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 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 22. PROCEDURAL RULES

The Public Utility Commission of Texas (commission) adopts amendments to §22.51 relating to Notice for Public Utility Regulatory Act, Chapter 36, Subchapters C - E; Chapter 51, §51.009; and Chapter 53, Subchapters C - E, Proceedings; §22.52, relating to Notice in Licensing Proceedings; and §22.142 relating to Limitations on Discovery and Protective Orders without changes to the proposed text as published in the May 12, 2023, issue of the *Texas Register* (48 TexReg 2448). The amended rules will not be republished.

The adopted amendments are administrative in nature to update contact resources used by individuals with hearing or speech difficulties and also to make other minor and conforming amendments.

The commission did not receive any comments on the proposed rules. These amendments are adopted under Project Number 54844.

SUBCHAPTER D. NOTICE

16 TAC §22.51, §22.52

The rules are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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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Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7244

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SUBCHAPTER H. DISCOVERY PROCEDURES

16 TAC §22.142

The rule is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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

SUBCHAPTER H. CERTIFICATES OF CONVENIENCE AND NECESSITY

16 TAC §24.235

The Public Utility Commission of Texas (commission) adopts amendments to §24.235, relating to Notice Requirements for Certificate of Convenience and Necessity Applications with changes to the proposed text as published in the May 12, 2023, issue of the *Texas Register* (48 TexReg 2453). The amended rule will be republished.

The adopted amendments are administrative in nature to update contact resources used by individuals with hearing or speech difficulties and also to make other minor and conforming amendments. The commission did not receive any comments on the proposed amendments. The amendments are adopted under Project Number 54844.

The rule is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and under

the Texas Water Code §13.041(b), which provides the commission with the authority to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052; Texas Water Code §13.041(b).

§24.235. Notice Requirements for Certificate of Convenience and Necessity Applications.

(a) If an application to obtain or amend a certificate of convenience and necessity (CCN) is filed, the applicant will prepare the notice prescribed in the commission's application form, which will include the following:

(1) all information outlined in the Administrative Procedure Act, Texas Government Code, Chapter 2001;

(2) all information listed in the commission's instructions for completing a CCN application;

(3) the following statement: "Persons who wish to intervene in the proceeding or comment upon action sought should contact the Public Utility Commission, P.O. Box 13326, Austin, Texas 78711-3326, or call the Public Utility Commission at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals may contact the commission through Relay Texas at 1-800-735-2989. The deadline for intervention in the proceeding is (30 days from the mailing or publication of notice, whichever occurs later, unless otherwise provided by the presiding officer). You must send a letter requesting intervention to the commission which is received by that date."; and

(4) except for publication of notice, the notice must include a map showing the requested area.

(b) After reviewing and, if necessary, modifying the proposed notice, the commission will provide the notice to the applicant for publication and/or mailing.

(1) For applications for a new CCN or a CCN amendment, the applicant must mail the notice to the following:

(A) cities, districts, and neighboring retail public utilities providing the same utility service whose corporate boundaries or certificated service area are located within two miles from the outer boundary of the requested area.

(B) the county judge of each county that is wholly or partially included in the requested area; and

(C) each groundwater conservation district that is wholly or partially included in the requested area.

(2) Except as otherwise provided by this subsection, in addition to the notice required by subsection (a) of this section, the applicant must mail notice to each owner of a tract of land that is at least 25 acres and is wholly or partially included in the requested area. Notice required under this subsection must be mailed by first class mail to the owner of the tract of land according to the most current tax appraisal rolls of the applicable central appraisal district at the time the commission received the application for the CCN. Good faith efforts to comply with the requirements of this subsection may be considered adequate mailed notice to landowners. Notice under this subsection is not required for a matter filed with the commission under:

(A) TWC §13.248 or §13.255; or

(B) TWC Chapter 65.

(3) Utilities that are required to possess a CCN but that are currently providing service without a CCN must provide individual mailed notice to all current customers. The notice must contain the current rates, the effective date of the current rates, and any other information required in the application or notice form or by the commission.

(4) Within 30 days of the date of the notice, the applicant must file in the docket an affidavit specifying every person and entity to whom notice was provided and the date that the notice was provided.

(c) The applicant must publish the notice in a newspaper having general circulation in the county where a CCN is being requested, once each week for two consecutive weeks beginning with the week after the proposed notice is approved by the commission. Proof of publication in the form of a publisher's affidavit must be filed with the commission within 30 days of the last publication date. The affidavit must state with specificity each county in which the newspaper is of general circulation.

(d) The commission may require the applicant to deliver notice to other affected persons or agencies.

(e) The recording in the county records required by this section must be completed not later than the 31st day after the date a CCN holder receives a final order from the commission that grants or amends a CCN and thus changes the CCN holder's certificated service area.

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

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CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts amendments to §25.31 relating to Information to Applicants and Customers, §25.238, relating to Purchased Power Capacity Cost Recovery Factor (PCRF); §25.240, relating to Contribution Disclosure Statements in Appeals of Municipal Utility Rates, §25.271, relating to Foreign Utility Company Ownership by Exempt Holding Companies, §25.301, relating to Nuclear Decommissioning Trusts; §25.483, relating to Disconnection of Service, and §25.486, relating to Customer Protections for Brokerage Services without changes to the proposed text as published in the May 12, 2023, issue of the *Texas Register* (48 TexReg 2454). The amended rules with no change will not republished. The commission adopts amendments to §25.231, relating to Cost of Service with changes to the proposed text as published in the May 12, 2023 issue of the *Texas Register* (48 TexReg 2454). The amended rule with change will be republished.

The adopted amendments are administrative in nature to update contact resources used by individuals with hearing or speech difficulties and also to make other minor and conforming amendments. These amendments are adopted under Project Number 54844.

The commission received comments on the proposed rule from Alliance for Retail Markets' (ARM) and Texas Electric Cooperatives, Inc (TEC).

§25.231(c)(1)(B)

Existing §25.231(c)(1)(B) requires the commission to consider specific factors along with other applicable conditions and practices when fixing the rate of return for a utility's invested capital.

TEC commented that proposed §25.231(c)(1)(B) as replaces an obligatory shall with a permissive may, allowing the commission to elect whether to consider the specific considerations when setting a rate of return. TEC requested that the language remain obligatory to remain consistent with statutory language. TEC also argues that the proposed language is too significant to be styled as a minor or conforming change and should be considered in a longer rulemaking process.

Commission Response

The commission agrees with TEC that the change in language from shall to may is inconsistent with the statutory language and modifies the requirement to remain obligatory.

§25.483(g)(4)

Section 25.483(g)(4) requires a transmission and distribution utility (TDU) to cease charging a retail electric provider (REP) most transmission and distribution charges for the premises of a critical care residential customer that the TDU refuses to disconnect.

ARM requested that the process for a TDU to cease transmission and distribution charges in this context be streamlined.

Commission Response

ARM's request for a streamlined §25.483(g)(4) is outside of the scope of what was noticed in this project. The requested modifications may be considered in a future rulemaking project.

§25.483(j)

Section 25.483(j) prohibits REPs from authorizing the disconnection of a customer for non-payment during an extreme weather emergency.

ARM requested that §25.483(j) be modified to clarify the process for extreme weather moratoriums on disconnection for non-payment and provided language consistent with its proposed change.

ARM further requested the addition of a new paragraph to standardize the timelines for a REP to cease requesting disconnections for non-payment when a TDU makes that determination and sends notice to the commission and REPs. ARM provided the following language:

§25.483(j)(3) A REP must discontinue authorizations of disconnections for non-payment within two hours of receiving notice that a TDU has determined that an extreme weather emergency has been issued for a county in its service area.

Commission Response

ARM's requested changes are outside of the scope of what was noticed in this rulemaking project. The requested modifications may be considered in a future rulemaking project.

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.31

The rules are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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SUBCHAPTER J. COSTS, RATES AND TARIFFS

DIVISION 1. RETAIL RATES

16 TAC §§25.231, 25.238, 25.240

The rules are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

§25.231. Cost of Service.

(a) Components of cost of service. Except as provided for in subsection (c)(2) of this section, relating to invested capital; rate base, and §23.23(b) of this title, (relating to Rate Design), rates are to be based upon an electric utility's cost of rendering service to the public during a historical test year, adjusted for known and measurable changes. The two components of cost of service are allowable expenses and return on invested capital.

(b) Allowable expenses. Only those expenses which are reasonable and necessary to provide service to the public will be included in allowable expenses. In computing an electric utility's allowable expenses, only the electric utility's historical test year expenses as adjusted for known and measurable changes will be considered, except as provided for in any section of these rules dealing with fuel expenses.

(1) Components of allowable expenses. Allowable expenses, to the extent they are reasonable and necessary, and subject to this section, may include, but are not limited to the following general categories:

(A) Operations and maintenance expense incurred in furnishing normal electric utility service and in maintaining electric utility plant used by and useful to the electric utility in providing such service to the public. Payments to affiliated interests for costs of service, or any property, right or thing, or for interest expense will not

be allowed as an expense for cost of service except as provided in the Public Utility Regulatory Act §36.058.

(B) Depreciation expense based on original cost and computed on a straight line basis as approved by the commission. Other methods of depreciation may be used when it is determined that such depreciation methodology is a more equitable means of recovering the cost of the plant.

(C) Assessments and taxes other than income taxes.

(D) Federal income taxes on a normalized basis. Federal income taxes must be computed according to the provisions of the Public Utility Regulatory Act §36.060.

(E) Advertising, contributions and donations. The actual expenditures for ordinary advertising, contributions, and donations may be allowed as a cost of service provided that the total sum of all such items allowed in the cost of service must not exceed three-tenths of 1.0% (0.3%) of the gross receipts of the electric utility for services rendered to the public. The following expenses must be included in the calculation of the three-tenths of 1.0% (0.3%) maximum:

(i) funds expended advertising methods of conserving energy;

(ii) funds expended advertising methods by which the consumer can effect a savings in total electric utility bills;

(iii) funds expended advertising methods to shift usage off of system peak; and

(iv) funds expended promoting renewable energy.

(F) Nuclear decommissioning expense. The following restrictions must apply to the inclusion of nuclear decommissioning costs that are placed in an electric utility's cost of service.

(i) An electric utility owning or leasing an interest in a nuclear-fueled generating unit must include its cost of nuclear decommissioning in its cost of service. Funds collected from ratepayers for decommissioning must be deposited monthly in irrevocable trusts external to the electric utility, in accordance with §25.301 of this title (relating to Nuclear Decommissioning Trusts). All funds held in short-term investments must bear interest. The level of the annual cost of decommissioning for ratemaking purposes will be determined in each rate case based on an allowance for contingencies of 10% of the cost of decommissioning, the most current information reasonably available regarding the cost of decommissioning, the balance of funds in the decommissioning trust, anticipated escalation rates, the anticipated return on the funds in the decommissioning trust, and other relevant factors. The annual amount for the cost of decommissioning determined pursuant to the preceding sentence must be expressly included in the cost of service established by the commission's order.

(ii) In the event that an electric utility implements an interim rate increase, including an increase filed under bond, an incremental change in decommissioning funding must be included in the increase.

(iii) An electric utility's decommissioning fund and trust balances will be reviewed in general rate cases. In the event that an electric utility does not have a rate case within a five-year period, the commission, on its own motion or on the motion of commission staff, the Office of Public Utility Counsel, or any affected person, may initiate a proceeding to review the electric utility's decommissioning cost study and plan, and the balance of the trust.

(iv) An electric utility must perform, or cause to be performed, a study of the decommissioning costs of each nuclear generating unit that it owns or in which it leases an interest. A study or a redetermination of the previous study must be performed at least every five years. The study or redetermination should consider the most current information reasonably available on the cost of decommissioning. A copy of the study or redetermination must be filed with the commission and a copy provided to the Office of Public Utility Counsel. An electric utility's most recent decommissioning study or redeterminations must be filed with the commission within 30 days of the effective date of this subsection. The five-year requirement for a new study or redetermination must begin from the date of the last study or redetermination.

(G) Accruals credited to reserve accounts for self-insurance under a plan requested by an electric utility and approved by the commission. The commission may consider approval of a self insurance plan in a rate case in which expenses or rate base treatment are requested for a such a plan. For the purposes of this section, a self insurance plan is a plan providing for accruals to be credited to reserve accounts. The reserve accounts are to be charged with property and liability losses which occur, and which could not have been reasonably anticipated and included in operating and maintenance expenses, and are not paid or reimbursed by commercial insurance. The commission will approve a self insurance plan to the extent it finds it to be in the public interest. In order to establish that the plan is in the public interest, the electric utility must present a cost benefit analysis performed by a qualified independent insurance consultant who demonstrates that, with consideration of all costs, self-insurance is a lower-cost alternative than commercial insurance and the ratepayers will receive the benefits of the self insurance plan. The cost benefit analysis must present a detailed analysis of the appropriate limits of self insurance, an analysis of the appropriate annual accruals to build a reserve account for self insurance, and the level at which further accruals should be decreased or terminated.

(H) Postretirement benefits other than pensions (known in the electric utility industry as "OPEB"). For ratemaking purposes, expense associated postretirement benefits other than pensions (OPEB) must be treated as follows:

(i) OPEB expense must be included in an electric utility's cost of service for ratemaking purposes based on actual payments made.

(ii) An electric utility may request a one-time conversion to inclusion of current OPEB expense in cost of service for ratemaking purposes on an accrual basis in accordance with generally accepted accounting principles (GAAP). Rate recognition of OPEB expense on an accrual basis must be made only in the context of a full rate case.

(iii) An electric utility will not be allowed to recover current OPEB expense on an accrual basis until GAAP requires that electric utility to report OPEB expense on an accrual basis.

(iv) For ratemaking purposes, the transition obligation must be amortized over 20 years.

(v) OPEB amounts included in rates must be placed in an irrevocable external trust fund dedicated to the payment of OPEB expenses. The trust must be established no later than six months after the order establishing the OPEB expense amount included in rates. The electric utility must make deposits to the fund at least once per year. Deposits on the fund must include, in addition to the amount included in rates, an amount equal to fund earnings that would have accrued if deposits had been made monthly. The funding requirement can be met with deposits made in advance of the recognition of the expense for ratemaking purposes. The electric utility must, to the extent permitted by the Internal Revenue Code, establish a postretirement benefit plan

that allows for current federal income tax deductions for contributions and allows earnings on the trust funds to accumulate tax free.

(vi) When an electric utility terminates an OPEB trust fund established pursuant to clause (v) of this subparagraph, it must notify the commission in writing. If excess assets remain after the OPEB trust fund is terminated and all trust related liabilities are satisfied, the electric utility must file, for commission approval, a proposed plan for the distribution of the excess assets. The electric utility must not distribute any excess assets until the commission approves the disbursement plan.

(2) Expenses not allowed. The following expenses must never be allowed as a component of cost of service:

(A) legislative advocacy expenses, whether made directly or indirectly, including, but not limited to, legislative advocacy expenses included in professional or trade association dues;

(B) funds expended in support of political candidates;

(C) funds expended in support of any political movement;

(D) funds expended promoting political or religious causes;

(E) funds expended in support of or membership in social, recreational, fraternal, or religious clubs or organizations;

(F) funds promoting increased consumption of electricity;

(G) additional funds expended to mail any parcel or letter containing any of the items mentioned in subparagraphs (A)-(F) of this paragraph;

(H) payments, except those made under an insurance or risk-sharing arrangement executed before the date of the loss, made to cover costs of an accident, equipment failure, or negligence at an electric utility facility owned by a person or governmental body not selling power within the State of Texas;

(I) costs, including, but not limited to, interest expense, of processing a refund or credit of sums collected in excess of the rate finally ordered by the commission in a case where the electric utility has put bonded rates into effect, or when the electric utility has otherwise been ordered to make refunds;

(J) any expenditure found by the commission to be unreasonable, unnecessary, or not in the public interest, including but not limited to executive salaries, advertising expenses, legal expenses, penalties and interest on overdue taxes, criminal penalties or fines, and civil penalties or fines.

(c) Return on invested capital. The return on invested capital is the rate of return times invested capital.

(1) Rate of return. The commission will allow each electric utility a reasonable opportunity to earn a reasonable rate of return, which is expressed as a percentage of invested capital, and will fix the rate of return in accordance with the following principles.

(A) The return should be reasonably sufficient to assure confidence in the financial soundness of the electric utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low because of changes affecting opportunities for investment, the money market, and business conditions generally.

(B) The commission will consider efforts by the electric utility to comply with the statewide integrated resource plan, the efforts and achievements of the electric utility in the conservation of resources, the quality of the electric utility's services, the efficiency of the electric utility's operations, and the quality of the electric utility's management, along with other applicable conditions and practices.

(C) The commission may, in addition, consider inflation, deflation, the growth rate of the service area, and the need for the electric utility to attract new capital. The rate of return must be high enough to attract necessary capital but need not go beyond that. In each case, the commission will consider the electric utility's cost of capital, which is the weighted average of the costs of the various classes of capital used by the electric utility.

(i) Debt capital. The cost of debt capital is the actual cost of debt at the time of issuance, plus adjustments for premiums, discounts, and refunding and issuance costs.

(ii) Equity capital. For companies with ownership expressed in terms of shares of stock, equity capital commonly consists of the following classes of stock.

(I) Common stock capital. The cost of common stock capital must be based upon a fair return on its market value.

(II) Preferred stock capital. The cost of preferred stock capital is the actual cost of preferred stock at the time of issuance, plus an adjustment for premiums, discounts, and refunding and issuance costs.

(2) Invested capital; rate base. The rate of return is applied to the rate base. The rate base, sometimes referred to as invested capital, includes as a major component the original cost of plant, property, and equipment, less accumulated depreciation, used and useful in rendering service to the public. Components to be included in determining the overall rate base are as set out in subparagraphs (A)-(F) of this paragraph.

(A) Original cost, less accumulated depreciation, of electric utility plant used by and useful to the electric utility in providing service.

(i) Original cost must be the actual money cost, or the actual money value of any consideration paid other than money, of the property at the time it would have been dedicated to public use, whether by the electric utility which is the present owner or by a predecessor.

(ii) Reserve for depreciation is the accumulation of recognized allocations of original cost, representing recovery of initial investment, over the estimated useful life of the asset. Depreciation must be computed on a straight line basis or by such other method approved under subsection (b)(1)(B) of this section over the expected useful life of the item or facility.

(iii) Payments to affiliated interests must not be allowed as a capital cost except as provided in the Public Utility Regulatory Act §36.058.

(B) Working capital allowance to be composed of, but not limited to the following:

(i) Reasonable inventories of materials, supplies, and fuel held specifically for purposes of permitting efficient operation of the electric utility in providing normal electric utility service. This amount excludes appliance inventories and inventories found by the commission to be unreasonable, excessive, or not in the public interest.

(ii) Reasonable prepayments for operating expenses. Prepayments to affiliated interests will be subject to the standards set forth in the Public Utility Regulatory §36.058.

(iii) A reasonable allowance for cash working capital. The following applies in determining the amount to be included in invested capital for cash working capital:

(I) Cash working capital for electric utilities must in no event be greater than one-eighth of total annual operations and maintenance expense, excluding amounts charged to operations and maintenance expense for materials, supplies, fuel, and prepayments.

(II) For electric cooperatives, river authorities, and investor-owned electric utilities that purchase 100% of their power requirements, one-eighth of operations and maintenance expense excluding amounts charged to operations and maintenance expense for materials, supplies, fuel, and prepayments will be considered a reasonable allowance for cash working capital.

(III) Operations and maintenance expense does not include depreciation, other taxes, or federal income taxes, for purposes of subclauses (I), (II), and (V) of this clause.

(IV) For all investor-owned electric utilities a reasonable allowance for cash working capital, including a request of zero, will be determined by the use of a lead-lag study. A lead-lag study will be performed in accordance with the following criteria:

(-a-) The lead-lag study will use the cash method; all non-cash items, including but not limited to depreciation, amortization, deferred taxes, prepaid items, and return (including interest on long-term debt and dividends on preferred stock), will not be considered.

(-b-) Any reasonable sampling method that is shown to be unbiased may be used in performing the lead-lag study.

(-c-) The check clear date, or the invoice due date, whichever is later, will be used in calculating the lead-lag days used in the study. In those cases where multiple due dates and payment terms are offered by vendors, the invoice due date is the date corresponding to the terms accepted by the electric utility.

(-d-) All funds received by the electric utility except electronic transfers must be considered available for use no later than the business day following the receipt of the funds in any repository of the electric utility (e.g. lockbox, post office box, branch office). All funds received by electronic transfer will be considered available the day of receipt.

(-e-) For electric utilities the balance of cash and working funds included in the working cash allowance calculation must consist of the average daily bank balance of all non-interest bearing demand deposits and working cash funds.

(-f-) The lead on federal income tax expense must be calculated by measurement of the interval between the midpoint of the annual service period and the actual payment date of the electric utility.

(-g-) If the cash working capital calculation results in a negative amount, the negative amount must be included in rate base.

(V) If cash working capital is required to be determined by the use of a lead-lag study under the previous subclause and either the electric utility does not file a lead lag study or the electric utility's lead-lag study is determined to be so flawed as to be unreliable, in the absence of persuasive evidence that suggests a different amount of cash working capital, an amount of cash working capital equal to negative one-eighth of operations and maintenance expense including fuel and purchased power will be presumed to be the reasonable level of cash working capital.

(C) Deduction of certain items which include, but are not limited to, the following:

(i) accumulated reserve for deferred federal income taxes;

(ii) unamortized investment tax credit to the extent allowed by the Internal Revenue Code;

(iii) contingency and/or property insurance reserves;

(iv) contributions in aid of construction;

(v) customer deposits and other sources of cost-free capital;

(D) Construction work in progress (CWIP). The inclusion of construction work in progress is an exceptional form of rate relief. Under ordinary circumstances the rate base must consist only of those items which are used and useful in providing service to the public. Under exceptional circumstances, the commission will include construction work in progress in rate base to the extent that:

(i) the electric utility has proven that:

(I) the inclusion is necessary to the financial integrity of the electric utility; and

(II) major projects under construction have been efficiently and prudently planned and managed. However, construction work in progress must not be allowed for any portion of a major project which the electric utility has failed to prove was efficiently and prudently planned and managed; or

(ii) for a project ordered by the commission under §25.199 of this title (relating to Transmission Planning, Licensing and Cost-recovery for Utilities within the Electric Reliability Council of Texas), if the commission determines that conditions warrant the inclusion of CWIP in rate base, the project is being efficiently and prudently planned and managed, and there will be a significant delay between initial investment and the initial cost recovery for a transmission project.

(E) Self-insurance reserve accounts. If a self insurance plan is approved by the commission, any shortages to the reserve account will be an increase to the rate base and any surpluses will be a decrease to the rate base. The electric utility must maintain appropriate books and records to permit the commission to properly review all charges to the reserve account and determine whether the charges being booked to the reserve account are reasonable and correct.

(F) Requirements for post test year adjustments.

(i) Post test year adjustments for known and measurable rate base additions (increases) to historical test year data will be considered only as set out in subclauses (I)-(IV) of this clause.

(I) Where the addition represents plant which would appropriately be recorded:

(-a-) for investor-owned electric utilities in FERC account 101 or 102;

(-b-) for electric cooperatives, the equivalent of FERC accounts 101 or 102.

(II) Where each addition comprises at least 10% of the electric utility's requested rate base, exclusive of post test year adjustments and CWIP.

(III) Where the plant addition is deemed by this commission to be in-service before the rate year begins.

(IV) Where the attendant impacts on all aspects of a utility's operations (including but not limited to, revenue, expenses and invested capital) can with reasonable certainty be identified, quantified and matched. Attendant impacts are those that reasonably follow as a consequence of the post test year adjustment being proposed.

(ii) Each post test year plant adjustment will be included in rate base at:

(I) the reasonable test year-end CWIP balance, if the addition is constructed by the electric utility; or,

(II) the reasonable price, if the addition represents a purchase, subject to original cost requirements, as specified in Public Utility Regulatory Act §36.053.

(iii) Post test year adjustments for known and measurable rate base decreases to historical test year data will be allowed only when clause (i)(IV) of this subparagraph and the criteria described in subclauses (I) and (II) of this clause are satisfied.

(I) The decrease represents:

(-a-) plant which was appropriately recorded in the accounts set forth in clause (i)(I) of this subparagraph;

(-b-) plant held for future use;

(-c-) CWIP (mirror CWIP is not considered CWIP); or

(-d-) an attendant impact of another post test year adjustment.

(II) Plant that has been removed from service, mothballed, sold, or removed from the electric utility's books prior to the rate year.

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

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Andrea Gonzalez
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For further information, please call: (512) 936-7244

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SUBCHAPTER K. RELATIONSHIPS WITH AFFILIATES

16 TAC §25.271

The rule is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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

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SUBCHAPTER L. NUCLEAR DECOMMISSIONING

16 TAC §25.301

The rule is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE PROVIDERS

16 TAC §25.483, §25.486

The rules are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING SPECIAL EDUCATION SERVICES

DIVISION 2. CLARIFICATION OF PROVISIONS IN FEDERAL REGULATIONS

19 TAC §89.1050

The Texas Education Agency adopts an amendment to §89.1050, concerning the admission, review, and dismissal (ARD) committee. The amendment is adopted with changes to the proposed text as published in the April 14, 2023 issue of the *Texas Register* (48 TexReg 1946) and will be republished. The adopted amendment provides clarification regarding students who register in a new school district during the summer months, as well as students who transfer to a new district during the school year. Additionally, the adopted amendment clarifies the federal requirement to ensure that a parent who is unable to meaningfully participate in English is still able to understand the proceedings of the admission, review, and dismissal (ARD) committee and receives proper notice in the parent's native language or other mode of communication.

REASONED JUSTIFICATION: Section 89.1050 describes ARD committee requirements for a child who receives special education and related services.

The amendment to §89.1050 provides clarification based on requests from school districts regarding students who register in a new district during the summer months. Additionally, the amendment clarifies an ARD committee's duties when a parent is deaf or hard of hearing or whose native language is not English. Specifically, the following changes have been made.

The amendment removes an outdated cross reference to 34 Code of Federal Regulations (CFR), §300.18, in subsection (c)(2) and amends subsections (f) and (g) to require the school district to take action, including arranging for an interpreter for parents who are deaf or hard of hearing or whose native language is a language other than English, to ensure parent understanding when a parent is unable to meaningfully participate in the ARD process. Based on public comment, the language in subsection (g) has been amended at adoption to require a district to take "all reasonable actions necessary" rather than "whatever action is necessary."

The amendment to subsection (j) clarifies ARD committee responsibilities when a student transfers to a new school district during the school year or registers in a new district during the summer months.

The amendment to subsection (j)(1) addresses requirements for a student who transfers within the state in the same school year with an individualized education program (IEP) in effect in the student's previous district. The proposed amendment would have changed the timeline for completing the requirements of 34 CFR, §300.323(e)(1) or (2), from 30 school days to 30 calendar days to align with the new definition of "verify" in subsection (j)(6). However, based on public comment, the timeline in subsection (j)(1) has been changed at adoption to 20 school days.

The amendment to subsection (j)(2) addresses a student who transfers from a district in another state in the same school year with an IEP in effect in the student's previous district. The proposed amendment would have changed the timeline for completing the requirements of 34 CFR, §300.323(f)(2), from 30 school days to 30 calendar days to align with the new definition of "verify" in subsection (j)(6). However, based on public comment, the timeline in subsection (j)(2) has been changed at adoption to 20 school days.

The amendment to subsection (j)(3) requires the new school district to take reasonable steps to obtain the student's previous records in a timely manner.

The amendment to subsection (j)(4) addresses a student who registers in a new district in the summer months. It requires the new school district to implement the IEP from the previous district if the parents or in- or out-of-state district verify the previous IEP before the new school year, and it also requires that the timelines in subsection (j)(1) and (2) apply to any student with an unverified eligibility for special education services before the start of the new school year.

New subsection (j)(5) addresses additional requirements for a student who transfers to a new school district during the summer months. If the new district wishes to convene an ARD committee meeting to consider revision to the student's IEP before the start of the school year, a new provision requires the district to determine if the student's parent will agree to waive the five school-day notice, and, if the parent agrees, to make every reasonable effort to hold the ARD meeting prior to the first day of the new school year.

New subsection (j)(6) adds a new definition of "verify" to mean that the new school district has received a copy of the student's IEP that was in effect in their previous district. Because of this specific definition, timelines associated with developing, adopting, and implementing a new IEP for a student who transfers during the school year have been changed to 20 school days.

New subsection (j)(7) provides instruction for the new district awaiting verification to take reasonable steps, with the consultation of the student's parent, to provide comparable services received by the student in the previous district if the new district is aware of the student's placement.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began April 14, 2023, and ended May 15, 2023. Two public hearings to solicit testimony and input on the proposed amendment were held on April 26 and May 1, 2023, via Zoom. Following is a summary of the public comments received and agency responses.

Comment: A special education administrator commented that the proposed change in subsection (g) referencing the actions

of a school district to take "whatever action is necessary" is extraordinary language that seems to require an unlimited scope of responsibilities on the district. The administrator recommended changing the language to reflect "reasonable actions" of the school district to ensure that parents understand the proceedings of the ARD committee.

Response: The agency agrees in part. While the agency can understand that the phrase "whatever action is necessary" may be interpreted as requiring district actions that may not be feasible, the agency has determined that stating solely "reasonable actions" does not adequately communicate the importance of taking all possible actions to ensure parent understanding. Therefore, the agency has amended subsection (g) at adoption to state that the district must take "all reasonable actions necessary" to ensure that the parent understands the meeting's proceedings.

Comment: Disability Rights Texas requested a sentence be added in subsection (g) to state that a parent must have the opportunity to review the new or revised required elements of a student's IEP in writing during the meeting.

Response: The agency disagrees that the rule should address a parent's opportunity to review new or revised required elements of a student's IEP in writing during an ARD meeting. However, the agency will review existing technical assistance resources to determine whether revisions should be made to those resources to include information about parent requests to view materials in writing at the ARD meeting, along with other parental participation best practices.

Comment: Eleven school district special education professionals and the Texas Association of School Psychologists (TASP) expressed concern with the proposed change from 30 school days to 30 calendar days in subsection (j)(1) and (2). One comment stated that 30 calendar days is not sufficient to complete a full individual and initial evaluation and develop an IEP for a student. Another comment stated that calendar days are interrupted by school holidays and that more time is needed due to an increased level of transfer students. An additional comment referenced that this change would require a district to make decisions on placement without seeing or working with a student and stressed that many staff will not be on contract during the summer.

Response: The agency agrees in part. Based on some of the comments received, the agency has revised subsection (j)(1) and (2) at adoption from the proposed 30 calendar days to 20 school days. In addition, the agency disagrees in part and provides the following clarification.

Federal regulations in 34 CFR, §300.323, drive the requirements for §89.1050(j). Section 300.323(a) reflects the requirement that a school district have an IEP in effect at the beginning of each school year for each child who receives special education services. Whereas §300.323(e) and (f) reflect the procedures required when a student transfers to a school district during the school year from an in- or out-of-state district, the federal regulations do not address the procedures required for students who enroll in a new district over the summer. However, §300.323(a) would apply. Section 89.1050(j) is written in part to address the required actions a school district must take when a student enrolls over the summer. To that end, the agency provides the following clarification.

If a student transfers to a Texas school district from another Texas school district during the school year, the provisions in 34 CFR, §300.323(e), would apply. Those provisions state that the new district must provide a free appropriate public education (FAPE) to the transfer student, including services comparable to those described in the child's IEP from the previous district, until the new district either (a) adopts the child's IEP from the previous district, or (b) develops, adopts, and implements a new IEP. There is no set timeline defined in this provision of §300.323(e). The purpose of the proposed change from 30 school days to 30 calendar days was to align with the more specific definition of "verify" provided in the proposed rule.

If a student transfers to a Texas district from a district outside of Texas during the school year, the provisions in 34 CFR, § 300.323(f), would apply. The difference between a transfer from out of state versus within Texas is that the provision of FAPE and comparable services are effective until the new district (a) conducts an evaluation, and (b) develops, adopts, and implements a new IEP, if appropriate. While there is no set timeline defined in this provision of §300.323(f), if an evaluation is determined to be necessary, the evaluation timeline would align with the Texas requirement of having initial evaluations completed within 45 school days, with limited exceptions. The requirement to comply with the development, adoption, and implementation of the new IEP would then align with §300.323(c)(1) to have an ARD meeting within 30 calendar days from the completion date of the evaluation report. If the new district determines that an evaluation is not necessary, the purpose of the proposed change from 30 school days to 30 calendar days was to align with the more specific definition of "verify" provided in the proposed rule.

Procedures for ensuring the provision of FAPE to students with disabilities who enroll in a new district over the summer months are not contemplated in 34 CFR, §300.323.

Because the definition of "verify" requires actual receipt of a student's previous IEP, the agency proposed the change from 30 school days to 30 calendar days based on the premise that possession of the student's actual IEP, rather than informal verifications of special education services that were in place at the student's former district, would allow for a quicker turnaround for the required decision-making process. While the agency understands the importance of getting to know students well prior to determining whether to accept or revise a child's IEP that was in effect in a previous district, as well as determining whether an evaluation is necessary, the agency also must balance the need for expedient decisions in relation a student's necessary services. Waiting a full six-week period prior to making determinations, especially when the timeline does not begin until the new district has a copy of the student's IEP that was previously in effect, delays those expedient decisions. However, the agency acknowledges that calendar day references are difficult to account for in terms of school business. For these reasons, at adoption, the agency has revised subsections (j)(1) and (2) from the proposed 30 calendar days to 20 school days.

Comment: A licensed specialist in school psychology employed by a school district expressed that not considering students who enroll in a new district during the summer months as transfer students is unfair to children and their families.

Response: The agency disagrees. Procedures for students with disabilities who transfer from an in- or out-of-state district are addressed in 34 CFR, §300.323. Procedures for students with disabilities who enroll in a new district over the summer months are not. Therefore, §89.1050(j) is partly intended to address the requirement in §300.323(a) that IEPs must be developed and implemented at the beginning of the school year.

Comment: TASP commented that the proposed definition of "verify" should include both the student's evaluation and the student's IEP.

Response: The agency disagrees. While the agency acknowledges that having both the student's most recent IEP and evaluation would provide a school district with the most up-to-date and necessary information about the student's programming and needs, the agency has determined that a copy of the student's IEP that was in effect at the previous district is the most essential piece that would trigger the school district's obligations to comply with the requirements to provide the student FAPE. The agency notes that nothing prohibits the district from pursuing consent for an evaluation from the student's parent regardless of whether the district is in possession of the most recent evaluation.

Comment: TASP and a special education administrator expressed the need for the agency to provide guidance on what is meant by "reasonable steps" in proposed subsection (j)(7) in relation to providing comparable services while the district awaits verification (i.e., receipt of the IEP) of the student's eligibility for special education services. The special education administrator asked if using a similar form documenting the district's agreement to implement certain services, regardless of whether it is a student who transfers into the district during the school year or one who enrolls in a new district over the summer, would be appropriate.

Response: The agency provides the following clarification. If the new school district has been unable to verify the student's eligibility for special education services (i.e., has not received a copy of the student's most recent IEP), often the student's parent or the student's former district will informally acknowledge the student's receipt of certain special education services at the former district. To that end, a reasonable step of the new district would be to attempt to provide similar services to the information it was provided by the parent or the previous district. While the agency has no requirement to use a specific form, the steps to provide comparable services would apply regardless of when a student transferred or enrolled in a district, so a similar form for both circumstances seems acceptable.

Comment: A campus special education coordinator expressed that the proposed rule will drive educators from the profession and asked the agency to refrain from adopting it.

Response: This comment is outside the scope of the proposed rulemaking. However, the agency notes that the amendment to §89.1050 was proposed primarily based on requests from the field.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code, §29.001, which requires the agency to ensure that the statewide design for special education ensures that a free appropriate public education is available to all eligible students with a disability, including that individualized education programs (IEPs) are properly developed, implemented, and maintained in the least restrictive environment that is appropriate to meet the student's educational needs; 34 Code of Federal Regulations (CFR), §300.322, which requires actions to ensure that parents understand the proceedings of the IEP team meeting, including arranging for interpreters; and 34 CFR, §300.323, which requires an IEP to be in effect at the beginning of each school year for a child with a disability, with limited exception.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §29.001; and 34 Code of Federal Regulations, §300.322 and §300.323.

§89.1050. The Admission, Review, and Dismissal Committee.

(a) Each school district must establish an admission, review, and dismissal (ARD) committee for each eligible student with a disability and for each student for whom a full individual and initial evaluation is conducted pursuant to §89.1011 of this title (relating to Full Individual and Initial Evaluation). The ARD committee is the individualized education program (IEP) team defined in federal law and regulations, including, specifically, 34 Code of Federal Regulations (CFR), §300.321. The school district is responsible for all of the functions for which the IEP team is responsible under federal law and regulations and for which the ARD committee is responsible under state law, including the following:

(1) 34 CFR, §§300.320-300.325, and Texas Education Code (TEC), §29.005 (individualized education programs);

(2) 34 CFR, §§300.145-300.147 (relating to placement of eligible students in private schools by a school district);

(3) 34 CFR, §§300.132, 300.138, and 300.139 (relating to the development and implementation of service plans for eligible students placed by parents in private school who have been designated to receive special education and related services);

(4) 34 CFR, §300.530 and §300.531, and TEC, §37.004 (disciplinary placement of students with disabilities);

(5) 34 CFR, §§300.302-300.306 (relating to evaluations, re-evaluations, and determination of eligibility);

(6) 34 CFR, §§300.114-300.117 (relating to least restrictive environment);

(7) TEC, §28.006 (Reading Diagnosis);

(8) TEC, §28.0211 (Satisfactory Performance on Assessment Instruments Required; Accelerated Instruction);

(9) TEC, §28.0212 (Junior High or Middle School Personal Graduation Plan);

(10) TEC, §28.0213 (Intensive Program of Instruction);

(11) TEC, Chapter 29, Subchapter I (Programs for Students Who Are Deaf or Hard of Hearing);

(12) TEC, §30.002 (Education for Children with Visual Impairments);

(13) TEC, §30.003 (Support of Students Enrolled in the Texas School for the Blind and Visually Impaired or Texas School for the Deaf);

(14) TEC, §33.081 (Extracurricular Activities);

(15) TEC, Chapter 39, Subchapter B (Assessment of Academic Skills); and

(16) TEC, §48.102 (Special Education).

(b) For a student from birth through two years of age with a visual impairment or who is deaf or hard of hearing, an individualized family services plan (IFSP) meeting must be held in place of an ARD committee meeting in accordance with 34 CFR, §§300.320-300.324, and the memorandum of understanding between the Texas Education Agency and the Texas Health and Human Services Commission. For students three years of age and older, school districts must develop an IEP.

(c) ARD committee membership.

(1) ARD committees must include the following:

(A) the parents of the student;

(B) not less than one regular education teacher of the student (if the student is, or may be, participating in the regular education environment) who must, to the extent practicable, be a teacher who is responsible for implementing a portion of the student's IEP;

(C) not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student;

(D) a representative of the school district who:

(i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students with disabilities;

(ii) is knowledgeable about the general education curriculum; and

(iii) is knowledgeable about the availability of resources of the school district;

(E) an individual who can interpret the instructional implications of evaluation results, who may be a member of the committee described in subparagraphs (B)-(D) and (F) of this paragraph;

(F) at the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel, as appropriate;

(G) whenever appropriate, the student with a disability;

(H) to the extent appropriate, with the consent of the parents or a student who has reached the age of majority, a representative of any participating agency that is likely to be responsible for providing or paying for transition services;

(I) a representative from career and technical education (CTE), preferably the teacher, when considering initial or continued placement of a student in CTE; and

(J) a professional staff member who is on the language proficiency assessment committee who may be a member of the committee described in subparagraphs (B) and (C) of this paragraph, if the student is identified as an English language learner.

(2) The special education teacher or special education provider that participates in the ARD committee meeting must be appropriately certified or licensed as required by 34 CFR, §300.156.

(3) If the student is:

(A) a student with a suspected or documented visual impairment, the ARD committee must include a teacher who is certified in the education of students with visual impairments;

(B) a student who is suspected or documented to be deaf or hard of hearing, the ARD committee must include a teacher who is certified in the education of students who are deaf or hard of hearing; or

(C) a student with suspected or documented deaf-blindness, the ARD committee must include a teacher who is certified in the education of students with visual impairments and a teacher who is certified in the education of students who are deaf or hard of hearing.

(4) An ARD committee member is not required to attend an ARD committee meeting if the conditions of either 34 CFR, §300.321(e)(1), regarding attendance, or 34 CFR, §300.321(e)(2), regarding excusal, have been met.

(d) The school district must take steps to ensure that one or both parents are present at each ARD committee meeting or are afforded the opportunity to participate, including notifying the parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed upon time and place. Additionally, a school district must allow parents who cannot attend an ARD committee meeting to participate in the meeting through other methods such as through telephone calls or video conferencing. The school district must provide the parents with written notice of the ARD committee meeting that meets the requirements in 34 CFR, §300.322, at least five school days before the meeting unless the parents agree to a shorter timeframe.

(e) Upon receipt of a written request for an ARD committee meeting from a parent, the school district must:

(1) schedule and convene a meeting in accordance with the procedures in subsection (d) of this section; or

(2) within five school days, provide the parent with written notice explaining why the district refuses to convene a meeting.

(f) The school district must provide the parent with a written notice required under subsection (d) or (e)(2) of this section in the parent's native language, unless it is clearly not feasible to do so. If the parent's native language is not a written language, the school district must take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication so that the parent understands the content of the notice.

(g) All members of the ARD committee must have the opportunity to participate in a collaborative manner in developing the IEP. The school district must take all reasonable actions necessary to ensure that the parent understands the proceedings of the ARD committee meeting, including arranging for an interpreter for parents who are deaf or hard of hearing or whose native language is a language other than English. A decision of the ARD committee concerning required elements of the IEP must be made by mutual agreement if possible. The ARD committee may agree to an annual IEP or an IEP of shorter duration.

(1) When mutual agreement about all required elements of the IEP is not achieved, the parent who disagrees must be offered a single opportunity to recess and reconvene the ARD committee meeting. The period of time for reconvening the ARD committee meeting must not exceed ten school days, unless the parties mutually agree otherwise. The ARD committee must schedule the reconvened meeting at a mutually agreed upon time and place. The opportunity to recess and reconvene is not required when the student's presence on the campus presents a danger of physical harm to the student or others or when the student has committed an expellable offense or an offense that may lead to a placement in a disciplinary alternative education program. The requirements of this subsection do not prohibit the ARD committee from recessing an ARD committee meeting for reasons other than the failure to reach mutual agreement about all required elements of an IEP.

(2) During the recess, the ARD committee members must consider alternatives, gather additional data, prepare further documentation, and/or obtain additional resource persons who may assist in enabling the ARD committee to reach mutual agreement.

(3) If a recess is implemented as provided in paragraph (1) of this subsection and the ARD committee still cannot reach mutual agreement, the school district must implement the IEP that it has determined to be appropriate for the student.

(4) Each member of the ARD committee who disagrees with the IEP developed by the ARD committee is entitled to include a statement of disagreement in the IEP.

(h) Whenever a school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of

a student or the provision of a free appropriate public education to the student, the school district must provide prior written notice as required in 34 CFR, §300.503, including providing the notice in the parent's native language or other mode of communication. This notice must be provided to the parent at least five school days before the school district proposes or refuses the action unless the parent agrees to a shorter timeframe.

(i) If the student's parent is unable to speak English and the parent's native language is Spanish, the school district must provide a written copy or audio recording of the student's IEP translated into Spanish. If the student's parent is unable to speak English and the parent's native language is a language other than Spanish, the school district must make a good faith effort to provide a written copy or audio recording of the student's IEP translated into the parent's native language.

(1) For purposes of this subsection, a written copy of the student's IEP translated into Spanish or the parent's native language means that all of the text in the student's IEP in English is accurately translated into the target language in written form. The IEP translated into the target language must be a comparable rendition of the IEP in English and not a partial translation or summary of the IEP in English.

(2) For purposes of this subsection, an audio recording of the student's IEP translated into Spanish or the parent's native language means that all of the content in the student's IEP in English is orally translated into the target language and recorded with an audio device. A school district is not prohibited from providing the parent with an audio recording of an ARD committee meeting at which the parent was assisted by an interpreter as long as the audio recording provided to the parent contains an oral translation into the target language of all of the content in the student's IEP in English.

(3) If a parent's native language is not a written language, the school district must take steps to ensure that the student's IEP is translated orally or by other means to the parent in his or her native language or other mode of communication.

(4) Under 34 CFR, §300.322(f), a school district must give a parent a written copy of the student's IEP at no cost to the parent. A school district meets this requirement by providing a parent with a written copy of the student's IEP in English or by providing a parent with a written translation of the student's IEP in the parent's native language in accordance with paragraph (1) of this subsection.

(j) A school district must comply with the following for a student who is new to the school district.

(1) When a student transfers to a new school district within the state in the same school year and the parents or previous school district verifies that the student had an IEP that was in effect in the previous district, the new school district must meet the requirements of 34 CFR, §300.323(e), regarding the provision of special education services. The timeline for completing the requirements outlined in 34 CFR, §300.323(e)(1) or (2), is 20 school days from the date the student is verified as being a student eligible for special education services.

(2) When a student transfers from a school district in another state in the same school year and the parents or previous school district verifies that the student had an IEP that was in effect in the previous district, the new school district must meet the requirements of 34 CFR, §300.323(f), regarding the provision of special education services. If the new school district determines that an evaluation is necessary, the evaluation is considered a full individual and initial evaluation and must be completed within the timelines established by §89.1011(c) and (e) of this title. The timeline for completing the requirements in 34 CFR, §300.323(f)(2), if appropriate, is 30 calendar days from the date of the completion of the evaluation report. If the school district determines that an evaluation is not necessary, the timeline for completing the requirements outlined in 34 CFR, §300.323(f)(2), is 20 school days from the date the student is verified as being a student eligible for special education services.

(3) In accordance with 34 CFR, §300.323(g), the new school district must take reasonable steps to promptly obtain the student's records from the previous school district, and, in accordance with TEC, §25.002, and 34 CFR, §300.323(g), the previous school district must furnish the new school district with a copy of the student's records, including the student's special education records, not later than the 10th working day after the date a request for the information is received by the previous school district.

(4) A student who registers in a new school district during the summer is not considered a transfer student for the purposes of this subsection or for 34 CFR, §300.323(e) or (f). For these students, if the parents or in- or out-of-state school district verifies before the new school year begins that the student had an IEP that was in effect in the previous district, the new school district must implement the IEP from the previous school district in full on the first day of class of the new school year or must convene an ARD committee meeting during the summer to revise the student's IEP for implementation on the first day of class of the new school year. If the student's eligibility for special education and related services cannot be verified before the start of the new school year, the timelines in paragraphs (1) and (2) of this subsection apply to the student.

(5) In the case of a student described by paragraph (4) of this subsection, if the new district wishes to convene an ARD committee meeting to consider revision to the student's IEP before the beginning of the school year, the new district must determine whether the parent will agree to waive the requirement in subsection (d) of this section that the written notice of the ARD committee meeting must be provided at least five school days before the meeting. If the parent agrees to a shorter timeframe, the new district must make every reasonable effort to hold the ARD committee meeting prior to the first day of the new school year if the parent agrees to the meeting time.

(6) For the purposes of this subsection, "verify" means that the new school district has received a copy of the student's IEP that was in effect in the previous district.

(7) While the new school district waits for verification, the new school district must take reasonable steps to provide, in consultation with the student's parents, services comparable to those the student received from the previous district if the new school district has been informed by the previous school district of the student's special education and related services and placement.

(k) All disciplinary actions regarding students with disabilities must be determined in accordance with 34 CFR, §§300.101(a) and 300.530-300.536; TEC, Chapter 37, Subchapter A; and §89.1053 of this title (relating to Procedures for Use of Restraint and Time-Out). If a school district takes a disciplinary action regarding a student with a disability who receives special education services that constitutes a change in placement under federal law, the district shall:

(1) not later than the 10th school day after the change in placement:

(A) seek consent from the student's parent or person standing in parental relation to the student to conduct a functional behavioral assessment of the student if a functional behavioral assessment has never been conducted on the student or the student's most recent functional behavioral assessment is more than one year old; and

(B) review any previously conducted functional behavioral assessment of the student and any behavior improvement plan or behavioral intervention plan developed for the student based on that assessment; and

(2) as necessary:

(A) develop a behavior improvement plan or behavioral intervention plan for the student if the student does not have a plan; or

(B) if the student has a behavior improvement plan or behavioral intervention plan, revise the student's plan.

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

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Texas Education Agency
Effective date: July 18, 2023
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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 181. VITAL STATISTICS

SUBCHAPTER E. DELAYED REGISTRATION

25 TAC §181.62

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts an amendment to §181.62, concerning Documentary Evidence; Requirements and Acceptability.

The amendment to §181.62 is adopted without changes to the proposed text as published in the May 26, 2023, issue of the *Texas Register* (48 TexReg 2657). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The amendment assists people seeking a delayed registration of birth, despite having contradictory documents regarding parentage. Under the previous rule, people were unable to obtain a delayed registration of birth if documents presented to the State Registrar contained contradictory information. An inability to obtain a birth certificate may impact a person's ability to obtain state-issued identification documents, passports, or other governmental benefits. This rule change assists persons unable to have their birth recorded by requiring that documents not be contradictory on name, date and place of birth, and the identity of one parent. If there are contradictory documents regarding the second parent, the amendment requires that the second parent not be recorded and the field for that parent remain blank on any birth certificate issued.

The amendment also clarifies the number and types of acceptable documents to submit with a request to record a delayed registration of birth.

COMMENTS

The 21-day comment period ended June 16, 2023.

During this period, DSHS did not receive any comments regarding the proposed rule.

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code §191.003, which authorizes rules necessary for the effective administration of Vital Statistics Records; Texas Health and Safety Code §192.022, which authorizes rules for filing applications with the State Registrar for delayed birth certificates; and Texas Health and Safety Code §1001.075, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code Chapter 1001.

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

Filed with the Office of the Secretary of State on June 28, 2023.

TRD-202302355
Cynthia Hernadez
General Counsel
Department of State Health Services
Effective date: July 18, 2023
Proposal publication date: May 26, 2023
For further information, please call: (512) 776-7646

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 9. TRAINING AND EMPLOYEE PROGRAMS

SUBCHAPTER C. EMPLOYEE PROGRAMS

30 TAC §9.20

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amended Chapter 9, Training, by adding Subchapter C: Employee Programs, and retitling Chapter 9 to Training and Employee Programs.

Amended Chapter 9 and §9.20 are adopted *with changes* to correct punctuation to the proposed text as published in the March 10, 2023, issue of the *Texas Register* (48 TexReg 1402) and, therefore, will be republished.

Background and Summary of the Factual Basis for the Adopted Rules

The following statutes require all state agencies to adopt rules relating to the operation of two employee leave pool programs:

Texas Government Code, Subchapter A, State Employee Sick Leave Pool, §§661.001, et seq., and Texas Government Code, Subchapter A-1, State Employee Family Leave Pool, §§661.021, et seq.

TCEQ's established sick leave pool policy is in Operating Policy and Procedure (OPP) 9.06, Sick Leave Pool, and administered in accordance with the statute by the Human Resources and Staff Services Division. TCEQ is revising OPP 9.06 to establish a family sick leave pool program and follow similar administrative procedures to the sick leave pool program to incorporate House Bill (HB) 2063, 87th Texas Legislature, 2021.

The adopted rule confirms the establishment of the agency's programs for the sick leave and family leave pools and incorporates by reference the agency's policy and procedure.

Section by Section Discussion

The commission rulemaking adoption amends the title of Chapter 9 from "Training" to "Training and Employee Programs."

The commission adopts new Subchapter C, Employee Programs, and new §9.20, Employee Leave Pool Programs, to establish by rule the agency's sick leave pool and family leave pool programs and incorporate by reference the agency's policies to administer these programs.

Final Regulatory Impact Determination

The commission reviewed the new rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the new rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined by statute. Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a).

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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." The intent of the adopted rulemaking is to conform to Texas Government Code, §661.002 and §661.022, and to provide an internal family leave pool program and sick leave pool program to TCEQ employees. Because the changes are not expressly to protect the environment and reduce risks to human health and environment, the rulemaking does not meet the definition of a "major environmental rule."

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

Takings Impact Assessment

The commission evaluated the adopted new rule and assessed whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this new rule is to conform to Texas Government Code, §661.002 and §661.022, and to provide an internal family leave pool program and sick leave pool program to TCEQ employees. Promulgation and enforcement of this adopted new rule will be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulation does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, there are no burdens imposed on private real property.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption and found that it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the rulemaking adoption is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No public comments were received.

Public Comment

The commission offered a public hearing on April 7, 2023. The comment period closed on April 10, 2023. No public comments were received.

Statutory Authority

The new rule is adopted under Texas Water Code (TWC), TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under the TWC and any other laws of the State of Texas.

The rulemaking adoption implements Texas Government Code, §661.002 and §661.022, which states that a governing body of the state agency shall adopt rules and prescribe procedures relating to the operation of the agency sick leave pool and family leave pool.

§9.20. Employee Leave Pool Programs.

(a) Sick Leave Pool. A sick leave pool is established to allow eligible agency employees to use time contributed to the sick leave pool, if the employee has exhausted their sick leave due to a catastrophic illness or injury;

(b) Family Leave Pool. A family leave pool is established to allow eligible agency employees to use time contributed to the family leave pool, to allow for more flexibility in bonding with and caring for children during a child's first year following birth, adoption, or foster placement, and caring for a seriously ill family member or the employee's own serious illness, including pandemic-related illnesses or complications caused by a pandemic; and

(c) Administration of both pools programs is delegated to the Deputy Director for the Human Resources and Staff Services Division and shall be implemented by policy and procedures that are consistent with Texas Government Code, Chapter 661, as amended.

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 June 28, 2023.

TRD-202302354
David Timberger
Deputy Director, General Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2678

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CHAPTER 113. STANDARDS OF PERFORMANCE FOR HAZARDOUS AIR POLLUTANTS AND FOR DESIGNATED FACILITIES AND POLLUTANTS
SUBCHAPTER D. DESIGNATED FACILITIES AND POLLUTANTS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§113.2400, 113.2402, 113.2404, 113.2406, 113.2408, 113.2410, and 113.2412; and amended §113.2069.

Sections 113.2402, 113.2406, and 113.2410 are adopted *with changes* to the proposed text as published in the January 27, 2023, issue of the *Texas Register* (48 TexReg 301) and will be republished. Sections 113.2069, 113.2400, 113.2404, 113.2408, and 113.2412 are adopted *without changes* to the proposed text and will not be republished.

The adopted new and amended sections are included in the adopted revisions to the Federal Clean Air Act (FCAA), §111(d) Texas State Plan for Existing Municipal Solid Waste (MSW) Landfills. The adopted revisions to Chapter 113 and the associated revisions to the state plan will be submitted to the U.S. Environmental Protection Agency (EPA) for review and approval.

Background and Summary of the Factual Basis for the Adopted Rules

The amendments to Chapter 113, Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants, are necessary to implement emission guidelines in 40 Code of Federal Regulations (CFR) Part 60, Subpart Cf, Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills. These emission guidelines (2016 emission guidelines) were promulgated by the EPA on August 29, 2016 (81 FR 59276), and amended on August 26, 2019 (84 FR 44547), and March 26, 2020 (85 FR 17244). The August 26, 2019, amendments to Subpart Cf were vacated on April 5, 2021, by the D.C. Circuit Court of Appeals, and are not included in this proposal. On May 21, 2021, the EPA also published a federal plan (86 FR 27756) to implement the 2016 emission guidelines for MSW landfills located in states where an approved FCAA, §111(d), state plan is not in effect. The federal plan for MSW landfills was adopted under 40 CFR Part 62, Subpart OOO.

The FCAA, §111, requires the EPA to develop performance standards and other requirements for categories of sources which the EPA finds "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." Under FCAA, §111, the EPA promulgates New Source Performance Standards (NSPS) and Emission Guidelines. NSPS regulations promulgated by the EPA apply to new stationary sources for which construction begins after the NSPS is proposed, or that are reconstructed or modified on or after a specified date. Emission Guidelines promulgated by the EPA are similar to NSPS, except that they apply to existing sources which were constructed on or before the date the NSPS is proposed, or that are reconstructed or modified before a specified date. Unlike the NSPS, emission guidelines are not enforceable until the EPA approves a state plan or adopts a federal plan for implementing and enforcing them.

States are required under the FCAA, §111(d), and 40 CFR Part 60, Subpart B, to adopt and submit to the EPA for approval a state plan to implement and enforce emission guidelines promulgated by the EPA. A state plan is required to be at least as protective as the corresponding emission guidelines. The FCAA also requires the EPA to develop, implement, and enforce a federal plan to implement the emission guidelines. The federal plan applies to affected units in states without an approved state plan.

In 1996, the EPA promulgated the original NSPS for MSW landfills under 40 CFR Part 60 Subpart WWW, and corresponding emission guidelines (the 1996 emission guidelines) under 40 CFR Part 60 Subpart Cc. TCEQ adopted rules under Chapter 113, Subchapter D, Division 1, and a corresponding §111(d) state plan, to implement the 1996 emission guidelines on October 7, 1998 (23 TexReg 10874). The EPA approved TCEQ's rules and state plan for existing MSW landfills on June 17, 1999 (64 FR 32427).

On August 29, 2016, the EPA adopted a new NSPS (40 CFR Part 60 Subpart XXX) and new emission guidelines (40 CFR Part 60 Subpart Cf) for MSW landfills, which essentially replaced the 1996 NSPS and emission guidelines. The 2016 emission guidelines lowered the emission threshold at which a landfill gas collection system is required from 50 megagrams (Mg) of nonmethane organic compounds (NMOC) to 34 Mg of NMOC. The EPA's 2016 adoption of NSPS Subpart XXX and the 2016 emission guidelines under Subpart Cf also included changes to monitoring, recordkeeping, and reporting requirements, relative to the original 1996 requirements of Subparts WWW and Cc.

The original deadline for states to submit a state plan to implement the EPA's 2016 emission guidelines for MSW landfills was May 30, 2017. The TCEQ submitted a request for an extension to this deadline as provided under 40 CFR §60.27(a). In June 2017, TCEQ received a response from EPA Region 6 which stated that, as a result of the stay in effect at that time, "a state plan submittal is not required at this time." The stay expired August 29, 2017. On October 17, 2017, the EPA released a "Desk Statement" concerning the emission guidelines, which stated that "we do not plan to prioritize the review of these state plans nor are we working to issue a Federal Plan for states that failed to submit a state plan. A number of states have expressed concern that their failure to submit a state plan could subject them to sanctions under the Clean Air Act. As the Agency has previously explained, states that fail to submit state plans are not subject to sanctions (e.g., loss of federal highway funds)." Given that the EPA's Desk Statement indicated that submittal of state plans was not a priority, and considering that the EPA had stated that a reconsideration rulemaking of the NSPS and emission guidelines was impending, TCEQ put state plan development on hiatus to monitor developments in the federal rules. On August 26, 2019, the EPA promulgated rules which established a new deadline of August 29, 2019, for states to submit a §111(d) state plan for the 2016 emission guidelines. However, the August 26, 2019, rules were vacated and remanded on April 5, 2021, effectively restoring the original Subpart B deadline of May 30, 2017. *(Environmental Defense Fund v. EPA*, No. 19-1222 (D.C. Circuit, 2021)).

On March 12, 2020, the EPA published a finding of failure to submit (85 FR 14474) that determined that 42 states and territories, including the State of Texas, had failed to submit the required §111(d) state plans to implement the 2016 emission guidelines for MSW landfills. On May 21, 2021, the EPA published a federal plan under 40 CFR Part 62, Subpart OOO, to implement

the 2016 emission guidelines for MSW landfills in states where an approved §111(d) state plan for the 2016 emission guidelines was not in effect. This federal plan became effective on June 21, 2021, and currently applies to MSW landfills in Texas and numerous other states without an approved state plan implementing the 2016 emission guidelines. The overall requirements of the federal plan are similar to the emission guidelines in Subpart Cf, but EPA included certain changes and features in the federal plan to simplify compliance obligations for landfills that are already controlling emissions under prior landfill regulations such as 40 CFR Part 60, Subpart WWW, or state rules adopted as part of a previously approved state plan for the 1996 emission guidelines. Once a state has obtained approval for a §111(d) state plan implementing the 2016 emission guidelines, most requirements of the federal plan no longer apply, as affected sources would instead comply with the requirements of the approved state plan. (Some of the compliance deadlines and increments of progress specified in the federal plan may still apply.)

In order to implement the EPA's 2016 emission guidelines, TCEQ must revise the corresponding Chapter 113 rules and state plan for existing MSW landfills. The adopted changes to Chapter 113 include amendments to §113.2069 in Subchapter D, Division 1, and several new sections under a new Division 6. The adopted rules will, once approved by the EPA as a revision to the Texas state plan, phase out the requirement to comply with the commission's existing Division 1 rules and phase in new rules corresponding to the EPA's 2016 emission guidelines. The adopted Division 6 rules also incorporate certain elements from the 40 CFR Part 62 Subpart OOO federal plan to facilitate ongoing compliance for MSW landfills in Texas which have been required to comply with the federal plan since it became effective on June 21, 2021. The transition date for the applicability of the adopted Division 6 rules, and non-applicability of the existing Division 1 rules, is the effective date of the EPA's approval of Texas' revisions to the §111(d) state plan. This is discussed in more detail in the section-by-section discussion for the adopted changes to §113.2069 and adopted new §113.2412.

Interested persons are encouraged to consult the EPA's 2016 emission guidelines under 40 CFR Part 60 Subpart Cf, and the federal plan under 40 CFR Part 62 Subpart OOO, for further information concerning the specific requirements that are the subject of this rulemaking. In a concurrent action, the commission is adopting a state plan revision to implement and enforce the 2016 emission guidelines that are the subject of this rulemaking.

Section by Section Discussion

§113.2069, Compliance Schedule and Transition to 2016 Landfill Emission Guidelines

The commission adopts an amendment to §113.2069. Adopted subsection (c) serves as a transition mechanism for owners or operators of existing MSW landfills to end compliance with the requirements of Chapter 113, Subchapter D, Division 1, and begin compliance with the requirements of Subchapter D, Division 6, based on the implementation date specified in §113.2412. The implementation date is a future date established when the EPA's approval of the revised Texas §111(d) state plan for the 2016 emission guidelines for landfills becomes effective. On and after this date, owners or operators of MSW landfills will no longer be required to comply with the Division 1 rules but must instead comply with the applicable requirements of Division 6.

The Division 1 rule requirements were created to implement the 1996 emission guidelines contained in 40 CFR Part 60 Subpart Cc, which have been supplanted by the more stringent 2016 emission guidelines contained in 40 CFR Part 60 Subpart Cf. These Division 1 rules will no longer be needed once the EPA approves TCEQ's new Division 6 rules and the corresponding §111(d) state plan to implement the 2016 emission guidelines.

The commission also adopts a revision to the title of §113.2069 to reflect that the section now contains provisions for the transition from the Chapter 113, Division 1, requirements to the new Division 6 rules implementing the 2016 emission guidelines.

Division 6: 2016 Emission Guidelines for Existing Municipal Solid Waste Landfills

§113.2400, Applicability

The commission adopts new §113.2400, which contains requirements establishing the applicability of the new Subchapter D, Division 6 rules that implement the 2016 emission guidelines. Adopted subsection (a) specifies that the Division 6 rules apply to existing MSW landfills for which construction, reconstruction, or modification was commenced on or before July 17, 2014, except for certain landfills exempted under the provisions of adopted §113.2406. The applicability of the adopted Division 6 requirements includes MSW landfills which were previously subject to the requirements of Chapter 113, Subchapter D, Division 1; the requirements of 40 CFR Part 60 Subpart WWW; or the requirements of the federal plan adopted by the EPA to implement the 2016 emission guidelines (40 CFR Part 62 Subpart OOO).

Adopted subsection (b) is intended to clarify that physical or operational changes made to an existing landfill solely for purposes of achieving compliance with the Division 6 rules will not cause the landfill to become subject to NSPS under 40 CFR Part 60, Subpart XXX. This subsection corresponds to 40 CFR Part 60, Subpart Cf, §60.31f(b).

Adopted subsection (c) is intended to clarify that MSW landfills which are subject to 40 CFR Part 60 Subpart XXX are not subject to the requirements of Division 6. 40 CFR Part 60 Subpart XXX applies to landfills which have been modified, constructed, or reconstructed after July 17, 2014, whereas the adopted Division 6 requirements apply to MSW landfills which have not been modified, constructed, or reconstructed after July 17, 2014.

Adopted subsection (d) establishes that the requirements of Division 6 do not apply until the implementation date specified in §113.2412(a). This implementation date corresponds to the future date when the EPA's approval of Texas' revised §111(d) state plan for existing MSW landfills becomes effective. Until that date, owners or operators of existing MSW landfills must continue complying with the Chapter 113, Division 1, requirements for existing MSW landfills. The EPA will publish a notice in the *Federal Register* once their review of the revised Texas §111(d) state plan has been completed.

§113.2402, Definitions

The commission adopts new §113.2402, which identifies the definitions that apply for the purposes of Subchapter D, Division 6. Subsection (a) incorporates the definitions in 40 CFR §§60.2 and 60.41f by reference, as amended through May 16, 2007, and March 26, 2020, respectively. Subsections (b), (c), and (d) address certain exceptions or additional definitions relevant to the adopted Division 6 rules.

Adopted subsection (b) establishes that the term "Administrator" as used in 40 CFR Part 60, §§60.30f - 60.41f shall refer to the commission, except for the specific purpose of 40 CFR

§60.35f(a)(5), in which case the term "Administrator" shall refer to the Administrator of the EPA. Under 40 CFR §60.30f(c)(1), approval of alternative methods to determine NMOC concentration or a site-specific methane generation rate constant cannot be delegated to States. The federal rule associated with approval of these alternative methods is 40 CFR §60.35f(a)(5), so for purposes of this specific rule the EPA must remain "the Administrator."

Adopted subsection (c) establishes a definition of a "legacy controlled landfill" for use with the Chapter 113, Division 6 rules. The definition parallels the definition of "legacy controlled landfill" used by the EPA in the 40 CFR Part 62, Subpart OOO federal plan, with minor changes to align this definition with the Chapter 113 landfill rules. In plain language, a legacy controlled landfill is a landfill which submitted a collection and control system design plan before May 21, 2021, to comply with previous standards for MSW landfills (either 40 CFR Part 60, Subpart WWW, or 30 TAC Chapter 113, Division 1). This includes not only landfills which have already completed construction and installation of the GCCS, but also those that have submitted design plans and are within the 30-month timeline to install and start-up a GCCS according to 40 CFR §60.752(b)(2)(ii) (if subject to NSPS Subpart WWW), or the corresponding requirements of Chapter 113, Division 1.

Adopted Subsection (d) establishes a definition of "reconstruction" which is based on the existing definition of this term currently in §113.2060 and the underlying federal definition of reconstruction in 40 CFR §60.15. The commission is including language within §113.2402(d) to clarify that the term "fixed capital cost" as used within the definition of reconstruction has the same meaning as it does in 40 CFR §60.15(c). As discussed further in the Response to Comments section of this preamble, this definition was added in response to a comment.

§113.2404, Standards for existing municipal solid waste landfills

The commission adopts new §113.2404, which contains the technical and administrative requirements for affected MSW landfills under Subchapter D, Division 6.

Adopted subsection (a) specifies the following requirements for MSW landfills subject to Division 6: default emission standards; operational standards; compliance, testing, and monitoring provisions; recordkeeping and reporting provisions; and other technical and administrative requirements. Subsection (a) refers directly to the provisions of 40 CFR Part 60, Subpart Cf, as amended, for the relevant requirement. The various sections of Subpart Cf have been amended at different times, so the most recent amendment date of each rule section is noted in the rule text. Owners or operators of existing MSW landfills subject to Division 6 will be required to comply with the referenced requirements of Subpart Cf, as applicable, unless otherwise specified within the Division 6 rules. Certain landfills, such as legacy controlled landfills, are subject to different (non-Subpart Cf) requirements as addressed in §113.2404(b), (c), and (d), and in §113.2410.

Adopted subsection (b) establishes that landfill gas collection and control systems that are approved by the commission and installed in compliance with 30 TAC §115.152 are deemed to satisfy certain technical requirements of these emission guidelines. Subsection (b) is intended to reduce potentially duplicative requirements relating to the landfill gas collection and control system. The gas collection and control system requirements in 30 TAC §115.152 are based on the requirements in the proposed version of the original landfill NSPS under 40 CFR Part 60, Subpart WWW (56 FR 24468, May 30, 1991). Adopted subsection (b) is essentially carried over from existing 30 TAC §113.2061(b), but the text of the rule has been rephrased to more clearly state which specific design requirements of 40 CFR Part 60, Subpart Cf are satisfied. A detailed explanation of the 30 TAC §115.152 requirements and how they compare to the corresponding requirements of 40 CFR Part 60, Subpart Cf is provided in Appendix C.5 of the Texas §111(d) state plan document. The technical requirements of 30 TAC §115.152 are still substantially equivalent to the corresponding Subparts Cc and Cf requirements for landfill gas collection and control systems, so preserving this previously approved aspect of the Texas state plan is still appropriate and would not result in any backsliding of emission standards or control system requirements. Owners or operators of landfills meeting the Chapter 115 requirements must still comply with all other applicable requirements of Division 6 and the associated requirements of 40 CFR Part 60, Subpart Cf, except for 40 CFR §60.33f(b) and (c).

Adopted subsection (c) allows legacy controlled landfills or landfills in the closed landfill subcategory that have already completed initial or subsequent performance tests to comply with prior landfill regulations (such as 40 CFR Part 60 Subpart WWW, or the Chapter 113, Subchapter D, Division 1, rules) to use those performance test results to comply with the Division 6 rules. This subsection parallels similar language in Subpart Cf at 40 CFR §60.33f(c)(2)(iii), but adds legacy controlled landfills as eligible to use this provision. This is consistent with the approach EPA used for the federal plan at 40 CFR §62.16714(c)(2)(iii). The commission believes that expanding the provision to include legacy controlled landfills, as the EPA did with the federal plan, is reasonable and will not reduce the effectiveness of the emission guidelines as implemented by the adopted revisions to the Texas §111(d) state plan for MSW landfills. This provision will minimize the need for costly re-testing when appropriately recent test results are already available as a result of testing for compliance with prior landfill emission standards. Existing landfills in Texas will have been operating under the requirements of the federal plan for some time prior to the EPA's approval of the adopted changes to Chapter 113, and maintaining consistency with the federal plan for purposes of this requirement should reduce the potential for confusion or noncompliance while having no adverse effect on emissions or the environment.

Adopted subsection (d) specifies that legacy controlled landfills shall comply with the requirements of 40 CFR §62.16714(b)(1), as amended through May 21, 2021, in lieu of the requirements of 40 CFR §60.33f(b)(1). This change in requirements (relative to the Subpart Cf requirements) is necessary and reasonable because in the 40 CFR Part 62, Subpart OOO federal plan, 40 CFR §62.16714(b)(1)(ii) addresses the 30-month control deadlines for both legacy controlled landfills and landfills in the closed landfill subcategory, where the corresponding Subpart Cf requirement of 40 CFR §60.33f(b)(1)(ii) only addresses landfills in the closed landfill subcategory. The approach the EPA used in the federal plan to address legacy controlled landfills is an improvement relative to the corresponding provisions of Subpart Cf. Existing landfills in Texas will have been operating under the requirements of the federal plan for some time prior to the EPA's approval of the adopted changes to Chapter 113, and maintaining consistency with the federal plan for purposes of this requirement should reduce the potential for confusion or noncompliance while having no adverse effect on emissions or the environment.

§113.2406, Exemptions, Alternate Emission Standards, and Alternate Compliance Schedules

The commission adopts new §113.2406, which contains exemptions from the proposed Subchapter D, Division 6, requirements.

Adopted subsection (a) would exempt certain MSW landfills from the requirements of Division 6. This exemption is carried over from the Division 1 landfill rules (30 TAC §113.2060(2)(A)) and the previously approved state plan, but has been rephrased as an explicit exemption rather than as a part of the definition of existing MSW landfill. Subsection (a) exempts MSW landfills which have not accepted waste since October 9, 1993, and have no remaining waste disposal capacity. This exemption modifies the applicability of the rules relative to the default federal requirements of 40 CFR Part 60, Subparts Cc and Cf, because it excludes MSW landfills which stopped accepting waste between November 8, 1987 (the date specified in the federal guidelines) and October 9, 1993. This exemption is in accordance with 40 CFR §60.24(f) criteria, which allow a state rule to be less stringent for a particular designated class of facilities provided the state can show that factors exist which make application of a less stringent standard significantly more reasonable. When TCEQ adopted the Chapter 113, Subchapter D, Division 1, rules for existing MSW landfills in 1998, the commission's analysis found that only one landfill (City of Killeen) which closed within the relevant time period had an estimated emission rate above the control threshold of 50 Mg/yr, and that the Killeen landfill's emissions were projected to fall below the 50 Mg/yr control threshold by 2004. The commission also estimated that, using an alternate calculation method, the emissions from the landfill would be even lower, and would be "borderline" relative to the 50 Mg/yr threshold. The commission further determined that the cost of installing and operating a gas collection and control system for the landfill would be unreasonable based on the short period of time the facility was projected to be above the 50 Mg/yr threshold. (*See* 23 TexReg 10876, October 23, 1999.) In EPA's approval of the TCEQ's original state plan submittal, the EPA acknowledged that no designated landfills which closed between November 8, 1987, and October 9, 1993, would have estimated non-methane organic compounds (NMOC) emissions above the 50 megagram (Mg) control threshold, and that controlling these closed landfills would not result in a significant reduction in NMOC emissions compared to the cost to install gas collection systems. (*See* 64 FR 32428.) As many years have passed since the original Texas state plan was approved in 1999, none of the landfills which stopped accepting waste during the relevant 1987-1993 time period would have current NMOC emissions above the 50 Mg/year threshold. The previous state plan analysis and other supporting material relating to this exemption is included in Appendix C.5 of the adopted state plan document. As a result of a comment, the commission has added language to subsection (a) to clarify that MSW landfills claiming the exemption criteria in subsection (a) are still required to provide additional information if requested by the executive director.

Adopted subsection (b) allows an owner or operator of an MSW landfill to apply for less stringent emission standards or longer compliance schedules, provided that the owner or operator demonstrates to the executive director and to the EPA that certain criteria are met. An exemption under subsection (b) may be requested based on unreasonable cost of control, the physical impossibility of installing control equipment, or other factors specific to the MSW landfill that make application of a less stringent standard or compliance deadline more reasonable. The provisions of subsection (b) are carried over from functionally identical provisions in the EPA-approved Division 1 landfill rules at 30 TAC §113.2067. This exemption is consistent with the federal requirements in 40 CFR §60.24(f) for obtaining a less stringent emission standard or compliance schedule.

Adopted subsection (c) contains language to clarify how an owner or operator of an affected MSW landfill would request an alternate emission standard or alternate compliance schedule. Requests should be submitted to the TCEQ Office of Air, Air Permits Division, and a copy should be provided to the EPA Region 6 office.

In response to a comment, the commission has added subsection (d) to adopted §113.2406, to specify that the executive director may request that a landfill owner or operator provide additional information to document that the landfill meets the eligibility or compliance criteria for an exemption.

§113.2408, Federal Operating Permit requirements

The commission adopts new §113.2408 to address federal operating permit requirements for MSW landfills subject to the adopted Chapter 113, Subchapter D, Division 6, rules. Adopted §113.2408 requires that owners or operators of MSW landfills subject to Division 6 obtain a federal operating permit as required under 40 CFR §60.31f(c) and (d) and applicable requirements of 30 TAC Chapter 122, Federal Operating Permits Program. Under 40 CFR §60.31f(c), a federal operating permit is not required for MSW landfills with a design capacity less than 2.5 million megagrams or 2.5 million cubic meters, unless the landfill is otherwise subject to the requirement to obtain an operating permit under 40 CFR Part 70 or 71. For purposes of submitting a timely application for an operating permit, the owner or operator of an MSW landfill with a design capacity greater than or equal to 2.5 million megagrams and 2.5 million cubic meters on the effective date of EPA approval of the Texas landfill state plan under §111(d) of the CAA, and not otherwise subject to either Part 70 or 71, becomes subject to the requirements of 40 CFR §70.5(a)(1)(i) or §71.5(a)(1)(i), 90 days after the effective date of the §111(d) state plan approval, even if the design capacity report is submitted earlier.

As stated in 40 CFR §60.31f(d), when an MSW landfill subject to the Division 6 rules is closed (as defined in Subpart Cf) the owner or operator is no longer subject to the requirement to maintain an operating permit for the landfill if the landfill is not otherwise subject to the requirements of either Part 70 or 71 and either of the following conditions are met: (1) The landfill was never subject to the requirement to install and operate a gas collection and control system under 40 CFR §60.33f; or (2) the landfill meets the conditions for control system removal specified in 40 CFR §60.33f(f).

§113.2410, Initial and Annual Reporting, and Modified Reporting Requirements for Legacy Controlled Landfills

The commission adopts new §113.2410 to address certain initial reports and design plans which must be submitted to the executive director and to establish modified reporting requirements for legacy controlled landfills.

Adopted subsection (a) identifies the requirements for initial reports of design capacity, non-methane organic compound (NMOC) emissions, and initial gas collection and control system design plans. These reporting requirements correspond to certain reports required by 40 CFR §60.38f and by the 40 CFR Part 62, Subpart OOO federal plan. The subsection (a) rules do not require an owner or operator that has already submitted the

specified reports to comply with the Subpart OOO federal plan to re-submit the reports to TCEQ unless specifically requested.

The commission is adopting an additional reporting requirement in 30 TAC §113.2410(a)(4) that would require owners or operators of existing MSW landfills to provide annual calculations of NMOC emissions. This requirement is necessary to enable TCEQ to maintain current information on NMOC emissions from designated facilities covered by the revised state plan and provide updated emissions inventory information to the EPA in compliance with federal annual progress report requirements of 40 CFR §60.25(e) and (f). The commission is excluding landfills with a capacity less than 2.5 million Mg by mass or 2.5 million cubic meters by volume from this annual NMOC inventory reporting requirement, as these small landfills are exempt from most substantive requirements of 40 CFR Part 60, Subpart Cf and 40 CFR Part 62, Subpart OOO, and the NMOC calculation's results would not affect the applicable emission control requirements or monitoring requirements for these small sites. If a small site were to increase capacity above the 2.5 Mg or 2.5 million cubic meter threshold, the applicable control requirements and monitoring requirements for the site would be determined by the NMOC calculation methodology specified in 40 CFR Part 60, Subpart Cf. In addition, in response to a comment, TCEQ has added language to §113.2410(a)(4) to clarify that MSW landfills that are exempt from Division 6 under the criteria of §113.2406(a) are also exempt from the annual NMOC emission inventory reporting.

For the annual NMOC emission inventory reports required by proposed §113.2410(a)(4), TCEQ is adopting a requirement that designated facilities use calculation methods specified in the EPA's *Compilation of Air Pollutant Emissions Factors* (AP-42), as opposed to the calculation methods specified in 40 CFR Part 60, Subpart Cf. The use of AP-42 calculation methods for purposes of the emissions inventory, rather than the methods in 40 CFR Part 60, Subpart Cf, is in accordance with federal guidance for the implementation of §111(d) state plans for MSW landfills (EPA-456R/98-009, *Summary of the Requirements for Section 111(d) State Plans for Implementing the Municipal Solid Waste Landfills Emission Guidelines*). In this guidance, the EPA explains that the calculation methods (AP-42 vs. the emission guideline rule itself) are intentionally different, as the AP-42 methodology for emission inventories is designed to reflect typical or average landfill emissions, while the emission guideline rule methodology is purposefully conservative to protect human health, encompass a wide range of MSW landfills, and encourage the use of site-specific data.

At this time, the commission is not adopting a specific method that affected facilities will use to submit the annual NMOC emission inventory reports. The commission anticipates that an electronic method will facilitate more efficient collection and analysis of the data. The annual reporting may be implemented through modification of the commission's existing Annual Emissions Inventory Report (AEIR) system, the commission's existing e-permitting system, or through a separate portal or interface. Once the methodology of reporting has been finalized, the commission will post guidance on the method of submitting these reports on the TCEQ website.

It should be noted that adopted 30 TAC §113.2410 does not comprehensively include all reporting requirements, and that owners or operators of MSW landfills subject to Subchapter D, Division 6, must also comply with any additional reporting requirements specified in 40 CFR §60.38f or elsewhere in 40 CFR Part 60, Subpart Cf, even if not specifically identified in §113.2410.

Adopted subsection (b) establishes certain exemptions from reporting requirements for legacy controlled landfills which have already submitted similar reports to comply with prior regulations that applied to MSW landfills. Specifically, the owner or operator of a legacy controlled landfill is not required to submit an initial design capacity report, initial or subsequent NMOC emission rate report, collection and control system design plan, initial performance test report, or the initial annual report, if those report(s) were already provided under the requirements of 40 CFR Part 60, Subpart WWW, or the Chapter 113, Subchapter D, Division 1, rules. This exemption corresponds to the approach EPA used for legacy controlled landfills in the 40 CFR Part 62, Subpart OOO, federal plan (specifically, 40 CFR §62.16711(h)). The commission has included this provision because the approach the EPA used in the federal plan to address reporting for legacy controlled landfills is an improvement relative to the corresponding provisions of Subpart Cf. Existing landfills in Texas will have been operating under the requirements of the federal plan for some time prior to the EPA's approval of the adopted changes to Chapter 113, and maintaining consistency with this aspect of the federal plan should reduce the potential for confusion or noncompliance while having no adverse effect on emissions or the environment.

Adopted subsection (c) establishes that owners or operators of legacy controlled landfills that have already submitted an annual report under 40 CFR Part 60, Subpart WWW, or Chapter 113, Subchapter D, Division 1, are required to submit the following annual report under Division 6 no later than one year after the most recent annual report was submitted, as specified in 40 CFR §62.16724(h). This is a clarification of the timing requirements for the annual reports of legacy controlled landfills transitioning from the prior-effective landfill regulations (40 CFR Part 60 Subpart WWW, or Chapter 113, Subchapter D, Division 1) to the new Division 6 regulations. This subsection corresponds to the approach EPA used for legacy controlled landfills in the 40 CFR Part 62, Subpart OOO, federal plan (specifically, 40 CFR §62.16724(h)). Existing landfills in Texas will have been operating under the requirements of the federal plan for some time prior to the EPA's approval of the adopted changes to Chapter 113 and maintaining consistency with this aspect of the federal plan should reduce the potential for confusion or noncompliance while having no adverse effect on emissions or the environment.

Adopted subsection (d) requires owners or operators of legacy controlled landfills that demonstrate compliance with the emission control requirements of Division 6 using a treatment system (as defined in 40 CFR §60.41f) to comply with 40 CFR §62.16724(d)(7). This requires the preparation of a site-specific treatment system monitoring plan no later than May 23, 2022. Legacy controlled landfills affected by this rule will have been required to prepare this plan by May 23, 2022, to comply with the federal plan, even though the Subchapter D, Division 6, rules were not yet effective or approved by the EPA at that time. This requirement maintains consistency with this aspect of the federal plan and ensures that TCEQ will have continuing authority to enforce this requirement for any legacy controlled landfills which fail to prepare the required treatment system monitoring plan.

In response to a comment, the commission is adopting new subsection (e) to §113.2410. Subsection (e) allows the TCEQ executive director or a local air or waste pollution control program with jurisdiction to request additional information as necessary to document compliance.

§113.2412, Implementation Date and Increments of Progress

The commission adopts new §113.2412 to establish an implementation date and required increments of progress for the Subchapter D, Division 6, rules.

Adopted subsection (a) contains language that requires owners or operators of existing MSW landfills to comply with the Division 6 requirements beginning on the effective date of the EPA's approval of Texas' revised §111(d) state plan implementing the 2016 emission guidelines for existing MSW landfills. Prior to this implementation date, owners or operators of existing MSW landfills shall continue to comply with the Chapter 113, Subchapter D, Division 1, rules; 40 CFR Part 60, Subpart WWW; and/or 40 CFR Part 62, Subpart OOO, as applicable. On and after the implementation date specified in this subsection, owners or operators of existing MSW landfills would no longer be required to comply with the Chapter 113, Subchapter D, Division 1, requirements or the federal requirements of Subparts WWW or OOO.

Adopted subsection (b) requires owners or operators of MSW landfills subject to Subchapter D, Division 6, to comply with all applicable requirements of progress specified in 40 CFR Part 62, Subpart OOO, Table 1, as amended through May 21, 2021. These increments of progress set deadlines for certain milestones, such as the submittal of the cover page of the final control plan; the awarding of contracts; the beginning of on-site construction; the completion of on-site construction; and final compliance. The commission is adopting the same increments of progress as the 40 CFR Part 62 federal plan because the federal plan is already in effect, and maintaining consistency with the Subpart OOO requirements will minimize confusion and the potential for noncompliance for owners or operators who have already started the process of designing and installing controls to comply with the federal plan. In addition, 40 CFR §62.16712(c)(1), indicates that facilities subject to the federal plan will remain subject to the schedule in Table 1, even if a subsequently approved state or tribal plan contains a less stringent schedule. As stated in footnote 2 of Subpart OOO, Table 1, increments of progress that have already been completed under previous regulations do not have to be completed again.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Tex. Gov't Code Ann., §2001.0225, and determined that the rulemaking does not meet the definition of a "Major environmental rule" as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis. A "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Additionally, the adopted rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a "Major environmental rule," which are listed in Tex. Gov't Code Ann., §2001.0225. Tex. Gov't Code Ann., §2001.0225 applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The specific intent of the adopted rules is to comply with federal emission guidelines for existing municipal solid waste landfills mandated by 42 United States Code (U.S.C.), §7411 (Federal Clean Air Act (FCAA), §111); and required to be included in operating permits by 42 U.S.C., §7661a (FCAA, §502) as specified elsewhere in this preamble. These sources are required to comply with the federal emission guidelines whether or not the commission adopts rules to implement the federal emission guidelines. The sources are required to comply with federal plans adopted by EPA if states do not adopt state plans. As discussed in the FISCAL NOTE portion of the preamble to the proposed rules, the adopted rules are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with these federal standards for: 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.

Under 42 U.S.C., §7661a (FCAA, §502), states are required to have federal operating permit programs that provide authority to issue permits and assure compliance with each applicable standard, regulation, or requirement under the FCAA; including emission guidelines, which are required under 42 U.S.C., §7411 (FCAA, §111). Similar to requirements in 42 U.S.C., §7410 (FCAA, §110) regarding the requirement to adopt and implement plans to attain and maintain the national ambient air quality standards, states are not free to ignore requirements in 42 U.S.C., §7661a (FCAA, §502), and must develop and submit programs to provide for operating permits for major sources that include all applicable requirements of the FCAA. Additionally, states are required by 42 U.S.C., §7411 (FCAA, §111), to adopt and implement plans to implement and enforce emission guidelines promulgated by the EPA.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. Such rules are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules designed to incorporate or satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal

notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission concludes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature.

While the adopted rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and in fact creates no additional impacts since the adopted rules do not modify the federal emission guidelines in any substantive aspect, but merely provide for minor administrative changes as described elsewhere in this preamble. For these reasons, the adopted rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law. The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. -- Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Mosley v. Tex. Health & Human Services Comm'n*, 593 S.W.3d 250 (Tex. 2019); *Tex. Ass'n of Appraisal Districts, Inc. v. Hart*, 382 S.W.3d 587 (Tex. App.--Austin 2012, no pet.); *Tex. Dep't of Protective & Regulatory Services v. Mega Child Care, Inc.*, 145 S.W.3d 170 (Tex. 2004).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance," Tex. Gov't Code Ann., §2001.035. The legislature specifically identified Tex. Gov't Code Ann., §2001.0225, as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Tex. Gov't Code Ann., §2001.0225. The adopted rules implement the requirements of the FCAA as discussed in this analysis and elsewhere in this preamble.

The emission guidelines being adopted for incorporation are federal standards that are required by 42 U.S.C., §7411 (FCAA, §111), and are required to be included in permits under 42 U.S.C., §7661a (FCAA, §502). They are adopted with only minor administrative changes and will not exceed any standard set by state or federal law. These adopted rules will not implement an express requirement of state law. The adopted rules do not exceed a requirement of a delegation agreement or a contract between state and federal government, as the EPA will delegate implementation and enforcement of the emission guidelines to Texas if this rulemaking is adopted and the EPA approves the rules as part of the State Plan required by 42 U.S.C. §7411(d) (FCAA, §111(d)). The adopted rules were not developed solely under the general powers of the agency but are authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.011, 382.012, and 382.017. Therefore, this rulemaking adoption is not subject to the regulatory analysis provisions of Tex. Gov't Code Ann., §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments on the Draft Regulatory Impact Analysis Determination were received.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an assessment of whether the requirements of Tex. Gov't Code Ann., Chapter 2007, are applicable. Under Tex. Gov't Code Ann., §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part, or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the rulemaking action as required by Tex. Gov't Code Ann., §2007.043. The primary purpose of this adopted rulemaking action, as discussed elsewhere in this preamble, is to implement the federal emission guidelines for municipal solid waste landfills, mandated by 42 U.S.C., §7411 (FCAA, §111), and required to be included in operating permits by 42 U.S.C., §7661a (FCAA, §502), to facilitate implementation and enforcement of the emission guidelines by the state. States are also required to submit state plans for the implementation and enforcement of the emission guidelines to EPA for its review and approval.

Tex. Gov't Code Ann., §2007.003(b)(4), provides that the requirements of Chapter 2007 of the Texas Government Code do not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law. In addition, the commission's assessment indicates that Texas Government Code Chapter 2007 does not apply to these adopted rules because this action is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that it does not impose a greater burden than is necessary to achieve the health and safety purpose. For the reasons stated above, this action is exempt under Tex. Gov't Code Ann. §2007.003(b)(13).

Any reasonable alternative to the adopted rulemaking would be excluded from a takings analysis required under Chapter 2007 of the Texas Government Code for the same reasons as elaborated in this analysis. As discussed in this preamble, states are not free to ignore the federal requirements to implement and enforce the federal emission guidelines for municipal solid waste landfills, including the requirement to submit state plans for the implementation and enforcement of the emission guidelines to EPA for its review and approval; nor are they free to ignore the federal requirement to include the emission guideline require-

ments in state issued federal operating permits. If the state does not adopt the rules, the federal rules will continue to apply, and sources must comply with a federal plan that implements those rules. The adopted rules present as narrowly tailored an approach to complying with the federal mandate as possible without unnecessary incursion into possible private real property interests. Consequently, the adopted rules will not create any additional burden on private real property. The adopted rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adopted rules also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the adopted rulemaking will not cause a taking under Texas Government Code, Chapter 2007; nor does the Texas Government Code, Chapter 2007, apply to the adopted rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that it 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 rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The adopted amendments to Chapter 113 would update TCEQ rules to implement federal emission guidelines for existing landfills under 40 CFR Part 60, Subpart Cf. These guidelines require certain landfills to install and operate gas collection systems to capture and control emissions. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 CFR to protect and enhance air quality in the coastal areas (31 TAC §501.32). This rulemaking also complies with applicable requirements of 40 CFR Part 60, Subpart B, Adoption and Submittal of State Plans for Designated Facilities.

The commission invited public comment regarding the consistency of the rules with the CMP during the public comment period. No comments were received on the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

Sites which would be required to obtain a federal operating permit under adopted §113.2408 are already required to obtain a federal operating permit under existing federal regulations. The adopted Subchapter D, Division 6 rules are applicable requirements under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators of affected sites subject to the federal operating permit program and the adopted rules must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 113 requirements.

Public Comment

The commission offered a hybrid in-person and virtual public hearing on the proposed rules and revision to the state plan in Austin on February 23, 2023, at 10:00 a.m. in Building D, Room 191, at the commission's central office located at 12100 Park 35 Circle. No persons submitted oral comments during the hearing. The public comment period ended on February 28, 2023. The commission received written comments from two individuals and Harris County Pollution Control Services (HCPCS).

Response to Comments

Comment

One individual expressed general support for the proposed rules and state plan revision implementing the federal emission guidelines for MSW landfills.

Response

The commission appreciates the support. No changes to the rules were made as a result of this comment.

Comment

One individual noted several formatting errors (missing spaces) in the PDF version of the proposed rules posted on the agency website.

Response

While these formatting issues were unfortunate, these issues were not duplicated in the official proposed rule text published in the *Texas Register* and had no material impact on the public's ability to review and understand the proposed rules. These formatting issues will not be present in the final rule published in the *Texas Register* and on the Texas Secretary of State website. No changes to the rules were made as a result of this comment.

Comment

An individual stated that the proposed plan does not direct specific methods for gas collection, and stated that this will enable landfill owners and operators the flexibility to implement a gas collection system that will fit within their budget constraints while still complying with the standards. The commenter also stated that communities affected by landfills should also be empowered and that TCEQ should continue to monitor new studies and findings on the most cost-effective and positively impactful methods for gas collection/emission reduction. The commenter stated that as these findings come to light, it would be beneficial to establish required methods that support facilities and communities and update the state plan accordingly.

Response

The proposed rules and state plan revision follow the gas collection system design requirements and control requirements specified in 40 CFR Part 60 Subpart Cf. These requirements include consideration of many factors, including, but not limited to, landfill gas temperatures and pressures within the capture system, gas flow rates, and final control device destruction efficiency. These federal regulations (and the 30 TAC Chapter 113 rules referencing them) provide a framework for the effective capture and control of landfill gas while still allowing owners or operators of MSW landfills reasonable flexibility to design and install a system that is appropriate for the site.

As time passes, there will likely be advances in emission capture and control technology, although the rate of such progress is uncertain by its nature. The EPA and TCEQ are constantly monitoring developments in the field of pollution control to ensure that permits and emission standards are kept appropriately current. In this case, the TCEQ's Chapter 113 rules and state plan are intended to closely parallel the requirements established by

the EPA in Subpart Cf, so any future updates or revisions to the TCEQ's Chapter 113 rules and state plan for MSW landfills will likely depend on determinations made by the EPA.

For other regulatory purposes, such as for new source review (NSR) air permitting, TCEQ will continue to require that new or modified facilities be equipped with up-to-date control technology. New and modified sources must obtain permits which require best available control technology (BACT). TCEQ is continually monitoring BACT for various industries and source types, including MSW landfills. In addition, MSW landfills are regulated under federal NESHAP standards which are designed to further minimize risks to human health, and may require a more stringent level of emission control beyond that specified in emission guideline rules or NSR permits.

No changes to the rules were made as a result of this comment.

Comment

An individual commented that TCEQ's annual MSW report does a good job of showing which landfills have gas recovery facilities, but asked if TCEQ could track revenue and distribution associated with landfill gas recovery facilities and determine if it is benefiting marginalized communities where landfills are predominantly located. The commenter stated that this may not be in the commission's direct area of influence, but the TCEQ is in a position to monitor systems and methods that lead to generating revenue from energy collection. The commenter stated that this transparency would ensure accountability and that local communities near these facilities do not continue to be negatively affected.

Response

The TCEQ's overall authority and purpose under the Texas Clean Air Act is to safeguard the state's air resources from pollution, consistent with the protection of public health, general welfare, and physical property. TCEQ's general authority under the portions of the Texas Health and Safety Code relating to solid waste is similar; to safeguard public health, welfare, and physical property by controlling the management of solid waste. The proposed rules and revision to the state plan that are the subject of this action have the relatively limited purpose of implementing federal requirements to ensure that existing landfills are equipped with technically appropriate and economically reasonable emission control measures. The TCEQ does not track the generation or distribution of revenue associated with pollution reduction measures. The commenters' remarks about the use of revenue and/or energy from landfill gas recovery to benefit local communities relate to broader policy questions which are beyond the scope of this rulemaking. No changes to the rules were made as a result of this comment. However, these comments have been relayed to the agency's Office of Air and Office of Waste for consideration as general stakeholder input.

Comment

An individual recommended that proposed subsection §113.2069(c), containing language addressing the transition of requirements from the Division 1 rules to the new Division 6 rules, be renumbered as subsection (a).

Response

While the commenter's suggested change would make the transition requirements in proposed subsection (c) more prominent, the suggested change would not have a material impact on the meaning or legal effect of the rule, and implementing this change would require the relettering of other subsections of §113.2069, which would increase the administrative complexity of this rulemaking. No changes to the rules were made in response to this comment.

Comment

An individual expressed support for the proposed language of §113.2400(d), which states that the requirements of Division 6 do not apply until the implementation date specified in proposed §113.2412.

Response

The commission appreciates the commenter's support for this rule language. No changes to the rules were made in response to this comment.

Comment

HCPCS requested that TCEQ add or reference by rule the definitions specified in 30 TAC §113.2060.

Response

In order to maximize consistency with the current emission guidelines in 40 CFR Part 60 Subpart Cf, §113.2402 of the new Chapter 113, Division 6 rules references the definitions in 40 CFR §60.2 and 40 CFR §60.41f instead of relying on the Division 1 definitions in §113.2060. Under the Chapter 113 Division 6 rules, the definitions of "construction" and "modification" are addressed by the definitions for those terms in 40 CFR §60.2 and §60.41f respectively. The phrase "existing municipal solid waste landfill" as defined in 30 TAC §113.2060 is not explicitly defined in the Chapter 113, Division 6 rules, but the phrase means any municipal solid waste landfill as defined in 40 CFR §60.41f which is an existing facility as defined in 40 CFR §60.2. Effectively, an existing municipal solid waste landfill is any municipal solid waste landfill which has not been constructed, modified, or reconstructed after July 17, 2014. The commission believes the meaning of these terms are adequately clear as proposed based on the definitions in 40 CFR §60.2 and §60.41f.

However, the terms "reconstruction" and "fixed capital cost" which are defined in §113.2060 have no corresponding definition in proposed §113.2402 and are not defined in 40 CFR §60.2 or §60.41f. These terms are defined in 40 CFR §60.15. In response to this comment, the commission has added a definition of reconstruction as new subsection §113.2402(d), based on the current definition of reconstruction in §113.2060 and the underlying federal definition in 40 CFR §60.15. The commission is also including language within §113.2402(d) to clarify that "fixed capital cost" has the same meaning as it does in 40 CFR §60.15(c).

Comment

An individual commented on the proposed language of §113.2404(b), suggesting that this provision be rewritten so that sites which comply with the requirements of Chapter 113, Division 6 would also be considered in compliance with the requirements of Chapter 115. The commenter stated that it's important that sites complying with Chapter 115 be considered to meet Division 6, but very important that sites meeting Division 6 be considered to meet Chapter 115. The commenter stated that Division 6 is a newer, more stringent rule (than the rules which the Chapter 115 requirements are based on) and that making the suggested change would provide greater clarity to the regulated community.

Response

In order to implement the suggested change, the Chapter 115 rules relating to landfills would have to be revised. Chapter 115 was not proposed to be revised as part of this rulemaking action, and the Texas Administrative Procedure Act, Government Code, Chapter 2001 and agency rulemaking procedures prevent the commission from adopting revisions to portions of Chapter 115 which were not proposed to be amended. However, staff have noted the request for future consideration by the Executive Director and the commission. No changes to the rules were made in response to this comment.

Comment

An individual commented on proposed 30 TAC §113.2404(d), stating that the phrase referring to 40 CFR §60.33f(b)(1) appeared to be irrelevant, and recommending that the phrase be deleted.

Response

The commission does not agree that the phrase referring to 40 CFR §60.33f(b)(1) is irrelevant, as it is intended to identify which specific requirement of Subpart Cf is being replaced by complying with 40 CFR §62.16714(b)(1). The rule text as proposed makes the intent of the rule clearer. No changes to the rules were made in response to this comment.

Comment

An individual expressed support for the exemptions in proposed §113.2406 and stated that it shows that TCEQ has given careful thought and attention to the rule.

Response

The commission appreciates the support. No changes to the rules were made in response to this comment.

Comment

HCPCS requested that an additional provision be added as new subsection 30 TAC §113.2406(d), regarding documentation of unreasonable cost, physical impossibilities, or other justifications for requesting exemptions. HCPCS suggested the language, "Upon request, the owner or operator shall submit any requested additional information to the executive director."

Response

The commission agrees that, in some situations, it may be necessary to request additional information from the owner or operator to document compliance with the exemptions in this section. In response to this comment, the commission has added new subsection §113.2406(d) with language similar to that suggested by the commenter.

Comment

An individual commented on proposed 30 TAC §113.2410(a)(1), (2), and (3), recommending that the rule language be broadened to exempt NSPS sites which previously submitted certain reports (initial design capacity reports, NMOC emission rate reports, and GCCS design plans) from the requirement to submit those reports again.

Response

Former NSPS sites which previously submitted these reports to EPA to comply with 40 CFR §62.16724 are covered by the reporting exemptions in 30 TAC §113.2410(a)(1), (2), and (3). Other NSPS and Chapter 113, Division 1 sites meeting the definition of a legacy controlled landfill are exempted from these reporting requirements under §113.2410(b), if they previously submitted the relevant report(s) to satisfy those rules. Taken together, these exemptions should address the commenter's concern about potentially duplicative reporting for many landfill sites. If the commission expanded these reporting exemptions to cover all MSW landfills to which the NSPS regulations applied, not just those sites considered legacy controlled landfills, the new Chapter 113, Division 6 rules could be perceived to be less stringent than the 40 CFR Part 60 Subpart Cf emission guidelines or the 40 CFR Part 62 Subpart OOO federal plan. The commission recognizes and generally supports the commenter's goal of reducing redundant or duplicative reporting, but in order to ensure the federal approvability of the proposed rules and the revision to the Texas state plan, the commission is not making the suggested change.

Comment

An individual stated that it was unclear why the proposed requirement in 30 TAC §113.2410(a)(4) for owners or operators to provide an annual report of NMOC emissions was necessary, and unclear how the data would be used. The commenter noted that reporting of NMOC emissions was already part of the regulatory framework used to determine when a gas collection system was required. The commenter suggested that the burden of this requirement did not seem justified, and suggested that it be removed.

Response

Federal requirements for state plans under 40 CFR Part 60, Subpart B require states to provide annual progress reports under 40 CFR §60.25, and those progress reports are required to include emission inventory data for designated facilities that were not in operation at the time of plan development but began operation during the reporting period, as well as additional data as necessary to update the emission inventory information required in 40 CFR §60.25(a). As TCEQ does not currently have a comprehensive system in place for reporting of NMOC emissions from designated MSW landfills, adding this annual reporting requirement to the rule is the most expedient mechanism to provide for the collection of this NMOC data to enable TCEQ to prepare up-to-date emission inventories as part of the required CAA §111(d) state plan annual progress reports.

The commission acknowledges that under the requirements of 40 CFR Part 60 Subpart Cf, many landfills are already required to provide annual NMOC emissions data as a requirement of 40 CFR §60.38f(c). However, after installing a GCCS, MSW landfills become exempt from this NMOC reporting requirement per 40 CFR §60.38f(c)(4), so relying solely on the Subpart Cf NMOC reporting requirements would not provide TCEQ with comprehensive information on NMOC emissions from all designated MSW landfill facilities. In addition, EPA guidance relating to the annual progress reports (EPA-456R/98-009, *Summary of the Requirements for Section 111(d) State Plans for Implementing the Municipal Solid Waste Landfills Emission Guidelines*) explains that the underlying purpose and strategy behind the NMOC reporting under Subpart Cf is somewhat different from the purpose of the emission inventory required by 40 CFR §60.25.

While the commission shares the commenter's desire to minimize redundant or duplicative requirements, maintaining the proposed requirement is necessary for TCEQ to ensure approvability of the revision to the state plan and meet ongoing state plan

obligations of 40 CFR Part 60 Subpart B. No changes to the rules were made in response to this comment.

Comment

An individual commented that the rule text relating to the annual NMOC reporting (30 TAC §113.2410(a)(4)) should be revised to exclude MSW landfills that were otherwise exempt from the Chapter 113, Division 6 requirements (in addition to landfills with a capacity less than 2.5 million megagrams or 2.5 million cubic meters).

Response

The intent of this provision is to facilitate reporting of annual NMOC emissions data from effectively all MSW landfills which are covered by the applicability of Chapter 113, Division 6. The commission proposed to exclude small capacity landfills from this requirement because small landfills are already exempt from most substantive requirements of 40 CFR Part 60, Subpart Cf and 40 CFR Part 62, Subpart OOO, so the annual NMOC emission calculation's results would not affect the applicable emission control requirements or monitoring requirements. In light of this comment, the commission has revised §113.2410(a)(4) to also exclude MSW landfills which are exempted from Division 6 on the basis of §113.2406(a), as landfills meeting those criteria for waste acceptance date and design capacity are not intended to be regulated under Division 6 (much as they are not regulated under the current Division 1 rules). However, TCEQ is not broadening the exemption from annual NMOC reporting to globally exclude all MSW landfills which are, for whatever reason, not required to install a gas collection and control system.

Comment

An individual recommended that the rule text in 30 TAC §113.2410(a)(4)(A) be rephrased to refer to "...NMOC emissions after controls" instead of the proposed phrasing of "...controlled NMOC emissions."

Response

The commission respectfully declines to make the suggested change, as the rule text as proposed is sufficiently clear. No changes to the rules were made in response to this comment.

Comment

An individual recommended that, if the annual NMOC emission reporting requirement was to remain in the rule, the information should be submitted to TCEQ as part of the existing Emission Inventory (EI) program.

Response

The commission is still evaluating the most appropriate and practical method for MSW landfills covered by Chapter 113, Division 6 to provide this information. Many MSW landfills are already covered under the EI program and are familiar with the current requirements. However, the applicability requirements for the EI program as laid out in 30 TAC §101.10(a) do not directly correlate with the population of MSW landfills that would be required to provide this NMOC data, and under the provisions of 30 TAC §101.10(b), NMOC is not one of the criteria pollutants or hazardous air pollutants (HAP) which are normally addressed in the EI program. Rule changes to Chapter 101 may be needed to integrate or align the annual NMOC reporting required by Chapter 113, Division 6 with the EI program, and it might be necessary to utilize some other method of reporting until those rule changes could be made. Once a final determination has been made relating to the method of providing the annual NMOC emission inventory report, information on the method of reporting will be posted on the commission's website. No changes to the rules were made in response to this comment.

Comment

An individual stated that the public should have access to the annual NMOC emission reports required by the rules.

Response

The commission will make this information on annual NMOC emissions available to the public, although at the time of this adoption, the methodology of doing so is still under evaluation. The commission may periodically post annual NMOC data on the agency website, or provide an online interface or portal through which the NMOC data may be viewed or requested. No changes to the rules were made in response to this comment.

Comment

An individual recommended edits to §113.2410(c) to address reports from MSW landfills complying with 40 CFR Part 63, Subpart AAAA. The commenter noted that facilities complying with 40 CFR Part 63 Subpart AAAA are required to provide semi-annual reports instead of annual reports, and recommended edits to the proposed rule text in §113.2410(c) to address Subpart AAAA facilities which are on a semi-annual reporting cycle.

Response

The commission acknowledges that some MSW landfills complying with 40 CFR Part 63, Subpart AAAA are subject to a semi-annual reporting requirement, as laid out in 40 CFR §63.1981(h). The rule text in §113.2410(c), which corresponds to similar language in 40 CFR §62.16724(h), is only intended to address non-Subpart AAAA legacy controlled landfills which are on an annual reporting schedule. As stated in 40 CFR §60.38f(h) and 40 CFR §62.16724(h), MSW landfills complying with the 40 CFR Part 63 Subpart AAAA operational provisions of §§63.1958, 63.1960, and 63.1961 must follow the semi-annual reporting requirements in §63.1981(h). Because the proposed Chapter 113, Division 6 rules (see §113.2404(a)(8)) directly reference and require compliance with 40 CFR §60.38f, which covers semi-annual reporting for Subpart AAAA landfills under §60.38f(h), the semi-annual Subpart AAAA reporting schedule is already addressed within the Chapter 113, Division 6 rules as proposed. Therefore, no changes to the rules were made in response to this comment.

Comment

HCPCS requested that an additional provision be added to the rule's reporting requirements as new subsection 30 TAC §113.2410(e). HCPCS suggested the following rule text for this provision: "Upon request, the owner or operator shall submit any requested additional information to the executive director, commission employees, or local government authorities."

Response

The commission agrees that there may be some situations where it is necessary to request additional information or data relating to the reporting requirements. In response to this comment, the commission has added §113.2410(e) to include similar, but slightly narrower, language which requires an owner or operator to submit any requested additional information necessary to document compliance to the executive director or applicable local air or waste pollution control programs with jurisdiction.

Comment

HCPCS recommended that, upon finalization of the rule, that 1) TCEQ adequately train staff at local offices to avoid confusion and provide consistent information; and 2) TCEQ provide education and outreach and make clear guidance documents available to the regulated community to ensure consistent dissemination of information regarding the regulations, to aid in understanding the rules, and to provide methodologies for estimating emissions.

Response

In some respects, the landfill rules in new Chapter 113, Division 6 would maintain or continue requirements that have been in effect for many years, either through the Chapter 113, Division 1 rules or through NSPS standards such as 40 CFR Part 60 Subpart WWW. While the new Division 6 rules do have changes to applicability (particularly with respect to construction and modification dates, and the NMOC threshold at which the installation of a GCCS is required) it's not yet clear what scale of training on the new rules may be needed. TCEQ's individual regional offices will develop or continue internal training programs as needed, taking into account the number of landfill sources within their jurisdiction and the experience level of their staff. If requested, the TCEQ central office will provide additional support to regional staff to assist with development of appropriate training programs or materials.

TCEQ has existing resources that are available to the public and the regulated community, such as the Small Business and Local Government Assistance program and educational events such as the annual Environmental Trade Fair. In addition, members of the public and the regulated community can directly contact staff in the appropriate TCEQ regional office, or the TCEQ Air Permits or Waste Permits divisions, if they have questions about the regulations or permits that apply to MSW landfills. Since the new Chapter 113, Division 6 rules are based on federal requirements, the public and the regulated community may also find it useful to consult federal guidance or training on 40 CFR Part 60 Subpart Cf.

No changes to the rules have been made in response to this comment.

DIVISION 1. MUNICIPAL SOLID WASTE LANDFILLS

30 TAC §113.2069

Statutory Authority

The amended section is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the Texas Clean Air Act. The amended section is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; THSC, §382.015, concerning Power to Enter Property, which authorizes a member, employee, or agent of the commission to enter public or private property to inspect and investigate conditions relating to emissions of air contaminants to or the concentration of air contaminants in the atmosphere; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants, as well as require recordkeeping; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures; THSC, §382.022, concerning Investigations, which authorizes the commission to make or require the making of investigations; and THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the Texas Clean Air Act.

The adopted amended section implements TWC, §§5.102-5.103, and 5.105; as well as THSC, §§382.002, 382.011 - 382.017, 382.021-382.022, and 382.051.

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

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DIVISION 6. 2016 EMISSION GUIDELINES FOR EXISTING MUNICIPAL SOLID WASTE LANDFILLS

30 TAC §§113.2400, 113.2402, 113.2404, 113.2406, 113.2408, 113.2410, 113.2412

Statutory Authority

The new sections are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the Texas Clean Air Act. The new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commis-

sion to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; THSC, §382.015, concerning Power to Enter Property, which authorizes a member, employee, or agent of the commission to enter public or private property to inspect and investigate conditions relating to emissions of air contaminants to or the concentration of air contaminants in the atmosphere; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants, as well as require recordkeeping; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures; THSC, §382.022, concerning Investigations, which authorizes the commission to make or require the making of investigations; and THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the Texas Clean Air Act. The new sections are also adopted under TWC, §7.002, Enforcement Authority, which authorizes the commission to institute legal proceedings to compel compliance; TWC, §7.032, Injunctive Relief, which provides that injunctive relief may be sought by the executive director; and TWC, §7.302, Grounds for Revocation or Suspension of Permit, which provides authority to the commission to revoke or suspend any air quality permit.

The adopted new sections implement TWC, §§5.102 - 5.103, and 5.105; as well as THSC, §§382.002, 382.011 - 382.017, 382.021 - 382.022 and 382.051.

§113.2402. Definitions.

(a) Except as provided in subsections (b) and (c) of this section, the terms used in this division are defined in 40 CFR §60.2 as amended through May 16, 2007, and 40 CFR §60.41f as amended through March 26, 2020, which are incorporated by reference.

(b) The term "Administrator" wherever it appears in 40 CFR Part 60, §§60.30f - 60.41f, shall refer to the commission, except for purposes of 40 CFR §60.35f(a)(5). For purposes of 40 CFR §60.35f(a)(5), the term "Administrator" means the Administrator of the U.S. Environmental Protection Agency.

(c) Legacy controlled landfill--any municipal solid waste landfill subject to this division that submitted a gas collection and control system (GCCS) design plan prior to May 21, 2021, in compliance with 40 CFR §60.752(b)(2)(i) or 30 TAC §113.2061 of this title (relating to Standards for Air Emissions), depending on which regulation was applicable to the landfill. This definition applies to those landfills that completed construction and began operations of the GCCS and those that are within the 30-month timeline for installation and start-up of a GCCS according to 40 CFR §60.752(b)(2)(ii), or the requirements of 30 TAC Chapter 113, Subchapter D, Division 1.

(d) Reconstruction--the replacement of components of an existing MSWLF to such an extent that the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new MSWLF, and it is technologically and economically feasible to meet the applicable standards set forth in this division. Fixed capital cost means the capital needed to provide all the depreciable components.

§113.2406. Exemptions, Alternate Emission Standards, and Alternate Compliance Schedules.

(a) A municipal solid waste landfill (MSWLF) meeting the following conditions is not subject to the requirements of this division, except for the requirements of subsection (d) of this section, as applicable:

(1) The MSWLF has not accepted waste at any time since October 9, 1993; and

(2) The MSWLF does not have additional design capacity available for future waste deposition, regardless of whether the MSWLF is currently open or closed.

(b) A MSWLF may apply for less stringent emission standards or longer compliance schedules than those otherwise required by this division, provided that the owner or operator demonstrates to the executive director and EPA, the following:

(1) unreasonable cost of control resulting from MSWLF age, location, or basic MSWLF design;

(2) physical impossibility of installing necessary control equipment; or

(3) other factors specific to the MSWLF that make application of a less stringent standard or final compliance time significantly more reasonable.

(c) Owners or operators requesting alternate emission standards or compliance schedules under subsection (b) of this section shall submit requests and supporting documentation to the TCEQ Office of Air, Air Permits Division and provide a copy to the United States Environmental Protection Agency, Region 6.

(d) Upon request from the executive director, the owner or operator of a MSWLF shall submit any additional information necessary to demonstrate eligibility for or compliance with exemptions under this section.

§113.2410. Initial and Annual Reporting, and Modified Reporting Requirements for Legacy Controlled Landfills.

(a) An owner or operator of a municipal solid waste landfill (MSWLF) subject to the requirements of this division shall comply with the following reporting requirements, except as otherwise specified for legacy controlled landfills in subsections (b) - (d) of this section.

(1) The owner or operator shall submit the initial design capacity report in accordance with 40 CFR Part 60, §60.38f(a), to the executive director within 90 days from the implementation date specified in §113.2412 of this title (relating to Implementation Date and Increments of Progress). Owners or operators that have already submitted an initial design capacity report to EPA to satisfy 40 CFR §62.16724 are not required to submit the report again, unless specifically requested by the executive director.

(2) An owner or operator of an MSWLF with a design capacity equal to or greater than 2.5 million megagrams and 2.5 million cubic meters and subject to the requirements of this division shall also submit the initial non-methane organic compound (NMOC) emission rate report in accordance with 40 CFR §60.38f(c) to the executive director within 90 days from the implementation date specified in §113.2412 of this title. Owners or operators that have already submitted an initial NMOC report to EPA to satisfy 40 CFR §62.16724 are not required to submit the report again, unless specifically requested by the executive director.

(3) An owner or operator of an MSWLF subject to the requirements of this division shall comply with applicable requirements of 40 CFR §60.38f(d) and (e) concerning the submittal of a site-specific

gas collection and control system design plan to the executive director. Owners or operators that have already submitted a design plan to EPA to satisfy 40 CFR §62.16724 are not required to submit the design plan again, unless specifically requested by the executive director.

(4) Owners or operators of an MSWLF subject to the requirements of this division shall provide to the executive director an annual emission inventory report of landfill-generated non-methane organic compound (NMOC) emissions. This annual NMOC emission inventory report is not required for an MSWLF with a capacity less than 2.5 million megagrams by mass or 2.5 million cubic meters by volume or an MSWLF which is exempt from this division under the provisions of §113.2406(a). This annual NMOC emission inventory report is separate and distinct from any initial or annual NMOC emission rate reports required under 40 CFR §60.38f.

(A) Annual NMOC emission inventory reports required under this paragraph shall include the landfill's uncontrolled and (if equipped with a control system) controlled NMOC emissions in megagrams per year (Mg/yr) for the preceding calendar year. For purposes of these annual emission inventory reports, NMOC emissions will be calculated using the procedures specified in the U.S. EPA's *Compilation of Air Pollutant Emissions Factors* (AP-42). Note that the use of AP-42 calculations for these annual NMOC emission inventory reports is different from the calculation method that is required for NMOC emission rate reports prepared for purposes of 40 CFR Part 60, Subpart Cf or 40 CFR Part 62, Subpart OOO.

(B) Annual NMOC emission inventory reports required under this paragraph shall be submitted no later than March 31 of each year following the calendar reporting year. These reports shall be submitted using the method designated by the executive director.

(5) This section only addresses certain specific reports for MSWLFs which are subject to this division. Owners or operators of an MSWLF subject to this division shall also comply with any additional reporting requirements specified in 40 CFR §60.38f or elsewhere in 40 CFR Part 60, Subpart Cf, except as otherwise specified for legacy controlled landfills in subsections (b) - (d) of this section.

(b) Owners or operators of legacy controlled landfills are not required to submit the following reports, provided these reports were submitted under 40 CFR Part 60, Subpart WWW, or Chapter 113, §113.2061 (relating to Standard for Air Emissions), on or before June 21, 2021:

(1) Initial design capacity report specified in 40 CFR §60.38f(a);

(2) Initial or subsequent NMOC emission rate report specified in 40 CFR §60.38f(c);

(3) Collection and control system design plan specified in 40 CFR §60.38f(d);

(4) Initial annual report specified in 40 CFR §60.38f(h); and

(5) Initial performance test report specified in 40 CFR §60.38(f)(i).

(c) Owners or operators of legacy controlled landfills that have already submitted an annual report under 40 CFR Part 60, Subpart WWW, or Chapter 113, Division 1, of this title, are required to submit the annual report under this division no later than one year after the most recent annual report was submitted.

(d) Owners or operators of legacy controlled landfills that demonstrate compliance with the emission control requirements of this division using a treatment system as defined in 40 CFR §60.41f must comply with 40 CFR §62.16724(d)(7) as amended through May 21, 2021.

(e) Upon request, the owner or operator of a MSWLF subject to the requirements of this division shall submit any requested additional information necessary to document compliance to the executive director or applicable local air or waste pollution control programs with jurisdiction.

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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