReg 1796).

The amendments to §291.34 clarify that prescriptions must be transferred within four business hours; clarify the requirements regarding identification records for individuals involved in dispensing; and implement provisions of HB 751 regarding interchangeable biological products.

The Board received the following comments: CVSHealth commented that the timing requirement is arbitrary and suggested that the transferring of prescriptions be a delegable task performed by pharmacy technicians. CVSHealth also suggested that the Board broaden the ability to transfer an image of a prescription via electronic means. DaVita Rx provided comments opposing the requirement for prescriptions to be transferred within four business hours. Gloria Cox, R.Ph., submitted a comment not supporting the four hour transfer rule. The Board disagrees with the comments in that the requirement protects patients and requires the timely transfer of prescription information. In addition, federal Drug Enforcement Administration (DEA) regulations require prescriptions for controlled substances be transferred between pharmacists; the regulations do not allow prescriptions to be transferred by pharmacy technicians. In addition, the Board received comments supporting the four hour transfer requirement from the Texas Association of Independent Pharmacy Owners, Damita Wyatt, Vanese Berry, R.Ph., Marcia Smith-Anderson, and Brenda Richardson.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

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

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TRD-201602509  
Gay Dodson, R.Ph.  
Executive Director  
Texas State Board of Pharmacy  
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Proposal publication date: March 11, 2016  
For further information, please call: (512) 305-8026



### SUBCHAPTER G. SERVICES PROVIDED BY PHARMACIES

#### 22 TAC §291.133

The Texas State Board of Pharmacy adopts amendments to §291.133 concerning Pharmacies Compounding Sterile Preparations. The amendments are adopted without changes to the proposed text as published in the March 11, 2016, issue of the *Texas Register* (41 TexReg 1799).

The adopted amendments remove references to training requirements that are no longer necessary; update the requirements for sterility testing and temperature and humidity to be consistent with USP 797; clarify the requirements regarding blood labeling to specify that blood labeling occurs in a buffer area; and clarify recordkeeping requirements.

The Board received a comment from CardinalHealth supporting the proposed changes, specifically regarding blood labeling procedures.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

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

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TRD-201602510

Gay Dodson, R. Ph.

Executive Director

Texas State Board of Pharmacy

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For further information, please call: (512) 305-8028



## CHAPTER 297. PHARMACY TECHNICIANS AND PHARMACY TECHNICIAN TRAINEES

### 22 TAC §297.3, §297.10

The Texas State Board of Pharmacy adopts amendments to §297.3, concerning Registration Requirements, and §297.10, concerning Registration for Military Service Members, Military Veterans, and Military Spouses. The amendments are adopted without changes to the proposed text as published in the March 11, 2016, issue of the *Texas Register* (41 TexReg 1819).

The amendments eliminate the provisions allowing individuals who are unable to obtain a social security number to provide an individual taxpayer identification number in lieu of a social security number because a social security number is required in order to process criminal background checks.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

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

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TRD-201602512

Gay Dodson, R.Ph.

Executive Director

Texas State Board of Pharmacy

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For further information, please call: (512) 305-8028



## PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

### CHAPTER 571. LICENSING

#### SUBCHAPTER D. LICENSE RENEWALS

##### 22 TAC §571.59

The Texas Board of Veterinary Medical Examiners (Board) adopts amendments to §571.59, concerning Expired Veterinary Licenses. The amendments are adopted without changes to the proposed text as published in the March 18, 2016, issue of the *Texas Register* (41 TexReg 2082) and will not be republished.

The Board adopts these amendments to reflect the correct title of Board rule §571.17.

No comments were received regarding the adoption of the amendments to the rule.

The amendments to §571.59 are adopted under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter.

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 May 25, 2016.

TRD-201602652

Loris Jones

Executive Assistant

Texas Board of Veterinary Medical Examiners

Effective date: June 14, 2016

Proposal publication date: March 18, 2016

For further information, please call: (512) 305-7563



##### 22 TAC §571.60

The Texas Board of Veterinary Medical Examiners (Board) adopts amendments to §571.60, concerning Expired Licenses for Licensed Veterinary Technicians and Equine Dental Providers. The amendments are adopted without changes to the proposed text as published in the March 18, 2016, issue of the *Texas Register* (41 TexReg 2083) and will not be republished.

The Board adopts these amendments in accordance with Senate Bill 1307 (84th Legislature, 2015) to allow military spouses, military veterans, and military service members, as defined by Chapter 55, §55.001, of the Texas Occupations Code, to receive a license even if they have failed to renew their license for a period of one year or more and if they meet the requirements of §571.17 for expedited licensure. The amendments are also adopted to ensure that references to licensed veterinary technicians and equine dental providers appear in the same order in the rule title and throughout the rule.

No comments were received regarding the adoption of the amendments to the rule.

The amendments to §571.60 are adopted under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter.

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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TRD-201602653

Loris Jones

Executive Assistant

Texas Board of Veterinary Medical Examiners

Effective date: June 14, 2016

Proposal publication date: March 18, 2016

For further information, please call: (512) 305-7563



## CHAPTER 577. GENERAL ADMINISTRATIVE DUTIES

### SUBCHAPTER B. STAFF

#### 22 TAC §577.20

The Texas Board of Veterinary Medical Examiners (Board) adopts amendments to §577.20, concerning Employee Education and Training. The amendments are adopted without changes to the proposed text as published in the March 18, 2016, issue of the *Texas Register* (41 TexReg 2084) and will not be republished.

The Board adopts these amendments in accordance with House Bill 3337 (84th Legislature, 2015) to impose certain requirements and limitations on training and education for agency employees.

No comments were received regarding the adoption of the amendments to the rule.

The amendments are adopted under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter.

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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Loris Jones

Executive Assistant

Texas Board of Veterinary Medical Examiners

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For further information, please call: (512) 305-7563



## TITLE 30. ENVIRONMENTAL QUALITY

### PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

#### CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§335.1, 335.4, 335.10 - 335.12, 335.17 - 335.19, 335.21, 335.112, 335.152, 335.504, and 335.602; and new §§335.26, 335.27, 335.32, and 335.701 - 335.706.

The amendments to §§335.1, 335.17 - 335.19, and 335.21 are adopted *with changes* to the proposed text as published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9566). The amendments to §§335.4, 335.10 - 335.12, 335.112, 335.152, 335.504, 335.602; and new §§335.26, 335.27, 335.32, and 335.701 - 335.706 are adopted *without changes* to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

The federal hazardous waste program is authorized under the Resource Conservation and Recovery Act of 1976 (RCRA), §3006. States may obtain authorization from the United States Environmental Protection Agency (EPA) to administer the hazardous waste program. State authorization is a rulemaking process through which the EPA delegates the primary responsibility of implementing the RCRA hazardous waste program to individual states in lieu of the EPA. This process ensures national consistency and minimum standards while providing flexibility to states in implementing rules. State RCRA programs must always be at least as stringent as the federal requirements.

Since the beginning of the federal hazardous waste program, Texas has continuously participated in the EPA's authorization program. To maintain RCRA authorization, the commission must adopt regulations to meet the minimum standards of federal programs administered by the EPA. Because the federal regulations undergo regular revision, the commission adopts new regulations regularly to meet the changing federal regulations.

Texas received authorization of its hazardous waste "base program" under RCRA on December 26, 1984. Texas received authorization for revisions to its base hazardous waste program on February 17, 1987 (Clusters I and II). Texas submitted further revisions to its hazardous waste program and received final authorization of those revisions on March 15, 1990; July 23, 1990; October 21, 1991; December 4, 1992; June 27, 1994; November 26, 1997; October 18, 1999; September 11, 2000; June 14, 2005 (parts of Clusters III - X); March 5, 2009 (parts of Clusters XI - XV); May 7, 2012 (parts of Clusters IX and XV - XVIII);

November 3, 2014 (parts of Clusters XIX - XXI); and December 21, 2015 (parts of Clusters XXI - XXIII).

The commission adopts in this rulemaking certain parts of RCRA Rule Clusters XXIII (Checklists 231 and 232) and XXIV (Checklist 233) that implement revisions to the federal hazardous waste program which the EPA made between February 7, 2014, and January 13, 2015. Both mandatory and optional federal rule changes in these clusters are adopted. Adoption of Checklists 231, 232, and part of Checklist 233 of the federal rule changes is mandatory to maintain RCRA authorization. Although not necessary to maintain authorization, the EPA recommends that optional federal regulatory changes be incorporated into the state rules. Establishing equivalency with federal regulations will enable Texas to operate all aspects of the federal hazardous waste program in lieu of the EPA.

The commission further adopts the amended definition of "Solid waste" to promulgate a new exclusion from regulation as a solid waste for certain steel slag which was added by House Bill (HB) 2598, 84th Texas Legislature, 2015 and codified in Texas Health and Safety Code (THSC), §361.040. All adopted rule changes are discussed further in the Section by Section Discussion portion of this preamble.

#### Section by Section Discussion

In addition to the adopted amendments associated with this rulemaking, various stylistic, non-substantive changes have been made to update rule language to current *Texas Register* style and format requirements. These changes are non-substantive and generally not specifically discussed in this preamble.

#### *Definition of Solid Waste Rule*

The commission adopts amended §335.1 to incorporate rule changes to the definition of "Solid waste" made by the EPA in the January 13, 2015, issue of the *Federal Register* (80 FR 1694). Three exclusions from the definition of solid waste are adopted for incorporation into §335.1. These exclusions are: the generator controlled exclusion, the verified recycler exclusion, and the remanufacturing exclusion. All of the exclusions apply to hazardous secondary materials (e.g., listed by-products, listed sludges, and spent materials) when the materials are recycled by being reclaimed.

The generator controlled exclusion excludes hazardous secondary materials from the definition of "Solid waste" if they are generated and legitimately reclaimed within the United States (U.S.) and its territories. Generators that wish to take advantage of this exclusion must satisfy specific criteria. These criteria include: 1) notification to the executive director of the reclamation of the hazardous secondary materials; 2) development of an effective emergency preparedness and response plan to ensure that the hazardous secondary materials are properly contained in order to prevent releases to the environment, and if releases should occur, implementation of the emergency preparedness and response plan to respond to and deal with the release; 3) specific criteria for evaluating the legitimacy of the reclamation process; 4) recordkeeping requirements for the generator of the hazardous secondary materials; and 5) that the hazardous secondary materials not be speculatively accumulated.

The verified recycler exclusion excludes hazardous secondary materials from the definition of "Solid waste" if they are transferred from the generators located in Texas to verified reclamation facilities located in the U.S. and its territories. Owners and operators of verified reclamation facilities that wish to take ad-

vantage of this exclusion must satisfy specific criteria. These criteria include: 1) notification to the executive director of the reclamation of the hazardous secondary materials; 2) development of an effective emergency preparedness and response plan to ensure that the hazardous secondary materials are properly contained in order to prevent releases to the environment, and if releases should occur, implementation of the emergency preparedness and response plan to respond to and deal with the release; 3) specific criteria for evaluating the legitimacy of the reclamation process; 4) recordkeeping requirements for the generator of the hazardous secondary materials; 5) that the hazardous secondary materials not be speculatively accumulated; 6) that the facility that reclaims the hazardous secondary materials have either a RCRA permit or a solid waste variance; and 7) that the verified reclamation facility and intermediate facilities that manage the hazardous secondary materials prior to arrival at the verified reclamation facility establish and maintain financial assurance prior to acceptance of hazardous secondary materials.

The remanufacturing exclusion excludes specified spent solvents from the definition of "Solid waste" when the spent solvents are generated in Texas and regenerated in the U.S. and its territories. Generators that wish to take advantage of this exclusion must satisfy specific criteria. These criteria include: 1) that the spent solvent(s) being regenerated be one or more of the solvents specified in the exclusion; 2) notification to the executive director of the reclamation of the hazardous secondary materials; 3) that the generators of the spent solvents, the facilities to which the spent solvents are sent to be remanufactured, and the uses to which the solvents that result from the remanufacturing process are those specified in the exclusion; 4) recordkeeping requirements for the generator and remanufacturer of the spent solvents; 5) that tanks and containers in which the spent solvents are held meet specific technical standards; 6) that all equipment, vents, and tanks involved in the remanufacturing of the spent solvents are managed in accordance with requirements specified in the exclusion; and 7) that the spent solvents not be speculatively accumulated.

Incorporation of the exclusions into Chapter 335 requires: 1) adding definitions; 2) updating and renumbering existing definitions; 3) expanding the scope of variances from classification as a solid waste; 4) incorporating specific criteria to evaluate the legitimacy of the reclamation activities; 5) updating the criteria and standards for submittal and evaluation of applications for variances from classification as a solid waste; and 6) adding criteria, standards, and notification requirements for submittal and evaluation of requests for non-waste determinations.

These changes will be consistent with the EPA's new standards and criteria for variances from classification as a solid waste and non-waste determinations by updating references to exclusions from the definition of a "Solid waste" to include changes to the federal regulations that became effective on January 13, 2015, and by adding specific standards for the management of hazardous secondary materials.

#### *Promulgation of THSC, §361.040 (HB 2598)*

The commission further adopts promulgating a new exclusion from regulation as a solid waste for certain steel slag that was added by HB 2598, and codified in THSC, §361.040. THSC, §361.040 prevents the commission from regulating steel slag as a solid waste if the steel slag has not been discarded and is either an intended output of or the result of the use of an electric arc furnace to make steel, is introduced into the stream of com-

merce, and is managed as an item of commercial value, which may include a controlled use in a manner constituting disposal.

#### *Electronic Manifest Rule*

In the February 7, 2014, issue of the *Federal Register* (79 FR 7518), the EPA established new requirements authorizing the use of electronic manifests (or e-Manifests) as a means to track off-site shipments of hazardous waste from a generator's site to the site of the receipt and disposition of the hazardous waste. The commission adopts rule changes to conform to the EPA's rules, thereby allowing persons the ability to participate in the EPA's e-Manifest system, including Class 1 waste. These adopted amendments are part of an effort by the EPA to transition the nation to electronic manifests for hazardous waste shipment and therefore will establish the legal equivalence of EPA Forms 8700-22 (Manifest), 8700-22A (Continuation Sheet) and the electronic format (e-Manifest) as defined in 40 Code of Federal Regulations (CFR) §260.10 (Definitions). See the Section by Section Discussion of §335.10 for additional information.

#### *Cathode Ray Tube Rule*

In the June 26, 2014, issue of the *Federal Register* (79 FR 36220), the EPA revised requirements for export provisions of the Cathode Ray Tube (CRT) rule that was promulgated on July 28, 2006. Specifically, the commission adopts rule changes that will revise certain provisions for the export of CRTs for reuse and recycling in order to ensure safe management of these materials.

#### *§335.1, Definitions*

The commission adopts renumbering definitions in §335.1 to add ten definitions. The added definitions are: "Cathode ray tube (CRT) exporter," "Contained," "Electronic manifest or e-Manifest," "Electronic manifest system or e-Manifest system," "Hazardous secondary material," "Hazardous secondary materials generator," "Intermediate facility," "Land-based unit," "Remanufacturing," and "User of the electronic manifest system."

The commission adopts amended §335.1 to add the definition of "Cathode ray tube (CRT) exporter" as §335.1(20) and renumbers subsequent definitions accordingly. Specifically, this amendment conforms to federal regulations promulgated in the June 26, 2014, issue of the *Federal Register* (79 FR 36220) by adding the definition of "Cathode ray tube (CRT) exporter" that is consistent with the definition of "CRT exporter" in 40 CFR §260.10.

The commission adopts amended §335.1 to add the definition of "Contained" as §335.1(33) and renumbers subsequent definitions accordingly. This addition pertains to new management and storage requirements for certain hazardous waste recycling activities when qualifying for exclusions from the new, federal definition of solid waste for hazardous secondary materials. Specifically, this amendment conforms to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694) by adding the definition of "Contained" that is consistent with the definition of "Contained" in 40 CFR §260.10.

The commission adopts amended §335.1 to add the definition of "Electronic manifest or e-Manifest" as §335.1(50) and renumbers subsequent definitions accordingly. This change is part of an effort by the EPA to transition the nation to electronic manifests for hazardous waste shipment and will establish that the electronic format (e-Manifest) is legally equivalent with the paper EPA Forms 8700-22 (Manifest) and 8700-22A (Continuation

Sheet). Specifically, this amendment conforms to federal regulations promulgated in the February 7, 2014, issue of the *Federal Register* (79 FR 7518) by adding the definition of "Electronic manifest or e-Manifest" that is consistent with the definition of "Electronic manifest (or e-Manifest)" in 40 CFR §260.10. See the Section by Section Discussion of §335.10 for additional information.

The commission adopts amended §335.1 to add the definition of "Electronic manifest system or e-Manifest system" as §335.1(51) and renumbers subsequent definitions accordingly. Specifically, this amendment conforms to federal regulations promulgated in the February 7, 2014, issue of the *Federal Register* (79 FR 7518) by adding the definition of "Electronic manifest system or e-Manifest system" consistent with the definition of "Electronic Manifest System (or e-Manifest System)" in 40 CFR §260.10. See the Section by Section Discussion of §335.10 for additional information.

The commission adopts amended §335.1(61), the definition of "Facility," to expand the scope of the current definition to include management of hazardous secondary material. Specifically, this amendment conforms to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694) by revising the current definition of "Facility" to be consistent with the definition of "Facility" in 40 CFR §260.10.

The commission adopts amended §335.1 to add the definition of "Hazardous secondary material" as §335.1(70) and renumbers subsequent definitions accordingly. Specifically, this amendment conforms to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694) by adding the definition of "Hazardous secondary material" that is consistent with the definition of "Hazardous secondary material" in 40 CFR §260.10.

The commission adopts amended §335.1 to add the definition of "Hazardous secondary material generator" as §335.1(71) and renumbers subsequent definitions accordingly. Specifically, this amendment conforms to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694) by adding the definition of "Hazardous secondary material generator" that is consistent with the definition of "Hazardous secondary material generator" in 40 CFR §260.10.

The commission adopts amended §335.1 to add the definition of "Intermediate facility" as §335.1(89) and renumbers subsequent definitions accordingly. Specifically, this amendment conforms to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694) by adding the definition of "Intermediate facility" that is consistent with the definition of "Intermediate facility" in 40 CFR §260.10.

The commission adopts amended §335.1 to add the definition of "Land-based unit" as §335.1(92) and renumbers subsequent definitions accordingly. Specifically, this amendment conforms to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694) by adding the definition of "Land-based unit" when used to refer to reclamation of hazardous secondary materials that is consistent with the EPA definition of "Land-based unit" in 40 CFR §260.10. It is not the intent of the commission for this definition to include spills or releases from units that include, but are not limited to, tanks, containers, and miscellaneous units that result in corrective action.

The commission adopts amended §335.1(101) to add electronic manifest to the definition of "Manifest." Specifically, this amendment conforms to federal regulations published in the February

7, 2014, issue of the *Federal Register* (79 FR 7518) by adding electronic manifest to be consistent with the definition of "Manifest" in 40 CFR §260.10. See the Section by Section Discussion of §335.10 for additional information.

The commission adopts amended §335.1 to add the definition of "Remanufacturing" as §335.1(134) and renumbers subsequent definitions accordingly. Specifically, this amendment conforms to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694) by adding the definition of "Remanufacturing" that is consistent with the definition of "Remanufacturing" in 40 CFR §260.10.

The commission adopts amended §335.1(146) to revise the definition of "Solid waste" to be consistent with state and federal law. This change adds requirements and opportunities for certain hazardous waste recycling activities including creating a classification as hazardous secondary materials for certain hazardous waste that will be recycled and exclusions from the definition of "Solid waste" for certain activities including the generator controlled exclusion, the verified recycler exclusion, and the remanufacturing exclusion. Additionally, this amendment adds references to the sections of this chapter that relate to solid waste that is being recycled. Specifically, this amendment conforms to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694) by changing the scope of the current definition of "Solid waste" to be consistent with the definition of "Solid waste" in 40 CFR §261.2.

The commission further amends the definition of "Solid waste," by adopting a new exclusion from regulation as a solid waste for certain recycled steel slag as subparagraph (M). This change excludes steel slag, when recycled in accordance with certain criteria from regulation as a solid waste. Specifically, this amendment promulgates a new exclusion from regulation as a solid waste for recycled steel slag as codified in THSC, §361.040 (HB 2598).

The commission adopts amended §335.1 to expand the scope of the definition of "Transfer facility," renumbered as §335.1(161), to include management of hazardous secondary material. Specifically, this amendment conforms to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694) by revising the current definition of "Transfer facility" to be consistent with the definition of "Transfer facility" in 40 CFR §260.10.

The commission adopts amended §335.1 to add the definition for "User of the electronic manifest system" as §335.1(180) and renumbers subsequent definitions accordingly. Specifically, this amendment conforms to federal regulations as promulgated in the February 7, 2014, issue of the *Federal Register* (79 FR 7518) by adding the definition of "User of the electronic manifest system" consistent with the definition of "User of the electronic manifest system" in 40 CFR §260.10. See the Section by Section Discussion of §335.10 for additional information.

#### *§335.10, Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste*

In the February 7, 2014, issue of the *Federal Register* (79 FR 7518), the EPA established new requirements authorizing the use of electronic manifests (or e-Manifests) as a means to track off-site shipments of hazardous waste from a generator's site to the site of the receipt and disposition of the hazardous waste. The commission adopts these changes to conform its rules to the EPA's, thereby allowing persons the ability to participate in the EPA's e-Manifest system, including Class 1 waste.

The Hazardous Waste Electronic Manifest Establishment Act, Public Law 112-195 directed the EPA to implement a national electronic manifest system and to impose reasonable user service fees as a means to fund the development and operation of the e-Manifest system. The EPA announced explicitly that electronic manifest documents obtained from the Agency's national e-Manifest system and completed in accordance with applicable regulations are the legal equivalent of the paper manifest forms (EPA Forms 8700-22 and 8700-22A) currently authorized for use in tracking hazardous waste shipments. Upon completion of the e-Manifest system, the electronic manifest documents authorized by this final regulation will be available to manifest users as an alternative to the paper manifest forms to comply with federal and state requirements for the use of the hazardous waste manifest.

As of this rule adoption, the EPA has not implemented the electronic manifest system. The EPA has delayed the compliance date for its regulations until the e-Manifest system is ready for operation and after the announcement of the schedule of fees for manifest related services. The EPA will publish a further document subsequent to this rule's effective date to announce the user fee schedule for manifest related activities. This document will also announce the date that compliance with the federal e-Manifest regulation will be required and when the EPA will be ready to receive electronic manifests through the national e-Manifest system. Please see the EPA's website at <http://www3.epa.gov/epawaste/hazard/transportation/manifest/e-man.htm> for further information regarding implementation of the electronic manifest system including equipment requirements, compliance dates, etc.

The EPA has authorized the use of its electronic manifest system to allow states to use the system for shipments of waste required to have a manifest under state law. The commission adopts giving persons the flexibility to use the EPA's electronic manifest system or paper manifests for shipments of Texas Class 1 waste.

The commission adopts amended §335.10 to allow the use of either EPA ID numbers or Solid Waste Registration numbers when completing a manifest for Class 1 waste. The commission adopts amended §335.10 by incorporating by reference the Electronic Manifest System published in the February 7, 2014, issue of the *Federal Register* (79 FR 7518). This change will add references to 40 CFR §§262.20, 262.24, and 262.25. Incorporation of these federal requirements provide generators of hazardous and industrial waste the option of using the electronic manifest system or the paper manifest and establish that the electronic manifest is legally equivalent to the paper manifest. The commission adopts amended §335.10(a) to remove §335.10(a)(3) and (4) because the EPA is implementing the e-Manifest system instead of TCEQ.

#### *§335.11, Shipping Requirements for Transporters of Hazardous Waste or Class 1 Waste*

The commission adopts amended §335.11 to incorporate by reference the Electronic Manifest System as published in the February 7, 2014, issue of the *Federal Register* (79 FR 7518). This change will incorporate the requirements of 40 CFR §263.22 and §263.25.

#### *§335.12, Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities*

The commission adopts amended §335.12 to incorporate by reference the Electronic Manifest System as published in the Feb-

ruary 7, 2014, issue of the *Federal Register* (79 FR 7518). This change will incorporate federal requirements establishing that the electronic manifest is legally equivalent to the paper manifest.

#### *§335.17, Special Definitions for Recyclable Materials and Non-hazardous Recyclable Materials*

The commission adopts amended §335.17 to conform to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694). Specifically, this amendment adds language clarifying the scope of the definition of when a material is reclaimed for the purposes of the generator controlled exclusion and the verified recycler exclusion regarding certain types of smelting, melting, and refining furnaces. In addition, the amendment establishes a requirement to label materials that will be recycled with the first date of accumulation for the purpose of demonstrating compliance with the legitimate recycling criteria prohibiting speculative accumulation. Further, the amendment adds references to the sections of this chapter that relate to solid waste that is being recycled. The adoption is consistent with the reclamation requirements and definition of when a material is accumulated speculatively under 40 CFR §261.1.

#### *§335.18, Non-Waste Determinations and Variances from Classification as a Solid Waste*

The commission adopts amended §335.18 to conform to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694). This amendment adds new opportunities for material that will be recycled to exit regulation as solid wastes if approved by the executive director on a case-by-case basis: variances from classification as solid waste for hazardous secondary materials that are reclaimed in a continuous process, variances from classification as solid waste for hazardous secondary materials that are managed in accordance with the new generator controlled exclusion and the new verified recycler exclusion, and a non-waste determination. Additionally, this amendment adds references to the sections of this chapter that relate to solid waste that is being recycled. Specifically, this amendment adds non-waste determinations to the title of the section and adds language regarding the new requirements for non-waste determinations and variances from classification as a solid waste that is consistent with the non-waste determination and variance requirements of 40 CFR §260.30.

#### *§335.19, Standards and Criteria for Variances from Classification as a Solid Waste*

The commission adopts amended §335.19 to conform to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694). This amendment adds requirements for the new variance opportunities for hazardous secondary materials to the existing requirements for variances from classification as a solid waste. The amendment adds specified legitimacy criteria for determining whether resulting material from partial reclamation is commodity-like. Additionally, the amendment adds specified criteria for determining whether to issue a variance for hazardous secondary materials that will be transferred to a verified reclamation facility. These criteria include: demonstration of legitimate recycling; providing financial assurance; the facility not having been subject to formal enforcement action in the past three years and not having been classified as a significant non-complier under RCRA, Subtitle C, with an opportunity to provide credible evidence to demonstrate that any such violations have and will be addressed; that the facility has adequate equipment and training, and personnel for proper

management of the hazardous secondary material; compliance with emergency preparedness and response requirements; authorization or credible evidence that management of any residuals generated will be protective of human health and the environment; and the facility must address the potential risk to surrounding populations including cumulative risks from other sources. Additionally, this amendment adds references to the sections of this chapter that relate to solid waste that is being recycled. Specifically, this amendment adds non-waste determinations to the title of the section and adds language regarding the requirements for variances and non-waste determinations that is consistent with the variances and non-waste determination requirements of 40 CFR §260.31.

#### *§335.21, Procedures for Variances from Classification as a Solid Waste or To Be Classified as a Boiler or for Non-Waste Determinations*

The commission adopts amended §335.21 to conform to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694). This change adds requirements to the existing procedures for the executive director's case-by-case review of variances from classification as a solid waste, and applications to classify particular enclosed flame combustion devices as a boiler and adds a new opportunity for an owner or operator to submit an application for a non-waste determination to the executive director. In response to comments the commission is adding paragraph (2) to §335.21 that instructs the owner or operator to submit an application for a non-waste determination to the executive director. The new procedures address the new criteria under §335.19 and §335.32, and require an owner or operator to notify the executive director when a change in circumstances affects how hazardous secondary material satisfy the relevant criteria upon which a variance or non-waste determination is based and require the executive director to determine whether the criteria are still met or if the owner or operator must reapply for the non-waste determination or variance. Additionally, the new procedures impose a fixed term of no more than ten years on a variance or non-waste determination, require an owner or operator to re-apply six months prior to expiration of the fixed term, and impose additional notification requirements for hazardous secondary material management activities under a variance or non-waste determination. The commission adopts amended §335.21 to clarify that the executive director's ability to hold a public hearing upon request or at his discretion under existing §335.21 means that the executive director may hold a TCEQ public meeting because TCEQ's public meeting process meets or exceeds the minimum requirements of a public hearing under 40 CFR §25.5 and §260.33. Specifically, this amendment adds non-waste determinations to the title of the section and adds language that is consistent with the federal variance and non-waste determination requirements of 40 CFR §260.33.

#### *§335.26, Notification Requirements for Hazardous Secondary Materials*

The commission adopts new §335.26 to conform to federal regulations published in the January 13, 2015, issue of the *Federal Register* (80 FR 1694). Specifically, this new section incorporates by reference the notification requirements of 40 CFR §260.42 for hazardous secondary materials that are reclaimed under the verified recycler exclusion and clarify that notification required by this section must be made to the TCEQ executive director instead of the EPA Regional Administrator.

#### *§335.27, Legitimate Recycling of Hazardous Secondary Materials*

The commission adopts new §335.27 to conform to federal regulations published in the January 13, 2015, issue of the *Federal Register* (80 FR 1694). Specifically, this new section incorporates by reference 40 CFR §260.43 requirements for legitimate recycling of hazardous secondary materials that are reclaimed and clarify that notification required under this section must be made to the TCEQ executive director instead of the EPA Regional Administrator.

#### §335.32, *Standards and Criteria for Non-Waste Determinations*

The commission adopts new §335.32 to conform to federal regulations published in the January 13, 2015, issue of the *Federal Register* (80 FR 1694). Specifically, this new section incorporates by reference the standards and criteria for non-waste determinations that is consistent with the requirements of 40 CFR §260.34.

#### §335.112, *Standards*

The commission adopts amended §335.112(a)(4), Subpart E - Manifest System, Recordkeeping and Reporting, to conform to federal regulations published in the February 7, 2014, issue of the *Federal Register* (79 FR 7518). This amendment adopts by reference the electronic manifest system requirements for owners and operators of interim standard hazardous waste treatment, storage, or disposal facilities.

#### §335.152, *Standards*

The commission adopts amended §335.152(a)(4), Subpart E - Manifest System, Recordkeeping and Reporting, to conform to federal regulations promulgated in the February 7, 2014, issue of the *Federal Register* (79 FR 7518). This amendment adopts by reference the electronic manifest system requirements for owners and operators of permitted hazardous waste treatment, storage, or disposal facilities.

#### §335.504, *Hazardous Waste Determination*

The commission adopts amended §335.504 to conform to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694). This amendment adds the new exclusions from the definition of solid waste to the existing considerations when making a hazardous waste determination. See the Section by Section Discussion of §335.1 for additional information.

#### §335.602, *Standards*

The commission adopts amended §335.602(c) to correct a reference to "Subchapter P of this chapter." The correct citation is "Chapter 37, Subchapter P of this title."

#### *Subchapter V: Standards for Reclamation of Hazardous Secondary Materials*

The commission adopts new Subchapter V to conform to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694). This subchapter is adopted to establish minimum standards and requirements for generators and owners and operators of recycling facilities seeking to conduct hazardous waste recycling activities under the exclusions from the definition of solid waste for hazardous secondary materials reclaimed under the generator controlled exclusion, the verified recycler exclusion and the remanufacturing exclusion under 40 CFR §261.4(a)(23), (24), and (27) (Exclusions). Specifically, this rulemaking adopts five new sections in Chapter 335, Subchapter V: §335.701 (Purpose and Applicability); §335.702 (Standards); §335.703 (Financial Assurance Require-

ments); §335.704; (Cost Estimate); §335.705 (Removal and Decontamination Plan for Release); and §335.706 (Release of the Owner or Operator from the Requirements of this Subchapter).

#### §335.701, *Purpose and Applicability*

The commission adopts new §335.701 to provide the purpose and applicability of new Subchapter V. This new section establishes that the purpose of the new subchapter is to provide the minimum standards for management of hazardous secondary materials. The new subchapter establishes applicable standards for persons managing hazardous secondary materials under the new exclusions from the definition of solid waste for hazardous secondary materials. Specifically, this new section conforms to federal regulations promulgated in the January 13, 2015, issue of the *Federal Register* (80 FR 1694) by adopting management standards and applicability consistent with the requirements of 40 CFR §261.4(a)(23), (24), and (27).

#### §335.702, *Standards*

The commission adopts new §335.702 to set standards and criteria for management of hazardous secondary material. This new section establishes requirements for management of hazardous secondary materials under the exclusions from the definition of solid waste for hazardous secondary materials including use and management of containers, tank systems, emergency preparedness and response, and air emissions standards for process vents, equipment leaks, and tanks and containers consistent with federal requirements. Specifically, this new section conforms to federal regulations promulgated January 13, 2015, issue of the *Federal Register* (80 FR 1694) by incorporating by reference, with clarifications, 40 CFR Part 261, Subparts I, J, M, and AA - CC.

#### §335.703, *Financial Assurance Requirements*

The commission adopts new §335.703 to establish financial assurance requirements for owners or operators of reclamation and intermediate facilities managing hazardous secondary materials excluded under 40 CFR §261.4(a)(24), and excludes states and the federal government from the financial assurance requirements. This new section requires owners and operators of reclamation facilities and intermediate facilities to establish and maintain financial assurance for removal and decontamination and corrective action, and liability coverage for sudden and nonsudden accidental occurrences. Specifically, this new section conforms to federal regulations promulgated in the October 30, 2008, issue of the *Federal Register* (73 FR 64764) by adopting federal requirements by reference and by incorporating TCEQ financial assurance requirements and financial instruments under 30 TAC Chapter 37. The Chapter 37 requirements and financial instruments would be revised to be consistent with the financial assurance requirements of 40 CFR Part 261, Subpart H and §261.143.

#### §335.704, *Cost Estimate*

The commission adopts new §335.704 to establish financial assurance cost estimate requirements for owners or operators of reclamation and intermediate facilities managing hazardous secondary materials excluded under 40 CFR §261.4(a)(24). This new section establishes requirements for cost estimates. Specifically, this section conforms to federal regulations promulgated in the October 30, 2008, issue of the *Federal Register* (73 FR 64764) by adopting requirements for cost estimates by incorporating requirements of Chapter 37, with revisions to the Chapter

37 requirements, consistent with the financial assurance requirements of 40 CFR Part 261, Subpart H and §261.143.

#### *§335.705, Removal and Decontamination Plan for Release*

The commission adopts new §335.705 to establish requirements for owners or operators of reclamation and intermediate facilities managing hazardous secondary materials excluded under 40 CFR §261.4(a)(24) who wish to discontinue hazardous secondary material activities and initiate the process of being released from financial assurance obligations. This new section establishes a process for submittal, review and approval, by the executive director, of a plan for removal of hazardous secondary material residues and decontamination in a manner that is protective of human health and the environment. This process includes public notice and opportunities for the public to request a public meeting and for an owner or operator and the public to file a motion to overturn the executive director's determination. Specifically, this new section conforms to federal regulations promulgated in the October 30, 2008, issue of the *Federal Register* (73 FR 64764) by adopting requirements consistent with 40 CFR §261.143(h).

#### *§335.706, Release of the Owner or Operator from the Requirements of this Subchapter*

The commission adopts new §335.706 to establish requirements for owners or operators of reclamation and intermediate facilities managing hazardous secondary materials excluded under 40 CFR §261.4(a)(24) to be released from financial assurance obligations. This new section establishes requirements for release from financial assurance obligations following fulfillment of the requirements of adopted §335.705. Specifically, this section conforms to federal regulations promulgated in the October 30, 2008, issue of the *Federal Register* (73 FR 64764) by adopting requirements consistent with 40 CFR §261.143(i).

#### Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because the adopted rules do not meet the definition of a "Major environmental rule" as defined in the act and do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a).

"Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rules are not major environmental rules because they are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state since the adopted rules promulgate existing requirements that are already imposed under state statute and 42 United States Code (USC), §6926(g).

Further, even if the adopted rules met the definition of a major environmental rule, this rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically

required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The rulemaking does not exceed a standard set by federal law because the commission adopts this rulemaking to implement revisions to the federal hazardous waste program. The commission's rules must meet the minimum standards and mandatory requirements of the federal program to maintain authorization of the state hazardous waste program. Although this rulemaking adopts some requirements that are more stringent than existing state laws, federal law requires the commission to promulgate rules that are as stringent as federal law for the commission to maintain authorization of the state hazardous waste program. Additionally, to the extent that the rulemaking implements the state law requirements of HB 2598, it is not a requirement that is more stringent than existing state law. Moreover, the rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government, where the delegation agreement or contract is to implement a state and federal program. On the contrary, the commission must undertake the rulemaking to maintain authorization of the state hazardous waste program. Finally, the rulemaking does not seek to adopt a rule solely under the general powers of the agency instead of under specific state law. The commission adopts this rulemaking under the authority of the Texas Water Code, §5.103 and the THSC, §§361.017, 361.024, and 361.040.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission received no comments on the regulatory impact analysis determination.

#### Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed analysis of whether the adopted rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rules is to: 1) maintain consistency with the requirements of the federal solid and hazardous waste regulations and with the RCRA; and 2) implement state law, THSC, §361.040, added by HB 2598. The adopted rulemaking substantially advances these stated purposes by adopting rules that: 1) are equivalent to the federal regulations; 2) incorporate the federal regulations; and 3) implement the requirements of HB 2598.

The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to the portions of the rulemaking adopting rules that meet the minimum standards of the federal hazardous waste program because Texas Government Code, §2007.003(b)(4) exempts an action reasonably taken, by a state agency, to fulfill an obligation mandated by federal law from the requirements of Texas Government Code, Chapter 2007. Under 42 USC, §6926(e), the state must adopt rules that meet the minimum standards of the federal hazardous waste program administered by the EPA in order to maintain authorization to administer the program. Therefore, the portions of the rulemaking adopting rules that meet the minimum standards of the federal hazardous waste program are exempt from the requirements of Texas Government Code, Chapter 2007 because the rules are required by federal law.

Finally, to the extent that portions of the adopted rulemaking are not exempt under Texas Government Code, §2007.003(b)(4) or it implements state law, promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in real property because the adopted rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, the adopted rules do not constitute a takings under the Texas Government Code, Chapter 2007 because they would either implement requirements already imposed on the regulated community under 42 USC, §6926(g) or that are less stringent than existing rules.

#### Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to the rulemaking is to protect, preserve, restore and enhance the diversity, quality, quantity, functions and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 USC, §§6901 *et seq.* Promulgation and enforcement of these rules are consistent with the applicable CMP goals and policies because the rulemaking would update and enhance the commission's rules concerning hazardous waste facilities. In addition, the rules would not violate any applicable provisions of the CMP's stated goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission received no comments on the CMP.

#### Public Comment

The commission held a public hearing on January 22, 2016. The comment period closed on January 29, 2016. The commission received comments from the Texas Chemical Council (TCC), the Texas Industry Project (TIP), and the Vanadium Producers and Reclaimers Association (VPRA).

All of the commenters were in support of and suggested changes to the proposed rules. Response to Comments

#### *Support of the Rulemaking*

##### *Comment*

The VPRA commented that its group consists of producers and recyclers of Vanadium in the U.S., and that it focuses on matters of importance to the industry such as trade, health and safety and environmental issues. The VPRA was formed in 2003 and it has a particular interest in the environmental aspects related to the spent petroleum catalyst recycling industry; in particular the recycling of hydrotreating (K171) and hydrorefining (K172)

catalyst material. The TIP commented that its membership is composed of 65 companies in the chemical, refining, oil and gas, electronics, forest products, terminal, electric utility, transportation, and national defense industries with operations in Texas. TIP commented in support of the proposed revisions to the definition of "Solid waste." The TCC commented that it is a statewide trade association representing over 70 chemical manufacturers operating approximately 200 Texas facilities. The Texas chemical industry has more than \$75 billion in physical assets in the state, and pays over \$1 billion annually in state and local taxes and over \$20 billion in federal income taxes. TCC's members provide approximately 70,000 direct jobs and over 400,000 indirect jobs in Texas. TCC commented that its members have cited an average of 60 to upwards of multiple thousands of individual recycle streams per site with hundreds of millions of pounds of material recycled annually. TCC commented that adoption of the definition of "Solid waste" will have a profound impact on the way Texas chemical manufacturing plants operate and manage solid and hazardous wastes and that continued economic viability at these facilities requires an in depth understanding of the impact of the rules and implementation of the rules by regulated entities and TCEQ staff.

##### *Response*

The commission acknowledges the comments and has made no changes in response to these comments.

##### *Existing Variances*

##### *Comment*

The VPRA encouraged the commission to revisit the variances from classification as a solid waste issued under §335.19 to ensure consistency with the new federal program and particularly the legitimate recycling criteria.

##### *Response*

The commission intends to establish a procedure to address existing variances. The commission has made no changes in response to this comment.

##### *Requests for Regulatory Guidance*

##### *Comment*

TIP requested that the commission establish regulatory guidance to address the effect of §335.27 on solid waste exclusions, solid waste determinations, variances currently in effect, and the duration of existing variances and solid waste determinations as applied to generators and verified recyclers. The TIP also requested that the commission establish regulatory guidance to address prior variances and solid waste determinations, when facilities are operating under any existing variances, when solid waste determinations qualify as a verified recycler, and when and whether a verified recycler must determine and document that 40 CFR §260.43(a)(1) - (4) is met. TIP requested that TCEQ develop regulatory guidance to assist generators and recyclers in determining whether an activity qualifies as legitimate recycling and what documentation is required. The TCC requested that the commission provide guidance on speculative accumulation requirements for the regulated community and the commission. The TIP requested that the commission establish regulatory guidance to address solid waste determinations as applied to generators and verified recyclers and to address when solid waste determinations qualify as a verified recycler. The TIP requested that the commission establish regulatory guidance to address what documentation is required to support

a determination that the product of the recycling process is comparable to a legitimate product or intermediate. The TIP requested that the commission establish guidance to address 40 CFR §260.41 requirements including what constitutes "an analogous product or intermediate," "widely recognized commodity standards and specifications," or "returned to the original process or processes from which [the HSMs] were generated to be reused." The TIP requested that the commission establish guidance providing examples of recycling scenarios that would meet 40 CFR §260.43(a)(4), other than closed loop recycling, where hazardous secondary materials are returned to the original process or processes from which they are generated.

The TIP commented that 40 CFR §260.43(a)(4) requires recyclers to demonstrate that the product of the recycling process and not the recycled materials, does not contain levels of hazardous constituents that pose a significant human health or environmental risk and requested the commission establish guidance addressing the requirements of 40 CFR §260.43(a)(4).

#### *Response*

The commission agrees that implementation of these new federal regulations present challenges to the regulated community and recognizes the commenters' concerns and need for additional regulatory guidance due to the diverse nature of industry in Texas. However, the commission respectfully declines to establish regulatory guidance in this adoption preamble because there is limited federal regulatory guidance. The commission intends to establish a procedure to address existing variances. The commission is adopting a new formal opportunity to apply to the executive director for a non-waste determination in circumstances where hazardous secondary materials cannot meet the conditions of the exclusion under 40 CFR §261.2 or §261.4. In response to comment, the commission is clarifying this new non-waste determination opportunity by adding paragraph (2) to §335.21 instructing an owner or operator to submit an application for a non-waste determination to the executive director and renumbering the subsequent paragraphs accordingly. Also, in response to comment, the commission is making non-substantive changes to §335.1 and §§335.17 - 335.19, to add references to sections of Chapter 335 that relate to solid waste that is being recycled.

#### *Legitimacy Factors*

##### *Comment*

The TCC commented that if a chemical product made from a hazardous secondary material has an analogous product made from raw materials and does not exhibit a hazardous characteristic that the analogous product does not exhibit and the concentration of hazardous constituents are comparable to those in analogous products, that 40 CFR §260.43(a)(4)(i) is met.

##### *Response*

The commission notes that while the comment is similar to the plain language of 40 CFR §260.43(a)(4)(i)(A) and (B), which the commission is adopting at §335.27, it does not include specific language of 40 CFR §260.43(a)(4)(i)(B), "[t]he concentration of any hazardous constituents found in appendix VIII of part 261 of this chapter." With this clarification, the commission agrees with this comment. The commission has made no changes in response to this comment.

##### *Comment*

TCC commented that TCEQ should clarify in the Chapter 335 preamble that the federal legitimacy requirement for the analogous product comparison in 40 CFR §260.43(a)(4)(i) includes common products or intermediates found in wide-spread markets, which may be secondary markets; such markets typically are well-known, recognized, established, mature, and large. Additionally, the TCC commented that one company does not know whether another company produces an analogous product or intermediate made from virgin materials and requested that TCEQ clarify what constitutes a valid comparison to satisfy the 40 CFR §260.43(a)(4)(ii)(B) criterion.

##### *Response*

The commission's rules must be at least as stringent as the federal requirements promulgated by the EPA and the commission relies on the plain language of the federal rules when implementing the EPA's definition of solid waste. Because limited federal regulatory guidance is available, the commission respectfully declines to comment on the EPA's intent or include specific examples in this adoption preamble. The commission has made no changes in response to this comment.

##### *Comment*

The TCC provided four scenarios it believes are valid methods to perform comparisons for the purposes under 40 CFR §260.43(a)(4)(ii)(B): the hazardous secondary material that is being recycled directly (i.e., without reclamation) versus the virgin raw material or ingredient that the hazardous secondary material is replacing; the hazardous secondary material after reclamation that is being recycled versus the virgin raw material or ingredient that the reclaimed hazardous secondary material is replacing; the product/intermediate that results from recycling the hazardous secondary material versus the product/intermediate that results from using the virgin raw material or ingredient that the hazardous secondary material is replacing; and the product/intermediate that results from recycling the hazardous secondary material versus a substitute product/intermediate that is made without the hazardous secondary material by a different company or by the same company at a different site or through a different process.

##### *Response*

The commission's rules must be at least as stringent as the federal requirements promulgated by the EPA. When implementing the EPA's definition of solid waste, the commission relies on the plain language of the federal rules. The commission respectfully declines to establish regulatory guidance in this adoption preamble because there is limited federal regulatory guidance. The commission has made no changes in response to this comment.

##### *Comment*

The TCC provided the following examples of common chemical industry practices of recycling hazardous secondary material to make commodity grade chemicals: 1) a single facility manufacturer of Product A uses Product A on-site to make Product B and generates a characteristic by-product hazardous secondary material. The hazardous secondary material is reclaimed (via pipe or container) to make Product A which is subsequently used to make Product B; 2a) Manufacturer of Product A sends Product A off-site to another of its plant sites which uses Product A as an ingredient in its manufacturing process and generates a hazardous secondary material which is sent back to the original manufacturing site to be recycled and reused; 2b) the same as Example 2a except the off-site subsequent plant site is a sub-

subsidiary company of the original manufacturer; 3) Manufacturer of Product A sells Product A to a customer. The customer generates same hazardous secondary material as described in Examples 1 and 2 and sends the hazardous secondary material back to the manufacturer of Product A to be recycled. This arrangement is covered by an exclusivity contract and is an established long-standing process.

#### *Response*

The commission acknowledges that the described scenarios have the potential of being conducted in a manner that is compliant with the new hazardous secondary material requirements. The commission has made no changes in response to this comment.

#### *Comment*

The TCC commented that, in the EPA document "2015 Definition of Solid Waste Final Rule Frequent Questions March 31, 2015," the EPA stated that 40 CFR §260.43(a)(1) - (4) applies to the pre-2008 exclusions, but that documentation of legitimacy is not required for the pre-2008 exclusions unless the recycling is legitimate but does not meet 40 CFR §260.43(a)(4) and that in such a case, documentation, certification, and notice are required. Additionally, the TCC commented that EPA guidance states that no analytical testing and no further demonstration of legitimacy is required to satisfy 40 CFR §260.43(a)(4), when hazardous secondary materials: 1) are returned to the original process or processes from which they were generated, such as in concentrating metals in minerals processing; and 2) when recycled product meets widely-recognized commodity specifications and there is no analogous product made from raw materials, such as scrap metal being reclaimed into metal commodities. TCC further commented that in these instances customer specifications would be sufficient for specialty products such as specialty batch chemicals or specialty metal alloys. Finally, the TCC commented that EPA guidance states that no analytical testing and no further demonstration of legitimacy is required to satisfy 40 CFR §260.43(a)(4), when the recycled product has an analogous product made from virgin materials, but meets widely-recognized commodity specifications which address the hazardous constituents such as spent solvents being reclaimed into solvent products.

#### *Response*

The commission agrees that no additional documentation is being required by this rule adoption for pre-2008 exclusions meeting 40 CFR §260.43(a)(4)(i) and (ii). The plain language found at 40 CFR §260.43(a)(4), which the commission is adopting at §335.27, provides an opportunity for a facility to demonstrate that a recycling activity that does not appear to meet the legitimacy factor is legitimate by meeting the documentation, certification, and notification requirements. The existing rules require the recycling of solid waste to be legitimate in accordance with §335.1(140)(l) and 40 CFR §261.2(f). Further, under §335.27, owners and operators that generate, store, process, or recycle hazardous secondary material are expected to document and be able to demonstrate the legitimacy of their recycling activities to the commission including that the recycling activities satisfy 40 CFR §260.43(a)(4). The commission has made no changes in response to this comment.

#### *Comment*

The TCC commented that except where the recycling is legitimate but does not meet 40 CFR §260.43(a)(4), that the pre-2008

exclusions are not subject to the notification requirements of 40 CFR §260.42.

#### *Response*

The commission agrees that the plain language of 40 CFR §260.42, which the commission is adopting at §335.26, only imposes notification requirements on facilities managing hazardous secondary materials under 40 CFR §260.30 and §261.4(a)(23), (24), and (27). No additional documentation is being required by this rule adoption for pre-2008 exclusions meeting 40 CFR §260.43(a)(4)(i) and (ii). The commission has made no changes in response to this comment.

#### *Transfers within the U.S. or its Territories*

#### *Comment*

The VPRA commented that the commission has proposed limiting the exclusions from definition as a solid waste, the generator controlled exclusion, verified recycler exclusion, and remanufacturing exclusion, to activities and material transfers located in the state of Texas and that this limitation would negatively impact commerce. VPRA commented that the exclusions from definition as a solid waste, the generator controlled exclusion, verified recycler exclusion, and remanufacturing exclusion, should not be limited to hazardous secondary materials transferred to facilities located in Texas but should be expanded to include hazardous secondary materials transferred from a generator located in the U.S. to a verified recycling facility located in the U.S. VPRA commented that the rule should be amended to apply to materials that remain within the U.S. and are transferred between generator, verified recycler and remanufacturing facility located in the U.S. that fall within the appropriate exclusion in accordance with EPA's intent. TIP commented that limiting the verified recycler exclusion to hazardous secondary materials generated in Texas is inconsistent with the federal rule and recommended amending the preamble to include a verified reclamation facility located in the U.S. in accordance with 40 CFR §261.4(a)(24). TCC commented that the preamble limits applicability of the exclusions under 40 CFR §261.4(a)(23), (24), and (27) to within the state of Texas and recommends that the preamble be revised to remove the phrase "within Texas."

#### *Response*

The commission agrees with these comments. The commission has revised the discussion of the exclusions in the preamble to change the term "Texas" to the phrase "the United States (U.S.) and its territories."

#### *Hazardous Secondary Material Import*

#### *Comment*

The VPRA commented that the EPA has stated in guidance, "2015 Definition of Solid Waste Final Rule-Frequent Questions March 31, 2015," that the hazardous secondary material exclusions are available for material imported into the U.S. where the importer would assume the generator duties for the imported material.

#### *Response*

The commission agrees that under established federal regulations and commission rules, an importer of record of material from a foreign country assumes the generator responsibilities for those materials. The commission has made no changes in response to this comment.

#### *Legitimacy Criteria*

### *Comment*

The TCC commented that when the product of the recycling process is comparable to a legitimate product or intermediate and requirements of 40 CFR §260.43(a)(4)(i), (ii), or (iii) are met, that there is no need to determine whether the other discrete subparts have been met and that a facility may make the determinations out of order such as first reviewing 40 CFR §260.43(a)(4)(ii) (return to the generator and commodity specifications), before reviewing 40 CFR §260.43(a)(4)(i) (analogous). The TCC also commented that TCEQ should clarify that 40 CFR §260.43(a)(4) determination will be satisfied by complying with 40 CFR §260.43(a)(4)(i), (ii), or (iii), and that such a demonstration constitutes compliance with 40 CFR §260.43(a)(4).

### *Response*

The commission agrees with this comment based on the plain language of 40 CFR §260.43(a)(4)(i) - (iii), which the commission is adopting at §335.27. The commission has made no changes in response to this comment.

### *Documentation of Legitimacy Criteria*

#### *Comment*

The TCC commented that TCEQ should adopt a presumption of legitimacy for pre-2008 exclusions. TCC commented that EPA has indicated in the Definition of Solid Waste rule preamble and in guidance that all recycling, including the recycling under the pre-2008 exclusions, must be legitimate and meet 40 CFR §260.43(a)(1) - (4) criteria but that EPA is not requiring facilities to submit or maintain documentation of 40 CFR §260.43(a) criteria under the pre-2008 recycling exclusions because EPA believes that if the conditions of the pre-2008 recycling exclusions are met, that the material is legitimately recycled and meets 40 CFR §260.43(a)(1) - (4). TCC expressed concern that EPA's findings regarding the pre-2008 exclusions will be lost over time if not clarified and that a future interpretation that documentation of 40 CFR §260.43(a) criteria is required, would be inconsistent with EPA's intent. TCC cited 80 FR 1720 - 1721 and 1739 - 1741 and the EPA document "2015 Definition of Solid Waste Final Rule Frequent Questions March 31, 2015," in support of its comments. Additionally, the TCC recommended that TCEQ clarify the requirements for a legitimacy demonstration and the documentation required under 40 CFR §260.43(a)(4)(ii). TCC specifically requests that TCEQ include in the preamble the following list of examples that would meet the legitimacy criteria without additional analyses or statistical demonstration when recycled by being "returned to the original process or processes from which they are generated:" return to the original process or other processes from which the hazardous secondary material derives; return via closed- or open-loop; return from on-site or off-site; return from second, third and later generation (e.g., downstream processes); use of the hazardous secondary material-produced product or intermediate; existing recycling of hazardous secondary material in connection with the manufacturing and used both on-site and off-site, or a product or intermediate made with the hazardous secondary material, and production process or processes include those activities that tie directly into the manufacturing operation or those activities that are the primary operation at the establishment.

#### *Response*

The commission agrees that no additional documentation is being required by this rule adoption for pre-2008 exclusions meeting 40 CFR §260.43(a)(4)(i) and (ii). The commission recog-

nizes the commenter's concerns and need for additional regulatory guidance regarding the criteria for evaluating legitimate recycling, and notes that individual determinations regarding legitimate recycling may be necessary due to the diverse nature of industry in Texas. Because the commission's rules must be at least as stringent as the federal requirements promulgated by the EPA and limited federal regulatory guidance is available, the commission respectfully declines to comment on the EPA's intent, the EPA's frequently asked questions document, to restate the EPA's preamble discussions in this adoption preamble, or to include specific examples in this adoption preamble. The commission has made no changes in response to this comment.

#### *Comment*

The TCC commented that documentation of the four legitimacy criteria is not required for recycling conducted under the pre-2008 exclusions. Additionally, the TCC commented that no documentation is required to be maintained on-site for immediate access by an inspector prior to an environmental investigation of recycling involving return to process or processes in accordance with TCC's understanding of EPA's position.

#### *Response*

The commission agrees that no additional documentation is being required by this rule adoption for pre-2008 exclusions meeting 40 CFR §260.43(a)(4)(i) and (ii). Existing rules require documentation of the legitimacy criteria in accordance with §335.1(140)(l) and 40 CFR §261.2(f). Therefore, the commission requires owners and operators that generate, store, process, or recycle hazardous secondary materials to provide the commission upon request, documentation demonstrating the legitimacy of recycling activities. The commission has made no changes in response to this comment.

#### *Comment*

The TCC commented that recycling involving return to process or processes represent the recycling of hazardous secondary materials that are not solid wastes in accordance with the pre-2008 exclusion found at 40 CFR §261.2(c)(3), Table 1. TCC provided examples of common chemical industry practices of recycling hazardous secondary materials to make commodity grade chemicals and commented that these examples do not represent the management of a solid waste. TCC further commented that recycling involving return to process or processes practices represent the recycling of hazardous secondary materials is understood to be a widely accepted manufacturing practice as the characteristic by-product is to be reclaimed and reused in a major manufacturing process and is, therefore, not a solid waste. Additionally, the TCC commented that, under the new definition of solid waste rule, recycling involving return to the process or processes would not require any additional legitimacy demonstration or associated documentation. Finally, the TCC commented that the federal preamble supports TCC's interpretation that documentation, certification, and notice requirements only apply to pre-2008 exclusions when the product comparison is required by 40 CFR §260.43(a)(4)(iii).

#### *Response*

The commission acknowledges that legitimate recycling of hazardous secondary materials to make commodity grade chemicals and legitimate recycling of a characteristic by-product by reuse or return to the process or processes from which it originated are widely accepted manufacturing practices. However, even when a hazardous secondary material is recycled by being

returned to the process or processes from which it originated, §335.1(140)(l) and §335.27 and 40 CFR §261.2(f) require owners and operators to provide the commission upon request, documentation demonstrating the legitimacy of recycling activities. The commission has made no changes in response to this comment.

#### *No Analogous Product/Process Knowledge*

##### *Comment*

The TCC commented that EPA guidance states that no analytical testing and no further demonstration of legitimacy is required to satisfy 40 CFR §260.43(a)(4), when the hazardous secondary materials are returned to the original process or processes from which they were generated, such as in concentrating metals in minerals processing. The TCC provided language from EPA's "2015 Definition of Solid Waste Final Rule Frequent Questions March 31, 2015," restated in four comments/examples, adding that EPA believes that the iterated examples will apply to the majority of recycling and that analytical testing to determine compliance with 40 CFR §260.43(a)(4), will be infrequent. The TCC commented that EPA guidance states that no analytical testing and no further demonstration of legitimacy is required to satisfy 40 CFR §260.43(a)(4), when the person recycling has the necessary knowledge, such as knowledge about the incoming hazardous secondary material and the recycling process, to be able to demonstrate that the product of recycling does not exhibit a hazardous characteristic and contains hazardous constituents at levels comparable to or lower than those in products made from virgin materials. The TCC requested that TCEQ add language from EPA guidance to the rule preamble to indicate that when documenting a legitimacy demonstration to satisfy 40 CFR §260.43(a)(4), that process knowledge may be utilized instead of analytical testing.

##### *Response*

The commission does not agree that process knowledge will always be adequate to demonstrate compliance with 40 CFR §260.43(a)(4). Certain circumstances exist under which a generator is capable of relying on process knowledge when making a hazardous waste determination that complies with Chapter 335, Subchapter R. An owner or operator is responsible for demonstrating whether the product of recycling contains hazardous constituents at levels comparable to or lower than those in products made from virgin materials, and must determine on a case-by-case basis whether the use of process knowledge is adequate. At a minimum, documentation of the determination would include any process knowledge, including a full description of the process, a list of chemical constituents that enter the process, and a full description of the hazardous secondary materials including identification of and the concentrations of chemical constituents in the hazardous secondary materials. The commission has made no changes in response to this comment.

#### *Speculative Accumulation*

##### *Comment*

The TCC commented that hazardous secondary material that is stored in a unit for greater than one year will not be considered to be speculatively accumulated, as defined by 40 CFR §261.1(c)(8), if a demonstration is made that 75% or greater of the hazardous secondary materials in inventory on January 1st of the previous year was recycled during the previous calendar year.

##### *Response*

The commission acknowledges that this comment generally describes the requirements of the plain language of §335.17 and 40 CFR §261.1(c)(8). The commission has made no changes in response to this comment.

##### *Comment*

The TCC commented that the speculative accumulation requirements of 40 CFR §261.1(c)(8) are not applicable to the following exclusions or exemptions: (i) 40 CFR §261.4(a)(13)/§261.2, Table 1 (scrap metal); (ii) 40 CFR §261.6(a)(3)(ii) (scrap metal); (iii) 40 CFR §261.2(c)(4), Table 1 (commercial chemical products); (iv) 40 CFR §261.6(a)(3)(i) (industrial ethyl alcohol); (v) 40 CFR §261.6(a)(3)(iii) - (iv) (fuels produced from the refining of oil-bearing hazardous waste); (vi) 40 CFR §261.4(b)(2)(i) (growing and harvesting of agricultural crops); (vii) 40 CFR §261.4(b)(2)(ii) (raising of animals, including animal manures); (viii) 40 CFR §262.4(b)(3) (mining overburden returned to the mine site); (ix) 40 CFR §261.4(b)(12) (used chlorofluorocarbon refrigerants from totally enclosed heat transfer equipment); (x) 40 CFR §261.4(b)(14) (used oil re-refining distillation bottoms that are used as feedstock to manufacture asphalt products); (xi) 40 CFR §261.4(a)(8) (closed loop recycling); and (xii) 40 CFR §261.4(a)(26) (solvent wipes).

Additionally, the TCC requested that TCEQ clarify which exemptions and exclusions the speculative accumulation requirements are applicable to 40 CFR §261.1(c)(8).

##### *Response*

The commission is adopting the speculative accumulation documentation and labeling requirements of 40 CFR §261.1(c)(8) at §335.17(a)(8). The commission is not revising the applicability of existing §335.17. The commission's existing rule defines when a material is accumulated speculatively. The changes being adopted at §335.17(a)(8) do not broaden or reduce the scope of the applicability of the speculative accumulation requirements. The changes add a requirement that a label, or documentation if labeling is not practicable, be made indicating the first date of accumulation of the material. The commission has made no changes in response to this comment.

##### *Comment*

The TCC commented that labeling fixed equipment for the purpose of demonstrating speculative accumulation requirements is not required by 40 CFR §261.1(c)(8) because the federal rule states that "[i]f placing a label on the storage unit is not practicable, the accumulation period must be documented through an inventory log or other appropriate method" and requested that TCEQ explain that this requirement includes material stored in batch tanks, continuous-flow tanks, waste piles, or containment buildings.

##### *Response*

The commission is adopting the requirements of 40 CFR §261.1(c)(8) at §335.17. The commission agrees that the plain language of 40 CFR §261.1(c)(8) allows demonstration of compliance by using a log or other method when placing a label on the unit is not practicable. The commission has made no changes in response to this comment.

#### *Contained Standard/Definition*

##### *Comment*

The TCC commented that its interpretation that one or more releases from a container does not presumptively negate compli-

ance with the "contained" standard is supported by EPA's document "2015 Definition of Solid Waste Final Rule Frequent Questions March 31, 2015." The TCC additionally commented that its interpretation of the definition of solid waste rule is that a facility is not required to meet the contained standard, that the new definition of "Contained" is intended as a presumption of compliance rather than a requirement for compliance, and that its interpretation is supported by EPA's document, "2015 Definition of Solid Waste Final Rule Frequent Questions March 31, 2015." Finally, TCC quoted EPA's example of the contained standard not requiring a specific type management in a container when performance based standards depend on the type of material being managed such as scrap metal, a material whose hazardous constituents are generally immobile that is capable of being managed in an uncovered pile on the ground and still be considered "contained."

#### *Response*

The commission believes the plain language of 40 CFR §261.4(a)(23)(ii)(A), (24)(v)(A), and (27)(vi)(B)(5) and (D) - (E) adequately describe what constitutes being "contained" with respect to the storage, processing and recycling of hazardous secondary materials. The commission's rules must be at least as stringent as the federal requirements promulgated by the EPA. When implementing the EPA's definition of solid waste, the commission relies on the plain language of the federal rules. The commission respectfully declines to comment on the EPA's intent or the EPA's frequently asked questions document, or to restate the EPA's preamble discussions in this adoption preamble. The commission has made no changes in response to this comment.

#### *Comment*

The TCC commented that materials subject to the pre-2008 exclusions do not have to be contained, as defined in 40 CFR §260.10.

#### *Response*

The commission is adopting the EPA's definition of "Contained" for hazardous secondary materials in the definitions section at §335.1(33). The requirement for containment is set out by 40 CFR §260.43(a)(3) and adopted at §335.27. These requirements are broadly applicable to hazardous secondary materials. Therefore, the commission disagrees with this comment. The commission has made no changes in response to this comment.

#### *Comment*

The TCC commented that hazardous secondary materials that have no analogous raw material, even if subject to one or more of the pre-2008 exclusions, must be contained as specified in 40 CFR §260.43(a)(3).

#### *Response*

The commission is adopting the requirements of 40 CFR §260.43(a)(3) relating to legitimate recycling of hazardous secondary materials at §335.27. To the extent that hazardous secondary material is recycled for the purpose of the exclusions or exemptions from the hazardous waste regulations where there is no analogous raw material and where the recycling activity can be characterized as being conducted under the pre-2008 exclusions, the commission agrees with this comment. The commission has made no changes in response to this comment.

#### *Comment*

The TCC commented that it interprets 40 CFR §261.4(a)(24) to mean that the verified recycler requirements do not apply to pre-2008 exclusions and that its interpretation is supported by EPA's document "2015 Definition of Solid Waste Final Rule Frequent Questions March 31, 2015."

#### *Response*

The commission is adopting the verified recycler requirements of 40 CFR §261.4(a)(24) at §§335.18, 335.19, and 335.703 - 335.706. The commission generally agrees with this comment because certain requirements of the new opportunities for verified recycler facilities are distinct and limited to intermediate facilities and verified recycler facilities and because the exclusions from solid waste operate independently. The commission has made no changes in response to this comment.

#### *Comment*

The TCC commented that the wording of 40 CFR §260.43(a)(4)(iii), "or other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk" is capable of multiple interpretations and that EPA's intent is that the rule language refers to the product made using recycled material and not from recycled product.

#### *Response*

The commission agrees with this comment based on the plain language of 40 CFR §260.43(a)(4)(iii), which the commission is adopting at §335.27. The plain language of 40 CFR §260.43(a)(4)(iii) uses the phrases "the product of the recycling process" and "the recycled product." The commission has made no changes in response to this comment.

#### *Postpone Implementation*

#### *Comment*

The TCC requested that TCEQ postpone implementing the definition of solid waste rule until July 2017 because regulated entities need additional time to make time consuming evaluations of multiple waste streams and compliance determinations, particularly when making the evaluations and determinations for multiple facilities and because regulated entities need a greater time period over which to expense the capital expenditures required to bring facilities into compliance and because TCC estimates implementation for complex facilities may require 18 to 24 months.

#### *Response*

The commission recognizes the commenter's concerns regarding the complexities and costs presented by the new definition of solid waste rule. In order to maintain RCRA authorization, EPA requires states to adopt the sections of the new definition of solid waste that are not optional by July 1, 2016. Under the commission's schedule for this rulemaking, these rules will be in effect on June 16, 2016. The commission has made no changes in response to this comment.

## SUBCHAPTER A. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE IN GENERAL

**30 TAC §§335.1, 335.4, 335.10 - 335.12, 335.17 - 335.19, 335.21, 335.26, 335.27, 335.32**

Statutory Authority

The amendments and new sections are adopted under Texas Water Code (TWC), §5.103 (Rules) and §5.105 (General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste), §361.024 (Rules and Standards), and §361.036 (Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC; and THSC, §361.040 (Treatment of Steel Slag as Solid Waste), which provides an exclusion from regulation as a solid waste for certain steel slag.

The adopted amendments and new sections implement THSC, Chapter 361.

§335.1. *Definitions.*

In addition to the terms defined in Chapter 3 of this title (relating to Definitions), the following words and terms, when used in this chapter, have the following meanings.

(1) Aboveground tank--A device meeting the definition of "Tank" in this section and that is situated in such a way that the entire surface area of the tank is completely above the plane of the adjacent surrounding surface and the entire surface area of the tank (including the tank bottom) is able to be visually inspected.

(2) Act--Texas Health and Safety Code, Chapter 361.

(3) Active life--The period from the initial receipt of hazardous waste at the facility until the executive director receives certification of final closure.

(4) Active portion--That portion of a facility where processing, storage, or disposal operations are being or have been conducted after November 19, 1980, and which is not a closed portion. (See also "Closed portion" and "Inactive portion.")

(5) Activities associated with the exploration, development, and production of oil or gas or geothermal resources--Activities associated with:

(A) the drilling of exploratory wells, oil wells, gas wells, or geothermal resource wells;

(B) the production of oil or gas or geothermal resources, including:

(i) activities associated with the drilling of injection water source wells that penetrate the base of usable quality water;

(ii) activities associated with the drilling of cathodic protection holes associated with the cathodic protection of wells and pipelines subject to the jurisdiction of the commission to regulate the production of oil or gas or geothermal resources;

(iii) activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants;

(iv) activities associated with any underground natural gas storage facility, provided the terms "Natural gas" and "Storage facility" shall have the meanings set out in the Texas Natural Resources Code, §91.173;

(v) activities associated with any underground hydrocarbon storage facility, provided the terms "Hydrocarbons" and

"Underground hydrocarbon storage facility" shall have the meanings set out in the Texas Natural Resources Code, §91.201; and

(vi) activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil or gas prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel;

(C) the operation, abandonment, and proper plugging of wells subject to the jurisdiction of the commission to regulate the exploration, development, and production of oil or gas or geothermal resources; and

(D) the discharge, storage, handling, transportation, reclamation, or disposal of waste or any other substance or material associated with any activity listed in subparagraphs (A) - (C) of this paragraph, except for waste generated in connection with activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants if that waste is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency in accordance with the Federal Solid Waste Disposal Act, as amended (42 United States Code, §§6901 *et seq.*).

(6) Administrator--The administrator of the United States Environmental Protection Agency or his designee.

(7) Ancillary equipment--Any device that is used to distribute, meter, or control the flow of solid waste or hazardous waste from its point of generation to a storage or processing tank(s), between solid waste or hazardous waste storage and processing tanks to a point of disposal on site, or to a point of shipment for disposal off site. Such devices include, but are not limited to, piping, fittings, flanges, valves, and pumps.

(8) Aquifer--A geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs.

(9) Area of concern--Any area of a facility under the control or ownership of an owner or operator where a release to the environment of hazardous wastes or hazardous constituents has occurred, is suspected to have occurred, or may occur, regardless of the frequency or duration.

(10) Authorized representative--The person responsible for the overall operation of a facility or an operation unit (i.e., part of a facility), e.g., the plant manager, superintendent, or person of equivalent responsibility.

(11) Battery--As defined in §335.261 of this title (relating to Universal Waste Rule).

(12) Boiler--An enclosed device using controlled flame combustion and having the following characteristics:

(A) the unit must have physical provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases;

(B) the unit's combustion chamber and primary energy recovery section(s) must be of integral design. To be of integral design, the combustion chamber and the primary energy recovery section(s) (such as waterwalls and superheaters) must be physically formed into one manufactured or assembled unit. A unit in which the combustion chamber and the primary energy recovery section(s) are joined only by ducts or connections carrying flue gas is not integrally designed; however, secondary energy recovery equipment (such as economizers or air preheaters) need not be physically formed into the same unit as the combustion chamber and the primary energy recovery section. The

following units are not precluded from being boilers solely because they are not of integral design:

(i) process heaters (units that transfer energy directly to a process stream); and

(ii) fluidized bed combustion units;

(C) while in operation, the unit must maintain a thermal energy recovery efficiency of at least 60%, calculated in terms of the recovered energy compared with the thermal value of the fuel; and

(D) the unit must export and utilize at least 75% of the recovered energy, calculated on an annual basis. In this calculation, no credit shall be given for recovered heat used internally in the same unit. (Examples of internal use are the preheating of fuel or combustion air, and the driving of induced or forced draft fans or feedwater pumps); or

(E) the unit is one which the executive director has determined, on a case-by-case basis, to be a boiler, after considering the standards in §335.20 of this title (relating to Variance To Be Classified as a Boiler).

(13) Captive facility--A facility that accepts wastes from only related (within the same corporation) off-site generators.

(14) Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(15) Captured receiver--A receiver that is located within the property boundaries of the generators from which it receives waste.

(16) Carbon dioxide stream--Carbon dioxide that has been captured from an emission source (e.g., power plant), plus incidental associated substances derived from the source materials and the capture process, and any substances added to the stream to enable or improve the injection process.

(17) Carbon regeneration unit--Any enclosed thermal treatment device used to regenerate spent activated carbon.

(18) Cathode ray tube (CRT)--A vacuum tube, composed primarily of glass, which is the visual or video display component of an electronic device. A used, intact CRT means a CRT whose vacuum has not been released. A used, broken CRT means its glass has been removed from its housing, or casing whose vacuum has been released.

(19) Cathode ray tube (CRT) collector--A person who receives used, intact CRTs for recycling, repair, resale, or donation.

(20) Cathode ray tube (CRT) exporter--Any person in the United States who initiates a transaction to send used CRTs outside the United States or its territories for recycling or reuse, or any intermediary in the United States arranging for such export.

(21) Cathode ray tube (CRT) glass manufacturer--An operation or part of an operation that uses a furnace to manufacture CRT glass.

(22) Cathode ray tube (CRT) processing--Conducting all of the following activities:

(A) receiving broken or intact CRTs;

(B) intentionally breaking intact CRTs or further breaking or separating broken CRTs; and

(C) sorting or otherwise managing glass removed from CRT monitors.

(23) Certification--A statement of professional opinion based upon knowledge and belief.

(24) Class 1 wastes--Any industrial solid waste or mixture of industrial solid wastes which because of its concentration, or physical or chemical characteristics, is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, or may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or disposed of or otherwise managed, as further defined in §335.505 of this title (relating to Class 1 Waste Determination).

(25) Class 2 wastes--Any individual solid waste or combination of industrial solid waste which cannot be described as hazardous, Class 1, or Class 3 as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(26) Class 3 wastes--Inert and essentially insoluble industrial solid waste, usually including, but not limited to, materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable, as further defined in §335.507 of this title (relating to Class 3 Waste Determination).

(27) Closed portion--That portion of a facility which an owner or operator has closed in accordance with the approved facility closure plan and all applicable closure requirements. (See also "Active portion" and "Inactive portion.")

(28) Closure--The act of permanently taking a waste management unit or facility out of service.

(29) Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(30) Component--Either the tank or ancillary equipment of a tank system.

(31) Confined aquifer--An aquifer bounded above and below by impermeable beds or by beds of distinctly lower permeability than that of the aquifer itself; an aquifer containing confined groundwater.

(32) Consignee--The ultimate treatment, storage, or disposal facility in a receiving country to which the hazardous waste will be sent.

(33) Contained--Hazardous secondary materials held in a unit (including a "Land-based unit" as defined in this section) that meets the following criteria:

(A) the unit is in good condition, with no leaks or other continuing or intermittent unpermitted releases of the hazardous secondary materials to the environment, and is designed, as appropriate for the hazardous secondary materials, to prevent releases of hazardous secondary materials to the environment. Unpermitted releases are releases that are not covered by a permit (such as a permit to discharge to water or air) and may include, but are not limited to, releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures;

(B) the unit is properly labeled or otherwise has a system (such as a log) to immediately identify the hazardous secondary materials in the unit;

(C) the unit holds hazardous secondary materials that are compatible with other hazardous secondary materials placed in the

unit and is compatible with the materials used to construct the unit and addresses any potential risks of fires or explosions; and

(D) hazardous secondary materials in units that meet the requirements of 40 Code of Federal Regulations Parts 264 and 265 are presumptively contained.

(34) Container--Any portable device in which a material is stored, transported, processed, or disposed of, or otherwise handled.

(35) Containment building--A hazardous waste management unit that is used to store or treat hazardous waste under the provisions of §335.112(a)(21) or §335.152(a)(19) of this title (relating to Standards).

(36) Contaminant--Includes, but is not limited to, "Solid waste," "Hazardous waste," and "Hazardous waste constituent" as defined in this section; "Pollutant" as defined in Texas Water Code (TWC), §26.001, and Texas Health and Safety Code (THSC), §361.401; "Hazardous substance" as defined in THSC, §361.003; and other substances that are subject to the Texas Hazardous Substances Spill Prevention and Control Act, TWC, §§26.261 - 26.267.

(37) Contaminated medium/media--A portion or portions of the physical environment to include soil, sediment, surface water, groundwater or air, that contain contaminants at levels that pose a substantial present or future threat to human health and the environment.

(38) Contingency plan--A document setting out an organized, planned, and coordinated course of action to be followed in case of a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

(39) Control--To apply engineering measures such as capping or reversible treatment methods and/or institutional measures such as deed restrictions to facilities or areas with wastes or contaminated media which result in remedies that are protective of human health and the environment when combined with appropriate maintenance, monitoring, and any necessary further corrective action.

(40) Corrosion expert--A person who, by reason of his knowledge of the physical sciences and the principles of engineering and mathematics, acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be certified as being qualified by the National Association of Corrosion Engineers or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control on buried or submerged metal piping systems and metal tanks.

(41) Decontaminate--To apply a treatment process(es) to wastes or contaminated media whereby the substantial present or future threat to human health and the environment is eliminated.

(42) Designated facility--A hazardous waste treatment, storage, or disposal facility which: has received a permit (or interim status) in accordance with the requirements of 40 Code of Federal Regulations (CFR) Parts 124 and 270; has received a permit (or interim status) from a state authorized in accordance with 40 CFR Part 271; or is regulated under 40 CFR §261.6(c)(2) or 40 CFR Part 266, Subpart F and has been designated on the manifest by the generator pursuant to 40 CFR §262.20. For hazardous wastes, if a waste is destined to a facility in an authorized state which has not yet obtained authorization to regulate that particular waste as hazardous, then the designated facility must be a facility allowed by the receiving state to accept such waste. For Class 1 wastes, a designated facility is any treatment, storage, or disposal facility authorized to receive the Class 1 waste that has been designated on the manifest by the generator.

Designated facility also means a generator site designated on the manifest to receive its waste as a return shipment from a facility that has rejected the waste in accordance with §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Treatment, Storage, or Disposal Facilities).

(43) Destination facility--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(44) Dike--An embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(45) Dioxins and furans (D/F)--Tetra, penta, hexa, hepta, and octa-chlorinated dibenzo dioxins and furans.

(46) Discharge or hazardous waste discharge--The accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of waste into or on any land or water.

(47) Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

(48) Disposal facility--A facility or part of a facility at which solid waste is intentionally placed into or on any land or water, and at which waste will remain after closure. The term "Disposal facility" does not include a corrective action management unit into which remediation wastes are placed.

(49) Drip pad--An engineered structure consisting of a curbed, free-draining base, constructed of non-earthen materials and designed to convey preservative kick-back or drippage from treated wood, precipitation, and surface water run-on to an associated collection system at wood preserving plants.

(50) Electronic manifest or e-Manifest--The electronic format of the hazardous waste manifest that is obtained from the United States Environmental Protection Agency's (EPA's) national e-Manifest system and transmitted electronically to the system, and that is the legal equivalent of EPA Forms 8700-22 (Manifest) and 8700-22A (Continuation Sheet).

(51) Electronic manifest system or e-Manifest system--The United States Environmental Protection Agency's national information technology system through which the electronic manifest may be obtained, completed, transmitted, and distributed to users of the electronic manifest and to regulatory agencies.

(52) Elementary neutralization unit--A device which:

(A) is used for neutralizing wastes which are hazardous only because they exhibit the corrosivity characteristic defined in 40 Code of Federal Regulations (CFR) §261.22, or are listed in 40 CFR Part 261, Subpart D, only for this reason; or is used for neutralizing the pH of non-hazardous industrial solid waste; and

(B) meets the definition of "Tank," "Tank system," "Container," or "Transport vehicle," as defined in this section; or "Vessel" as defined in 40 CFR §260.10.

(53) Essentially insoluble--Any material, which if representatively sampled and placed in static or dynamic contact with deionized water at ambient temperature for seven days, will not leach any quantity of any constituent of the material into the water in excess of current United States Public Health Service or United States Environmental Protection Agency limits for drinking water as published in the *Federal Register*.

(54) Equivalent method--Any testing or analytical method approved by the administrator under 40 Code of Federal Regulations §260.20 and §260.21.

(55) Existing portion--That land surface area of an existing waste management unit, included in the original Part A permit application, on which wastes have been placed prior to the issuance of a permit.

(56) Existing tank system or existing component--A tank system or component that is used for the storage or processing of hazardous waste and that is in operation, or for which installation has commenced on or prior to July 14, 1986. Installation will be considered to have commenced if the owner or operator has obtained all federal, state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system and if either:

(A) a continuous on-site physical construction or installation program has begun; or

(B) the owner or operator has entered into contractual obligations--which cannot be canceled or modified without substantial loss--for physical construction of the site or installation of the tank system to be completed within a reasonable time.

(57) Explosives or munitions emergency--A situation involving the suspected or detected presence of unexploded ordnance, damaged or deteriorated explosives or munitions, an improvised explosive device, other potentially explosive material or device, or other potentially harmful military chemical munitions or device, that creates an actual or potential imminent threat to human health, including safety, or the environment, including property, as determined by an explosives or munitions emergency response specialist. These situations may require immediate and expeditious action by an explosives or munitions emergency response specialist to control, mitigate, or eliminate the threat.

(58) Explosives or munitions emergency response--All immediate response activities by an explosives and munitions emergency response specialist to control, mitigate, or eliminate the actual or potential threat encountered during an explosives or munitions emergency, subject to the following:

(A) an explosives or munitions emergency response includes in-place render-safe procedures, treatment or destruction of the explosives or munitions and/or transporting those items to another location to be rendered safe, treated, or destroyed;

(B) any reasonable delay in the completion of an explosives or munitions emergency response caused by a necessary, unforeseen, or uncontrollable circumstance will not terminate the explosives or munitions emergency; and

(C) explosives and munitions emergency responses can occur on either public or private lands and are not limited to responses at hazardous waste facilities.

(59) Explosives or munitions emergency response specialist--An individual trained in chemical or conventional munitions or explosives handling, transportation, render-safe procedures, or destruction techniques, including United States Department of Defense (DOD) emergency explosive ordnance disposal, technical escort unit, and DOD-certified civilian or contractor personnel; and, other federal, state, or local government, or civilian personnel similarly trained in explosives or munitions emergency responses.

(60) Extrusion--A process using pressure to force ground poultry carcasses through a decreasing-diameter barrel or nozzle, causing the generation of heat sufficient to kill pathogens, and resulting in an extruded product acceptable as a feed ingredient.

(61) Facility--Includes:

(A) all contiguous land, and structures, other appurtenances, and improvements on the land, used for storing, processing, or disposing of municipal hazardous waste or industrial solid waste, or for the management of hazardous secondary materials prior to reclamation. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them);

(B) for the purpose of implementing corrective action under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) or §335.602(a)(5) of this title (relating to Standards), all contiguous property under the control of the owner or operator seeking a permit for the treatment, storage, and/or disposal of hazardous waste. This definition also applies to facilities implementing corrective action under Texas Water Code, §7.031 (Corrective Action Relating to Hazardous Waste);

(C) regardless of subparagraph (B) of this paragraph, a "Remediation waste management site," as defined in 40 Code of Federal Regulations §260.10, is not a facility that is subject to §335.167 of this title, but is subject to corrective action requirements if the site is located within such a facility.

(62) Final closure--The closure of all hazardous waste management units at the facility in accordance with all applicable closure requirements so that hazardous waste management activities under Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) and Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) are no longer conducted at the facility unless subject to the provisions in §335.69 of this title (relating to Accumulation Time).

(63) Food-chain crops--Tobacco, crops grown for human consumption, and crops grown for feed for animals whose products are consumed by humans.

(64) Freeboard--The vertical distance between the top of a tank or surface impoundment dike, and the surface of the waste contained therein.

(65) Free liquids--Liquids which readily separate from the solid portion of a waste under ambient temperature and pressure.

(66) Gasification--For the purpose of complying with 40 Code of Federal Regulations §261.4(a)(12)(i), gasification is a process, conducted in an enclosed device or system, designed and operated to process petroleum feedstock, including oil-bearing hazardous secondary materials through a series of highly controlled steps utilizing thermal decomposition, limited oxidation, and gas cleaning to yield a synthesis gas composed primarily of hydrogen and carbon monoxide gas.

(67) Generator--Any person, by site, who produces municipal hazardous waste or industrial solid waste; any person who possesses municipal hazardous waste or industrial solid waste to be shipped to any other person; or any person whose act first causes the solid waste to become subject to regulation under this chapter. For the purposes of this regulation, a person who generates or possesses Class 3 wastes only shall not be considered a generator.

(68) Groundwater--Water below the land surface in a zone of saturation.

(69) Hazardous industrial waste--Any industrial solid waste or combination of industrial solid wastes identified or listed as a hazardous waste by the administrator of the United States En-

Environmental Protection Agency in accordance with the Resource Conservation and Recovery Act of 1976, §3001 (42 United States Code, §6921). The administrator has identified the characteristics of hazardous wastes and listed certain wastes as hazardous in 40 Code of Federal Regulations Part 261. The executive director will maintain in the offices of the commission a current list of hazardous wastes, a current set of characteristics of hazardous waste, and applicable appendices, as promulgated by the administrator.

(70) Hazardous secondary material--A secondary material (e.g., spent material, by-product, or sludge) that, when discarded, would be identified as "Hazardous waste" as defined in this section.

(71) Hazardous secondary material generator--Any person whose act or process produces hazardous secondary materials at the generating facility. For purposes of this paragraph, "generating facility" means all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator. For the purposes of 40 Code of Federal Regulations §261.4(a)(23), a facility that collects hazardous secondary materials from other persons is not the hazardous secondary material generator.

(72) Hazardous substance--Any substance designated as a hazardous substance under 40 Code of Federal Regulations Part 302.

(73) Hazardous waste--Any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency in accordance with the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.*

(74) Hazardous waste constituent--A constituent that caused the administrator to list the hazardous waste in 40 Code of Federal Regulations (CFR) Part 261, Subpart D or a constituent listed in Table 1 of 40 CFR §261.24.

(75) Hazardous waste management facility--All contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of hazardous waste. The term includes a publicly- or privately-owned hazardous waste management facility consisting of processing, storage, or disposal operational hazardous waste management units such as one or more landfills, surface impoundments, waste piles, incinerators, boilers, and industrial furnaces, including cement kilns, injection wells, salt dome waste containment caverns, land treatment facilities, or a combination of units.

(76) Hazardous waste management unit--A landfill, surface impoundment, waste pile, industrial furnace, incinerator, cement kiln, injection well, container, drum, salt dome waste containment cavern, or land treatment unit, or any other structure, vessel, appurtenance, or other improvement on land used to manage hazardous waste.

(77) In operation--Refers to a facility which is processing, storing, or disposing of solid waste or hazardous waste.

(78) Inactive portion--That portion of a facility which is not operated after November 19, 1980. (*See also "Active portion" and "Closed portion."*)

(79) Incinerator--Any enclosed device that:

(A) uses controlled flame combustion and neither meets the criteria for classification as a boiler, sludge dryer, or carbon regeneration unit, nor is listed as an industrial furnace; or

(B) meets the definition of "Infrared incinerator" or "Plasma arc incinerator."

(80) Incompatible waste--A hazardous waste which is unsuitable for:

(A) placement in a particular device or facility because it may cause corrosion or decay of containment materials (e.g., container inner liners or tank walls); or

(B) commingling with another waste or material under uncontrolled conditions because the commingling might produce heat or pressure, fire or explosion, violent reaction, toxic dusts, mists, fumes, or gases, or flammable fumes or gases.

(81) Individual generation site--The contiguous site at or on which one or more solid waste or hazardous wastes are generated. An individual generation site, such as a large manufacturing plant, may have one or more sources of solid waste or hazardous waste, but is considered a single or individual generation site if the site or property is contiguous.

(82) Industrial furnace--Includes any of the following enclosed devices that use thermal treatment to accomplish recovery of materials or energy:

(A) cement kilns;

(B) lime kilns;

(C) aggregate kilns;

(D) phosphate kilns;

(E) coke ovens;

(F) blast furnaces;

(G) smelting, melting, and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, and foundry furnaces);

(H) titanium dioxide chloride process oxidation reactors;

(I) methane reforming furnaces;

(J) pulping liquor recovery furnaces;

(K) combustion devices used in the recovery of sulfur values from spent sulfuric acid;

(L) halogen acid furnaces for the production of acid from halogenated hazardous waste generated by chemical production facilities where the furnace is located on the site of a chemical production facility, the acid product has a halogen acid content of at least 3.0%, the acid product is used in a manufacturing process, and, except for "Hazardous waste" burned as fuel, hazardous waste fed to the furnace has a minimum halogen content of 20% as generated; and

(M) other devices the commission may list, after the opportunity for notice and comment is afforded to the public.

(83) Industrial solid waste--Solid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include "Hazardous waste" as defined in this section.

(84) Infrared incinerator--Any enclosed device that uses electric powered resistance heaters as a source of radiant heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(85) Inground tank--A device meeting the definition of "Tank" in this section whereby a portion of the tank wall is situated to any degree within the ground, thereby preventing visual inspection of that external surface area of the tank that is in the ground.

(86) Injection well--A well into which fluids are injected. (*See also "Underground injection."*)

(87) Inner liner--A continuous layer of material placed inside a tank or container which protects the construction materials of the tank or container from the contained waste or reagents used to treat the waste.

(88) Installation inspector--A person who, by reason of his knowledge of the physical sciences and the principles of engineering, acquired by a professional education and related practical experience, is qualified to supervise the installation of tank systems.

(89) Intermediate facility--Any facility that stores hazardous secondary materials for more than ten days, other than a hazardous secondary material generator or reclaimer of such material.

(90) International shipment--The transportation of hazardous waste into or out of the jurisdiction of the United States.

(91) Lamp--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(92) Land-based unit--When used to describe recycling of hazardous secondary materials, an area where hazardous secondary materials are placed in or on the land before recycling. This definition does not include land-based production units.

(93) Land treatment facility--A facility or part of a facility at which solid waste or hazardous waste is applied onto or incorporated into the soil surface and that is not a corrective action management unit; such facilities are disposal facilities if the waste will remain after closure.

(94) Landfill--A disposal facility or part of a facility where solid waste or hazardous waste is placed in or on land and which is not a pile, a land treatment facility, a surface impoundment, an injection well, a salt dome formation, a salt bed formation, an underground mine, a cave, or a corrective action management unit.

(95) Landfill cell--A discrete volume of a solid waste or hazardous waste landfill which uses a liner to provide isolation of wastes from adjacent cells or wastes. Examples of landfill cells are trenches and pits.

(96) Leachate--Any liquid, including any suspended components in the liquid, that has percolated through or drained from solid waste or hazardous waste.

(97) Leak-detection system--A system capable of detecting the failure of either the primary or secondary containment structure or the presence of a release of solid waste or hazardous waste or accumulated liquid in the secondary containment structure. Such a system must employ operational controls (e.g., daily visual inspections for releases into the secondary containment system of aboveground tanks) or consist of an interstitial monitoring device designed to detect continuously and automatically the failure of the primary or secondary containment structure or the presence of a release of solid waste or hazardous waste into the secondary containment structure.

(98) Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(99) Liner--A continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment, landfill, or landfill cell, which restricts the downward or lateral escape of solid waste or hazardous waste, hazardous waste constituents, or leachate.

(100) Management or hazardous waste management--The systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of solid waste or hazardous waste.

(101) Manifest--The waste shipping document, United States Environmental Protection Agency (EPA) Form 8700-22 (including, if necessary, EPA Form 8700-22A), or the electronic manifest, originated and signed by the generator or offeror in accordance with the instructions in §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste) and the applicable requirements of 40 Code of Federal Regulations Parts 262 - 265.

(102) Manifest tracking number--The alphanumeric identification number (i.e., a unique three-letter suffix preceded by nine numerical digits), which is pre-printed in Item 4 of the manifest by a registered source.

(103) Military munitions--All ammunition products and components produced or used by or for the Department of Defense (DOD) or the United States Armed Services for national defense and security, including military munitions under the control of the DOD, the United States Coast Guard, the United States Department of Energy (DOE), and National Guard personnel. The term "military munitions":

(A) includes confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof; and

(B) includes non-nuclear components of nuclear devices, managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, have been completed; but

(C) does not include wholly inert items, improvised explosive devices, and nuclear weapons, nuclear devices, and nuclear components thereof.

(104) Miscellaneous unit--A hazardous waste management unit where hazardous waste is stored, processed, or disposed of and that is not a container, tank, surface impoundment, pile, land treatment unit, landfill, incinerator, boiler, industrial furnace, underground injection well with appropriate technical standards under Chapter 331 of this title (relating to Underground Injection Control), corrective action management unit, containment building, staging pile, or unit eligible for a research, development, and demonstration permit or under Chapter 305, Subchapter K of this title (relating to Research, Development, and Demonstration Permits).

(105) Movement--That solid waste or hazardous waste transported to a facility in an individual vehicle.

(106) Municipal hazardous waste--A municipal solid waste or mixture of municipal solid wastes which has been identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency.

(107) Municipal solid waste--Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities; including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial waste.

(108) New tank system or new tank component--A tank system or component that will be used for the storage or processing of hazardous waste and for which installation has commenced after

July 14, 1986; except, however, for purposes of 40 Code of Federal Regulations (CFR) §264.193(g)(2) (incorporated by reference at §335.152(a)(8) of this title (relating to Standards)) and 40 CFR §265.193(g)(2) (incorporated by reference at §335.112(a)(9) of this title (relating to Standards)), a new tank system is one for which construction commences after July 14, 1986. (See also "Existing tank system.")

(109) No free liquids--As used in 40 Code of Federal Regulations §261.4(a)(26) and (b)(18), means that solvent-contaminated wipes may not contain free liquids as determined by Method 9095B (Paint Filter Liquids Test), included in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (EPA Publication SW-846), which is incorporated by reference, and that there is no free liquid in the container holding the wipes.

(110) Off-site--Property which cannot be characterized as on-site.

(111) Onground tank--A device meeting the definition of "Tank" in this section and that is situated in such a way that the bottom of the tank is on the same level as the adjacent surrounding surface so that the external tank bottom cannot be visually inspected.

(112) On-Site--The same or geographically contiguous property which may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property.

(113) Open burning--The combustion of any material without the following characteristics:

(A) control of combustion air to maintain adequate temperature for efficient combustion;

(B) containment of the combustion-reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and

(C) control of emission of the gaseous combustion products. (See also "Incinerator" and "Thermal processing.")

(114) Operator--The person responsible for the overall operation of a facility.

(115) Owner--The person who owns a facility or part of a facility.

(116) Partial closure--The closure of a hazardous waste management unit in accordance with the applicable closure requirements of Subchapters E and F of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities; and Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) at a facility that contains other active hazardous waste management units. For example, partial closure may include the closure of a tank (including its associated piping and underlying containment systems), landfill cell, surface impoundment, waste pile, or other hazardous waste management unit, while other units of the same facility continue to operate.

(117) PCBs or polychlorinated biphenyl compounds--Compounds subject to 40 Code of Federal Regulations Part 761.

(118) Permit--A written permit issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify, or operate a specified municipal hazardous waste or in-

dustrial solid waste treatment, storage, or disposal facility in accordance with specified limitations.

(119) Personnel or facility personnel--All persons who work at, or oversee the operations of, a solid waste or hazardous waste facility, and whose actions or failure to act may result in noncompliance with the requirements of this chapter.

(120) Pesticide--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(121) Petroleum substance--A crude oil or any refined or unrefined fraction or derivative of crude oil which is a liquid at standard conditions of temperature and pressure.

(A) Except as provided in subparagraph (C) of this paragraph for the purposes of this chapter, a "Petroleum substance" shall be limited to a substance in or a combination or mixture of substances within the following list (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 United States Code (USC), §§6921, *et seq.*)) and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere):

(i) basic petroleum substances--i.e., crude oils, crude oil fractions, petroleum feedstocks, and petroleum fractions;

(ii) motor fuels--a petroleum substance which is typically used for the operation of internal combustion engines and/or motors (which includes, but is not limited to, stationary engines and engines used in transportation vehicles and marine vessels);

(iii) aviation gasolines--i.e., Grade 80, Grade 100, and Grade 100-LL;

(iv) aviation jet fuels--i.e., Jet A, Jet A-1, Jet B, JP-4, JP-5, and JP-8;

(v) distillate fuel oils--i.e., Number 1-D, Number 1, Number 2-D, and Number 2;

(vi) residual fuel oils--i.e., Number 4-D, Number 4-light, Number 4, Number 5-light, Number 5-heavy, and Number 6;

(vii) gas-turbine fuel oils--i.e., Grade O-GT, Grade 1-GT, Grade 2-GT, Grade 3-GT, and Grade 4-GT;

(viii) illuminating oils--i.e., kerosene, mineral seal oil, long-time burning oils, 300 oil, and mineral colza oil;

(ix) lubricants--i.e., automotive and industrial lubricants;

(x) building materials--i.e., liquid asphalt and dust-laying oils;

(xi) insulating and waterproofing materials--i.e., transformer oils and cable oils; and

(xii) used oils--See definition for "Used oil" in this section.

(B) For the purposes of this chapter, a "Petroleum substance" shall include solvents or a combination or mixture of solvents (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 USC, §§6921, *et seq.*)) and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere) i.e., Stoddard solvent, petroleum spirits, mineral spirits, petroleum ether, varnish makers' and painters' naphthas, petroleum extender oils, and commercial hexane.

(C) The following materials are not considered petroleum substances:

- (i) polymerized materials, i.e., plastics, synthetic rubber, polystyrene, high and low density polyethylene;
- (ii) animal, microbial, and vegetable fats;
- (iii) food grade oils;
- (iv) hardened asphalt and solid asphaltic materials--i.e., roofing shingles, roofing felt, hot mix (and cold mix); and
- (v) cosmetics.

(122) Pile--Any noncontainerized accumulation of solid, nonflowing solid waste or hazardous waste that is used for processing or storage, and that is not a corrective action management unit or a containment building.

(123) Plasma arc incinerator--Any enclosed device using a high intensity electrical discharge or arc as a source of heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(124) Post-closure order--An order issued by the commission for post-closure care of interim status units, a corrective action management unit unless authorized by permit, or alternative corrective action requirements for contamination commingled from Resource Conservation and Recovery Act and solid waste management units.

(125) Poultry--Chickens or ducks being raised or kept on any premises in the state for profit.

(126) Poultry carcass--The carcass, or part of a carcass, of poultry that died as a result of a cause other than intentional slaughter for use for human consumption.

(127) Poultry facility--A facility that:

(A) is used to raise, grow, feed, or otherwise produce poultry for commercial purposes; or

(B) is a commercial poultry hatchery that is used to produce chicks or ducklings.

(128) Primary exporter--Any person who is required to originate the manifest for a shipment of hazardous waste in accordance with the regulations contained in 40 Code of Federal Regulations Part 262, Subpart B, which are in effect as of November 8, 1986, or equivalent state provision, which specifies a treatment, storage, or disposal facility in a receiving country as the facility to which the hazardous waste will be sent and any intermediary arranging for the export.

(129) Processing--The extraction of materials, transfer, volume reduction, conversion to energy, or other separation and preparation of solid waste for reuse or disposal, including the treatment or neutralization of solid waste or hazardous waste, designed to change the physical, chemical, or biological character or composition of any solid waste or hazardous waste so as to neutralize such waste, or so as to recover energy or material from the waste or so as to render such waste nonhazardous, or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage, or reduced in volume. The transfer of solid waste for reuse or disposal as used in this definition does not include the actions of a transporter in conveying or transporting solid waste by truck, ship, pipeline, or other means. Unless the executive director determines that regulation of such activity is necessary to protect human health or the environment, the definition of "Processing" does not include activities relating to those materials exempted by the administrator of the United States Environmental Protection Agency in accordance with the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.*, as amended.

(130) Publicly-owned treatment works (POTW)--Any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a state or municipality (as defined by the Clean Water Act, §502(4)). The definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

(131) Qualified groundwater scientist--A scientist or engineer who has received a baccalaureate or post-graduate degree in the natural sciences or engineering, and has sufficient training and experience in groundwater hydrology and related fields as may be demonstrated by state registration, professional certifications, or completion of accredited university courses that enable that individual to make sound professional judgments regarding groundwater monitoring and contaminant fate and transport.

(132) Receiving country--A foreign country to which a hazardous waste is sent for the purpose of treatment, storage, or disposal (except short-term storage incidental to transportation).

(133) Regional administrator--The regional administrator for the United States Environmental Protection Agency region in which the facility is located, or his designee.

(134) Remanufacturing--Processing a higher-value hazardous secondary material in order to manufacture a product that serves a similar functional purpose as the original commercial-grade material. For the purpose of this definition, a hazardous secondary material is considered higher-value if it was generated from the use of a commercial-grade material in a manufacturing process and can be remanufactured into a similar commercial-grade material.

(135) Remediation--The act of eliminating or reducing the concentration of contaminants in contaminated media.

(136) Remediation waste--All solid and hazardous wastes, and all media (including groundwater, surface water, soils, and sediments) and debris, which contain listed hazardous wastes or which themselves exhibit a hazardous waste characteristic, that are managed for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and Texas Water Code, §7.031 (Corrective Action Relating to Hazardous Waste). For a given facility, remediation wastes may originate only from within the facility boundary, but may include waste managed in implementing corrective action for releases beyond the facility boundary under §335.166(5) of this title (relating to Corrective Action Program) or §335.167(c) of this title.

(137) Remove--To take waste, contaminated design or operating system components, or contaminated media away from a waste management unit, facility, or area to another location for treatment, storage, or disposal.

(138) Replacement unit--A landfill, surface impoundment, or waste pile unit:

(A) from which all or substantially all the waste is removed; and

(B) that is subsequently reused to treat, store, or dispose of hazardous waste. "Replacement unit" does not apply to a unit from which waste is removed during closure, if the subsequent reuse solely involves the disposal of waste from that unit and other closing units or corrective action areas at the facility, in accordance with an approved closure plan or United States Environmental Protection Agency or state approved corrective action.

(139) Representative sample--A sample of a universe or whole (e.g., waste pile, lagoon, groundwater) which can be expected to exhibit the average properties of the universe or whole.

(140) Run-off--Any rainwater, leachate, or other liquid that drains over land from any part of a facility.

(141) Run-on--Any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

(142) Saturated zone or zone of saturation--That part of the earth's crust in which all voids are filled with water.

(143) Shipment--Any action involving the conveyance of municipal hazardous waste or industrial solid waste by any means off-site.

(144) Sludge dryer--Any enclosed thermal treatment device that is used to dehydrate sludge and that has a maximum total thermal input, excluding the heating valve of the sludge itself, of 2,500 British thermal units per pound of sludge treated on a wet-weight basis.

(145) Small quantity generator--A generator who generates less than 1,000 kilograms of hazardous waste in a calendar month.

(146) Solid waste--

(A) Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include:

(i) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued in accordance with Texas Water Code, Chapter 26 (an exclusion applicable only to the actual point source discharge that does not exclude industrial wastewaters while they are being collected, stored, or processed before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment);

(ii) uncontaminated soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements. The material serving as fill may also serve as a surface improvement such as a structure foundation, a road, soil erosion control, and flood protection. Man-made materials exempted under this provision shall only be deposited at sites where the construction is in progress or imminent such that rights to the land are secured and engineering, architectural, or other necessary planning have been initiated. Waste disposal shall be considered to have occurred on any land which has been filled with man-made inert materials under this provision if the land is sold, leased, or otherwise conveyed prior to the completion of construction of the surface improvement. Under such conditions, deed recordation shall be required. The deed recordation shall include the information required under §335.5(a) of this title (relating to Deed Recordation of Waste Disposal), prior to sale or other conveyance of the property;

(iii) waste materials which result from "Activities associated with the exploration, development, or production of oil or gas or geothermal resources," as those activities are defined in this section, and any other substance or material regulated by the Railroad Commission of Texas in accordance with the Texas Natural Resources Code, §91.101, unless such waste, substance, or material results from activities associated with gasoline plants, natural gas, or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency (EPA) in accordance with the federal Solid Waste Disposal Act, 42 United States Code, §§6901 *et seq.*, as amended; or

(iv) a material excluded by 40 Code of Federal Regulations (CFR) §§261.4(a)(1) - (24), (26), and (27), 261.39, and 261.40, as amended through January 13, 2015 (80 FR 1694), subject to the changes in this clause, by variance, or by non-waste determination granted under §335.18 of this title (relating to Non-Waste Determinations and Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste), §335.21 of this title (relating to Procedures for Variances from Classification as a Solid Waste or To Be Classified as a Boiler or for Non-Waste Determinations), and §335.32 of this title (relating to Standards and Criteria for Non-Waste Determinations). For the purposes of the exclusions under 40 CFR §261.39 (as amended through June 26, 2014 (79 FR 36220)) and §261.40, 40 CFR §261.41 is adopted by reference as amended through July 28, 2006 (71 FR 42928). For the purposes of the exclusion under 40 CFR §261.4(a)(16), 40 CFR §261.38 is adopted by reference as amended through July 10, 2000 (65 FR 42292), and is revised as follows, with "subparagraph (A)(iv) under the definition of 'Solid waste' in 30 TAC §335.1" meaning "subparagraph (A)(iv) under the definition of 'Solid waste' in §335.1 of this title (relating to Definitions)":

(I) in the certification statement under 40 CFR §261.38(c)(1)(i)(C)(4), the reference to "40 CFR §261.38" is changed to "40 CFR §261.38, as revised under subparagraph (A)(iv) under the definition of 'Solid waste' in 30 TAC §335.1," and the reference to "40 CFR §261.28(c)(10)" is changed to "40 CFR §261.38(c)(10)";

(II) in 40 CFR §261.38(c)(2), the references to "§260.10 of this chapter" are changed to "§335.1 of this title (relating to Definitions)," and the reference to "parts 264 or 265 of this chapter" is changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) or Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities)";

(III) in 40 CFR §261.38(c)(3) - (5), the references to "parts 264 and 265, or §262.34 of this chapter" are changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities) and Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, or Disposal Facilities), or §335.69 of this title (relating to Accumulation Time)";

(IV) in 40 CFR §261.38(c)(5), the reference to "§261.6(c) of this chapter" is changed to "§335.24(e) and (f) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials)";

(V) in 40 CFR §261.38(c)(7), the references to "appropriate regulatory authority" and "regulatory authority" are changed to "executive director";

(VI) in 40 CFR §261.38(c)(8), the reference to "§262.11 of this chapter" is changed to "§335.62 of this title (relating to Hazardous Waste Determination and Waste Classification)";

(VII) in 40 CFR §261.38(c)(9), the reference to "§261.2(c)(4) of this chapter" is changed to "§335.1(146)(D)(iv) of this title (relating to Definitions)"; and

(VIII) in 40 CFR §261.38(c)(10), the reference to "implementing authority" is changed to "executive director."

(B) A discarded material is any material which is:

(i) abandoned, as explained in subparagraph (C) of this paragraph;

(ii) recycled, as explained in subparagraph (D) of this paragraph;

(iii) considered inherently waste-like, as explained in subparagraph (E) of this paragraph; or

(iv) a military munition identified as a solid waste in 40 CFR §266.202.

(C) Materials are solid wastes if they are abandoned by being:

(i) disposed of;

(ii) burned or incinerated;

(iii) accumulated, stored, or processed (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated; or

(iv) sham recycling as explained in subparagraph (J) of this paragraph.

(D) Except for materials described in subparagraph (H) of this paragraph, materials are solid wastes if they are "recycled" or accumulated, stored, or processed before recycling as specified in this subparagraph. The chart referred to as Table 1 in Figure: 30 TAC §335.1(146)(D)(iv) indicates only which materials are considered to be solid wastes when they are recycled and is not intended to supersede the definition of "Solid waste" provided in subparagraph (A) of this paragraph.

(i) Used in a manner constituting disposal. Materials noted with an asterisk in Column 1 of Table 1 in Figure: 30 TAC §335.1(146)(D)(iv) are solid wastes when they are:

(I) applied to or placed on the land in a manner that constitutes disposal; or

(II) used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste). However, commercial chemical products listed in 40 CFR §261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.

(ii) Burning for energy recovery. Materials noted with an asterisk in Column 2 of Table 1 in Figure: 30 TAC §335.1(146)(D)(iv) are solid wastes when they are:

(I) burned to recover energy; or

(II) used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste). However, commercial chemical products, which are listed in 40 CFR §261.33, not listed in §261.33, but that exhibit one or more of the hazardous waste characteristics, or will be considered nonhazardous waste if disposed, are not solid wastes if they are fuels themselves and burned for energy recovery.

(iii) Reclaimed. Materials noted with an asterisk in Column 3 of Table 1 are solid wastes when reclaimed (unless they meet the requirements of 40 CFR §261.4(a)(17), (23), (24), or (27)). Materials without an asterisk in Column 3 of Table 1 in Figure: 30 TAC §335.1(146)(D)(iv) are not solid wastes when reclaimed.

(iv) Accumulated speculatively. Materials noted with an asterisk in Column 4 of Table 1 in Figure: 30 TAC §335.1(146)(D)(iv) are solid wastes when accumulated speculatively. Figure: 30 TAC §335.1(146)(D)(iv)

(E) Materials that are identified by the administrator of the EPA as inherently waste-like materials under 40 CFR §261.2(d) are solid wastes when they are recycled in any manner.

(F) Materials are not solid wastes when they can be shown to be recycled by being:

(i) used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed;

(ii) used or reused as effective substitutes for commercial products;

(iii) returned to the original process from which they were generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at 40 CFR §261.4(a)(17) apply rather than this provision; or

(iv) secondary materials that are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process provided:

(I) only tank storage is involved, and the entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed means of conveyance;

(II) reclamation does not involve controlled flame combustion (such as occurs in boilers, industrial furnaces, or incinerators);

(III) the secondary materials are never accumulated in such tanks for over 12 months without being reclaimed; and

(IV) the reclaimed material is not used to produce a fuel, or used to produce products that are used in a manner constituting disposal.

(G) Except for materials described in subparagraph (H) of this paragraph, the following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process, as described in subparagraph (F) of this paragraph:

(i) materials used in a manner constituting disposal, or used to produce products that are applied to the land;

(ii) materials burned for energy recovery, used to produce a fuel, or contained in fuels;

(iii) materials accumulated speculatively; or

(iv) materials deemed to be inherently waste-like by the administrator of the EPA, as described in 40 CFR §261.2(d)(1) and (2).

(H) With the exception of contaminated soils which are being relocated for use under §350.36 of this title (relating to Relocation of Soils Containing Chemicals of Concern for Reuse Purposes) and other contaminated media, materials that will otherwise be identified as nonhazardous solid wastes if disposed of are not considered solid wastes when recycled by being applied to the land or used as ingredients in products that are applied to the land, provided these materials can be shown to meet all of the following criteria:

(i) a legitimate market exists for the recycling material as well as its products;

(ii) the recycling material is managed and protected from loss as will be raw materials or ingredients or products;

(iii) the quality of the product is not degraded by substitution of raw material/product with the recycling material;

(iv) the use of the recycling material is an ordinary use and it meets or exceeds the specifications of the product it is replacing without treatment or reclamation, or if the recycling material is not replacing a product, the recycling material is a legitimate ingredient in a production process and meets or exceeds raw material specifications without treatment or reclamation;

(v) the recycling material is not burned for energy recovery, used to produce a fuel, or contained in a fuel;

(vi) the recycling material can be used as a product itself or to produce products as it is generated without treatment or reclamation;

(vii) the recycling material must not present an increased risk to human health, the environment, or waters in the state when applied to the land or used in products which are applied to the land and the material, as generated:

(I) is a Class 3 waste under Subchapter R of this chapter (relating to Waste Classification), except for arsenic, cadmium, chromium, lead, mercury, nickel, selenium, and total dissolved solids; and

(II) for the metals listed in subclause (I) of this clause:

(-a-) is a Class 2 or Class 3 waste under Subchapter R of this chapter; and

(-b-) does not exceed a concentration limit under §312.43(b)(3), Table 3 of this title (relating to Metal Limits); and

(viii) with the exception of the requirements under §335.17(a)(8) of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials):

(I) at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on an annual basis; and

(II) if the recycling material is placed in protective storage, such as a silo or other protective enclosure, at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on a biennial basis.

(I) Respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial.

(J) A hazardous secondary material found to be sham recycled is considered discarded and a solid waste. Sham recycling is recycling that is not legitimate recycling as defined in §335.27 of this title (relating to Legitimate Recycling of Hazardous Secondary Materials).

(K) Materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under 40 CFR §261.3(c) unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.

(L) Other portions of this chapter that relate to solid wastes that are recycled include §335.6 of this title (relating to Notification Requirements), §§335.17 - 335.19 of this title, §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities).

(M) Steel slag may not be considered as solid waste if the steel slag is an intended output or result of the use of an electric arc furnace to make steel, introduced into the stream of commerce, and managed as an item of commercial value, including through a controlled use in a manner constituting disposal, and not as discarded material.

(147) Solvent-contaminated wipe--A wipe that, after use or after cleaning up a spill, either:

(A) contains one or more of the F001 through F005 solvents listed in 40 Code of Federal Regulations (CFR) §261.31 or the corresponding P- or U-listed solvents found in 40 CFR §261.33;

(B) exhibits a hazardous characteristic found in 40 CFR Part 261, Subpart C, when that characteristic results from a solvent listed in 40 CFR Part 261; and/or

(C) exhibits only the hazardous waste characteristic of ignitability found in 40 CFR §261.21 due to the presence of one or more solvents that are not listed in 40 CFR Part 261. Solvent-contaminated wipes that contain listed hazardous waste other than solvents, or exhibit the characteristic of toxicity, corrosivity, or reactivity due to contaminants other than solvents, are not eligible for the exclusions at 40 CFR §261.4(a)(26) and (b)(18).

(148) Sorbent--A material that is used to soak up free liquids by either adsorption or absorption, or both. Sorb means to either adsorb or absorb, or both.

(149) Spill--The accidental spilling, leaking, pumping, emitting, emptying, or dumping of solid waste or hazardous wastes or materials which, when spilled, become solid waste or hazardous wastes into or on any land or water.

(150) Staging pile--An accumulation of solid, non-flowing "Remediation waste," as defined in this section, that is not a containment building and that is used only during remedial operations for temporary storage at a facility. Staging piles must be designated by the executive director according to the requirements of 40 Code of Federal Regulations §264.554, as adopted by reference under §335.152(a) of this title (relating to Standards).

(151) Standard permit--A Resource Conservation and Recovery Act permit authorizing management of hazardous waste issued under Chapter 305, Subchapter R of this title (relating to Resource Conservation and Recovery Act Standard Permits for Storage and Treatment Units) and Subchapter U of this chapter (relating to Standards for Owners and Operators of Hazardous Waste Facilities Operating Under a Standard Permit). The standard permit may have two parts, a uniform portion issued in all cases and a supplemental portion issued at the executive director's discretion.

(152) Storage--The holding of solid waste for a temporary period, at the end of which the waste is processed, disposed of, recycled, or stored elsewhere.

(153) Sump--Any pit or reservoir that meets the definition of "Tank" in this section and those troughs/trenches connected to it that serve to collect solid waste or hazardous waste for transport to solid waste or hazardous waste treatment, storage, or disposal facilities; except that as used in the landfill, surface impoundment, and waste pile rules, "sump" means any lined pit or reservoir that serves to collect liquids drained from a leachate collection and removal system or leak detection system for subsequent removal from the system.

(154) Surface impoundment or impoundment--A facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well or a corrective action management unit. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons.

(155) Tank--A stationary device, designed to contain an accumulation of solid waste which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provide structural support.

(156) Tank system--A solid waste or hazardous waste storage or processing tank and its associated ancillary equipment and containment system.

(157) TEQ--Toxicity equivalence, the international method of relating the toxicity of various dioxin/furan congeners to the toxicity of 2,3,7,8-tetrachlorodibenzo-p-dioxin.

(158) Thermal processing--The processing of solid waste or hazardous waste in a device which uses elevated temperatures as the primary means to change the chemical, physical, or biological character or composition of the solid waste or hazardous waste. Examples of thermal processing are incineration, molten salt, pyrolysis, calcination, wet air oxidation, and microwave discharge. (See also "Incinerator" and "Open burning.")

(159) Thermostat--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(160) Totally enclosed treatment facility--A facility for the processing of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during processing. An example is a pipe in which acid waste is neutralized.

(161) Transfer facility--Any transportation-related facility including loading docks, parking areas, storage areas, and other similar areas where shipments of hazardous or industrial solid waste or hazardous secondary materials are held during the normal course of transportation.

(162) Transit country--Any foreign country, other than a receiving country, through which a hazardous waste is transported.

(163) Transport vehicle--A motor vehicle or rail car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, railroad freight car, etc.) is a separate transport vehicle. Vessel includes every description of watercraft, used or capable of being used as a means of transportation on the water.

(164) Transporter--Any person who conveys or transports municipal hazardous waste or industrial solid waste by truck, ship, pipeline, or other means.

(165) Treatability study--A study in which a hazardous or industrial solid waste is subjected to a treatment process to determine:

(A) whether the waste is amenable to the treatment process;

(B) what pretreatment (if any) is required;

(C) the optimal process conditions needed to achieve the desired treatment;

(D) the efficiency of a treatment process for a specific waste or wastes; or

(E) the characteristics and volumes of residuals from a particular treatment process. Also included in this definition for the purpose of 40 Code of Federal Regulations §261.4(e) and (f) (§§335.2, 335.69, and 335.78 of this title (relating to Permit Required; Accumulation Time; and Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators)) exemptions are liner compatibility, corrosion, and other material compatibility studies and toxicological and health effects studies. A treatability study is not a means to commercially treat or dispose of hazardous or industrial solid waste.

(166) Treatment--To apply a physical, biological, or chemical process(es) to wastes and contaminated media which significantly reduces the toxicity, volume, or mobility of contaminants and which, depending on the process(es) used, achieves varying degrees of long-term effectiveness.

(167) Treatment zone--A soil area of the unsaturated zone of a land treatment unit within which hazardous constituents are degraded, transferred, or immobilized.

(168) Underground injection--The subsurface emplacement of fluids through a bored, drilled, or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension. (See also "Injection well.")

(169) Underground tank--A device meeting the definition of "Tank" in this section whose entire surface area is totally below the surface of and covered by the ground.

(170) Unfit-for-use tank system--A tank system that has been determined through an integrity assessment or other inspection to be no longer capable of storing or processing solid waste or hazardous waste without posing a threat of release of solid waste or hazardous waste to the environment.

(171) United States Environmental Protection Agency (EPA) acknowledgment of consent--The cable sent to EPA from the United States Embassy in a receiving country that acknowledges the written consent of the receiving country to accept the hazardous waste and describes the terms and conditions of the receiving country's consent to the shipment.

(172) United States Environmental Protection Agency (EPA) hazardous waste number--The number assigned by the EPA to each hazardous waste listed in 40 Code of Federal Regulations (CFR) Part 261, Subpart D and to each characteristic identified in 40 CFR Part 261, Subpart C.

(173) United States Environmental Protection Agency (EPA) identification number--The number assigned by the EPA or the commission to each generator, transporter, and processing, storage, or disposal facility.

(174) Universal waste--Any of the hazardous wastes defined as universal waste under §335.261(b)(16)(F) of this title (relating to Universal Waste Rule) that are managed under the universal waste requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(175) Universal waste handler--Has the definition adopted as "Large quantity handler of universal waste" and "Small quantity handler of universal waste" under §335.261 of this title (relating to Universal Waste Rule).

(176) Universal waste transporter--Has the definition adopted under 40 Code of Federal Regulations §273.9.

(177) Unsaturated zone or zone of aeration--The zone between the land surface and the water table.

(178) Uppermost aquifer--The geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected within the facility's property boundary.

(179) Used oil--Any oil that has been refined from crude oil, or any synthetic oil, that has been used, and, as a result of such use, is contaminated by physical or chemical impurities. Used oil fuel includes any fuel produced from used oil by processing, blending, or other treatment. Rules applicable to nonhazardous used oil, oil characteristically hazardous from use versus mixing, conditionally exempt small quantity generator hazardous used oil, and household used oil after collection that will be recycled are found in Chapter 324 of this title (relating to Used Oil Standards) and 40 Code of Federal Regulations Part 279 (Standards for Management of Used Oil).

(180) User of the electronic manifest system--A hazardous waste generator, a hazardous waste transporter, an owner or operator of a hazardous waste treatment, storage, recycling, or disposal facility, or any other person that:

(A) is required to use a manifest to comply with:

(i) any federal or state requirement to track the shipment, transportation, and receipt of hazardous waste or other waste material that is shipped from the site of generation to an off-site designated facility for treatment, storage, recycling, or disposal; or

(ii) any federal or state requirement to track the shipment, transportation, and receipt of rejected wastes or regulated container residues that are shipped from a designated facility to an alternative facility, or returned to the generator; and

(B) elects to use the system to obtain, complete and transmit an electronic manifest format supplied by the United States Environmental Protection Agency electronic manifest system; or

(C) elects to use the paper manifest form and submits to the system for data processing purposes a paper copy of the manifest (or data from such a paper copy), in accordance with §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste). These paper copies are submitted for data exchange purposes only and are not the official copies of record for legal purposes.

(181) Wastewater treatment unit--A device which:

(A) is part of a wastewater treatment facility subject to regulation under either the Federal Water Pollution Control Act (Clean Water Act), 33 United States Code, §§466 *et seq.*, §402 or §307(b), as amended;

(B) receives and processes or stores an influent wastewater which is a hazardous or industrial solid waste, or generates and accumulates a wastewater treatment sludge which is a hazardous or industrial solid waste, or processes or stores a wastewater treatment sludge which is a hazardous or industrial solid waste; and

(C) meets the definition of "Tank" or "Tank system" as defined in this section.

(182) Water (bulk shipment)--The bulk transportation of municipal hazardous waste or Class 1 industrial solid waste which is loaded or carried on board a vessel without containers or labels.

(183) Well--Any shaft or pit dug or bored into the earth, generally of a cylindrical form, and often walled with bricks or tubing to prevent the earth from caving in.

(184) Wipe--A woven or non-woven shop towel, rag, pad, or swab made of wood pulp, fabric, cotton, polyester blends, or other material.

(185) Zone of engineering control--An area under the control of the owner/operator that, upon detection of a solid waste or hazardous waste release, can be readily cleaned up prior to the release of solid waste or hazardous waste or hazardous constituents to groundwater or surface water.

§335.17. *Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials.*

(a) For the purposes of the definition of "Solid waste" in §335.1 of this title (relating to Definitions) and §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials):

(1) A spent material is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.

(2) Sludge has the same meaning used in Texas Health and Safety Code, §361.003.

(3) A by-product is a material that is not one of the primary products of a production process and is not solely or separately produced by the production process. Examples are process residues such as slags or distillation column bottoms. The term does not include a co-product that is produced for the general public's use and is ordinarily used in the form in which it is produced by the process.

(4) A material is reclaimed if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents. For purposes of 40 Code of Federal Regulations (CFR) §261.4(a)(23) and (24), smelting, melting, and refining furnaces are considered to be solely engaged in metals reclamation if the metal recovery from the hazardous secondary materials meets the same requirements as those specified for metals recovery from hazardous waste found in §335.221(a)(1) of this title (relating to Applicability and Standards), and if the residuals meet the requirements specified in §335.221(a)(23) of this title.

(5) A material is used or reused if it is either:

(A) employed as an ingredient (including use as an intermediate) in an industrial process to make a product (for example, distillation bottoms from one process used as feedstock in another process). However, a material will not satisfy this condition if distinct components of the material are recovered as separate end products (as when metals are recovered from metal-containing secondary materials); or

(B) employed in a particular function or application as an effective substitute for a commercial product (for example, spent pickle liquor used as phosphorous precipitant and sludge conditioner in wastewater treatment).

(6) Scrap metal is bits and pieces of metal parts (e.g., bars, turnings, rods, sheets, wires) or metal pieces that may be combined to-

gether with bolts or soldering (e.g., radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recycled.

(7) A material is recycled if it is used, reused, or reclaimed.

(8) A material is accumulated speculatively if it is accumulated before being recycled. A material is not accumulated speculatively, however, if the person accumulating it can show that the material is potentially recyclable and has a feasible means of being recycled; and that, during the calendar year (commencing on January 1), the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75% by weight or volume of the amount of that material accumulated at the beginning of the period. Materials must be placed in a storage unit with a label indicating the first date that the material began to be accumulated. If placing a label on the storage unit is not practicable, the accumulation period must be documented through an inventory log or other appropriate method. In calculating the percentage of turnover, the 75% requirement is to be applied to each material of the same type (e.g., slags from a single smelting process) that is recycled in the same way (i.e., from which the same material is recovered or that is used in the same way). Materials accumulating in units that would be exempt from regulation under 40 CFR §261.4(c) are not to be included in making the calculation. (Materials that are already defined as solid wastes also are not to be included in making the calculation.) Materials are no longer in this category once they are removed from accumulation for recycling, however.

(9) Excluded scrap metal is processed scrap metal, unprocessed home scrap metal, and unprocessed prompt scrap metal.

(10) Processed scrap metal is scrap metal which has been manually or physically altered to either separate it into distinct materials to enhance economic value or to improve the handling of materials. Processed scrap metal includes, but is not limited to, scrap metal which has been baled, shredded, sheared, chopped, crushed, flattened, cut, melted, or separated by metal type (i.e., sorted), and, fines, drosses and related materials which have been agglomerated. (Note: shredded circuit boards being sent for recycling are not considered processed scrap metal. They are covered under the exclusion from the definition of solid waste for shredded circuit boards being recycled (40 CFR §261.4(a)(14)).

(11) Home scrap metal is scrap metal as generated by steel mills, foundries, and refineries such as turnings, cuttings, punchings, and borings.

(12) Prompt scrap metal is scrap metal as generated by the metal working/fabrication industries and includes such scrap metal as turnings, cuttings, punchings, and borings. Prompt scrap is also known as industrial or new scrap metal.

(b) Other portions of this chapter that relate to solid wastes that are recycled include §335.1 of this title, under the definition of "Solid waste", §335.6 of this title (relating to Notification Requirements), §335.18 of this title (relating to Non-Waste Determinations and Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste), §335.20 of this title (relating to Variance To Be Classified as a Boiler), §335.21 of this title (relating to Procedures for Variances from Classification as a Solid Waste or To Be Classified as a Boiler or for Non-Waste Determinations), §335.22 of this title (relating to Additional Regulation of Certain Hazardous Waste Recycling Activities on a Case-by-Case Basis), §335.23 of this title (relating to Procedures for Case-by-Case Regulation of Hazardous Waste Recycling Activities), §335.24 of this title, Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities), and Subchapter V of this chapter (relating to Standards for Reclamation of Hazardous Secondary Materials).

*§335.18. Non-Waste Determinations and Variances from Classification as a Solid Waste.*

(a) In accordance with the standards and criteria in §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste) and §335.32 of this title (relating to Standards and Criteria for Non-Waste Determinations), and in accordance with the procedures in §335.21 of this title (relating to Procedures for Variances from Classification as a Solid Waste or To Be Classified as a Boiler or for Non-Waste Determinations) the executive director may determine on a case-by-case basis that the following recyclable materials and nonhazardous recyclable materials are not solid wastes:

(1) materials that are accumulated speculatively without sufficient amounts being recycled (as defined in §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials));

(2) materials that are reclaimed and then reused within the original production process in which they were generated;

(3) materials that have been reclaimed but must be reclaimed further before the materials are completely recovered;

(4) hazardous secondary materials that are reclaimed in a continuous industrial process;

(5) hazardous secondary materials that are indistinguishable in all relevant aspects from a product or intermediate; or

(6) hazardous secondary materials that are transferred for reclamation under 40 Code of Federal Regulations §261.4(a)(24) and are managed at a verified reclamation facility or intermediate facility where the management of the hazardous secondary materials is not addressed under a Resource Conservation and Recovery Act Part B permit or interim status standards.

(b) Other portions of this chapter that relate to solid wastes that are recycled include §335.1 of this title (relating to Definitions), under the definition of "Solid waste," §335.6 of this title (relating to Notification Requirements), §335.17 of this title, §335.19 of this title, §335.20 of this title (relating to Variance To Be Classified as a Boiler), §335.21 of this title, §335.22 of this title (relating to Additional Regulation of Certain Hazardous Waste Recycling Activities on a Case-by-Case Basis), §335.23 of this title (relating to Procedures for Case-by-Case Regulation of Hazardous Waste Recycling Activities), §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities), and Subchapter V of this title (relating to Standards for Reclamation of Hazardous Secondary Materials).

*§335.19. Standards and Criteria for Variances from Classification as a Solid Waste.*

(a) The executive director may grant requests for a variance from classifying as a solid waste those materials that are accumulated speculatively without sufficient amounts being recycled if the applicant demonstrates that sufficient amounts of the material will be recycled or transferred for recycling in the following year. If a variance is granted, it is valid only for the following year, but can be renewed, on an annual basis, by filing a new application. The executive director's decision will be based on the following criteria:

(1) the manner in which the material is expected to be recycled, when the material is expected to be recycled, and whether this expected disposition is likely to occur (for example, because of past practice, market factors, the nature of the material, or contractual arrangements for recycling);

(2) the reason that the applicant has accumulated the material for one or more years without recycling 75% of the weight or volume accumulated at the beginning of the year;

(3) the quantity of material already accumulated and the quantity expected to be generated and accumulated before the material is recycled;

(4) the extent to which the material is handled to minimize loss; and

(5) other relevant factors.

(b) The executive director may grant requests for a variance from classifying as a solid waste those materials that are reclaimed and then reused as feedstock within the original production process in which the materials were generated if the reclamation operation is an essential part of the production process. This determination will be based on the following criteria:

(1) how economically viable the production process would be if it were to use virgin materials, rather than reclaimed materials;

(2) the extent to which the material is handled before reclamation to minimize loss;

(3) the time periods between generating the material and its reclamation, and between reclamation and return to the original primary production process;

(4) the location of the reclamation operation in relation to the production process;

(5) whether the reclaimed material is used for the purpose for which it was originally produced when it is returned to the original process, and whether it is returned to the process in substantially its original form;

(6) whether the person who generates the material also reclaims it; and

(7) other relevant factors.

(c) The executive director may grant requests for a variance from classifying as a solid waste those hazardous secondary materials that have been partially reclaimed, but must be reclaimed further before recovery is completed, if the partial reclamation has produced a commodity-like material. A determination that a partially-reclaimed material for which the variance is sought is commodity-like material will be based on whether the hazardous secondary material is legitimately recycled as specified in §335.27 of this title (relating to Legitimate Recycling of Hazardous Secondary Materials) and on whether all of the following decision criteria are satisfied:

(1) whether the degree of partial reclamation the material has undergone is substantial as demonstrated by using a partial reclamation process other than the process that generated the hazardous waste;

(2) whether the partially reclaimed material has sufficient economic value that it will be purchased for further reclamation;

(3) whether the partially reclaimed material is a viable substitute for a product or intermediate produced from virgin or raw materials which is used in subsequent production steps;

(4) whether there is a market for the partially reclaimed material as demonstrated by known customer(s) who are further reclaiming the material (e.g., records of sales and/or contracts and evidence of subsequent use, such as bills of lading);

(5) whether the partially reclaimed material is handled to minimize loss; and

(6) other relevant factors.

(d) The executive director may grant requests for a variance from classifying as a solid waste those hazardous secondary materials that are transferred for reclamation in accordance with the requirements of 40 Code of Federal Regulations (CFR) §261.4(a)(24) and are managed at a verified reclamation facility or intermediate facility where the management of the hazardous secondary materials is not addressed under a Resource Conservation and Recovery Act (RCRA) Part B permit or interim status standards. The executive director's decision will be based on the following criteria:

(1) the reclamation facility or intermediate facility must demonstrate that the reclamation process for the hazardous secondary materials is legitimate pursuant to §335.27 of this title;

(2) the reclamation facility or intermediate facility must satisfy the financial assurance requirements of §335.703 of this title (relating to Financial Assurance Requirements);

(3) the reclamation facility or intermediate facility must not be subject to a formal enforcement action in the previous three years and not be classified as a significant non-complier under RCRA, Subtitle C, or must provide credible evidence that the facility will manage the hazardous secondary materials properly. Credible evidence may include a demonstration that the facility has taken remedial steps to address the violations and prevent future violations, or that the violations are not relevant to the proper management of the hazardous secondary materials;

(4) the intermediate or reclamation facility must have the equipment and trained personnel needed to safely manage the hazardous secondary material and must meet emergency preparedness and response requirements under 40 CFR Part 261, Subpart M;

(5) if residuals are generated from the reclamation of the excluded hazardous secondary materials, the reclamation facility must have the permits required (if any) to manage the residuals, have a contract with an appropriately permitted facility to dispose of the residuals or present credible evidence that the residuals will be managed in a manner that is protective of human health and the environment; and

(6) the intermediate or reclamation facility must address the potential for risk to proximate populations from unpermitted releases of the hazardous secondary material to the environment (i.e., releases that are not covered by a permit, such as a permit to discharge to water or air), which may include, but are not limited to, potential releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures), and must include consideration of potential cumulative risks from other nearby potential stressors.

(e) Other portions of this chapter that relate to solid wastes that are recycled include §335.1 of this title (relating to Definitions), under the definition of "Solid waste," §335.6 of this title (relating to Notification Requirements), §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Non-Waste Determinations and Variances from Classification as a Solid Waste), §335.20 of this title (relating to Variance To Be Classified as a Boiler), §335.21 of this title (relating to Procedures for Variances from Classification as a Solid Waste or To Be Classified as a Boiler or for Non-Waste Determinations), §335.22 of this title (relating to Additional Regulation of Certain Hazardous Waste Recycling Activities on a Case-by-Case Basis), §335.23 of this title (relating to Procedures for Case-by-Case Regulation of Hazardous Waste Recycling Activities), §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), Subchapter H of this chapter (relating to Stan-

dards for the Management of Specific Wastes and Specific Types of Facilities), and Subchapter V of this chapter (relating to Standards for Reclamation of Hazardous Secondary Materials).

§335.21. *Procedures for Variances from Classification as a Solid Waste or To Be Classified as a Boiler or for Non-Waste Determinations.*

The executive director will use the following procedures in evaluating applications for variances from classification as a solid waste, applications to classify particular enclosed flame combustion devices as boilers, and applications for non-waste determinations:

(1) the owner or operator must apply to the executive director for the variance. The application must address the relevant criteria contained in §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste) or §335.20 of this title (relating to Variance To Be Classified as a Boiler);

(2) the owner or operator must apply to the executive director for the non-waste determination. The application must address the relevant criteria referenced in §335.32 of this title (relating to Standards and Criteria for Non-Waste Determinations);

(3) the executive director will evaluate the application and issue a draft notice tentatively granting or denying the application. Notification of this tentative decision will be provided by newspaper advertisement or radio broadcast in the locality where the recycler is located. The executive director will accept comment on the tentative decision for 30 days, and may also hold a public meeting upon request or at his discretion. The executive director will issue a final decision after receipt of comments and after the public meeting (if any). Any person affected by a final decision of the executive director may file with the chief clerk a motion for reconsideration, in accordance with §50.39 of this title (relating to Motion for Reconsideration).

(4) in the event of a change in circumstances that affect how a hazardous secondary material meets the relevant criteria contained in §335.19 or §335.20 of this title or §335.32 of this title (relating to Standards and Criteria for Non-Waste Determinations), upon which a variance or non-waste determination has been based, the applicant must send a written description of the change in circumstances to the executive director. The executive director may issue a determination that the hazardous secondary material continues to meet the relevant criteria of the variance or non-waste determination or may require the facility to re-apply for the variance or non-waste determination;

(5) variances and non-waste determinations shall be effective for a fixed term not to exceed ten years. No later than six months prior to the end of this term, owners or operators of facilities must re-apply for a variance or non-waste determination. If an owner or operator of a facility re-applies for a variance or non-waste determination within six months, the owner or operator of the facility may continue to operate under an expired variance or non-waste determination until receiving a decision on their re-application from the executive director; and

(6) owners or operators of facilities receiving a variance or non-waste determination must provide notification as required by §335.26 of this title (relating to Notification Requirements for Hazardous Secondary Materials).

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

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Robert Martinez

Director, Environmental Law Division  
Texas Commission on Environmental Quality

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For further information, please call: (512) 239-6812

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SUBCHAPTER E. INTERIM STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITIES

**30 TAC §335.112**

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103 (Rules) and §5.105 (General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste), §361.024 (Rules and Standards), and §361.036 (Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The adopted amendment implements THSC, Chapter 361.

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

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Robert Martinez

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SUBCHAPTER F. PERMITTING STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITIES

**30 TAC §335.152**

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103 (Rules) and §5.105 (General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste), §361.024

(Rules and Standards), and §361.036 (Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The adopted amendment implements THSC, Chapter 361.

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

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Robert Martinez

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For further information, please call: (512) 239-6812



## SUBCHAPTER R. WASTE CLASSIFICATION

### 30 TAC §335.504

#### Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103 (Rules), and §5.105 (General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste), §361.024 (Rules and Standards), and §361.036 (Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The adopted amendment implements THSC, Chapter 361.

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

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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## SUBCHAPTER U. STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE FACILITIES OPERATING UNDER A STANDARD PERMIT

### 30 TAC §335.602

#### Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103 (Rules) and §5.105 (General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste), §361.024 (Rules and Standards), and §361.036 (Records and Manifests Required: Class I Industrial Solid Waste or Hazardous Waste), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The adopted amendment implements THSC, Chapter 361.

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

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-6812



## SUBCHAPTER V. STANDARDS FOR RECLAMATION OF HAZARDOUS SECONDARY MATERIALS

### 30 TAC §§335.701 - 335.706

#### Statutory Authority

The new sections are adopted under Texas Water Code (TWC), §5.103 (Rules) and §5.105 (General Policy), which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under Texas Health and Safety Code (THSC), §361.017 (Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste), and §361.024 (Rules and Standards), which authorize the commission to regulate industrial solid waste and hazardous waste and to adopt rules consistent with the general intent and purposes of the THSC.

The adopted sections implement THSC, Chapter 361.

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 May 26, 2016.

TRD-201602674

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-6812

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## TITLE 31. NATURAL RESOURCES AND CONSERVATION

### PART 4. SCHOOL LAND BOARD

#### CHAPTER 151. OPERATIONS OF THE SCHOOL LAND BOARD

##### 31 TAC §151.6

The School Land Board (SLB) adopts new §151.6, relating to the Procedures for the Release of Funds from the Real Estate Special Fund Account, under Title 31, Part 4, Chapter 151 of the Texas Administrative Code. The SLB adopts the new section without changes to the proposed text as published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2673). The rule will not be republished.

##### BACKGROUND AND JUSTIFICATION

New §151.6 will establish the procedures to be used by the School Land Board (SLB) to determine the dates that releases will be made and the amounts of money that will be released on those dates from the Real Estate Special Fund Account (RESFA) to either the Available School Fund (ASF) or the State Board of Education (SBOE) for investment in the Permanent School Fund (PSF), as required by §51.413(b) of the Texas Natural Resources Code.

In the last legislative session, H.B. 1551 amended §51.413(b), Texas Natural Resources Code, to provide that the Board adopt rules to establish the procedure to be used to determine the amount and date of any transfer of money from the RESFA to either the ASF or the SBOE for investment in the PSF.

The adopted rule drafted in response to H.B. 1551 is comprised of three sections:

Paragraph (1) states that no later than July 31 of each even-numbered year, the Chief Investment Officer ("CIO") will: (A) perform an analysis that determines an amount equal to 6% of the average market value of the TXGLO Real Assets Investment Portfolio ("Portfolio") over the trailing sixteen-quarter measurement period; (B) round the amount determined in (A) up or down to the nearest \$5,000,000 increment; and (C) determine the average quarterly change in the average market value of the Portfolio over the trailing sixteen-quarter measurement period, then multiply this amount times 4 and add the resulting amount to the amount determined in (A) and round the resulting amount up or down to the nearest \$5,000,000 increment.

Paragraph (2) states that not later than September 1 of each even-numbered year, the CIO will provide to the Board the results of the CIO's analyses performed in accordance with paragraph (1) and make recommendations to the SLB regarding the release of funds from the RESFA. The Board will adopt a resolution detailing the actual amounts to be released to either the ASF or the SBOE in each of the individual years of the next-approaching biennium and the actual dates of the releases.

Paragraph (3) states that not later than September 1 of each even-numbered year, the CIO will submit a report to the Legislature, Comptroller, SBOE, and Legislative Budget Board that states the dates and amounts approved by the Board for release to either the ASF or to the SBOE during next-approaching biennium.

## COMMENTS

There were no comments received during the 30-day comment period.

## LEGAL AUTHORITY

The new section is adopted under Texas Natural Resources Code, Chapter 51, including §51.407 and §51.413(b), which authorizes the board to adopt rules to establish the procedure to be used to determine the amount and date of any transfer of money from the RESFA to either the ASF or the SBOE for investment in the PSF.

Texas Natural Resources Code §51.413 and §32.061 are affected by this adopted rulemaking.

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 May 26, 2016.

TRD-201602705

Anne L. Idsal

Chief Clerk, Deputy Land Commissioner

School Land Board

Effective date: June 15, 2016

Proposal publication date: April 15, 2016

For further information, please call: (512) 569-2740

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## TITLE 34. PUBLIC FINANCE

### PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

#### CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)

##### SUBCHAPTER D. CLAIMS PROCESSING--PAYROLL

##### 34 TAC §5.48

The Comptroller of Public Accounts adopts amendments to §5.48, concerning deductions for contributions to charitable organizations, without changes to the proposed text as published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2674).

The amendment will modify the existing language to provide that state employees can submit an electronic deduction authorization entered through an online giving tool website or application. The amendment will also modify the existing language regarding personal identifying information required to be included in a deduction change authorization or a deduction cancellation authorization. In addition, the amendment will clarify that all references to local campaign manager(s) and local employee committee(s) are only applicable if the state policy committee has appointed a local campaign manager(s) and/or a local employee committee(s) under Government Code, §659.140. The amendment is authorized under Government Code, §659.132(h) and Senate Bill 217, 83rd Legislature, 2013.

Subsection (a) modifies the existing language to provide that state employees can submit an electronic deduction authoriza-

tion entered through an online giving tool website or application. The subsection is also modified to clarify that references to local campaign manager(s) and local employee committee(s) are only applicable if the state policy committee has appointed a local campaign manager(s) and/or a local employee committee(s) under Government Code, §659.140.

Subsection (b)(1), (3), (6), and (7) modify the existing language to provide that state employees can submit an electronic deduction authorization or cancellation entered through an online giving tool website or application.

Subsection (b)(3)(C)(i) and (6)(B)(i) modify the existing language to provide that appropriate identifying information is to be included in a deduction change authorization rather than a social security number.

Subsections (e), (j), (k), (u), and (w) modify the existing language to provide that state employees can submit an electronic deduction authorization entered through an online giving tool website or application.

Subsections (h), (i), (j), (n), (p), (q) and (r) also modify the existing language to clarify that references to local campaign manager(s) and local employee committee(s) are only applicable if the state policy committee has appointed a local campaign manager(s) and/or a local employee committee(s) under Government Code, §659.140.

New subsection (y) adds language to provide requirements that must be satisfied for the use of an online giving tool website or application.

The agency received one comment on the proposed amendments from Homer D. Trevino, Executive Vice President & General Manager, United Way of Waco-McLennan County. His comment and the agency's response are as follows.

Mr. Trevino commented that the proposed changes should provide for the use of electronic forms only and that local campaigns should only be allowed to use electronic forms rather than electronic forms and/or paper forms.

The agency responds that we are unable to accommodate this request because some agency payroll systems require electronic files to contain social security numbers and, for security reasons, the online giving tool website or application will not collect them. Also, paper forms may be necessary when the online giving tool website or application are unavailable, such as when a newly hired employee submits a deduction authorization outside of the normal campaign period.

The adoption is pursuant to Government Code, §659.142(d) and Senate Bill 217, 83rd Legislature, 2013, which allow the comptroller to adopt rules.

The amendment implements changes made to the state employee charitable campaign by the state policy committee under Government Code, §659.140. The amendment also implements Government Code, Chapter 659, Subchapter I, as amended by Senate Bill 217, 83rd Legislature, 2013.

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 May 26, 2016.  
TRD-201602662

Lita Gonzalez  
General Counsel  
Comptroller of Public Accounts  
Effective date: June 15, 2016  
Proposal publication date: April 15, 2016  
For further information, please call: (512) 475-0387

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## TITLE 37. PUBLIC SAFETY AND CORRECTIONS

### PART 11. TEXAS JUVENILE JUSTICE DEPARTMENT

#### CHAPTER 380. RULES FOR STATE-OPERATED PROGRAMS AND FACILITIES SUBCHAPTER F. SECURITY AND CONTROL

##### 37 TAC §380.9709, §380.9710

The Texas Juvenile Justice Department (TJJD) adopts amendments to §380.9709 (Youth Search) and §380.9710 (Entry Search) with changes to the proposed text as published in the November 27, 2015, issue of the *Texas Register* (40 TexReg 8453).

The changes to the proposed text of §380.9709 and §380.9710 consist of correcting minor grammatical errors.

##### JUSTIFICATION FOR RULEMAKING ACTION

The justification for these amended rules is the protection of youth in TJJD's care and individuals who enter a TJJD residential facility from being victimized by sexual abuse, sexual activity, or sexual harassment. These rule changes are also intended to promote the safety of staff, youth, and the public through practices designed to maintain a safe and orderly environment in TJJD residential facilities.

##### SUMMARY OF CHANGES

The amended §380.9709 includes the following exceptions to the general requirement that the staff member conducting a pat-down or strip search must be the same gender as the youth being searched: 1) cross-gender searches are allowed in exigent circumstances (which are defined as any set of temporary and unforeseen circumstances that require immediate action to combat a threat to the security or institutional order of a facility); and 2) limited by consideration of facility and staff safety and security, TJJD will honor the preference of a youth to be searched by a male or female staff member if the youth self-identifies as transgender or intersex and that identification is supported by collateral assessment processes. Additionally, the amended rule no longer includes step-by-step processes for conducting pat-down searches and strip searches. These processes are addressed in TJJD's internal procedures.

The amendments to §380.9710: 1) expand the scope of the rule to apply to all residential facilities operated by TJJD, not just secure facilities; 2) include the following exceptions to the general requirement that the staff member conducting a pat-down search at the entry point of a TJJD facility must be the same gender as the person being searched: A) cross-gender pat searches are allowed when it is not possible for a same-gender staff to conduct the search due to facility and staff safety and security;

and B) limited by operational considerations and by facility and staff safety and security, TJJD will honor the preference of a person to be searched by a male or female staff member if the person self-identifies as transgender or intersex; 3) clarify that the TJJD Office of Inspector General is the law enforcement agency to which TJJD will turn over seized items when appropriate; 4) delete the list of prohibited items; 5) clarify that a list of all prohibited items is posted at *all security search points* (rather than "at each entrance"); and 6) remove the step-by-step processes for conducting pat-down entry searches. These processes are addressed in TJJD's internal procedures.

#### SUMMARY OF PUBLIC COMMENTS

TJJD did not receive any public comments on the proposed amendments.

#### RULE REVIEW

In the Proposed Rules section of the November 27, 2015, issue of the *Texas Register* (40 TexReg 8453), TJJD published a notice of intent to review §380.9709 and §380.9710 as required by Texas Government Code §2001.039. TJJD did not receive any public comments regarding the rule review.

TJJD has determined that the reasons for adopting these rules continue to exist. Accordingly, these rules are readopted with amendments as described in this notice.

#### STATUTORY AUTHORITY

The amended sections are adopted under Texas Human Resources Code §242.003, which authorizes TJJD to adopt rules appropriate to the proper accomplishment of its functions and to adopt rules for governing TJJD schools, facilities, and programs. The amended sections are also adopted under Code of Federal Regulations, Title 28, Part 115, which establishes national standards for compliance with the Prison Rape Elimination Act.

##### §380.9709. *Youth Search.*

(a) Purpose. This rule establishes requirements for searching Texas Juvenile Justice Department (TJJD) youth, their property, and their rooms to detect and deter contraband. The purpose of all provisions in this rule is to promote and protect the safety of the facility, staff, and youth.

(b) Applicability. This rule applies to residential facilities operated by TJJD.

(c) Definitions.

(1) Reasonable Belief--a belief based on facts or circumstances sufficient to cause a reasonable person to believe that the person to be searched has prohibited items.

(2) Probable Cause--a determination based on facts and circumstances that would cause a reasonably prudent person to believe it is more likely than not that the person to be searched has a prohibited item.

(d) General Provisions.

(1) TJJD staff may conduct a search of a TJJD youth or a youth's room for the purpose of finding and seizing contraband.

(2) When contraband is seized from a youth, the search and disposition of items must be documented. See §380.9711 of this title.

(3) Areas where youth are housed or served may be subject to be searched by the use of the canine (K-9) teams. See §380.9713 of this title for more information on the use of K-9 teams.

(e) Room Searches and Pat-Down Searches.

(1) Room searches and pat-down searches may be conducted with or without probable cause.

(2) Room and pat-down searches must be conducted in accordance with the following rules.

(A) Room and pat-down searches may be unannounced and irregularly timed.

(B) Room and pat-down searches must be conducted routinely to control possession by youth of contraband or to recover missing or stolen property.

(C) Two trained staff members must be in attendance for room and pat-down searches.

(D) The staff conducting a pat-down search must be of the same gender as the youth being searched, except in exigent circumstances as defined in §380.9337 of this title.

(E) Limited by consideration of facility and staff safety and security, TJJD honors the preference of a youth to be pat searched by a male or female staff member if the youth self-identifies as transgender or intersex and that identification is supported by collateral assessment processes.

(F) Room and pat-down searches must be conducted in a professional manner. Staff must not make jokes, conversation, or comments while conducting searches.

(G) Room and pat-down searches are documented.

(f) Strip Searches.

(1) Strip searches must be based on a reasonable belief that the youth has custody or control of contraband. However, reasonable belief is not required when a youth returns from contact with the general public or from outside the facility or from visitation.

(2) Strip searches must be conducted in accordance with the following rules.

(A) The search must be conducted in a private setting.

(B) Two trained staff members must conduct the search.

(C) The staff members conducting the search must be of the same gender as the youth, except in exigent circumstances as defined in §380.9337 of this title.

(D) Limited by consideration of facility and staff safety and security, TJJD honors the preference of a youth to be strip searched by a male or female staff member if the youth self-identifies as transgender or intersex and that identification is supported by collateral assessment processes.

(E) The search must be conducted in a professional manner. Staff must not make jokes, conversation, or comments while conducting the strip search.

(F) The search must be documented.

(g) Physical Body-Cavity Searches.

(1) Physical body-cavity searches may only occur on probable cause that the youth possesses contraband and with the authorization of the facility administrator.

(2) Physical body-cavity searches must be conducted by off-site medical personnel who are not part of the facility's health care staff.

(3) Physical body-cavity searches refer to manual or instrument inspection of body cavities including the vagina or rectum.

(4) Physical body-cavity searches must be documented.

§380.9710. *Entry Search.*

(a) Purpose. This rule establishes requirements for conducting searches at the entry point of Texas Juvenile Justice Department (TJJD) facilities to prevent the introduction of items that are prohibited.

(b) Applicability. This rule applies to residential facilities operated by TJJD.

(c) General Provisions. Each person entering a facility operated by TJJD is subject to a search of his/her person, vehicle, and any property he/she is bringing into the facility.

(d) Definitions.

(1) Reasonable Belief--a belief based on facts or circumstances sufficient to cause a reasonable person to believe that the person to be searched has prohibited items.

(2) Routine Search--a search conducted at a scheduled time during which every person is searched at the entry point of a TJJD facility.

(3) Random Search--a search conducted at an unannounced time during which every person will be searched at the entry point of a TJJD facility.

(e) Entry Searches.

(1) TJJD conducts routine searches, random searches, or a search anytime there is a reasonable belief a person possesses an item that is prohibited.

(2) Entry searches may involve one or more of the following:

- (A) use of metal detectors (walk-through or wand);
- (B) use of trained detection dogs;
- (C) visual or touch inspection of property;
- (D) requiring pockets to be emptied;
- (E) removal and inspection of shoes; or
- (F) pat-down body search (outside the person's clothing).

(3) Entry searches must use the least intrusive method possible as determined by the circumstances.

(4) Whenever possible, considering facility and staff safety and security, pat-down searches conducted at the entry point are conducted by a staff member who is the same gender as the person being searched. Limited by operational considerations and by facility and staff safety and security, TJJD honors the preference of a person to be pat-searched by a male or female staff member if the person self-identifies as transgender or intersex.

(5) Any person who refuses to be searched may be prohibited from entering the facility and may be subject to other administrative action, as appropriate.

(6) Any person who refuses to have his/her personal property searched will be prohibited from taking the property into the facility and may be subject to other administrative action, as appropriate.

(7) Any item that is or appears to be a prohibited item and/or contraband as defined in §380.9107 of this title will not be allowed in a residential facility and may be seized.

(8) Seized items may be turned over to the TJJD Office of Inspector General (OIG) for identification or disposition.

(9) If personal property is seized, TJJD determines within 24 hours (or the next business day if on a weekend or holiday) whether the item will be:

(A) retained as evidence for an administrative investigation;

(B) turned over to OIG for criminal investigation and/or disposition; or

(C) returned to the person from whom the property was seized.

(f) Prohibited Items.

(1) A list of prohibited items and contraband is prominently posted at each security search point in secure facilities and halfway houses.

(2) Items on the prohibited list may be seized during entry searches.

(3) Individual facilities may not add items to the prohibited list. Requests to include additional items on the list must be made in writing to the division director over residential facilities.

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 May 24, 2016.

TRD-201602527

Jill Mata

General Counsel

Texas Juvenile Justice Department

Effective date: July 1, 2016

Proposal publication date: November 27, 2015

For further information, please call: (512) 490-7278



## TITLE 40. SOCIAL SERVICES AND ASSISTANCE

### PART 21. TEXAS COUNCIL FOR DEVELOPMENTAL DISABILITIES

#### CHAPTER 877. GRANT AWARDS

##### 40 TAC §877.1, §877.3

The Texas Council for Developmental Disabilities (Council) adopts amendments to §877.1 concerning General Provisions and to §877.3 concerning Payment Withhold, Suspension or Termination of Funding without changes to the proposed text as published in the December 4, 2015, issue of the *Texas Register* (40 TexReg 8745). The rules will not be republished.

The purpose of the amendments to these sections is to apply consistent equitable consequences to Council award recipients in the event they are found to be in non-compliance with reporting requirements, and to provide uniform guidance to apply consistent procedures that may result in withholding payment or reduction of payments. These amendments will add Payment Withhold, which may grant a payment withhold pending the result of corrective action, partially restoring funds or grant funds are suspended.

There may be fiscal implications as a result of enforcing these sections as amended.

No comments were received regarding adoption of the amendments.

The adopted amendments are authorized under the Texas Human Resources Code, §112.020, which provides authority for the Council to adopt rules as necessary to implement the Council's duties and responsibilities.

The amendments will effect Texas Human Resources Code, Title 7, Chapter 112, Developmental Disabilities.

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 May 25, 2016.

TRD-201602661

Beth Stalvey

Executive Director

Texas Council for Developmental Disabilities

Effective date: June 14, 2016

Proposal publication date: December 4, 2015

For further information, please call: (512) 437-5432



## TITLE 43. TRANSPORTATION

### PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

#### CHAPTER 1. MANAGEMENT

##### SUBCHAPTER E. PROCEDURES IN CONTESTED CASE

###### 43 TAC §§1.29, 1.37, 1.38

The Texas Department of Transportation (department) adopts amendments to §1.29, Notice of Hearing, §1.37, Notification of Decision, and §1.38, Motions for Rehearing, all concerning procedures in contested cases. The amendments to §§1.29, 1.37, and 1.38 are adopted without changes to the proposed text as published in the March 11, 2016, issue of the *Texas Register* (41 TexReg 1826) and will not be republished.

###### EXPLANATION OF ADOPTED AMENDMENTS

S.B. No. 1267, 84th Regular Session, 2015, amended Government Code, Chapter 2001, the Administrative Procedure Act (APA) to, among other things, make its deadlines more closely align with the Texas Rules of Civil Procedure and expand notice requirements. The department's procedures for contested cases, located in Title 43, Part 1, Chapter 1, Subchapter E of the Texas Administrative Code must be amended to comply with the changes to the APA made by S.B. 1267. The amendments substitute references to the APA for the restatement of statutory requirements provided in the current rules.

Amendments to §1.29, Notice of Hearing, replace a detailed description of the required contents of a notice of hearing with the simpler provision that a notice of hearing will conform with the notice requirements of the APA, which are provided by Government Code, §2001.052, as amended by S.B. 1267.

Amendments to §1.37, Notification of Decision, replace the requirement that a notification of decision will be sent to each party by first class mail with the statement that a notification will be sent to each party in the manner required by the APA. S.B. 1267 amended Government Code, §2001.142 to expand the methods that may be used to send the required notice and to add a process for determining when the notice was received.

Amendments to §1.38, Motions for Rehearing, make several changes relating to rehearing requests. The amendments delete subsection (a) because it is inaccurate; Government Code, §2001.145 provides exceptions to the requirement that a motion for rehearing is a prerequisite to an appeal of a decision or order in a contested case. The amendments also replace the deadlines for filing a motion for rehearing and a reply to a motion for rehearing with references to the APA. Those deadlines are found in Government Code, §2001.146 and were amended by S.B. 1267. Finally, the amendments replace the statement that a notice of a ruling on a motion for rehearing will be sent to each party by first class mail with a statement that a notice will be sent to each party in the manner required by the APA. S.B. 1267 amended Government Code, §2001.142 to expand the methods that may be used to send notice of the decision on a motion for rehearing.

###### SUBMITTAL OF COMMENTS

No comments concerning §§1.29, 1.37, and 1.38 were received.

###### STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, §2001.004, which requires a state agency to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures" under the APA.

###### CROSS REFERENCE TO STATUTE

Government Code, §2001.052, and Chapter 2001, Subchapter F.

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 May 26, 2016.

TRD-201602702

Joanne Wright

Deputy General Counsel

Texas Department of Transportation

Effective date: June 15, 2016

Proposal publication date: March 11, 2016

For further information, please call: (512) 463-8630



## CHAPTER 15. FINANCING AND CONSTRUCTION OF TRANSPORTATION PROJECTS

### SUBCHAPTER E. FEDERAL, STATE, AND LOCAL PARTICIPATION

#### 43 TAC §15.52

The Texas Department of Transportation (department) adopts amendments to §15.52, concerning Agreements. The amendments to §15.52 are adopted without changes to the proposed text as published in the March 11, 2016, issue of the *Texas Register* (41 TexReg 1827) and will not be republished.

#### EXPLANATION OF ADOPTED AMENDMENTS

Subchapter E of 43 TAC Chapter 15 describes federal, state, and local responsibilities for cost participation in highway improvement projects. These amendments make several changes to §15.52, Agreements.

Amendments to §15.52(3)(A)(i)(I) change the wording of the criteria for an adjustment to a local government's fixed price amount obligation under a joint participation agreement between the department and a local government for a highway improvement project. The amendments change the phrase "site conditions change" to allow an adjustment if certain conditions encountered at the project site differ materially from those indicated in or expected under the contract for the project, as described by 23 C.F.R. §635.109. The term "differing site conditions" is used to be consistent with those federal regulations.

Amendments to §15.52(3)(A)(ii)(II) change the wording of a factor that the department will consider when determining the fixed price amount. Currently, the rule provides "the need for expeditious project completion" as one of those factors. The amendment changes that wording to "the need for accelerated project delivery" in order to be consistent with the terminology used in Federal Highway Administration programs.

Amendments to §15.52(3)(C)(ii)(III) change the wording of a factor that the executive director will consider in approving a request for periodic payments. Currently, the rule provides "the need for expeditious project completion" as one of those factors. The amendment changes that wording to "the need for accelerated project delivery." This change is consistent with the change made to §15.52(3)(A)(ii)(II).

Amendments to §15.52(5) change the phrase "changed site conditions" to "differing site conditions" to correspond to the changes made by the amendments to §15.52(3)(A)(i)(I) described above.

The amendment to §15.52(6)(A) corrects the reference to the rule provision that allows an adjustment to a local government's fixed price obligation under a joint participation agreement.

The amendments to §15.52(6)(B)(ii) provide that, when the specified percentage method of payment is used in a joint funding agreement, the local government, rather than the department, is responsible for any extra funds required to complete the project. Under current §15.52(6)(B)(ii), the department determines the final cost of a project after its completion. If the department finds that the amount received is insufficient to pay the local government's funding share, the rule provides that the department is to pay the balance. If the amount received exceeds the local government's funding share, the excess is returned to the local government. This change more appropriately allocates the risk of cost overruns to the party that has the greater ability to manage the cost of the project.

Amendments to §15.52(6)(C) provide that, when the periodic payment method is used, the local government, rather than the department, is responsible for any extra funds required to complete the project. This is similar to the change made to §15.52(6)(B)(ii) to cover the insufficiency, and more appropriately allocates the risk of cost overruns to the party that has the greater ability to manage the costs of the project.

Amendments to §15.52(8)(D)(iii) change one of the factors that the department evaluates to determine whether to approve a local government's request to manage one or more elements of performance of a project from "need for expeditious project completion" to "the need for accelerated project delivery." This change is made to be consistent with the changes made in §15.52(3)(A)(ii)(II).

#### SUBMITTAL OF COMMENTS

Comments concerning §15.52 were received from four cities.

Comment: City of Anna, Texas

The City comments that the proposed rule change, as it relates to joint project costs, does not address increased costs caused by the department or allow for unforeseen conditions. It proposes that reasonable and warranted costs be shared at the same percentage as the joint participation project.

Response: The department disagrees with this comment. The standard funding arrangement on projects with a combination of local funds and state and/or federal funds, including those projects managed by the department, is a fixed price arrangement. In these agreements, a local government is responsible for a fixed price amount specified in their agreement with the department regardless of the actual cost of performing the work, unless the parties execute an amendment to adjust the price. The amendments to §15.52(6)(B)(ii) and (C) apply only to projects funded under non-standard funding arrangements requiring special approval by the executive director. The specified percentage arrangement will be the preferred arrangement for those projects managed by the local government.

Comment: City of Haslet, Texas

The City is concerned about its inability to either control or predict cost overruns and asserts that it is unfair to require the City to cover those costs because it "has the least amount of participation in the costs of the project."

Response: The department disagrees with this comment. The changes in risk allocation apply only to agreements funded with non-standard payment arrangements requiring special approval by the executive director. The specified percentage arrangement will be the preferred funding arrangement for those projects managed by the local government.

Comment: City of Mesquite, Texas

The City states that it opposes the proposed changes to 43 TAC §15.52(3)(B)(ii) and (3)(C), which shift the burden for project cost overruns from the department to the local governments for highway improvement projects, because the department prepares the cost estimates and manages the entire project delivery process, with little input or control on the City's part. The City suggests that local governments should be required to cover only those excess costs resulting solely from changes made at their own request. Lastly, it comments that the fear of receiving a "surprise bill" from the department years after a project is completed will discourage local government participation on highway improvement projects.

Response: The department assumes that the City intended to comment on 43 TAC §15.52(6)(B)(ii) and (3)(C). Projects controlled by the department will typically use the standard payment arrangement for joint participation agreements, the fixed price arrangement, which strictly limits the circumstances under which a local government would be required to pay more than the amount initially agreed upon. The amendments apply only to nonstan-

standard payment arrangements that require special approval by the executive director. The specified percentage arrangement is the preferred funding arrangement for those projects managed by the local government.

Further, the department encourages all local governments to participate in the cost estimation process. Input from local governments is valuable and necessary in allowing the parties to arrive at accurate project costs.

Comment: City of Houston, Texas

The City comments that the proposed amendments to §15.52(6)(B)(ii) and §15.52(6)(C) would unfairly burden local governments with costs beyond their control, and warns that joint participation agreements under these rules could violate the constitutional prohibition against "unfunded liabilities." The City maintains that local governments are precluded from controlling projects under joint participation agreements.

The City further comments that an agreement that requires the City to commit to payments greater than the amount appropriated and approved by the governing body when authorizing the agreement would violate the constitutional prohibition on creation of a debt unless the City were to divert money away from other city projects or services to create a sinking fund to cover potential overruns.

The City suggests that new wording be included stating that when an overrun occurs and the local government is responsible for payment, specifically, "...that the department will notify the local government of the amount of the difference and subject to an appropriation by the local government's governing body, the local government shall promptly transmit that amount to the department."

Response: The department disagrees with these comments and declines to change the wording of the amendment. Projects controlled by the department will typically use the standard payment arrangement for joint participation agreements, the fixed price arrangement, which strictly limits the circumstances under which a local government would be required to pay more than the amount

initially agreed upon. The specified percentage funding arrangement will be the preferred funding arrangement for those projects managed by the City. In the event that a City agrees to participate in a project under a specified percentage arrangement rather than the standard fixed price arrangement, constitutional concerns can be addressed in the joint participation agreement. The department is sensitive to the challenges local governments face when trying to pay for local services and when funding joint participation projects with the department, while being responsible for covering unexpected contingencies that occur in any particular fiscal year. However, the rules that are already in place require local governments in certain circumstances to pay cost overruns in joint participation projects.

#### STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

#### CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 221; Transportation Code, Chapter 222, Subchapter C; and Transportation Code, §224.033.

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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