PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 63. PUBLIC INFORMATION

SUBCHAPTER C. ELECTRONIC SUBMISSION OF REQUEST FOR ATTORNEY GENERAL OPEN RECORDS DECISION

1 TAC §63.21

The Office of the Attorney General (OAG), Open Records Division, proposes an amendment to §63.21 of Title 1 of the Texas Administrative Code. Subsection 402.006(d) of the Government Code authorized the creation of a nonrefundable administrative convenience fee for the electronic submission of documents to the attorney general. Pursuant to H.B. 2866, 82nd Regular Session (2011), subsection 402.006(d) expired on September 1, 2015. Accordingly, the references to the nonrefundable fee in the OAG rules are no longer applicable. This proposed amendment removes the corresponding language in §63.21 and renumbers the remaining subsection of §63.21. In addition, a grammatical error is corrected in the current subsection §63.21(a)(4).

Mr. Justin Gordon, Open Records Division Chief, has determined that for the first five-year period the section is in effect there will be no additional estimated costs to the state or local governments expected as a result of amending the rule. The OAG will still be allowed to charge reasonable fees for electronic filing pursuant to subsection 402.006(e) of the Government Code.

Mr. Gordon has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of removing the subsection will be uniform application and operation of state law pertaining to the electronic submission of documents and other materials to the OAG Open Records Division.

Mr. Gordon has also determined there will be no effect on individuals, as electronic submission was and is not required. Finally, Mr. Gordon has determined that this amendment will have no adverse effect on small business, micro-business or local employment.

Comments on the proposed amendment should be submitted to Mr. Justin Gordon, Chief, Open Records Division, Office of the Attorney General, (physical address) 209 West 14th Street, Austin, Texas 78701 or (mailing address) P.O. Box 12548, Austin, Texas 78711-2548. Comments on this proposed amendment must be submitted no later than 30 days from the date of this publication.

This amendment is proposed to address the expiration of subsection 402.006(d) of the Government Code. Subsection 402.006(d) expired on September 1, 2015. The remaining portions of §63.21 are authorized by section 552.011 of the Government Code.

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

§63.21. Definitions [~~and Purpose~~].

[~~(a)~~] The following words and terms, when used in this subchapter, shall have the following meanings:

(1) "Governmental body" means a governmental body as defined in Texas Government Code §552.003(1).

(2) "Request for decision" means a request for an attorney general open records decision made by a governmental body pursuant to Texas Government Code §552.301 and §552.309.

(3) "Requestor" means a requestor as defined in Texas Government Code §552.003(6).

(4) "Interested Third Party" means any third party who wishes to submit [~~submits~~] comments, documents, or other materials for consideration in the attorney general's open records decision process under Texas Government Code §552.304 or §552.305.

(5) "Attorney General's Designated Electronic Filing System" means the online, electronic filing system designated by the attorney general as the system for submitting documents and other materials to the attorney general under Texas Government Code §552.309.

[~~(b) This subchapter governs the procedures by which the attorney general may charge and collect a nonrefundable administrative convenience fee for the electronic submission of documents and other materials to the attorney general under Texas Government Code §552.309.~~]

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

Filed with the Office of the Secretary of State on June 7, 2016.

TRD-201603394
Amanda Crawford
General Counsel
Office of the Attorney General
Earliest possible date of adoption: August 21, 2016
For further information, please call: (512) 475-4163

♦ ♦ ♦

1 TAC §63.24

The Office of the Attorney General (OAG), Open Records Division, proposes repeal of §63.24 of Title 1 of the Administrative Code. Subsection 402.006(d) of the Government Code authorized the creation of a nonrefundable administrative convenience fee for the electronic submission of documents to the attorney general. Pursuant to H.B. 2866, 82nd Regular Session (2011), subsection 402.006(d) expired on September 1, 2015. Accordingly, the references to the nonrefundable fee in the OAG rules are no longer applicable. This proposed repeal removes the OAG rule referencing a nonrefundable administrative convenience fee.

Mr. Justin Gordon, Open Records Division Chief, has determined that for the first five-year period the repeal is in effect there will be no additional estimated costs to the state or local governments expected as a result of enforcing or administering the repeal. The OAG will still be allowed to charge reasonable fees for electronic filing pursuant to subsection 402.006(e) of the Government Code.

Mr. Gordon has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of removing the section will be uniform application and operation of state law pertaining to the electronic submission of documents and other materials to the OAG Open Records Division.

Mr. Gordon has also determined there will be no effect on individuals, as electronic submission was and is not required. Finally, Mr. Gordon has determined that this repeal will have no adverse effect on small business, micro-business or local employment.

Comments on the proposed repeal should be submitted to Mr. Justin Gordon, Chief, Open Records Division, Office of the Attorney General, (physical address) 209 West 14th Street, Austin, Texas 78701 or (mailing address) P.O. Box 12548, Austin, Texas 78711-2548. Comments on this proposed repeal must be submitted no later than 30 days from the date of this publication.

This repeal is proposed to address the expiration of subsection 402.006(d) of the Government Code. Subsection 402.006(d) expired on September 1, 2015.

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

§63.24. Administrative Convenience Fee.

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

Filed with the Office of the Secretary of State on July 7, 2016.

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Amanda Crawford
General Counsel
Office of the Attorney General
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For further information, please call: (512) 475-4163

CHAPTER 70. COST OF COPIES OF PUBLIC INFORMATION

1 TAC §70.13

The Office of the Attorney General (OAG), Open Records Division, proposes §70.13, of Title 1 of the Texas Administrative Code. Pursuant to S.B. 158, 84th Regular Session (2015), the OAG is to set a fee for obtaining a copy of a body worn camera recording. S.B. 158 states this amount shall be sufficient to cover the cost of reviewing and making the recording when release of a body worn camera recording is required.

Mr. Justin Gordon, Open Records Division Chief, has determined that for the first five-year period the section is in effect there will be no additional estimated costs to the state or local governments expected as a result of the proposed rule. The OAG believes its proposed fee covers the cost of providing a recording of a body worn camera.

Mr. Gordon has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of this proposed rule is a simple fee for obtaining body worn camera recordings that complies with the statutory mandate that the fee must be sufficient to cover the cost of reviewing and making the recording. The proposed rule will allow a law enforcement agency to efficiently and accurately calculate the fee to be charged to members of the public who seek to obtain body worn camera recordings pursuant to the Public Information Act. The proposed rule will also ensure the public will not be charged unless they actually obtain a copy of the body worn camera recording or for work previously completed.

Mr. Gordon has also determined that for the first five-year period in which the proposed rule is in effect, there will be a possible foreseeable fiscal impact on persons who decide to request a copy of a body worn camera and are charged in accordance with this rule. Finally, Mr. Gordon has determined that the proposed rule will have no adverse effect on small business, micro-business or local employment.

Comments on the proposed rule should be submitted to Mr. Justin Gordon, Chief, Open Records Division, Office of the Attorney General, (physical address) 209 West 14th Street, Austin, Texas 78701 or (mailing address) P.O. Box 12548, Austin, Texas 78711-2548. Comments on this proposed rule must be submitted no later than 30 days from the date of this publication.

This rule is proposed to comply with §1701.661(g) of the Occupations Code, which requires the OAG to set a proposed fee to obtain a copy of a body worn camera recording from a law enforcement agency under that section.

Chapter 552 of the Government Code is affected by this proposal.

§70.13. Fee for Obtaining Copy of Body Worn Camera Recording.

(a) This section provides the fee for obtaining a copy of body worn camera recording pursuant to §1701.661 of the Government Code.

(1) Section 1701.661 of the Government Code is the sole authority under which a copy of a body worn camera recording may be obtained from a law enforcement agency under the Public Information Act, Chapter 552 of the Government Code, and no fee for obtaining a copy of a body worn camera recording from a law enforcement agency may be charged unless authorized by this section.

(2) This section does not apply to a request, or portions of a request, seeking to obtain information other than a copy of a body worn camera recording. Portions of a request seeking information other than a copy of a body worn camera recording are subject to the charges listed in §70.3 of this chapter.

(b) The charge for obtaining a copy of a body worn camera recording shall be:

(1) $10.00 per recording responsive to the request for information; and

(2) $1.00 per full minute of body worn camera video or audio footage responsive to the request for information, if identical information has not already been obtained by a member of the public in response to a request for information.

(c) A law enforcement agency may provide a copy without charge, or at a reduced charge, if the agency determines waiver or reduction of the charge is in the public interest.

(d) If the requestor is not permitted to obtain a copy of a requested body worn camera recording under §1701.661 of the Government Code or an exception in the Public Information Act, Chapter 552 of the Government Code, the law enforcement agency may not charge the requestor under this section.

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

Filed with the Office of the Secretary of State on July 7, 2016.

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Amanda Crawford
General Counsel
Office of the Attorney General
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For further information, please call: (512) 475-4163

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 353. MEDICAID MANAGED CARE

The Texas Health and Human Services Commission (HHSC) proposes amendments to Chapter 353, Subchapter A, General Provisions, §353.2, concerning Definitions; Subchapter G, STAR+PLUS, §353.601, concerning General Provisions; and §353.603, concerning Member Participation; and Subchapter H, STAR Health, §353.701, concerning General Provisions; and §353.702, concerning Member Participation.

HHSC proposes new Subchapter M, concerning Home and Community Based Services in Managed Care, including new §353.1151, concerning General Provisions; §353.1153, concerning STAR+PLUS Home and Community Based Services (HCBS) Program; and §353.1155, concerning Medically Dependent Children Program. HHSC also proposes new Subchapter N, concerning STAR Kids, including new §353.1201, concerning General Provisions; §353.1203, concerning Member Participation; §353.1205, concerning Service Coordination; §353.1207, concerning Participating Providers; and §353.1209, concerning STAR Kids Handbook.

BACKGROUND AND JUSTIFICATION

HHSC proposes amendments to Subchapter A to update the definitions rule for Chapter 353. HHSC proposes amended rules in Subchapters G and H, concerning STAR+PLUS and STAR Health, to make changes resulting from the STAR Kids implementation. These primarily include changes to the list of client populations who are mandatory, voluntary, or excluded for these programs.

HHSC proposes amendments to STAR+PLUS member participation and program rules under Subchapter G to implement Senate Bill 169 (84th Legislature, Regular Session, 2015), which enacted new Texas Government Code §531.0931 regarding military members and their dependents who are on interest or waiting lists for services.

HHSC proposes to create new Subchapter M, concerning Home and Community Based Services in Managed Care. This subchapter describes the member participation and assessment requirements for the STAR+PLUS Home and Community Based Services (HCBS) program offered to qualified members in the STAR+PLUS managed care program and the Medically Dependent Children Program (MDCP).

HHSC proposes to create new Subchapter N, concerning STAR Kids. Senate Bill 7 (83rd Legislature, Regular Session, 2013) enacted new Texas Government Code §533.00253, which directs HHSC to establish a mandatory, capitated STAR Kids managed care program tailored to provide Medicaid benefits to individuals with disabilities under the age of 21. HHSC intends for the STAR Kids program to improve coordination of care, access to care, health outcomes, and quality of care, with an operational start date of November 1, 2016. Proposed Subchapter N contains the rules required to implement this program.

SECTION-BY-SECTION SUMMARY

Proposed §353.2 adds definitions for "CFR," "Consumer Directed Services (CDS) option, " "Habilitation, " "Legally authorized representative," "MDCP, " and "STAR Kids. " Proposed amendments also revise the definitions of "Action," "CMS," "Covered Services, " "Cultural Competency, " "Long term service and support (LTSS), " "Medical Assistance Only (MAO), " "Medically necessary, " and "STAR+PLUS Home and Community-Based Services Waiver. "

Proposed §353.601 lists subchapters that apply to the STAR+PLUS program.

Proposed §353.603 removes the option of voluntary enrollment in STAR+PLUS for those children who will be served by the STAR Kids program, as described in proposed Subchapter N, and makes other non-substantive updates and corrections.

Proposed §353.701 lists subchapters that apply to the STAR Health program and corrects a cross reference.

Proposed §353.702 revises the categories of individuals who cannot participate in STAR Health, to remove the exclusion of children and young adults who are dual eligible, to ensure these children and young adults receive services through STAR Health rather than STAR Kids. Proposed amendments also remove references to the Former Foster Care in Higher Education (FFCHE) program and make other nonsubstantive corrections.

Proposed §353.1151 outlines general provisions for home and community-based services offered through a Medicaid managed care organization (MCO).

Proposed §353.1153 describes eligibility and assessment processes for the STAR+PLUS Home and Community-Based Services (HCBS) program.

Proposed §353.1155 describes eligibility and assessment processes for the Medically Dependent Children Program (MDCP).

Proposed §353.1201 outlines general provisions for the STAR Kids program, including a list of certain subchapters of Chapter 353 that apply to the STAR Kids program.

Proposed §353.1203 describes the populations that will be mandatorily enrolled in STAR Kids and the populations that are excluded from STAR Kids.

Proposed §353.1205 describes the service coordination available to STAR Kids members.

Proposed §353.1207 outlines requirements for STAR Kids participating providers.

Proposed §353.1209 describes the purpose of the STAR Kids Handbook.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five years the proposed new and amended rules are in effect, there could be a reduction in cost due to the transition of the service delivery model from fee-for-service to managed care for STAR Kids and for MDCP services delivered through STAR Kids and STAR Health. However, there may be capitation rate increases for STAR Health due to this implementation. Capitation rate negotiations later this year will determine the outcome of any capitation changes. With capitation rate development pending, uncertainties as to the fiscal impact exist due to potential for a resulting cost or savings.

There is no anticipated impact to costs and revenues of local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

HHSC has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the proposed new and amended rules, because no Texas Medicaid MCO qualifies as a small business or micro-business.

PUBLIC BENEFIT AND COST

Gary Jessee, State Medicaid Director, has determined that for each year of the first five years the rules are in effect, the proposed new and amended rules are expected to positively impact individuals receiving Medicaid services. The proposed new rules provide guidance regarding the new STAR Kids program. Proposed amendments to existing STAR+PLUS and STAR Health, and proposed new rules related to HCBS in managed care, provide increased clarity and guidance, which will make it easier for Medicaid providers and members to understand managed care and how to access services. This will lead to increased access to care and will help ensure continuity of care across programs and MCOs.

Ms. Rymal has also determined there is no anticipated economic cost to persons required to comply with the proposed new and amended rules.

HHSC has determined that the proposed new and amended rules will not affect a local economy. There is no anticipated negative impact on local employment.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Kellie Dees, STAR Kids Specialist, at 4900 N. Lamar Blvd, MC H-312, Austin, Texas 78751; by fax to (512) 730-7452; or by e-mail to kellie.dees@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §353.2

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §533.00253, which requires HHSC to implement the STAR Kids managed care program.

The proposed amendment affects Texas Human Resources Code Chapter 32 and Texas Government Code Chapters 531 and 533. No other statutes, articles, or codes are affected by these proposed amendments.

§353.2. Definitions.

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

(1) Action--

(A) An action is defined as:

(i) the denial or limited authorization of a requested Medicaid service, including the type or level of service;

(ii) the reduction, suspension, or termination of a previously authorized service;

(iii) the failure to provide services in a timely manner;

(iv) the denial in whole or in part of payment for a service; or

(v) the failure of a managed care organization (MCO) to act within the timeframes set forth by the Health and Human Services Commission (HHSC) and state and federal law.[; or]

~~*[(vi)* for a resident of a rural area with only one MCO, the denial of a member's request to obtain services outside the network.]~~

(B) "Action" does not include expiration of a time-limited service.

(2) Acute care--Preventive care, primary care, and other medical or behavioral health care provided by the provider or under

the direction of a provider for a condition having a relatively short duration.

(3) Acute care hospital--A hospital that provides acute care services.

(4) Agreement or Contract--The formal, written, and legally enforceable contract and amendments thereto between HHSC and an MCO.

(5) Allowable revenue--All managed care revenue received by the MCO pursuant to the contract during the contract period, including retroactive adjustments made by HHSC. This would include any revenue earned on Medicaid managed care funds such as investment income, earned interest, or third party administrator earnings from services to delegated networks.

(6) Appeal--The formal process by which a member or his or her representative requests a review of the MCO's action.

(7) Behavioral health service--A covered service for the treatment of mental, emotional, or substance use disorders.

(8) Capitated service--A benefit available to members under the Texas Medicaid program for which an MCO is responsible for payment.

(9) Capitation rate--A fixed predetermined fee paid by HHSC to the MCO each month, in accordance with the contract, for each enrolled member in exchange for which the MCO arranges for or provides a defined set of covered services to the member, regardless of the amount of covered services used by the enrolled member.

(10) CFR--Code of Federal Regulations.

(11) [~~(10)~~] Children's Medicaid Dental Services--The dental services provided through a dental MCO to a client birth through age 20.

(12) [~~(11)~~] Clean claim--A claim submitted by a physician or provider for health care services rendered to a member, with the data necessary for the MCO or subcontracted claims processor to adjudicate and accurately report the claim. A clean claim must meet all requirements for accurate and complete data as further defined under the terms of the contract executed between the MCO and HHSC.

(13) [~~(12)~~] Client--Any Medicaid-eligible recipient.

(14) [~~(13)~~] CMS--The Centers for Medicare & [~~and~~] Medicaid Services, which is the federal agency responsible for administering Medicare and overseeing state administration of Medicaid.

(15) [~~(14)~~] Complainant--A member, or a treating provider or other individual designated to act on behalf of the member, who files a complaint.

(16) [~~(15)~~] Complaint--Any dissatisfaction expressed by a complainant, orally or in writing, to the MCO about any matter related to the MCO other than an action. Subjects for complaints may include:

(A) the quality of care of services provided;

(B) aspects of interpersonal relationships such as rudeness of a provider or employee; and

(C) failure to respect the member's rights.

(17) Consumer Directed Services (CDS) option--A service delivery option (also known as self-directed model with service budget) in which an individual or legally authorized representative employs and retains service providers and directs the delivery of certain program services.

(18) [~~(16)~~] Covered services--Unless a service or item is specifically excluded under the terms of the state plan, a federal waiver, a managed care services contract, or an amendment to any of these, the phrase "covered services" means all health care, long term services and supports, or dental services or items that the MCO must arrange to provide and pay for on a member's behalf under the terms of the contract executed between the MCO and HHSC, including:

(A) all services or items comprising "medical assistance" as defined in §32.003 of the Human Resources Code; and

(B) all value-added services under such contract.

(19) [~~(17)~~] Cultural competency--The ability of individuals and systems to provide services effectively to people of various disabilities, cultures, races, ethnic backgrounds, and religions in a manner that recognizes, values, affirms, and respects the worth of the individuals and protects and preserves their dignity.

(20) [~~(18)~~] Day--A calendar day, unless specified otherwise.

(21) [~~(19)~~] Default enrollment--The process established by HHSC to assign a Medicaid managed care enrollee to an MCO when the enrollee has not selected an MCO.

(22) [~~(20)~~] Dental managed care organization (dental MCO)--A dental indemnity insurance provider or dental health maintenance organization licensed or approved by the Texas Department of Insurance.

(23) [~~(21)~~] Dental contractor--A dental MCO that is under contract with HHSC for the delivery of dental services.

(24) [~~(22)~~] Dental home--A provider who has contracted with a dental MCO to serve as a dental home to a member and who is responsible for providing routine preventive, diagnostic, urgent, therapeutic, initial, and primary care to patients, maintaining the continuity of patient care, and initiating referral for care. Provider types that can serve as dental homes are federally qualified health centers and individuals who are general dentists or pediatric dentists.

(25) [~~(23)~~] Dental service--The routine preventive, diagnostic, urgent, therapeutic, initial, and primary care provided to a member and included within the scope of HHSC's agreement with a dental contractor. For purposes of this chapter, "dental service" does not include dental devices for craniofacial anomalies; treatment rendered in a hospital, urgent care center, or ambulatory surgical center setting for craniofacial anomalies; or emergency services provided in a hospital, urgent care center, or ambulatory surgical center setting involving dental trauma. These types of services are treated as health care services in this chapter.

(26) [~~(24)~~] Disability--A physical or mental impairment that substantially limits one or more of an individual's major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, socializing, or working.

(27) [~~(25)~~] Disproportionate Share Hospital (DSH)--A hospital that serves a higher than average number of Medicaid and other low-income patients and receives additional reimbursement from the State.

(28) [~~(26)~~] Dual eligible--A Medicaid recipient who is also eligible for Medicare.

(29) [~~(27)~~] Elective enrollment--Selection of a primary care provider (PCP) and MCO by a client during the enrollment period established by HHSC.

(30) [~~(28)~~] Emergency behavioral health condition--Any condition, without regard to the nature or cause of the condition, that in the opinion of a prudent layperson possessing an average knowledge of health and medicine:

(A) requires immediate intervention and/or medical attention without which the client would present an immediate danger to themselves or others; or

(B) renders the client incapable of controlling, knowing, or understanding the consequences of his or her actions.

(31) [~~(29)~~] Emergency medical condition--A medical condition manifesting itself by acute symptoms of recent onset and sufficient severity (including severe pain), such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical care to result in:

(A) placing the patient's health in serious jeopardy;

(B) serious impairment to bodily functions;

(C) serious dysfunction of any bodily organ or part;

(D) serious disfigurement; or

(E) serious jeopardy to the health of a pregnant woman or her unborn child.

(32) [~~(30)~~] Emergency service--A covered inpatient and outpatient service, furnished by a network provider or out-of-network provider that is qualified to furnish such service, that is needed to evaluate or stabilize an emergency medical condition and/or an emergency behavioral health condition. For health care MCOs, the term "emergency service" includes post-stabilization care services.

(33) [~~(31)~~] Encounter--A covered service or group of covered services delivered by a provider to a member during a visit between the member and provider. This also includes value-added services.

(34) [~~(32)~~] Enrollment--The process by which an individual determined to be eligible for Medicaid is enrolled in a Medicaid MCO serving the service area in which the individual resides.

(35) [~~(33)~~] EPSDT--The federally mandated Early and Periodic Screening, Diagnosis and Treatment program defined in 25 TAC Chapter 33. The State of Texas has adopted the name Texas Health Steps (THSteps) for its EPSDT program.

(36) [~~(34)~~] EPSDT-CCP--The Early and Periodic Screening, Diagnosis and Treatment-Comprehensive Care Program described in Chapter 363 of this title (relating to Texas Health Steps Comprehensive Care Program).

(37) [~~(35)~~] Exclusive provider benefit plan (EPBP)--An MCO that complies with 28 TAC §§3.9201 - 3.9212, relating to the Texas Department of Insurance's requirements for EPBPs, and contracts with HHSC to provide Medicaid coverage.

(38) [~~(36)~~] Experience rebate--The portion of the MCO's net income before taxes that is returned to the State in accordance with the MCO's contract with HHSC.

(39) [~~(37)~~] Fair hearing--The process adopted and implemented by HHSC in Chapter 357, Subchapter A of this title (relating to Uniform Fair Hearing Rules) in compliance with federal regulations and state rules relating to Medicaid fair hearings.

(40) [~~(38)~~] Federally Qualified Health Center (FQHC)--An entity that is certified by CMS to meet the requirements of 42 U.S.C. §1395x(aa)(3) as a Federally Qualified Health Center and is enrolled as a provider in the Texas Medicaid program.

(41) [~~(39)~~] Federal Poverty Level (FPL)--The household income guidelines issued annually and published in the *Federal Register* by the United States Department of Health and Human Services under the authority of 42 U.S.C. §9902(2) and as in effect for the applicable budget period determined in accordance with 42 C.F.R. §435.603(h). HHSC uses the FPL to determine an individual's eligibility for Medicaid.

(42) [~~(40)~~] Federal waiver--Any waiver permitted under federal law and approved by CMS that allows states to implement Medicaid managed care.

(43) [~~(41)~~] Former Foster Care Children (FFCC) program--The Medicaid program for young adults who aged out of the conservatorship of Texas Department of Family and Protective Services (DFPS), administered in accordance with Chapter 366, Subchapter J of this title (relating to Former Foster Care Children's Program).

(44) [~~(42)~~] Functional necessity--A member's need for services and supports with activities of daily living or instrumental activities of daily living to be healthy and safe in the most integrated setting possible. This determination is based on the results of a functional assessment.

(45) Habilitation--Acquisition, maintenance, and enhancement of skills necessary for the individual to accomplish ADLs, IADLs, and health-related tasks.

(46) [~~(43)~~] Health care managed care organization (health care MCO)--An entity that is licensed or approved by the Texas Department of Insurance to operate as a health maintenance organization or to issue an EPBP.

(47) [~~(44)~~] Health care services--The acute care, behavioral health care, and health-related services that an enrolled population might reasonably require in order to be maintained in good health, including, at a minimum, emergency services and inpatient and outpatient services.

(48) [~~(45)~~] Health and Human Services Commission (HHSC)--The single state agency charged with administration and oversight of the Texas Medicaid program or its designee.

(49) [~~(46)~~] Health maintenance organization (HMO)--An organization that holds a certificate of authority from the Texas Department of Insurance to operate as an HMO under Chapter 843 of the Texas Insurance Code, or a certified Approved Non-Profit Health Corporation formed in compliance with Chapter 844 of the Texas Insurance Code.

(50) [~~(47)~~] Hospital--A licensed public or private institution as defined in the Texas Health and Safety Code at Chapter 241, relating to hospitals, or Chapter 261, relating to municipal hospitals.

(51) [~~(48)~~] Intermediate care facility for individuals with an intellectual disability or related condition (ICF-IID)--A facility providing care and services to individuals with intellectual disabilities or related conditions as defined in §1905(d) of the Social Security Act (42 U.S.C. 1396(d)).

(52) Legally authorized representative (LAR)--A person authorized by law to act on behalf of an individual with regard to a matter described in this chapter, and may, depending on the circumstances, include a parent, guardian, or managing conservator of a minor, or the guardian of an adult, or a representative designated pursuant to 42 C.F.R. 431.923.

(53) [~~(49)~~] Long term service and support (LTSS)--A service provided to a qualified member in his or her home or other community-based setting [~~settings~~] necessary [~~to provide assistance with~~

~~activities of daily living~~] to allow the member to remain in the most integrated setting possible. LTSS includes services provided [~~to all SSI recipients~~] under the Texas State Plan as well as services available [~~only~~] to persons who qualify for STAR+PLUS Home and Community-Based Program services or Medicaid 1915(c) waiver services. LTSS available through an MCO in STAR+PLUS, STAR Health, and STAR Kids varies by program model. [~~Waiver Services.~~]

(54) [~~(50)~~] Main dental home provider--See definition of "dental home" in this section.

(55) [~~(51)~~] Main dentist--See definition of "dental home" in this section.

(56) [~~(52)~~] Managed care--A health care delivery system or dental services delivery system in which the overall care of a patient is coordinated by or through a single provider or organization.

(57) [~~(53)~~] Managed care organization (MCO)--A dental MCO or a health care MCO.

(58) [~~(54)~~] Marketing--Any communication from an MCO to a client who is not enrolled with the MCO that can reasonably be interpreted as intended to influence the client's decision to enroll, not to enroll, or to disenroll from a particular MCO.

(59) [~~(55)~~] Marketing materials--Materials that are produced in any medium by or on behalf of the MCO that can reasonably be interpreted as intending to market to potential members. Materials relating to the prevention, diagnosis or treatment of a medical or dental condition are not marketing materials.

(60) MDCP--Medically Dependent Children Program. A §1915(c) waiver program that provides community-based services to assist Medicaid beneficiaries under age 21 to live in the community and avoid institutionalization.

(61) [~~(56)~~] Medicaid--The medical assistance program authorized and funded pursuant to Title XIX of the Social Security Act (42 U.S.C. §1396 et seq) and administered by HHSC.

(62) [~~(57)~~] Medical Assistance Only (MAO)--A person who qualifies financially and functionally for Medicaid assistance but does not receive Supplemental Security Income (SSI) benefits, as defined in Chapters 358, 360, and 361, of this title (relating to Medicaid Eligibility for the Elderly and People with Disabilities, Medicaid Buy-In Program and Medicaid Buy-In for Children Program).

(63) [~~(58)~~] Medicaid for transitioning foster care youth (MTFCY) program--The Medicaid program for young adults who aged out of the conservatorship of Texas Department of Family and Protective Services (DFPS), administered in accordance with Chapter 366, Subchapter F of this title (relating to Medicaid for Transitioning Foster Care Youth).

(64) [~~(59)~~] Medical home--A PCP or specialty care provider who has accepted the responsibility for providing accessible, continuous, comprehensive, and coordinated care to members participating in an MCO contracted with HHSC.

(65) [~~(60)~~] Medically necessary--

(A) For Medicaid members birth through age 20, the following Texas Health Steps services:

(i) screening, vision, dental, and hearing services; and

(ii) other health care services or dental services that are necessary to correct or ameliorate a defect or physical or mental illness or condition. A determination of whether a service is necessary to correct or ameliorate a defect or physical or mental illness or condition:

(I) must comply with the requirements of a final court order that applies to the Texas Medicaid program or the Texas Medicaid managed care program as a whole; and

(II) may include consideration of other relevant factors, such as the criteria described in subparagraphs (B)(ii) - (vii) and (C)(ii) - (vii) of this paragraph.

(B) For Medicaid members over age 20, non-behavioral health services that are:

(i) reasonable and necessary to prevent illnesses or medical conditions, or provide early screening, interventions, or treatments for conditions that cause suffering or pain, cause physical deformity or limitations in function, threaten to cause or worsen a disability, cause illness or infirmity of a member, or endanger life;

(ii) provided at appropriate facilities and at the appropriate levels of care for the treatment of a member's health conditions;

(iii) consistent with health care practice guidelines and standards that are endorsed by professionally recognized health care organizations or governmental agencies;

(iv) consistent with the member's medical need [~~diagnoses~~];

(v) no more intrusive or restrictive than necessary to provide a proper balance of safety, effectiveness, and efficiency;

(vi) not experimental or investigative; and

(vii) not primarily for the convenience of the member or provider.

(C) For Medicaid members over age 20, behavioral health services that:

(i) are reasonable and necessary for the diagnosis or treatment of a mental health or substance use disorder, or to improve, maintain, or prevent deterioration of functioning resulting from such a disorder;

(ii) are in accordance with professionally accepted clinical guidelines and standards of practice in behavioral health care;

(iii) are furnished in the most appropriate and least restrictive setting in which services can be safely provided;

(iv) are the most appropriate level or supply of service that can safely be provided;

(v) could not be omitted without adversely affecting the member's mental and/or physical health or the quality of care rendered;

(vi) are not experimental or investigative; and

(vii) are not primarily for the convenience of the member or provider.

(66) [~~(61)~~] Member--A person who is eligible for benefits under Title XIX of the Social Security Act and Medicaid, is in a Medicaid eligibility category included in the Medicaid managed care program, and is enrolled in a Medicaid MCO.

(67) [~~(62)~~] Member education program--A planned program of education:

(A) concerning access to health care services or dental services through the MCO and about specific health or dental topics;

(B) that is approved by HHSC; and

(C) that is provided to members through a variety of mechanisms that must include, at a minimum, written materials and face-to-face or audiovisual communications.

(68) [~~(63)~~] Member materials--All written materials produced or authorized by the MCO and distributed to members or potential members containing information concerning the managed care program. Member materials include member ID cards, member handbooks, provider directories, and marketing materials.

(69) [~~(64)~~] Non-capitated service--A benefit available to members under the Texas Medicaid program for which an MCO is not responsible for payment.

(70) [~~(65)~~] Outside regular business hours--As applied to FQHCs and rural health clinics (RHCs), means before 8 a.m. and after 5 p.m. Monday through Friday, weekends, and federal holidays.

(71) [~~(66)~~] Participating MCO--An MCO that has a contract with HHSC to provide services to members.

(72) [~~(67)~~] Post-stabilization care service--A covered service, related to an emergency medical condition, that is provided after a Medicaid member is stabilized in order to maintain the stabilized condition, or, under the circumstances described in 42 C.F.R. §438.114(b) and (e) and 42 C.F.R. §422.113(c)(iii) to improve or resolve the Medicaid member's condition.

(73) [~~(68)~~] Primary care provider (PCP)--A physician or other provider who has agreed with the health care MCO to provide a medical home to members and who is responsible for providing initial and primary care to patients, maintaining the continuity of patient care, and initiating referral for care.

(74) [~~(69)~~] Provider--A credentialed and licensed individual, facility, agency, institution, organization, or other entity, and its employees and subcontractors, that have a contract with the MCO for the delivery of covered services to the MCO's members.

(75) [~~(70)~~] Provider education program--Program of education about the Medicaid managed care program and about specific health or dental care issues presented by the MCO to its providers through written materials and training events.

(76) [~~(71)~~] Provider network or Network--All providers that have contracted with the MCO for the applicable managed care program.

(77) [~~(72)~~] Quality improvement--A system to continuously examine, monitor, and revise processes and systems that support and improve administrative and clinical functions.

(78) [~~(73)~~] Rural Health Clinic (RHC)--An entity that meets all of the requirements for designation as a rural health clinic under §1861(aa)(1) of the Social Security Act (42 U.S.C. §1395x(aa)(1)) and is approved for participation in the Texas Medicaid program.

(79) [~~(74)~~] Service area--The counties included in any HHSC-defined service area as applicable to each MCO.

(80) [~~(75)~~] Significant traditional provider (STP)--A provider identified by HHSC as having provided a significant level of care to the target population, including a DSH.

(81) [~~(76)~~] STAR--The State of Texas Access Reform (STAR) managed care program that operates under a federal waiver and primarily provides, arranges for, and coordinates preventive, primary, acute care, and pharmacy services for low-income families, children, and pregnant women.

(82) [~~(77)~~] STAR Health--The managed care program that operates under the Medicaid state plan and primarily serves:

(A) children and youth in Texas Department of Family and Protective Services (DFPS) conservatorship;

(B) young adults who voluntarily agree to continue in a foster care placement (if the state as conservator elects to place the child in managed care); and

(C) young adults who are eligible for Medicaid as a result of their former foster care status through the month of their 21st birthday.

(83) STAR Kids--The program that operates under a federal waiver and primarily provides, arranges, and coordinates preventative, primary, acute care, and long-term services and supports to persons with disabilities under the age of 21 who qualify for Medicaid.

(84) [~~(78)~~] STAR+PLUS--The managed care program that operates under a federal waiver and primarily provides, arranges, and coordinates preventive, primary, acute care, and long-term services and supports to persons with disabilities and elderly persons age 65 and over who qualify for Medicaid by virtue of their SSI or MAO status.

(85) [~~(79)~~] STAR+PLUS Home and Community-Based Services Program [~~Waiver~~]--The program that provides person-centered care services that are delivered in the home or in a community setting, as authorized through a federal waiver under §1115 of the Social Security Act, to qualified clients who are 65 years of age or older, or who are age 21 or older and are blind[~~,~~] or have a disability, as cost-effective alternatives to institutional care in nursing facilities.

(86) [~~(80)~~] State plan--The agreement between the CMS and HHSC regarding the operation of the Texas Medicaid program, in accordance with the requirements of Title XIX of the Social Security Act.

(87) [~~(81)~~] Supplemental Security Income (SSI)--The federal cash assistance program of direct financial payments to people who are 65 years of age or older, are blind, or have a disability administered by the Social Security Administration (SSA) under Title XVI of the Social Security Act. All persons who are certified as eligible for SSI in Texas are eligible for Medicaid. Local SSA claims representatives make SSI eligibility determinations. The transactions are forwarded to the SSA in Baltimore, which then notifies the states through the State Data Exchange (SDX).

(88) [~~(82)~~] Texas Health Steps (THSteps)--The name adopted by the State of Texas for the federally mandated Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program, described at 42 U.S.C. §1396d(r) and 42 CFR §440.40 and §§441.40 - 441.62.

(89) [~~(83)~~] Value-added service--A service provided by an MCO that is not "medical assistance," as defined by §32.003 of the Texas Human Resources Code.

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

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SUBCHAPTER G. STAR+PLUS

1 TAC §353.601, §353.603

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §533.00253, which requires HHSC to implement the STAR Kids managed care program.

The proposed amendments affect Texas Human Resources Code Chapter 32 and Texas Government Code Chapters 531 and 533. No other statutes, articles, or codes are affected by these proposed amendments.

§353.601. General Provisions.

(a) HHSC administers the STAR+PLUS program.

(b) The following subchapters of this chapter apply to the STAR+PLUS program:

(1) Subchapter A (relating to General Provisions);

(2) Subchapter B (relating to Provider and Member Education Programs);

(3) Subchapter C (relating to Member Bill of Rights and Responsibilities);

(4) Subchapter E (relating to Standards for Medicaid Managed Care);

(5) Subchapter F (relating to Special Investigative Units); and

(6) Subchapter J (relating to Outpatient Pharmacy Services).

[~~(b) Rules governing the operation of the STAR+PLUS program will be in accordance with Subchapter E of this chapter (relating to Standards for Medicaid Managed Care).~~]

(c) HHSC selects STAR+PLUS MCOs using the purchasing methods described in Chapter 391, Subchapter D of this title (relating to Purchase [~~Purchases~~] of Goods and Services by the Texas Health and Human Services Commission).

(d) The STAR+PLUS program serves members in all service areas in the state.

§353.603. Member Participation.

(a) Except as provided in subsections (b) and (d) of this section, enrollment in the STAR+PLUS program is *mandatory* for Medicaid recipients who meet one or more of the following criteria:

(1) have [~~Have~~] a physical or mental disability, are age 21 or older, and receive [~~and qualify for~~] Supplemental Security Income (SSI) benefits or [~~for~~] Medicaid due to low income;

(2) qualify [~~Qualify~~] for the STAR+PLUS Home and Community-Based [~~Waiver~~] Services Program, as described in §353.1153 of this title (relating to STAR+PLUS Home and Community Based Services (HCBS) Program);

(3) are [~~Are~~] age 21 or older and receive Medicaid because they are in a Social Security Exclusion program and meet financial criteria for STAR+PLUS Home and Community-Based [~~Waiver~~] Services Program; or[~~;~~]

[~~(4) Are age 21 or older and are receiving SSI; and~~]

(4) [~~(5)~~] are [~~Are~~] age 21 or older and reside in a nursing facility. [~~HHSC will enforce mandatory enrollment of this population into STAR+PLUS beginning March 1, 2015.~~]

(b) In addition to the Medicaid recipients who must enroll in the STAR+PLUS program under subsection (a) of this section, recipients age 21 or older residing in a community-based ICF-IID or receiving services under the following Medicaid 1915(c) waivers and not enrolled in Medicare must enroll in STAR+PLUS to receive acute care services:

(1) Home and Community-based Services (HCS);

(2) Community Living Assistance and Support Services (CLASS);

(3) Texas Home Living (TxHmL); and

(4) Deaf Blind with Multiple Disabilities (DBMD).

[~~(c) Enrollment in the STAR+PLUS program is *voluntary* for children under age 21 who are not in a nursing facility and who receive SSI.~~]

[~~(1) Children residing in a community-based ICF-IID who are not enrolled in Medicare are eligible to voluntarily enroll in STAR+PLUS for acute care services;~~]

[~~(2) Children enrolled in the following Medicaid 1915(c) waivers who are not enrolled in Medicare are eligible to voluntarily enroll in STAR+PLUS for acute care services:~~]

[~~(A) HCS;~~]

[~~(B) CLASS;~~]

[~~(C) TxHmL; and~~]

[~~(D) DBMD.~~]

(c) [~~(d)~~] Medicaid recipients [~~will~~] have a choice among at least two MCOs.

(d) [~~(e)~~] The following Medicaid recipients *cannot* participate in the STAR+PLUS program:

(1) persons under age 21 [~~Children residing in nursing facilities~~];

(2) residents [~~Residents~~] of state supported living centers;

(3) persons [~~Persons~~] not eligible for full Medicaid benefits; and

[~~(4) Children in the conservatorship of the Texas Department of Family and Protective Services; and~~]

(4) [~~(5)~~] persons [~~Persons~~] enrolled in Programs of All-Inclusive Care for Elderly (PACE).

(e) [~~(f)~~] Dual eligible individuals [~~clients~~].

(1) Enrollment in Medicare does not affect eligibility for the STAR+PLUS program, except as specified in subsection [~~subsections~~] (b) [~~and (c)(1) and (2)~~] of this section.

(2) Dual eligible clients who participate in the STAR+PLUS program receive most acute care services through their Medicare provider, and STAR+PLUS Home and Community-Based [~~Waiver~~] Services Program through the STAR+PLUS MCO. Dual eligible clients who participate in the STAR+PLUS program receive most acute care services through their Medicare provider, but may receive additional services through their STAR+PLUS MCO. The

STAR+PLUS program does not change the way dual eligibles receive Medicare services.

[(g) An individual is eligible for STAR+PLUS Home and Community-Based Waiver Services if the individual:]

[(1) is 21 years of age or older;]

[(2) has been determined by HHSC to be financially eligible for Medicaid;]

[(3) is enrolled in the STAR+PLUS program;]

[(4) meets the level-of-care/medical necessity criteria for nursing facility placement according to applicable state and federal regulations, and as verified by an annual assessment;]

[(5) has an approved individual service plan with an estimated annual cost that does not exceed the applicable individual cost ceiling and service limits;]

[(6) chooses STAR+PLUS Home and Community-Based Waiver Services as an alternative to institutional care as described in the Code of Federal Regulations, Title 42, §441.302(d); and]

[(7) resides:]

[(A) in their own home;]

[(B) in a licensed assisted living facility contracted with the applicant's/member's MCO to provide STAR+PLUS Home and Community-Based Waiver Services; or]

[(C) in an adult foster care home contracted with the member's MCO to provide STAR+PLUS Home and Community-Based Waiver Services.]

[(h) An individual may apply for STAR+PLUS Home and Community-Based Waiver Services when the individual is in a nursing facility and is seeking a return to the community.]

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

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SUBCHAPTER H. STAR HEALTH

1 TAC §353.701, §353.702

STATUTORY AUTHORITY

The amendment are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §533.00253, which requires HHSC to implement the STAR Kids managed care program.

The proposed amendments affect Texas Human Resources Code Chapter 32 and Texas Government Code Chapters 531 and 533. No other statutes, articles, or codes are affected by these proposed amendments.

§353.701. General Provisions.

(a) HHSC administers the STAR Health program.

(b) The following subchapters of this chapter apply to the STAR Health program:

(1) Subchapter A (relating to General Provisions);

(2) Subchapter B (relating to Provider and Member Education Programs);

(3) Subchapter C (relating to Member Bill of Rights and Responsibilities);

(4) Subchapter E (relating to Standards for Medicaid Managed Care);

(5) Subchapter F (relating to Special Investigative Units); and

(6) Subchapter J (relating to Outpatient Pharmacy Services).

[(b) Rules governing the operation of the STAR Health program will be in accordance with Subchapter E of this chapter (relating to Standards for Medicaid Managed Care).]

(c) HHSC selects one or more STAR Health MCOs using the purchasing methods described in Chapter 391 of this title (relating to Purchase of Goods and Services by the Texas Health and Human Services Commission) [, Subchapter D of this title (relating to Purchases of Goods and Services)].

(d) The STAR Health program serves members in all service areas of the state through one statewide service area.

§353.702. Member Participation.

(a) Children and young adults in the following categories are eligible to participate in the STAR Health program:

(1) a child in the conservatorship of the Texas Department of Family and Protective Services (DFPS), if the state as conservator elects to place the child in the STAR Health program;

(2) a young adult from age 18 through the month of his or her 22nd birthday who voluntarily agrees to continue in foster care placement, if the state as conservator elects to place the child in the STAR Health program; and

(3) a young adult from age 18 through the month of his or her 21st birthday who is an FFCC member or participating in the MTFCY Program.[; and]

[(4) a young adult from age 21 through the month of his or her 23rd birthday who is participating in the FFCHE Program.]

[(b) Although young adults participating in the FFCHE Program are not Medicaid beneficiaries under Title XIX of the Social Security Act, they receive the same covered services and benefits as other eligible participants in the STAR Health program.]

(b) [(c)] A young adult described in subsection (a)(2) and (3) of this section may choose to transfer from the STAR Health program to the STAR program.

[(d) All FFCHE members are enrolled in STAR Health and do not qualify as a FFCC member.]

(c) [(e)] The following Medicaid recipients cannot participate in the STAR Health program:

(1) Children and youth who have been adjudicated and placed with the Texas Juvenile Justice Department (TJJD) [~~Texas Youth Commission (TYC) or Texas Juvenile Probation Commission (TJPC)~~];

(2) Children and youth from other states who are placed in Texas through the Interstate Compact Placement Commission (ICPC) as defined by DFPS in 40 TAC Chapter 700, Subchapter S (relating to Interstate Placement of Children);

(3) Children and youth in Medicaid-paid facilities such as nursing facilities or state supported living centers[~~, state schools, or ICF-IIDs~~];

[~~(4) Children and youth who are dual eligible;~~]

(4) [~~(5)~~] Children and youth who are in the conservatorship of DFPS who are placed outside of Texas;

(5) [~~(6)~~] Children and youth who are receiving adoption assistance Medicaid as defined by DFPS in 40 TAC Chapter 700, Subchapter H (relating to Adoption Assistance Program); and

(6) [~~(7)~~] Children who are declared manifestly dangerous as defined by the Texas Department of Health Services in accordance with 25 TAC Chapter 415, Subchapter G (relating to Determination of Manifest Dangerousness).

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

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SUBCHAPTER M. HOME AND COMMUNITY BASED SERVICES IN MANAGED CARE

1 TAC §§353.1151, 353.1153, 353.1155

STATUTORY AUTHORITY

The new rules are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §533.00253, which requires HHSC to implement the STAR Kids managed care program.

The proposed new rules affect Texas Human Resources Code Chapter 32 and Texas Government Code Chapters 531 and 533. No other statutes, articles, or codes are affected by these proposed new rules.

§353.1151. General Provisions.

(a) Home and Community Based Services (HCBS) are community-based services and supports to eligible individuals as an alternative to institutional services, such as those described in Section 1915 of the Social Security Act. HCBS are intended to enhance the individual's integration into the community, maintain or improve the individual's independent functioning, and prevent the individual's admission to an institution.

(b) Delivery of HCBS in managed care must comply with 42 CFR §441.530, with the exception of the delivery of out of home respite.

(c) Participation in managed care does not affect an individual's ability to receive HCBS operated by HHSC or another agency if the delivery of HCBS is not through an MCO.

(d) Participation in managed care does not impact an individual's ability to access or maintain a slot on the interest list(s) of an HCBS program.

(e) Delivery of Community First Choice Services in managed care must comply with Chapter 354, Subchapter A, Division 27 of this title (relating to Community First Choice).

(f) HCBS providers contracted with MCOs are subject to investigation of suspected or alleged abuse, neglect, or exploitation as described in 40 TAC, Chapter 700 (relating to Child Protective Services), Chapter 705 (relating to Adult Protective Services), and Chapter 745 (relating to Licensing).

§353.1153. STAR+PLUS Home and Community Based Services (HCBS) Program.

(a) The MCO assesses an individual's eligibility for STAR+PLUS HCBS.

(1) To be eligible for the STAR+PLUS HCBS program, an individual must:

(A) be 21 years of age or older;

(B) reside in Texas;

(C) meet the level-of-care criteria for medical necessity for nursing facility care as determined by HHSC;

(D) have an unmet need for support in the community that can be met through one or more of the STAR+PLUS HCBS program services;

(E) choose the STAR+PLUS HCBS program as an alternative to nursing facility services, as described in 42 CFR §441.302(d);

(F) not be enrolled in another Medicaid HCBS waiver program approved by CMS; and

(G) be determined by HHSC to be financially eligible for Medicaid, as described in Chapter 358 of this title (relating to Medicaid Eligibility for the Elderly and People with Disabilities) and Chapter 360 of this title (relating to Medicaid Buy-In Program).

(2) An individual receiving Medicaid nursing facility services is approved for the STAR+PLUS HCBS program if the individual requests services while residing in the nursing facility and meets eligibility criteria listed in paragraph (1) of this subsection. If the individual is voluntarily discharged from the nursing facility into a community setting before being determined eligible for Medicaid nursing facility services and the STAR+PLUS program, the individual is denied immediate enrollment in the program.

(b) HHSC maintains a statewide interest list of individuals not enrolled in STAR+PLUS interested in receiving services through the STAR+PLUS HCBS program. There is no interest list for individuals currently enrolled in STAR+PLUS who are eligible to receive services through the STAR+PLUS HCBS program. Individuals enrolled in STAR+PLUS may contact their MCO for more information about STAR+PLUS HCBS.

(1) A person may request an individual's name be added to the STAR+PLUS HCBS interest list by:

(A) calling HHSC;

(B) submitting a written request to HHSC; or

(C) generating a referral through YourTexasBenefits.com, Find Support Services screening and referral tool.

(2) HHSC removes an individual's name from the STAR+PLUS HCBS interest list if:

(A) the individual is deceased;

(B) the individual is assessed for the program and determined to be ineligible;

(C) the individual or LAR requests in writing that the individual's name be removed from the interest list; or

(D) the individual is no longer a Texas resident, unless the individual is a military family member living outside of Texas as described in Texas Government Code §531.0931:

(i) while the military member is on active duty; or

(ii) for less than one year after the former military member's active duty ends.

(c) The MCO develops a person-centered individual service plan (ISP) for each member, and all applicable documentation, as described in the STAR+PLUS Handbook.

(1) The ISP must:

(A) include services described in the Texas Healthcare Transformation and Quality Improvement Program Waiver, governed by §1115(a) of the Social Security Act.

(B) include services necessary to protect the individual's health and welfare in the community;

(C) include services that supplement rather than supplant the individual's natural supports and other non-STAR+PLUS HCBS supports and services for which the individual may be eligible;

(D) include services designed to prevent the individual's admission to an institution;

(E) include the most appropriate type and amount of services to meet the individual's needs in the community;

(F) be updated if an individual's needs or natural supports change;

(G) be approved by HHSC; and

(H) be cost effective.

(2) If an individual's ISP exceeds 202 percent of the cost of the individual's level-of-care in a nursing facility to safely serve the individual's needs in the community, the MCO must submit a request for a clinical assessment for general revenue funds to HHSC.

(d) MCOs are responsible for conducting reassessments and ISP development for their enrollees' continued eligibility for STAR+PLUS HCBS, in accordance with the policies and procedures outlined in the STAR+PLUS Handbook and in accordance with the timeframes outlined in the managed care contracts governing STAR+PLUS.

(e) MCOs are responsible for authorizing a network provider of the individual's choosing to deliver services outlined in an individual's ISP.

(f) Individuals participating in STAR+PLUS HCBS have the same rights and responsibilities as any individual enrolled in managed care, as described in Subchapter C of this chapter (relating to Member Bill of Rights and Responsibilities), including the right to appeal a decision made by HHSC or an MCO and the right to a fair hearing, as described in Chapter 357, Subchapter A, of this title (relating to Uniform Fair Hearing Rules).

(g) HHSC conducts utilization reviews of STAR+PLUS MCOs as described in Texas Government Code §533.00281.

§353.1155. Medically Dependent Children Program.

(a) This section applies to the Medically Dependent Children Program (MDCP) services provided under a Medicaid managed care program. The rules under 40 TAC, Chapter 51 (relating to Medically Dependent Children Program) do not apply to MDCP services provided under a Medicaid managed care program.

(b) The MCO assesses an individual's eligibility for MDCP.

(1) To be eligible for MDCP, an individual must:

(A) be under 21 years of age;

(B) reside in Texas;

(C) meet the level-of-care criteria for medical necessity for nursing facility care as determined by HHSC;

(D) have an unmet need for support in the community that can be met through one or more MDCP service;

(E) choose MDCP as an alternative to nursing facility services, as described in 42 CFR §441.302(d);

(F) not be enrolled in another Medicaid HCBS waiver program approved by CMS;

(G) if the individual is under 18 years of age, reside:

(i) with a family member; or

(ii) in a foster home that includes no more than four children unrelated to the individual; and

(H) be determined by HHSC to be financially eligible for Medicaid under Chapter 358 of this title (relating to Medicaid Eligibility for the Elderly and People with Disabilities), Chapter 360 of this title (relating to Medicaid Buy-In Program), or Chapter 361 of this title (relating to Medicaid Buy-In for Children Program).

(2) An individual receiving Medicaid nursing facility services is approved for MDCP if the individual requests services while residing in the nursing facility and meets eligibility criteria listed in paragraph (1) of this subsection. If the individual is discharged from the nursing facility for a community setting before being determined eligible for Medicaid nursing facility services and MDCP, the individual is denied immediate enrollment in the program.

(c) HHSC maintains a statewide interest list of individuals interested in receiving services through MDCP.

(1) A person may request an individual's name be added to the MDCP interest list by:

(A) calling HHSC;

(B) submitting a written request to HHSC; or

(C) generating a referral through the YourTexasBenefits.com, Find Support Services screening and referral tool.

(2) HHSC removes an individual's name from the MDCP interest list if:

(A) the individual is deceased;

(B) the individual is assessed for the program and determined to be ineligible;

(C) the individual, medical consenter, or LAR requests in writing that the individual's name be removed from the interest list; or

(D) the individual moves out of Texas, unless the individual is a military family member living outside of Texas as described in Texas Government Code §531.0931:

(i) while the military member is on active duty; or

(ii) for less than one year after the former military member's active duty ends.

(3) An individual may request to be placed at the end of the interest list immediately following a determination of ineligibility.

(d) The MCO develops a person-centered individual service plan (ISP) for each individual, and all applicable documentation, as described in the STAR Kids Handbook and the Uniform Managed Care Manual (UMCM).

(1) The ISP must:

(A) include services described in the waiver approved by CMS;

(B) include services necessary to protect the individual's health and welfare in the community;

(C) include services that supplement rather than supplant the individual's natural supports and other non-Medicaid supports and services for which the individual may be eligible;

(D) include services designed to prevent the individual's admission to an institution;

(E) include the most appropriate type and amount of services to meet the individual's needs in the community;

(F) be updated if an individual's needs or natural supports change; and

(G) be cost effective.

(2) If an individual's ISP exceeds 50 percent of the cost of the individual's level of care in a nursing facility to safely serve the individual's needs in the community, HHSC must review the circumstances and, when approved, provide funds through general revenue.

(e) MCOs are responsible for conducting reassessments and ISP development for their enrollees' continued eligibility for MDCP, in accordance with the policies and procedures outlined in the STAR Kids Handbook, UMCM, or materials designated by HHSC and in accordance with the timeframes outlined in the MCO's contract.

(f) MCOs are responsible for authorizing a provider of the individual's choosing to deliver services outlined in an individual's ISP.

(g) Individuals participating in MDCP have the same rights and responsibilities as any individual enrolled in managed care, as described in Subchapter C of this title (relating to Member Bill of Rights and Responsibilities), including the right to appeal a decision made by HHSC or an MCO and the right to a fair hearing, as described in Chapter 357 of this title (relating to Hearings).

(h) HHSC conducts utilization reviews of MCOs providing MDCP services.

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

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Karen Ray
Chief Counsel
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For further information, please call: (512) 424-6900

SUBCHAPTER N. STAR KIDS

1 TAC §§353.1201, 353.1203, 353.1205, 353.1207, 353.1209

STATUTORY AUTHORITY

The new rules are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §533.00253, which requires HHSC to implement the STAR Kids managed care program.

The proposed new rules affect Texas Human Resources Code Chapter 32 and Texas Government Code Chapters 531 and 533. No other statutes, articles, or codes are affected by these proposed new rules.

§353.1201. General Provisions.

(a) HHSC administers the STAR Kids program.

(b) The following subchapters of this chapter apply to the STAR Kids program:

(1) Subchapter A (relating to General Provisions);

(2) Subchapter B (relating to Provider and Member Education Programs);

(3) Subchapter C (relating to Member Bill of Rights and Responsibilities);

(4) Subchapter E (relating to Standards for Medicaid Managed Care);

(5) Subchapter F (relating to Special Investigative Units); and

(6) Subchapter J (relating to Outpatient Pharmacy Services).

(c) HHSC selects STAR Kids MCOs using the purchasing methods described in Chapter 391 of this title (relating to Purchase of Goods and Services by the Texas Health and Human Services Commission).

(d) The STAR Kids program serves members in all service areas in the state.

§353.1203. Member Participation.

(a) Except as provided in subsection (b) of this section, enrollment in the STAR Kids program is mandatory for a Medicaid client who is under the age of 21 and meets one or both of the following criteria:

(1) has a physical or mental disability and qualifies for Supplemental Security Income (SSI) or SSI-related Medicaid; or

(2) is enrolled in the Medically Dependent Children Program (MDCP) waiver.

(b) Clients birth through age 20 residing in a community-based ICF-IID or nursing facility or receiving services under the following Medicaid 1915(c) waivers must enroll in STAR Kids to receive acute care services and non-facility based state plan services:

(1) Home and Community-based Services (HCS);

(2) Community Living Assistance and Support Services (CLASS);

(3) Texas Home Living (TxHmL); or

(4) Deaf Blind with Multiple Disabilities (DBMD).

(c) Clients birth through age 20 receiving services under the Youth Empowerment Services (YES) Medicaid 1915(c) waiver must enroll in STAR Kids to receive acute care services and non-facility based state plan services other than Community First Choice state plan services.

(d) The following Medicaid clients cannot participate in the STAR Kids program:

(1) clients residing in the Truman W. Smith Children's Care Center;

(2) residents of state supported living centers;

(3) residents of state veterans' homes;

(4) persons not eligible for full Medicaid benefits; and

(5) children in the conservatorship of the Texas Department of Family and Protective Services.

(e) Dual eligible clients.

(1) Enrollment in Medicare does not affect eligibility for the STAR Kids program.

(2) Dual eligible clients who participate in the STAR Kids program receive most acute care services through their Medicare provider, and long term services and supports through the STAR Kids MCO. Participation in the STAR Kids program does not change the way dual eligible clients receive Medicare services.

(f) Individuals birth through 20 who participate in the Medicaid Buy-In for Children Program or the Medicaid Buy-In Program must enroll in STAR Kids.

(g) STAR Kids Medicaid clients have a choice among at least two MCOs.

§353.1205. Service Coordination.

(a) All STAR Kids members have access to service coordination. Service coordination includes:

(1) face-to-face and telephonic contacts between the member or the LAR and the service coordinator;

(2) development and maintenance of a comprehensive, person-centered individual service plan (ISP);

(3) coordination to assist the member in accessing services provided by the STAR Kids MCO;

(4) coordination to assist the member or the LAR in accessing services provided by other community entities or service providers; and

(5) transition planning, beginning no later than age 15, to help the member prepare for changes in life circumstances and changes in available healthcare services to ease the shift to adulthood.

(b) STAR Kids members with an identified need for more intensive service coordination are assigned a single, named service coordinator by the STAR Kids MCO. All STAR Kids members have access to a single, named service coordinator upon request.

§353.1207. Participating Providers.

Acute and long-term services and supports providers have the opportunity to participate in STAR Kids, provided they:

(1) comply with the applicable provisions of this chapter;

(2) comply with Chapter 352 of this title (relating to Medicaid and Children's Health Insurance Program Provider Enrollment);

(3) meet applicable licensing standards;

(4) meet the MCO's credentialing standards; and

(5) contract with the MCO.

§353.1209. STAR Kids Handbook.

The STAR Kids Handbook includes policies and procedures to be used by all health and human services agencies and their contractors and providers in the delivery of STAR Kids Program services to eligible members. The STAR Kids Handbook can be found on the Texas Health and Human Services Commission website.

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

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Karen Ray
Chief Counsel
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CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER E. COMMUNITY CARE FOR AGED AND DISABLED

1 TAC §355.501

The Texas Health and Human Services Commission (HHSC) proposes amendments to §355.501, concerning Reimbursement Methodology for Program for All-Inclusive Care for the Elderly (PACE).

BACKGROUND AND JUSTIFICATION

Federal law (42 U.S.C. §1396u-4) permits a state to operate a PACE program to provide comprehensive health care services to eligible individuals; providers are to be paid a capitated amount that is "less than the amount" the State would otherwise have paid under Medicaid "if the individuals were not" PACE-enrollees. Texas has elected to operate PACE since 2003.

The purpose of the proposed amendments is three-fold. First, the proposed amendments align the rule with the shift from a fee-for-service payment system to a managed care payment system. The proposed amendments will thus adjust the underlying methodology and the data sources for determining PACE

reimbursement. Second, the proposed amendments reflect the termination of the Community-Based Alternatives (CBA) 1915(c) waiver. And third, the proposed amendments implement Texas Human Resources Code §§32.0532 - 32.0534, adopted by House Bill 3823, 84th Legislature, Regular Session, 2015, which outline new requirements for reimbursement methodology. On the whole, the statutes link PACE reimbursement rates to those of the STAR+PLUS Medicaid program, modify the methods for collecting PACE and STAR+PLUS Medicaid program data, and require a comparison of PACE costs and care outcomes to STAR+PLUS Medicaid costs and outcomes.

SECTION-BY-SECTION SUMMARY

Proposed amendments to §355.501 outline the reimbursement methodology for PACE. The rule has minor changes to update the source of data used in determining the reimbursement, reflecting the shift from a fee-for-service payment basis to primarily a managed care payment basis. The rule also amends language reflecting the termination of the CBA waiver. Finally, the proposed amendments add language that implements new requirements set out in House Bill 3823 and that states the federal requirement that the PACE payment rate be less than the amount that would otherwise have been paid under the State Plan if the participants were not enrolled under the PACE program.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for each year of the first five years the amended rule is in effect, there could be a fiscal impact to state government from adoption and implementation of this rule. At this time, HHSC lacks sufficient data to provide an estimate of that impact. Costs and revenues of local governments will not be affected.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

HHSC has determined there could be an adverse economic impact to small businesses or micro-businesses from adoption and implementation of this rule. However, at this time HHSC lacks data to provide an estimate of that impact, or to determine if the impact will be adverse.

Current Texas PACE rates are so close to the maximum level federal rules allow that they approximate that level. Therefore, at this time, HHSC is unable to determine whether the impact to small business or micro-business providers will be positive or negative but any impact is expected to be relatively small.

PUBLIC BENEFIT AND COSTS

Gary Jessee, State Medicaid Director, has determined that for each year of the first five years the rule is in effect, the public will benefit from the adoption of the rule. The anticipated public benefit will be a more accurate reimbursement methodology to align with recent legislation and the changes in the Medicaid program in recent years.

Ms. Rymal has also determined that there are no probable economic costs to persons who are required to comply with the amended rule.

HHSC has determined that the amended rule will not affect a local economy. There is no anticipated negative impact on local employment.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to William Warburton, HHSC Rate Analysis Division, P.O. Box 149030, Mail Code H-400, Austin Texas 78714-9030; by phone to (512) 462-6222; or by e-mail to william.warburton@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements. The amendment is consistent with Texas Human Resources Code §32.0532, which sets out specific requirements for PACE program reimbursement methodology.

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

§355.501. Reimbursement Methodology for Program for All-Inclusive Care for the Elderly (PACE).

(a) General specifications. The Texas Health and Human Services Commission (HHSC) determines the upper payment limits and reimbursement rates for each PACE contractor. HHSC applies the general principles of cost determination as specified in §355.101 of this title (relating [~~related~~] to Introduction).

(b) Frequency of reimbursement determination. The upper payment limits and reimbursement rates are determined coincident with the state's biennium.

(c) Upper payment limit determination. There are three upper payment limits calculated for each PACE contract: one for clients eligible only for Medicaid services (Medicaid-only clients), one for clients eligible for both Medicare and Medicaid services (dual-eligible clients), and one for clients eligible for only Medicare services as Qualified Medicare Beneficiaries (QMBs). An average monthly historical cost per client receiving nursing facility services and Home and Community Based Services (HCBS) [~~Community Based Alternatives (CBA) services~~] under either the fee-for-service payment system or the managed care program is calculated for the counties served by each PACE contract for the upper payment limits for Medicaid-only clients and for dual-eligible clients.

(1) The upper payment limits for Medicaid-only and for dual-eligible clients for the biennium are calculated for the base period using historical [~~fee-for-service~~] claims and encounter data and member-month data from the most recent state fiscal year of complete claims available prior to the state's biennium.

(2) The historical costs are derived from [~~fee-for-service~~] claims data for clients age 55 and older receiving nursing facility services or HCBS [~~CBA services~~] in the counties served by each PACE contract. [~~This applies to clients who:~~]

[~~(A) are age 55 and older;~~]

[~~(B) have Medicare coverage and who do not have Medicare coverage; and~~]

[~~(C) are not receiving services under the STAR+PLUS managed care program.~~]

(3) The historical costs include:

(A) acute care services, including inpatient, outpatient, professional, and other acute care services;

(B) prescriptions;

(C) medical transportation;

(D) nursing facility services;

(E) hospice services;

(F) long-term care specialized services, such as physical therapy, occupational therapy, and speech therapy;

(G) HCBS [~~CBA services~~];

(H) Primary Home Care (including Family Care) services; and

(I) Day Activity and Health Services.

(4) Effective on and after January 1, 2006, the historical prescription costs from subparagraph (B) of this paragraph that are used in the calculation of the upper payment limit, and as such the associated payment rate, for dual-eligible clients for each PACE contract will exclude the costs of any drug that is in a category covered by Medicare Part D.

(5) To determine an average monthly historical cost for the counties served by each PACE contract, the total historical [~~fee-for-service~~] claims data for the counties served by each PACE contract are divided by the number of member months for the counties served by each PACE contract.

(6) An adjustment for administrative costs [~~A per member month amount~~] is added to the average monthly historical cost per client. The per member month amount is added for:

(A) processing claims, based on the state's cost to process claims under the managed care [~~fee-for-service~~] payment system; and

(B) case management, based on the state's cost to provide case management under the managed care [~~fee-for-service~~] payment system for HCBS [~~CBA~~] clients.

(7) The sum of the average monthly historical cost per client for each PACE contract and the amounts from paragraph (5) of this subsection are projected from the claims data base period identified in paragraph (1) of this subsection to the rate period to account for anticipated changes in costs for each PACE contract. The methodology used for trending historical costs for calculating PACE Upper Payment Limits (UPLs) [~~UPLs~~] and rates is comparable to that used for trending [~~fee-for-service~~] costs in the managed care program.

(8) The PACE Upper Payment Limit (UPL) method may be adjusted to account for statistical outliers, small populations, programmatic changes, catastrophic events, or other economic changes, as determined by HHSC to be actuarially appropriate. Data from sources other than those described in paragraphs (1) and (2) of this subsection may be used, if deemed by HHSC necessary to calculate an appropriate UPL. For example, HHSC may consider comparable data from other time periods.

(d) HHSC determines the UPL for Qualified Medicaid Beneficiaries (QMBs) [~~The upper payment limit for QMBs is determined~~] on a statewide basis using the average cost incurred by Medicaid for Medicare co-insurance and deductibles.

(e) Payment rate determination. HHSC calculates [~~There are~~] three reimbursement rates [~~calculated~~] for each PACE contract: one for clients eligible for Medicaid services (Medicaid Only rate), one for clients eligible for both Medicare and Medicaid services (Dual Eligible rate), and one for clients eligible for only Medicare services as QMBs [~~Qualified Medicare Beneficiaries (QMBs)~~]. The payment rates for the three client categories for each PACE contract are determined by multiplying the UPLs [~~upper payment limits~~] calculated for each PACE contract by a factor less than 1.0. HHSC may reduce the factor [~~no greater than 0.95. The factor may be reduced~~] as necessary to establish a rate consistent with available funds.

(1) In setting the reimbursement rates under the PACE program, HHSC complies with Texas Human Resources Code §32.0532(b).

(2) The PACE payment rate is less than the amount that would otherwise have been paid under the Texas State Plan if the participants were not enrolled under the PACE program.

(f) Reporting of cost. HHSC may require the PACE contractor to submit financial and statistical information on a cost report or in a survey format designated by HHSC. Cost report completion is governed by the requirements specified in Subchapter A of this chapter (relating to Cost Determination Process). HHSC may also require the PACE contractor to submit audited financial statements.

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

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Karen Ray
Chief Counsel
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TITLE 7. BANKING AND SECURITIES

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER G. LENDING POWERS

7 TAC §91.709

The Credit Union Commission (Commission) proposes amendments to Title 7 of the Texas Administrative Code, §91.709, relating to member business lending activities.

The amendments to the rule are proposed as a result of the adoption of federal regulations as discussed below. The proposed amendments will provide credit unions parity, under Texas Finance Code §123.003, with federal credit unions engaged in the business of making member business loans in Texas. The amendments will eliminate detailed collateral criteria and portfolio limits, and instead will focus on broad, yet well-defined, principles that clarify regulatory expectation for credit unions engaged in member business lending activities. The proposed amendments also distinguish between the broad commercial lending activities in which a credit union is authorized to engage, and the more narrowly defined category of member business loans subject to statutory aggregate limits in 12 U.S.C. §1757a. The proposed amendments clarify that, In addition to the other limitations set forth in the amendments, a credit union may not make a loan to a member or a business interest of the member if the loan would cause the aggregate amount of loans to the member and the member's business interests to exceed an amount equal to 10 percent of the credit union's total assets as provided by Texas Finance Code Section 123.003.

In general, the National Credit Union Administration (NCUA) has recently published a final rule to modernized its member business loans rule (12 C.F.R. Part 723) to provided federally insured credit unions with greater flexibility and autonomy to provide commercial and business loans to their members. The final rule amends NCUA's current regulatory requirements pertaining to credit union commercial lending activities by replacing the existing prescriptive requirements with a broad, principles-based regulatory approach. NCUA's final rule eliminates most of the regulatory thresholds and limits, and replaces those provisions with expanded requirements pertaining to policies, procedures, and oversight by credit union management and credit union directors. NCUA's final rule also provides that federally insured credit unions in a given state are exempted from compliance with 12 C.F.R. Part 723 if state supervisory authority administers a state commercial and member business loan rule for use by federally insured credit unions in that state, provided that the state rule at least covers all the provisions in 12 C.F.R. Part 723 and is no less restrictive (based on NCUA's determination).

States that currently have exemptions from the previous 12 C.F.R. Part 723 were grandfathered in NCUA's final rule. As a result, without action by the Commission, the grandfathered 7 TAC Section 91.709 will continue to require state chartered credit unions to comply with the extensive regulatory thresholds and limits and will place them at a competitive disadvantage to federally chartered credit unions when offering commercial and business loans to their members.

In keeping with NCUA's "no less restrictive" requirement to obtain an exemption from the new 12 C.F.R. Part 723, the proposed amendments closely track the provisions of NCUA's final rule and remove the current credit union requirements for collateral and security, equity, loans limits, and waiver processes, and replace them with broad principles intended to permit credit unions to govern safe and sound member business lending as part of their commercial lending program. Under the proposed amendments, the Commission requires credit unions to maintain and update written policies concerning the maximum amount of assets, credit underwriting standards, loan approval standards, loan monitoring standards and loan documentation standards. Credit unions are also required to have qualified staff and commercial loan risk management systems. In addition, the proposed amendments contain prohibitions on certain types of commercial loans and contain an aggregate member business loan limit. The Commission proposes to delay implementation of the final rule until January 1, 2017 to coincide with the effective date of NCUA's new 12 C.F.R. Part 723.

Shari Shivers, General Counsel, has determined that for the first five-year period the proposed amendments are in effect, there will be no additional cost to state or local governments as a result of enforcing or administering the amended rule.

Ms. Shivers also has determined that, for each year of the first five years the rule as proposed will be in effect, the public benefit will be greater clarity regarding the rule's requirements and significant regulatory relief for credit unions.

For each year of the first five years that the rule will be in effect, there will be no probable economic costs to persons required to comply with the rule as proposed, no adverse economic effect on small businesses or micro-businesses, and no difference in the cost of compliance for small businesses as compared to large businesses.

Comments on the proposed amendments may be submitted in writing to Shari Shivers, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699 or by email to *CUDMail@cud.texas.gov.* To be considered, a written comment must be received on or before 5:00 p.m. on the 31st day after the date the proposal is published in the *Texas Register.*

The amendments are proposed under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and Texas Finance Code, §123.003, which authorizes the Commission, in conjunction with the exercise of its specific rulemaking authority, to adopt rules reflecting the statutory right of a state credit union to engage in any activity in which it could engage, exercise any power it could exercise, or make any loan or investment it could make, if it were operating as a federal credit union.

The specific sections affected by the amendment are Texas Finance Code, §124.001 and §124.003.

§91.709. Member Business and Commercial Loans.

(a) Definitions. Definitions in TEX. FIN. CODE §121.002, are incorporated herein by reference. As used in this section, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) "Borrower" means a member or any other person named as a borrower, obligor, or debtor in a loan or extension of credit; or any other person, including, but not limited to, a comaker, drawer, endorser, guarantor or surety who is considered to be a borrower under the requirements of subsection (i) of this section concerning aggregation and attribution for commercial loans.

(2) "Commercial loan" means a loan or an extension of credit to an individual, sole proprietorship, partnership, corporation, or business enterprise for commercial, industrial, agricultural, or professional purposes, including construction and development loans, any unfunded commitments, and any interest a credit union obtains in such loans made by another lender. A commercial loan does not include a loan made for personal expenditure purposes; a loan made by a corporate credit union; a loan made by a credit union to a federally insured

credit union; a loan made by a credit union to a credit union service organization; a loan secured by a 1- to 4-family residential property (whether or not the residential property is the borrower's primary residence); a loan fully secured by shares in the credit union making the extension of credit or deposits in another financial institution; a loan secured by a vehicle manufactured for household use; and a loan that would otherwise meet the definition of commercial loan and which, when the aggregate outstanding balance plus unfunded commitments less any portion secured by shares in the credit union to a borrower, is equal to less than $50,000.

(3) "Control" means a person directly or indirectly, or acting through or together with one or more persons who:

(A) own, control, or have the power to vote twenty-five (25) percent or more of any class of voting securities of another person;

(B) control, in any manner, the election of a majority of the directors, trustees, or other persons exercising similar functions of another person; or

(C) have the power to exercise a controlling influence over the management or policies of another person.

(4) "Immediate family member" means a spouse or other family member living in the same household.

(5) "Loan secured by a lien on a 1- to 4-family residential property" means a loan that, at origination, is secured wholly or substantially by a lien on a 1- to 4-family residential property for which the lien is central to the extension of the credit; that is the borrower would not have been extended credit in the same amount or on terms as favorable without the lien. A loan is wholly or substantially secured by a lien on a 1- to 4-family residential property if the estimated value of the real estate collateral at origination (after deducting any senior liens held by others) is greater than fifty (50) percent of the principal amount of the loan.

(6) "Loan secured by a lien on a vehicle manufactured for household use" means a loan that, at origination, is secured wholly or substantially by a lien on a new and used passenger car or other vehicle such as a minivan, sport-utility vehicle, pickup truck, and similar light truck or heavy-duty truck generally manufactured for personal, family, or household use and not used as a fleet vehicle or to carry fare-paying passengers, for which the lien is central to the extension of credit. A lien is central to the extension of credit if the borrower would not have been extended credit in the same amount or on terms as favorable without the lien. A loan wholly or substantially secured by a lien on a vehicle manufactured for household use if the estimated value of the collateral at origination (after deducting any senior liens held by others) is greater than fifty (50) percent of the principal amount of the loan.

(7) "Loan-to-value ratio for collateral" means the aggregate amount of all sums borrowed and secured by the collateral, including outstanding balances plus any unfunded commitment or line of credit from another lender that is senior to the credit union's lien, divided by the current collateral value. The current collateral value must be established by prudent and accepted commercial loan practices and comply with all regulatory requirements.

(8) "Member business loan" has the meaning assigned by 12 C.F.R. Part 723.

(9) "Net worth" has the meaning assigned by 12 C.F.R. Part 702.2.

(10) "Readily marketable collateral" means financial instruments and bullion that are salable under ordinary market conditions with reasonable promptness at a fair market value determined by quotations based upon actual transactions on an auction or similarly available daily bid and ask price market.

(11) "Residential property" means a house, townhouse, condominium unit, cooperative unit, manufactured home, a combination of a home or dwelling unit and a business property that involves only minor or incidental business use, real property to be improved by the construction of such structures, or unimproved land zoned for 1- to 4-family residential use but does not include a boat, motor home, or timeshare property, even if used as a primary residence. This applies to such structure whether under construction or completed.

(b) Parity. A credit union may make, commit to make, purchase, or commit to purchase any member business loan it could make if it were operating as a federal credit union domiciled in this state, so long as for each transaction the credit union complies with all applicable regulations governing such activities by federal credit unions. However, all such loans must be documented in accordance with the applicable requirements of this chapter.

(c) Commercial Loan Responsibilities and Operational Requirements. Prior to engaging in the business of making commercial loans, a credit union must address the responsibilities and operational requirements under this subsection:

(1) Written policies. A credit union must establish comprehensive written commercial loan policies approved by its board of directors instituting prudent loan approval, credit underwriting, loan documentation, and loan monitoring standards in accordance with this paragraph. The board must review its policies at least annually and, additionally, prior to any material change in the credit union's commercial lending program or related organizational structure, in response to any material change in the credit union's overall portfolio performance, or in response to any material change in economic conditions affecting the credit union. The board must update its policies when warranted. Policies under this paragraph must be designed to identify:

(A) type(s) of commercial loans permitted;

(B) trade area;

(C) the maximum amount of assets, in relation to net worth, allowed in secured, unsecured, and unguaranteed commercial loans and in any given category or type of commercial loan and to any one borrower;

(D) credit underwriting standards including potential safety and soundness concerns to ensure that action is taken to address those concerns before they pose a risk to the credit union's net worth; the size and complexity of the loan as appropriate to the size of the credit union; the scope of the credit union's commercial loan activities; the level and depth of financial analysis necessary to evaluate financial trends and the condition of the borrower and the ability of the borrower to meet debt service requirements; requirements for a borrower-prepared projection when historic performance does not support projected debt payments; the financial statement quality and degree of verification sufficient to support an accurate financial analysis and risk assessment; the methods to be used in collateral authorized, including loan-to-value ratio limits; the means to secure various types of collateral; and other risk assessment analyses including analysis of the impact of current market conditions on the borrower.

(E) loan approval standards including consideration, prior to credit commitment, of the borrower's overall financial condition and resources; the financial stability of any guarantor; the nature and value of underlying collateral; environmental assessment requirements; the borrower's character and willingness to repay as agreed; the use of loan covenants when warranted; and the levels of loan approval authority commensurate with the proficiency of the

individuals or committee of the credit union tasked with such approval authority in evaluating and understanding commercial loan risk, when considered in terms of the level of risk the borrowing relationship poses to the credit union;

(F) loan monitoring standards including a system of independent, ongoing credit review and appropriate communication to senior management and the board of directors; the concentration of credit risk; and the risk management systems under subsection (d) of this section; and

(G) loan documentation standards including enabling the credit union to make informed lending decisions and assess risk, as necessary, on an ongoing basis; identifying the purpose of each loan and source(s) of repayment; assessing the ability of each borrower to repay the indebtedness in a timely manner; ensuring that any claim against a borrower is legally enforceable; and demonstrating appropriate administration and monitoring of each loan.

(2) Qualified Staff. A credit union must ensure that it is appropriately staffed with qualified personnel with relevant and necessary expertise and experience for the types of commercial lending in which the credit union is engaged, including appropriate experience in underwriting, processing, overseeing and evaluating the performance of a commercial loan portfolio, including rating and quantifying risk through a credit risk rating system and collections and loss mitigation activities for the types of commercial lending in which the credit union is engaged. At a minimum, a credit union making, purchasing, or holding any commercial loans must internally have a senior management employee that has a thorough understanding of the role of commercial lending in the credit union's overall business model and establish risk management processes and controls necessary to safely conduct commercial lending as provided by subsection (d) of this section.

(3) Use of Third-Party Experience. A third party may provide the requisite expertise and experience necessary for a credit union to safely conduct commercial lending if:

(A) the third party has no affiliation or contractual relationship with the borrower;

(B) the third party is independent from the commercial loan transaction and does not have a participation interest in a loan or an interest in any collateral securing a loan that the third party is responsible for reviewing, or an expectation of receiving compensation of any sort that is contingent on the closing of the loan, with the following exceptions:

(i) the third party may provide a service to the credit union that is related to the transaction, such as loan servicing;

(ii) the third party may provide the requisite experience to a credit union and purchase a loan or a participation interest in a loan originated by the credit union that the third party reviewed; and

(iii) the third party is a credit union service organization and the credit union has a controlling financial interest in the credit union service organization as determined under generally accepted accounting principles.

(C) the actual decision to grant a commercial loan resides with the credit union; and

(D) qualified credit union staff exercise ongoing oversight over the third party by regularly evaluating the quality of any work the third party performs for the credit union.

(4) De Minimis Exception. The responsibilities and operational requirements described in paragraphs (1) and (2) of this subsection do not apply to a credit union if it meets all of the following conditions:

(A) the credit union's total assets are less than $250 million;

(B) the credit union's aggregate amount of outstanding commercial loan balances (including any unfunded commitments, any outstanding commercial loan balances and unfunded commitments of participations sold, and any outstanding commercial loan balances and unfunded commitments sold and serviced by the credit union) total less than fifteen (15) percent of the credit union's net worth; and

(C) in a given calendar year, the amount of originated and sold commercial loans and the amount of originated and sold commercial loans the credit union does not continue to service, total fifteen (15) percent or less of the credit union's net worth.

(D) A credit union that relies on this de minimis exception is prohibited from engaging in any acts or practices that have the effect of evading the requirements of this subsection.

(d) Commercial Loan Risk Management Systems.

(1) Risk Management Processes. A credit union's risk management process must be commensurate with the size, scope and complexity of the credit union's commercial lending activities and borrowing relationships. The processes must, at a minimum, address the following:

(A) use of loan covenants, if appropriate, including frequency of borrower and guarantor financial reporting;

(B) periodic loan review, consistent with loan covenants and sufficient to conduct portfolio risk management, which, based upon current market conditions and trends, loan risk, and collateral conditions, must include a periodic reevaluation of the value and marketability of any collateral, and an updated loan-to-value ratio for collateral calculation;

(C) a credit risk rating system under paragraph (2) of this subsection; and

(D) a process to identify, report, and monitor commercial loans that are approved by the credit union as exceptions to the credit union's loan policies.

(2) Credit Risk Rating System. The credit risk rating system must be a formal process that identifies and assigns a relative credit risk rating to each commercial loan in a credit union's portfolio, using ordinal ratings to represent the degree of risk. The credit risk score must be determined through an evaluation of quantitative factors based on the financial performance of each commercial loan and qualitative factors based on the credit union's management, operational, market, and business environment factors. A credit risk rating must be assigned to each commercial loan at the inception of the loan. A credit risk rating must be reviewed as frequently as necessary to satisfy the credit union's risk monitoring and reporting policies, and to ensure adequate reserves as required by generally accepted accounting principles.

(3) Independent Review. Periodic independent reviews should be conducted by a person who is both qualified to conduct such a review and independent of the function being reviewed. The review should provide an objective assessment of the overall commercial loan portfolio quality and verify the accuracy of ratings and the operational effectiveness of the credit union's risk management processes. A credit union is not required to hire an outside third party to conduct this independent review, if it can be done in-house by a competent person that is considered unconnected to the function being reviewed.

(e) Collateral and Security for Commercial Loans.

(1) Collateral. A commercial loan must be secured by collateral commensurate with the level of risk associated with the size and type of the commercial loan. The collateral must be sufficient to ensure the credit union is protected by a prudent loan-to-value ratio for collateral along with appropriate risk sharing with the borrower and principal(s). A credit union making an unsecured commercial loan must determine and document in the loan file that mitigating factors sufficiently offset the relevant risk of making an unsecured loan.

(2) Personal Guarantees. A credit union that does not require the full and unconditional personal guarantee from all principals of the borrower who have a controlling interest, as defined by subsection (a)(3) of this section, in the borrower must determine and document in the loan file that mitigating factors sufficiently offset the relevant risk.

(f) Construction and Development Loans.

(1) Terms. In this subsection:

(A) "construction or development loan" means any financing arrangement to enable the borrower to acquire property or rights to property, including land or structures, with the intent to construct or renovate an income producing property, such as residential housing for rental or sale, or a commercial building, that may be used for commercial, agricultural, industrial, or other similar purposes. It also means a financing arrangement for the construction, major expansion or renovation of the property types referenced in this subsection. The collateral valuation for securing a construction or development loan depends on the satisfactory completion of the proposed construction or renovation where the loan proceeds are disbursed in increments as the work is completed. A loan to finance maintenance, repairs, or other improvements to an existing income-producing property that does not change the property's use or does not materially impact the property is not a construction or development loan.

(B) "cost to complete" means the sum of all qualifying costs necessary to complete a construction project and documented in an approved construction budget. Qualifying costs generally include on- or off-site improvements; building construction; other reasonable and customary costs paid to construct or improve a project, including a general contractor's fees; other expenses normally included in a construction contract such as bonding and contractor insurance; the value of the land, determined as the sum of the cost of any improvements to the land and the lesser of appraised market value or purchase price; interest as provided by this subparagraph; project costs as provided by this subparagraph; a contingency account to fund unanticipated overruns; and other development costs such as fees and related pre-development expenses. Interest expense is a qualifying cost only to the extent it is included in the construction budget and is calculated based on the projected changes in the loan balance up to the expected "as-complete" date for owner-occupied non-income-producing commercial real property or the "as stabilized" date for income-producing real estate. Project costs for related parties, such as developer fees, leasing expenses, brokerage commissions and management fees, are included in qualifying costs only if reasonable in comparison to the cost of similar services from a third party. Qualifying costs exclude interest or preferred returns payable to equity partners or subordinated debt holders, the developer's general corporate overhead, and selling costs to be funded out of sales proceeds such as brokerage commissions and other closing costs.

(C) "prospective market value" means the market value opinion determined by an independent appraiser in compliance with the relevant standards set forth in the Uniform Standards of Professional Appraisal Practice. Prospective value opinions are intended to reflect the current expectations and perceptions of market participants, based on available data. Two (2) prospective value opinions may be required to reflect the time frame during which development, construction, or occupancy occur. The prospective market value "as-completed" reflects the real property's market value as of the time that development is to be completed. The prospective market value "as-stabilized" reflects the real property's market value as of the time the real property is projected to achieve stabilized occupancy. For an income producing property, stabilized occupancy is the occupancy level that a property is expected to achieve after the real property is exposed to the market for lease over a reasonable period of time and at comparable terms and conditions to other similar real properties.

(2) Policies. A credit union that elects to make a construction or development loan must ensure that its commercial loan policies under subsection (c) of this section meets the following conditions:

(A) qualified personnel representing the interest of the credit union must conduct a review and approval of any line item construction budget prior to closing the loan;

(B) a requisition and loan disbursement process approved by the credit union is established;

(C) release or disbursement of loan funds occurs only after on-site inspections which are documented in a written report by qualified personnel who represents the interest of the credit union and certifies that the work requisitioned for payment has been satisfactorily completed, and the remaining funds available to be disbursed from the construction and development loan is sufficient to complete the project; and

(D) each loan disbursement is subject to confirmation that no intervening liens have been filed.

(3) Establishing Collateral Values. The current collateral value must be established by prudent and accepted commercial loan practices and comply with all regulatory requirements. The collateral value depends on the satisfactory completion of the proposed construction or renovation where the loan proceeds are disbursed in increments as the work is completed and is the lesser of the project's cost to complete or its prospective market value.

(4) Controls and Processes for Loan Advances. A credit union that elects to make a construction and development loan must have effective commercial loan control procedures in place to ensure sound loan advances and that liens are paid and released in a timely manner. Effective controls should include segregation of duties, delegation of duties to appropriate qualified personnel, and dual approval of loan disbursements.

(g) Commercial Loan Prohibitions.

(1) Ineligible borrowers. A credit union may not grant a commercial loan to the following:

(A) any senior management employee directly or indirectly involved in the credit union's commercial loan underwriting, servicing, and collection process, and any of their immediate family members;

(B) any person meeting the requirements of subsection (i) of this section concerning aggregations and attribution for commercial loans, with respect to persons identified in subparagraph (A) of this paragraph; or

(C) any director, unless the credit union's board of directors approves granting the loan and the borrowing director was recused from the board's decision making process.

(2) Equity Agreements and Joint Ventures. A credit union may not grant a commercial loan if any additional income received by the credit union or its senior management employees is tied to the profit

or sale of any business or commercial endeavor that benefits from the proceeds of the loan.

(3) Fees. No director, committee member, volunteer official, or senior management employee of a credit union, or immediate family member of such director, committee member, volunteer official, or senior management employee, may receive, directly or indirectly, any commission, fee, or other compensation in connection with any commercial loan made by the credit union. Employees, other than senior management, may be partially compensated on a commission or performance based incentive, provided the compensation is governed by a written policy and internal controls established by the board of directors. The board must review the policies and controls at least annually to ensure that such compensation is not excessive or expose the credit union to inappropriate risks that could lead to material financial loss. Loan origination employees are prohibited from receiving, in connection with any commercial loan made by the credit union, any compensation from any source other than the credit union. For the purposes of this paragraph, compensation includes non-monetary items and anything reasonably regarded as pecuniary gain or pecuniary advantage, including a benefit to any other person in whose welfare the beneficiary has a direct and substantial interest, but compensation does not include nonmonetary items of nominal value.

(h) Aggregate Member Business Loan Limit.

(1) Limits. The aggregate limit on a credit union's net member business loan balances is the lesser of 1.75 times the actual net worth of the credit union, or 1.75 times the minimum net worth required under 12 U.S.C. Section 1790d(c)(1)(A). For purposes of this calculation, member business loan means any commercial loan, except that the following commercial loans are not member business loans and are not counted toward the aggregate limit on member business loans:

(A) any loan in which a federal or state agency (or its political subdivision) fully insures repayment, fully guarantees repayment, or provides an advance commitment to purchase the loan in full; and

(B) any non-member commercial loan or non-member participation interest in a commercial loan made by another lender, provided the credit union acquired the non-member loans or participation interest in compliance with applicable laws and the credit union is not, in conjunction with one or more other credit unions, trading member business loans to circumvent the aggregate limit under this subsection.

(2) Exceptions. Any loan secured by a lien on a 1- to 4-family residential property that is not a member's primary residence, any loan secured by a lien on a vehicle manufactured for household use that will be used for commercial, corporate, or other business investment property or venture, and any other loan for an agricultural purpose are not commercial loans (if the outstanding aggregate net member business loan balance is $50,000 or greater), and must be counted toward the aggregate limit on a credit union's member business loans under this subsection.

(3) Exemption. A credit union that has a federal low-income designation, or participates in the federal Community Development Financial Institution program, or was chartered for the purpose of making member business loans, or which as of the date of the Credit Union Membership Access Act of 1998 had a history of primarily making commercial loans, is exempt from compliance with the aggregate member business loan limits in paragraph (1) of this subsection.

(4) Method of Calculation for Net Member Business Loan Balance. For the purposes of NCUA form 5300 reporting (call report), a credit union's net member business loan balance is determined by calculating the sum of the outstanding loan balance plus any unfunded commitments and reducing that sum by any portion of the loan that is: secured by shares in the credit union, by shares or deposits in other financial institutions, or by a lien on a borrower's primary residence; insured or guaranteed by any agency of the federal government, a state, or any political subdivision of a state; or subject to an advance commitment to purchase by any agency of the federal government, a state, or any political subdivision of a state; or sold as a participation interest without recourse and qualifying for true sales accounting under generally accepted accounting principles.

(i) Aggregation and Attribution for Commercial Loans.

(1) General Rule. A commercial loan or extension of credit to one borrower is attributed to another person, and each person will be considered a borrower, when:

(A) the proceeds of the commercial loan or extension of credit are to be used for the direct benefit of the other person, to the extent of the proceeds so used, as provided by paragraph (2) of this subsection;

(B) a common enterprise is deemed to exist between the persons as persons as provided by paragraph (3) of this subsection; or

(C) the expected source of repayment for each commercial loan or extension of credit is the same for each person as provided by paragraph (4) of this subsection.

(2) Direct Benefit. The proceeds of a commercial loan or extension of credit to a borrower is considered used for the direct benefit of another person and attributed to the other person when the proceeds, or assets purchased with the proceeds, are transferred in any manner to or for the benefit of the other person, other than in a bona fide arm's length transaction where the proceeds are used to acquire property, goods, or services from such other person.

(3) Common Enterprise.

(A) Description. A common enterprise is considered to exist and commercial loans to separate borrowers will be aggregated when:

(i) the expected source of repayment for each loan or extension of credit is the same for each borrower and neither borrower has another source of income from which the loan (together with the borrower's other obligations) may be fully repaid. An employer will not be treated as a source of repayment under this subparagraph because of wages and salaries paid to an employee, unless the standards of subdivision (ii) of this subparagraph are met:

(ii) the loans or extension of credit are made:

(I) to borrowers who are related directly or indirectly through control as defined by subsection (a) of this section; and

(II) substantial financial interdependence exists between or among the borrowers. Substantial financial interdependence is deemed to exist when fifty (50) percent or more of one borrower's gross receipts or gross expenditures (on an annual basis) are derived from transactions with the other borrower. Gross receipts and expenditures include gross revenues/expenses, intercompany loans, dividends, capital contributions, and other similar receipts or payments;

(iii) separate persons borrow from a credit union to acquire a business of enterprise of which those borrowers will own more than fifty (50) percent of the voting securities of voting interest, in which case a common enterprise is deemed to exist between the borrowers for purposes of combining the acquisition loans; or

(iv) the Department determines, based upon an evaluation of the facts and circumstances of particular transactions, that a common enterprise exists.

(B) Commercial Loans to Certain Entities. A commercial loan or extension of credit:

(i) to a partnership or joint venture is considered to be a commercial loan or extension of credit to each member of the partnership or joint venture. Excepted from this subdivision is a partner or member who: is not held generally liable, by the terms of the partnership or membership agreement or by applicable law, for the debts or actions of the partnership, joint venture, or association, provided those terms are valid against third parties under applicable law; and has not otherwise agreed to guarantee or be personally liable on the loan or extension of credit.

(ii) to a member of a partnership, joint venture, or association is generally not attributed to the partnership, joint venture, or associations, or to other members of the partnership, joint venture, or association, except as otherwise provided by paragraphs (2) - (4) of this subsection, provided that a commercial loan or extension of credit made to a member of a partnership, joint venture or association for the purpose of purchasing an interest in the partnership, joint venture or association, is attributed to the partnership, joint venture or association.

(C) Guarantors and Accommodation Parties. The derivative obligation of a drawer, endorser, or guarantor of a commercial loan or extension of credit, including a contingent obligation to purchase collateral that secures a commercial loan, is aggregated with other direct commercial loans or extensions of credit to such a drawer, endorser, or guarantor.

(j) Commercial Loans to One Borrower Limit. The total aggregate dollar amount of commercial loans by a credit union to any borrower at one time may not exceed the greater of fifteen (15) percent of the credit union's net worth or $100,000, plus an additional ten (10) percent of the credit union's net worth if the amount that exceeds the credit union's fifteen (15) percent general limit is fully secured at all times with a perfected security interest in readily marketable collateral. Any insured or guaranteed portion of a commercial loan made through a program in which a federal or state agency (or its political subdivision) insures repayment, guarantees repayment, or provides an advance commitment to purchase the commercial loan in full, is excluded from this limit.

(k) Finance Code Limitation. In addition to the other limitations of this section, a credit union may not make a loan to a member or a business interest of the member if the loan would cause the aggregate amount of loans to the member and the member's business interests to exceed an amount equal to 10 percent of the credit union's total assets as provided by TEX. FIN. CODE §121.003.

(l) Commercial Loans Regarding Federal or State Guaranteed Loan Programs. A credit union may follow the loan requirements and limits of a guaranteed loan program for loans that are part of a loan program in which a federal or state agency (or its political subdivision) insures repayment, guarantees repayment, or provides an advance commitment to purchase the loan in full if that program has requirements that are less restrictive than those required by this section.

(m) Transitional Provisions.

(1) Waivers. Upon the effective date of this section, any waiver approved by the Department concerning a credit union's commercial lending activity is rendered moot, except for waivers granted for the commercial loan to one borrower limit. Borrowing relationships granted by waivers will be grandfathered however, the debt associated with those relationships may not be increased.

(2) Administrative Constraints. Limitations or other conditions imposed on a credit union in any written directive from the Department are unaffected by the adoption of this section. As of the effective date of this section, all such limitations or other conditions remain in place until such time as they are modified by the Department.

(n) Effective Date. This section takes effect on January 1, 2017.

[~~(a) A member business loan is defined as any loan, line of credit, or letter of credit (including any unfunded commitments), the proceeds of which will be used for a commercial, corporate, business investment property or venture, or agricultural purpose, except that the following shall not be considered a member business loan for the purposes of this rule:~~]

[~~(1) A loan fully secured by a lien on a 1- to 4-family dwelling that is the member's primary residence;~~]

[~~(2) A loan fully secured by shares in the credit union making the extension of credit or deposits in other financial institutions;~~]

[~~(3) Loan(s) to a member or associated member which, when the net member business loan balances are added together, are equal to less than $50,000; or~~]

[~~(4) A loan where a federal or state agency or one of its political subdivisions fully insures repayment, or fully guarantees repayment, or provides an advance commitment to purchase in full.~~]

[~~(b) This section does not apply to loans made by a credit union to other credit unions and credit union service organizations.~~]

[~~(c) Any interest a credit union obtains in a loan that was made by another lender to the credit union's member is a member business loan, for purposes of this section, to the same extent as if made directly by the credit union to its member.~~]

[~~(d) Any interest a credit union obtains in a nonmember loan, pursuant to §91.805 (relating to loan participation investments) shall be treated the same as a member business loan for purposes of this section, except that the effect of such interest on a credit union's aggregate member business loan limit will be as set forth in subsection (f) of this rule.~~]

[~~(e) A credit union with a net worth ratio greater than 6% may make member business loans subject to the conditions of this section. The aggregate limit on a credit union's net member business loan balances is the lesser of 1.75 times the credit union's net worth or 12.25% of the credit union's total assets. Loans that are exempt from the definition of member business loans are not counted for the purpose of the aggregate loan limit.~~]

[~~(f) If a credit union holds any nonmember loan participation investments that would constitute a member business loan if made to a member, those loans will affect the credit union's aggregate limit on net member business loan balances as follows:~~]

[~~(1) The total of the credit union's net member business loan balances and the nonmember participation investments must not exceed the lesser of 1.75 times the credit union's net worth or 12.25% of the credit union's total assets, unless the credit union has first received approval from the commissioner.~~]

[~~(2) To request approval from the commissioner, a credit union must submit a letter application that:~~]

[~~(A) Includes a current copy of the credit union's member business loan policies;~~]

[~~(B) Confirms that the credit union is in compliance with all other aspects of this rule;~~]

[(C) States the credit union's proposed limit on the total amount of nonmember loan participation investments that the credit union may acquire if the application is granted; and]

[(D) Attests that the acquisition of nonmember loan participation investments is not being used, in conjunction with one or more other credit unions, to have the effect of trading member business loans that would otherwise exceed the aggregate limit.]

[(3) If the commissioner approves the request, the commissioner will promptly forward the request to Region IV of the NCUA for decision under NCUA rules at 12 C.F.R 723.16. The commissioner's approval is not effective until the regional director of the NCUA approves it in accordance with NCUA Rule at 12 C.F.R. 723.16.]

[(4) The commissioner shall deny a request to exceed the aggregate limit on a credit union's net member business loan balances, or may revoke a previously approved increased aggregate limit, if the commissioner determines that:]

[(A) the treatment of loan purchases or participations interest will or has resulted in circumvention of the aggregate limit;]

[(B) the credit union's level of capital is not commensurate with that needed to support the additional risks that will be or has been incurred; or]

[(C) the performance of the activity by the credit union will or has adversely affected the safety and soundness of the credit union, or poses a material risk to the share insurance fund.]

[(g) The aggregate amount of net member business loan balances to any one member or group of associated members shall not be more than 15% of the credit union's net worth (less the Allowance for Loan Losses account) or $100,000.00, whichever is higher.]

[(h) All member business loans must be secured by collateral in accordance with this section, except the following:]

[(1) a credit card line of credit granted to nonnatural persons that is limited to routine purposes normally made available under such lines of credit; and]

[(2) a loan made by a credit union under the following conditions:]

[(A) the aggregate of the unsecured outstanding member business loans to any one member or group of associated members does not exceed the lesser of one hundred thousand dollars or 2.5% of the credit union's net worth;]

[(B) the aggregate of all unsecured outstanding member business loans does not exceed ten percent of the credit union's net worth; and]

[(C) the credit union has a net worth of at least seven percent.]

[(i) The maximum loan-to-value (LTV) ratio for a member business loan may not exceed eighty percent, except when:]

[(1) the loan is secured by collateral on which the credit union will have a first mortgage lien, and the loan is covered by private mortgage or equivalent type insurance, or insured, guaranteed, or subject to advance commitment to purchase, by any federal or state agency or any political subdivision of this State, but in no case may the LTV ratio exceed ninety-five percent; or]

[(2) the loan is to purchase a car, van, pickup truck, or sport utility vehicle and is not part of a fleet of vehicles, but the LTV ratio and the term for this type of vehicle loan must be consistent with the depreciation schedule of any vehicle used for a particular type of business.]

[(j) A credit union that engages in this type of lending shall adopt specific member business loan policies and review them at least annually. In addition to the general lending provisions of this subchapter, the member business loan policies, at a minimum, shall address all of the following areas:]

[(1) Types of business loans to be made and collateral requirements for each type of loan.]

[(2) The maximum amount of net member business loan balances relative to the credit union's net worth.]

[(3) The maximum amount of any given category or type of member business loan relative to the credit union's net worth.]

[(4) The maximum amount that will be loaned to any one member or group of associated members, subject to subsection (g) of this section.]

[(5) The qualifications and experience requirements for personnel involved in making and servicing business loans, subject to subsection (k).]

[(6) A requirement for analysis of the member's initial and ongoing financial capacity to repay the debt.]

[(7) Documentation sufficient to support each request for an extension of credit or an increase in an existing loan or line of credit, except where the board of directors finds that the required documentation is not reasonably available for a particular type of loan and states the reasons for those findings in the credit union's written policy. At a minimum, the standard documentation must include the following:]

[(A) A balance sheet;]

[(B) An income statement;]

[(C) A cash flow analysis;]

[(D) Income tax data;]

[(E) Analysis of operating performance ratios, and comparison with industry averages, when applicable; and]

[(F) Receipt and the periodic updating of financial statements, income tax data, and other documentation necessary to support the borrower's ongoing repayment ability.]

[(8) Collateral requirements which include all of the following:]

[(A) Loan-to-value (LTV) ratios;]

[(B) Appraisal, determination of ownership, and insurance requirements;]

[(C) Environment impact assessment, when applicable; and]

[(D) Steps to be taken to secure various types of collateral.]

[(9) Identification, by position, of the officials and senior management employees who are prohibited from receiving member business loans which, at a minimum, shall include the credit union's chief executive officer, any assistant chief executive officers, the chief financial officer, and any associated member or immediate family member of such persons.]

[(10) Guidelines for purchase and sale of member business loans and loan participations, if the credit union engages in that activity.]

[(k) The board of directors must use the services of an individual with at least two years direct experience with the type of lending the credit union will be engaging in. The experience must provide the credit union sufficient expertise given the complexity and risk exposure of the loans in which the credit union intends to engage. A credit union can meet the experience requirement through various approaches, including the services of a credit union service organization (CUSO), an employee of another credit union, an independent contractor, or other third parties. However, the actual decision to grant a loan must reside with the credit union.]

[(l) Any third party used by a credit union to meet the requirements of subsection (k) must be independent from the transaction and is prohibited from having a participation in the loan or an interest in the collateral securing the loan that the third party is responsible for reviewing, with the following exceptions:]

[(1) the third party may provide a service to the credit union related to the transaction, such as loan servicing;]

[(2) the third party may provide the requisite experience to the credit union and purchase a participation interest in a loan originated by the credit union that the third party reviewed; or]

[(3) a credit union may use the services of a CUSO that otherwise meets the requirements of subsection (k) even though the CUSO is not independent from the transaction, provided the credit union has a controlling financial interest in the CUSO as determined under generally accepted accounting principles.]

[(m) Loans granted for the construction or development of commercial or residential property are subject to the following additional requirements:]

[(1) The aggregate of the net member business loan balances for all construction and development loans must not exceed 15% of the credit union's net worth. To determine the aggregate balances for purposes of this limitation, a credit union may exclude any loan made to finance the construction of a single-family residence if a prospective homeowner has contracted to purchase the property and may also exclude a loan to finance the construction of one single-family residence per member-borrower or group of associated member-borrowers, irrespective of the existence of a contractual commitment from a prospective homeowner to purchase the property;]

[(2) The member borrower on such loans must have a minimum of 25% equity interest in the project being financed, the value of which is determined by the market value of the project at the time the loan is made, except that this requirement will not apply in the case of a loan made to finance the construction of a single-family residence if a prospective homeowner has contracted to purchase the property and in the case of one loan to a member-borrower or group of associated member-borrowers to finance the construction of a single-family residence, irrespective of the existence of a contractual commitment from a prospective homeowner to purchase the property. Instead the collateral requirements of subsection (i) will apply; and]

[(3) The funds may be released only after on-site, written inspections by qualified personnel and according to a preapproved draw schedule and any other conditions as set forth in the loan documentation.]

[(n) The commissioner, consistent with safety and soundness principles, may grant a waiver of a requirement imposed by this Section only in the following areas:]

[(1) Aggregate construction or development loan limits under subsection (m);]

[(2) Minimum borrower equity requirements for construction or development loans under subsection (m);

[(3) LTV ratio requirements for member business loans under subsection (i);]

[(4) Maximum aggregate net member business loan balances to any one member or group of associated members under subsection (g); and]

[(5) Maximum unsecured member business loan limits under subsection (h).]

[(o) A waiver request authorized under subsection (n) must contain the following:]

[(1) A copy of the credit union's member business lending policy;]

[(2) The higher limit or ratio sought;]

[(3) An explanation of the need to raise the limit or ratio;]

[(4) Documentation supporting the credit union's ability to manage this activity; and]

[(5) An analysis of the credit union's prior experience making member business loans, including as a minimum:]

[(A) the history of loan losses and loan delinquency;]

[(B) volume and cyclical or seasonal patterns;]

[(C) diversification;]

[(D) concentrations of credit to one borrower or group of associated borrowers in excess of 15 percent of net worth;]

[(E) underwriting standards and practices;]

[(F) types of loans grouped by purpose and collateral; and]

[(G) the qualifications of personnel responsible for underwriting and administering member business loans.]

[(p) In determining action on a waiver request made under subsection (n), the commissioner will consider the credit union's:]

[(1) Condition and management, including compliance with regulatory net worth requirements. If significant weaknesses exist in these financial and managerial factors, the waiver normally will be denied.]

[(2) Adequacy of policies, practices, and procedures. Correction of any deficiencies may be included as conditions, as appropriate, if an approval decision is made.]

[(3) Record of performance. If the member business loan record is less than satisfactory or otherwise problematic, the waiver normally will be denied.]

[(4) Elevated level of risk. If the level of risk posses safety and soundness problems or material risks to the insurance fund, the waiver normally will be denied.]

[(q) The commissioner will provide the NCUA regional director with a copy of each waiver request made under subsection (n). The regional director will be consulted on all waiver requests. The regional director will provide NCUA's views within 30 calendar days, or NCUA will be deemed to have concurred with the commissioner's decision. The thirty days will begin to run once the commissioner and the regional director agree that the waiver request is complete.]

[(r) A credit union may not grant a member business loan if any additional income received by the credit union or senior manage-

~~ment employees is tied to the profit or sale of the business or commercial endeavor for which the loan is made.]~~

~~[(s) A credit union may not grant a member business loan to a compensated director unless the board of directors approves granting the loan and the compensated director is recused from the decision making process.]~~

~~[(t) If a credit union makes a member business loan as part of a Small Business Administration guaranteed loan program with loan requirements that are less restrictive than those required by Commission Rules, then the credit union may follow the loan requirements of the relevant Small Business Administration guaranteed loan program.]~~

~~[(u) For the purposes of this section, the following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.]~~

~~[(1) Associated member-means any member with a common ownership, investment, or other pecuniary interest in the business or agricultural endeavor for which the business loan is being made.]~~

~~[(2) Construction or development loan-a financing arrangement for acquiring property or rights to property, including land or structures, with the intent of converting the property into income-producing property such as residential housing for rental or sale; commercial use; industrial use; or similar use.]~~

~~[(3) Loan-to-value ratio-the aggregate amount of all sums borrowed including outstanding balances plus any unfunded commitment or line of credit from all sources on an item of collateral divided by the market value of the collateral used to secure the loan.]~~

~~[(4) Net Member Business Loan Balance-means the outstanding loan balance plus any unfunded commitments, reduced by any portion of the loan that is secured by shares or deposits in the credit union, or by shares or deposits in other financial institutions, or by a lien in the member's primary residence, or insured or guaranteed by any agency of the federal government, a state or any political subdivision of such state, or sold as a participation interest without recourse and qualifying for true sales accounting under generally accepted accounting principles.]~~

~~[(5) Net Worth-means retained earnings as defined under Section 702.2 of the National Credit Union Administration's Rules and Regulations (12 CFR, Chapter VII, Part 702).]~~

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

Filed with the Office of the Secretary of State on July 11, 2016.

TRD-201603432
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: August 21, 2016
For further information, please call: (512) 837-9236

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PART 8. JOINT FINANCIAL REGULATORY AGENCIES

CHAPTER 153. HOME EQUITY LENDING

7 TAC §§153.5, 153.8, 153.13, 153.14, 153.17

The Finance Commission of Texas and the Texas Credit Union Commission ("commissions") propose amendments to the following home equity lending interpretations: §153.5, concerning Three percent fee limitation: §50(a)(6)(E); §153.8, concerning Security of the Equity Loan; §153.13, concerning Preclosing Disclosures; §153.14, concerning One Year Prohibition; and §153.17, concerning Authorized Lenders.

The amendments apply the administrative interpretation of the home equity lending provisions of Article XVI, Section 50 of the Texas Constitution ("Section 50") allowed by Section 50(u) and Texas Finance Code, §11.308 and §15.413.

In general, the purpose of the amendments to Chapter 153 is to implement changes resulting from the commissions' review of this chapter under Texas Government Code, §2001.039. The notice of intention to review 7 TAC, Chapter 153 was published in the *Texas Register* on February 26, 2016. (41 TexReg 1503). The Texas Department of Banking, the Texas Department of Savings and Mortgage Lending, the Office of Consumer Credit Commissioner, and the Texas Credit Union Department ("agencies") received one comment on the notice of intention to review. The comment was submitted by Black, Mann & Graham, L.L.P.

The agencies prepared an initial draft of amendments with technical corrections and updates to Chapter 153. The agencies distributed the initial draft to home equity stakeholders for precomments, in order to prepare an informed and well-balanced proposal for the commissions. The agencies received written precomments from several stakeholders. The agencies have incorporated suggestions offered by stakeholders into the proposed amendments. The agencies believe that this early participation of stakeholders has greatly benefited the resulting proposal.

The individual purposes of the proposed amendments to each rule are provided in the following paragraphs.

The purpose of the amendments to §153.5 is to use terminology that is consistent with other interpretations. In paragraphs (3)(B) and (7), the amendments add "equity" before "loan" to ensure that the provisions use the term "equity loan," which is defined in §153.1(7).

The purpose of the amendment to §153.8(5) is to make a technical correction in a citation to Section 50(a)(6)(H). In the comment on the notice of intention to review, the commenter notes that this section currently contains an incorrect reference to "Section 50(a)(H)." In response to this comment, the amendment corrects the provision to cite Section 50(a)(6)(H).

The purpose of the proposed amendments to §153.13 is to specify how lenders can comply with the preclosing disclosure requirement in Section 50(a)(6)(M)(ii), and to include updated citations to federal rules. Under Section 50(a)(6)(M)(ii), a home equity loan may not be closed before "one business day after the date that the owner of the homestead receives . . . a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing." Currently, §153.13(3) explains that lenders may comply with this requirement by providing a properly completed HUD-1 form from the U.S. Department of Housing and Urban Development. The Consumer Financial Protection Bureau (CFPB) recently adopted a closing disclosure that integrates and replaces the HUD-1 form. The CFPB's rules containing the requirements for the integrated closing disclosure are located at Regulation Z, 12 C.F.R. §1026.19(f) and §1026.38. The requirement to provide the closing disclosure went into effect on October 3, 2015. The requirement generally applies to closed-end residential mortgage loans for which

the lender or servicer received a loan application on or after that date. For loans where the application was received before October 3, the HUD-1 form (rather than the CFPB closing disclosure) was the appropriate form for lenders to use. The closing disclosure requirement does not apply to home equity lines of credit, which require separate account-opening disclosures under a different section of Regulation Z, 12 C.F.R. §1026.6(a).

In the comment on the notice of intention to review, the commenter recommends replacing the reference to the HUD-1 form in §153.13(3) with a reference to the CFPB's closing disclosure. Based on this recommendation and the federal rules discussed above, the proposed amendments to §153.13(3) delete the reference to the HUD-1 form, and add new references to the disclosures currently required under Regulation Z: the closing disclosure (for closed-end equity loans) and the account-opening disclosures (for home equity lines of credit). When these disclosures are properly completed, they provide borrowers with a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing, in accordance with Section 50(a)(6)(M)(ii).

The purpose of the amendment to §153.14(2)(A) is to update a citation to federal law. Currently, this provision cites the Soldiers' and Sailors' Civil Relief Act. In 2003, the Servicemembers Civil Relief Act replaced the former Soldiers' and Sailors' Civil Relief Act. The amendment to §153.14(2)(A) replaces a citation to the previous law with a citation to the current law.

The purpose of the amendments to §153.17 is to specify who is authorized to make a home equity loan, in light of recent changes in federal policy and amendments to the licensing provisions of Texas Finance Code, Chapters 156 and 342. Section 50(a)(6)(P) lists the types of lenders that are authorized to make home equity loans, including "a person approved as a mortgagee by the United States government to make federally insured loans," "a person licensed to make regulated loans, as provided by statute of this state," and "a person regulated by this state as a mortgage broker."

In §153.17(2), a proposed amendment removes a reference to "Approved correspondents" and replaces it with "Loan correspondents." In 2010, the Department of Housing and Urban Development ended its program of approving loan correspondents, as described in mortgagee letter 2010-20. As amended by the proposed amendments, §153.17(2) explains that loan correspondents to an approved mortgagee are not authorized lenders unless they qualify under another provision of Section 50(a)(6)(P). In addition, in the comment on the notice of intention to review, the commenter recommends correcting a reference in §153.17(2) to "another section of (a)(6)(P)." In response to this recommendation, a proposed amendment replaces this phrase with "another provision of Section 50(a)(6)(P)."

Proposed new §153.17(3) explains that a person who is licensed under Texas Finance Code, Chapter 156 is a person regulated by this state as a mortgage broker for purposes of Section 50(a)(6)(P)(vi). Until 2011, Chapter 156 of the Texas Finance Code described the licensing requirements for mortgage brokers. In 2011, the chapter was amended to replace the term "mortgage broker" with the terms "residential mortgage loan company" and "residential mortgage loan originator." In 2011, the Texas Department of Savings and Mortgage Lending published a "Home Equity Terminology Advisory Bulletin," explaining that a person licensed under Chapter 156 is a mortgage broker for purposes of the constitution. In the comment on the notice of intention to review, the commenter recommends an amendment to §153.17 describing this interpretation. In response to this comment, proposed new §153.17(3) explains that a person licensed under Chapter 156 is a mortgage broker for purposes of the constitution.

Proposed new §153.17(4) replaces current paragraphs (3) and (4), and explains that a Chapter 342 licensee is a regulated lender for purposes of the constitution. Current §153.17(3) explains that a nondepository lender must hold a license under Chapter 342 to make, transact, or negotiate a secondary mortgage loan. Current §153.17(4) explains that if a person does not meet the definition of Section 50(a)(6)(P)(i), (ii), (iv), (v), or (vi), the person must obtain a Chapter 342 license to be authorized to make home equity loans. In 2007, Texas Finance Code, §342.051 was amended to include an exemption for a person licensed under Chapter 156. In a precomment, one stakeholder recommends deleting current paragraph (3), because the paragraph does not acknowledge the exemption for Chapter 156 licensees, and because current paragraph (1) already explains that lenders must comply with statutory licensing requirements. In response to this precomment, the proposal replaces paragraphs (3) and (4) with a new paragraph (4). The new paragraph explains that a Chapter 342 licensee is a regulated lender for purposes of the constitution, and that if a person is not described by Section 50(a)(6)(P)(i), (ii), (iv), (v), or (vi), the person must obtain a Chapter 342 license to be authorized to make home equity loans.

Harold Feeney, Credit Union Commissioner, on behalf of the Texas Credit Union Commission and Leslie L. Pettijohn, Consumer Credit Commissioner, on behalf of the Finance Commission of Texas have determined that for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of administering the interpretations.

Commissioner Feeney and Commissioner Pettijohn have also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of the amendments will be to create standards and guidelines for both lenders and borrowers, fostering a stable environment for the extension of home equity loans.

There is no anticipated cost to persons who are required to comply with the amendments as proposed. Regulation Z currently requires lenders to provide the disclosures described in the proposed amendments to §153.13. Any costs of complying with the proposed amendments are imposed by the constitution and federal law, and are not imposed by the proposed amendments. There will be no adverse economic effect on small or micro-businesses. There will be no effect on individuals required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.texas.gov. To be considered, a written comment must be received on or before 5:00 p.m. central time on the 31st day after the date the proposed amendments are published in the *Texas Register.* At the conclusion of the 31st day after the proposed amendments are published in the *Texas Register,* no further written comments will be considered or accepted by the commissions.

The amendments are proposed under Article XVI, Section 50(u) of the Texas Constitution and Texas Finance Code, §11.308 and

§15.413, which authorize the commissions to adopt interpretations of Article XVI, Section 50(a)(5) - (7), (e) - (p), (t), and (u) of the Texas Constitution. The constitutional provisions affected by the proposed amendments are contained in Article XVI, Section 50 of the Texas Constitution.

§153.5. Three percent fee limitation: Section 50(a)(6)(E).

An equity loan must not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit.

(1) - (2) (No change.)

(3) Charges that are Interest. Charges an owner or an owner's spouse is required to pay that constitute interest under §153.1(11) of this title (relating to Definitions) are not fees subject to the three percent limitation.

(A) (No change.)

(B) Legitimate discount points are interest and are not subject to the three percent limitation. Discount points are legitimate if the discount points truly correspond to a reduced interest rate and are not necessary to originate, evaluate, maintain, record, insure, or service the equity loan. A lender may rely on an established system of verifiable procedures to evidence that the discount points it offers are legitimate. This system may include documentation of options that the owner is offered in the course of negotiation, including a contract rate without discount points and a lower contract rate based on discount points.

(4) - (6) (No change.)

(7) Charges Paid to Third Parties. Charges an owner or an owner's spouse is required to pay to third parties for separate and additional consideration for activities relating to originating an equity [~~a~~] loan are fees subject to the three percent limitation. Charges those third parties absorb, and do not charge an owner or an owner's spouse that the owner or owner's spouse might otherwise be required to pay are unrestricted and not fees subject to the three percent limitation. Examples of these charges include attorneys' fees for document preparation and mortgage brokers' fees to the extent authorized by applicable law.

(8) - (16) (No change.)

§153.8. Security of the Equity Loan: Section 50(a)(6)(H).

An equity loan must not be secured by any additional real or personal property other than the homestead. The definition of "homestead" is located at Section 51 of Article XVI, Texas Constitution, and Chapter 41 of the Texas Property Code.

(1) - (4) (No change.)

(5) Any equity loan on an urban homestead that is secured by more than ten acres is secured by additional real property in violation of Section 50(a)(6)(H) [~~(50)(a)(H)~~].

§153.13. Preclosing Disclosures: Section 50(a)(6)(M)(ii).

An equity loan may not be closed before one business day after the date that the owner of the homestead receives a copy of the loan application, if not previously provided, and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. If a bona fide emergency or another good cause exists and the lender obtains the written consent of the owner, the lender may provide the preclosing disclosure to the owner or the lender may modify the previously provided preclosing disclosure on the date of closing.

(1) - (2) (No change.)

(3) The lender must deliver to the owner a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing.

(A) For a closed-end equity loan, the lender may satisfy this requirement by delivering a properly completed closing disclosure under Regulation Z, 12 C.F.R. §1026.19(f) and §1026.38.

(B) For a home equity line of credit, the lender may satisfy this requirement by delivering properly completed account-opening disclosures under Regulation Z, 12 C.F.R. §1026.6(a).

[~~(3) A lender may satisfy the disclosure requirement of providing a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing by delivery to the borrower of a properly completed Department of Housing and Urban Development (HUD) disclosure Form HUD-1 or HUD-1A.~~]

(4) - (7) (No change.)

§153.14. One Year Prohibition: Section 50(a)(6)(M)(iii).

An equity loan may not be closed before the first anniversary of the closing date of any other equity loan secured by the same homestead property.

(1) (No change.)

(2) Section 50(a)(6)(M)(iii) does not prohibit modification of an equity loan before one year has elapsed since the loan's closing date. A modification of a home equity loan occurs when one or more terms of an existing equity loan is modified, but the note is not satisfied and replaced. A home equity loan and a subsequent modification will be considered a single transaction. The home equity requirements of Section 50(a)(6) will be applied to the original loan and the subsequent modification as a single transaction.

(A) A modification of an equity loan must be agreed to in writing by the borrower and lender, unless otherwise required by law. An example of a modification that is not required to be in writing is the modification required under the Servicemembers Civil Relief Act, 50 U.S.C. app. §§501-597b [~~Soldiers' and Sailors' Civil Relief Act~~].

(B) - (D) (No change.)

§153.17. Authorized Lenders: Section 50(a)(6)(P).

An equity loan must be made by one of the following that has not been found by a federal regulatory agency to have engaged in the practice of refusing to make loans because the applicants for the loans reside or the property proposed to secure the loans is located in a certain area: a bank, savings and loan association, savings bank, or credit union doing business under the laws of this state or the United States; a federally chartered lending instrumentality or a person approved as a mortgagee by the United States government to make federally insured loans; a person licensed to make regulated loans, as provided by statute of this state; a person who sold the homestead property to the current owner and who provided all or part of the financing for the purchase; a person who is related to the homestead owner within the second degree of affinity and consanguinity; or a person regulated by this state as a mortgage broker.

(1) An authorized lender under Texas Finance Code, Chapter 341[~~, Texas Finance Code,~~] must meet both constitutional and statutory qualifications to make an equity loan.

(2) A HUD-approved mortgagee is a person approved as a mortgagee by the United States government to make federally insured loans for purposes of Section 50(a)(6)(P)(ii). Loan[~~. Approved~~] correspondents to a HUD-approved mortgagee are not authorized lenders of equity loans unless qualifying under another provision of Section 50(a)(6)(P) [~~section of (a)(6)(P)~~].

(3) A person who is licensed under Texas Finance Code, Chapter 156 is a person regulated by this state as a mortgage broker for purposes of Section 50(a)(6)(P)(vi).

(4) A person who is licensed under Texas Finance Code, Chapter 342 is a person licensed to make regulated loans for purposes of Section 50(a)(6)(P)(iii). If a person is not described by Section 50(a)(6)(P)(i), (ii), (iv), (v), or (vi), then the person must obtain a license under Texas Finance Code, Chapter 342 in order to be authorized to make an equity loan under Section 50(a)(6)(P)(iii).

[~~(3) A non-depository lender or broker that makes, negotiates, arranges, or transacts a secondary mortgage loan that is governed by Chapter 342, Texas Finance Code, must comply with the licensing provisions of Chapter 342, Texas Finance Code.~~]

[~~(4) A lender who does not meet the definition of Section 50(a)(6)(P)(i), (ii), (iv), (v), or (vi), must obtain a regulated loan license under Chapter 342 of the Texas Finance Code to meet the provisions of subsection (iii).~~]

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

Filed with the Office of the Secretary of State on July 8, 2016.

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Leslie L. Pettijohn
Consumer Credit Commissioner
Joint Financial Regulatory Agencies
Earliest possible date of adoption: August 21, 2016
For further information, please call: (512) 936-7621

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TITLE 10. COMMUNITY DEVELOPMENT

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

CHAPTER 184. SPORTS AND EVENTS TRUST FUND

The Office of the Governor, Economic Development and Tourism Office (OOG) proposes the repeal of Title 10, Chapter 184, Subchapter A (Major Events Trust Fund), §§184.100 - 184.106; and Subchapter B (Events Trust Fund), §§184.200 - 184.206, and proposes the adoption of new rules in Title 10, Chapter 184, Subchapter A (Authority and Applicability, Purpose, Construction of Rules and General Definitions), §§184.1 - 184.4; Subchapter B (Major Events Reimbursement Program Definitions, Eligibility, Participation and Deadlines), §§184.10 - 184.13; Subchapter C (Events Trust Fund Program Definitions, Eligibility, Participation and Deadlines), §§184.20 - 184.23; Subchapter D (Required Reports), §§184.30 - 184.33; Subchapter E (Disbursement Process), §§184.40 - 184.45; and Subchapter F (Event Support Contracts), §184.50 and §184.51. The proposed new rules will replace the rules proposed for repeal, which currently implement and govern the Events Trust Fund and Major Events Trust Fund (renamed in 2015 as the "Major Events Reimbursement Program" pursuant to H.B. 26, 84th Regular Legislative Session).

Explanation of Proposed Repeal and Proposed Rules

The purpose of the proposed repeal and the proposed new rules is to implement and administer the transfer of programs, including the Major Events Reimbursement Program (MERP), Events Trust Fund (ETF), and Motor Sports Racing Trust Fund (MSRTF), from the Comptroller of Public Accounts to the OOG pursuant to S.B. 633, 84th Regular Legislative Session. The proposed rules will ensure the efficient administration of the MERP, ETF, and MSRTF, which are established in Article 5190.14 of the Texas Revised Civil Statutes.

Proposed new Subchapter A, which consists of §§184.1 - 184.4, includes provisions that reference the statutory authority for the proposed rules, outline the applicability of the current rules, outline the purposes of the MERP, ETF, and MSRTF, outline the basic parameters of construction for the rules, and provides definitions of terms used throughout the Chapter.

Proposed new Subchapter B, which consists of §§184.10 - 184.13, includes provisions that govern the MERP. The new rules would provide necessary definitions of relevant terms and outline the eligibility and process requirements to participate in the MERP. The proposed rules will also outline the various time parameters associated with the MERP, including application deadlines, eligibility determination deadlines, and disbursement request deadlines.

Proposed new Subchapter C, which consists of §§184.20 - 184.23, includes provisions that govern the ETF and MSRTF. The new rules would provide necessary definitions of relevant terms and outline the eligibility and process requirements to participate in the ETF. The proposed rules will also outline the various time parameters associated with the ETF, including application deadlines, eligibility determination deadlines, and disbursement request deadlines.

Proposed new Subchapter D, which consists of §§184.30 - 184.33, includes provisions that specify what information the MERP and ETF participants must submit to the OOG, including attendance certifications, event support contracts, and post event report information.

Proposed new Subchapter E, which consists of §§184.40 - 184.45, includes provisions that govern the disbursement of trust funds to program participants. The new rules would also provide an illustrative list of costs that are allowable or unallowable under the MERP, ETF, and MSRTF programs, what documentation a program participant must submit in order to initiate the disbursement process, and the process by which a program participant can request an extension of time to submit required disbursement documentation.

Proposed new Subchapter F, which consists of §§184.50 - 184.51, includes provisions that outline the requirements associated with event support contracts, including certain contract provisions that the OOG disfavors.

While many of the requirements in the proposed new rules are similar in some respects to the requirements in the rules proposed for repeal, there are certain provisions in the new rules that diverge from current rules or practice. Among the changes are new requirements pertaining to reimbursement of costs and proof of payment, the reduction of the estimated incremental tax revenue for an event, event attendance, and the costs of economic impact studies. First, proposed new rule 10 TAC §184.41(4) will now require a program applicant to pay an event-related cost upfront and then seek reimbursement for the cost from the trust fund (assuming the cost is allowable). Under the current rules enacted by the Comptroller of Public

Accounts, no proof of payment is required in order to seek a disbursement. Next, the proposed new rules will not include a provision similar to current rule 10 TAC §184.202(i), which outlines the process by which the estimated incremental tax revenue for an event is reduced if that event has been held in this state within the past five years. The repeal of this rule will allow some program participants to access a greater amount of funds than they currently are allowed to. Next, proposed new rule 10 TAC §184.30(a) would require program participants to provide to the OOG documentation supporting the participant's attendance certification, including the methodology used to determine the event's attendance. Finally, proposed new rule 10 TAC §184.45(a)(5) - (7)(D) would no longer permit participants to seek reimbursement for the cost of food, travel, or preparing a pre-event or post-event economic impact study. Some program participants have previously sought and obtained reimbursement for such costs.

Fiscal Note

Mr. Bryan Daniel, Executive Director of Economic Development and Tourism, has determined that for the first five years that the proposed repeal of rule 10 TAC §184.202(i) is in effect (relating to a multi-year reduction in the amount of estimated incremental tax revenue for events held multiple times in Texas within the previous five years), there may be additional costs to state government of up to $3.6 million annually as a result of the repeal based on an analysis of past events in which the rule was applied. However, this estimated cost to the state is anticipated to be partially offset by the adoption of other rules that may reduce the amount eligible for disbursements as further described in this fiscal note. The remainder of the proposed new rules and rule repeals are not expected to result in a significant negative fiscal impact to the state.

Mr. Daniel has also determined that there may be a fiscal impact to local governments that participate in the program as a result of enforcing or administering some of the proposed new rules or rule repeals. The MERP, ETF, and MSRTF are voluntary programs availed to local municipalities and counties. The proposed new 10 TAC §184.45(a)(5) - (6), which makes the use of trust funds to reimburse food and travel costs unallowable, the proposed new 10 TAC §184.45(a)(7)(D), which makes the use of the trust fund to reimburse participants' cost of preparing a pre-event or post-event economic impact study unallowable, the proposed repeal of §184.202(i), which would eliminate the requirement that the estimated incremental tax revenue for an event be reduced if that event has been held in this state within the previous five years, and the proposed new 10 TAC §184.41(4), which will only allow program participants to seek reimbursement for costs already paid by the participant, may have a fiscal impact to local governments and an impact on the utilization of the programs by local governments.

For proposed new rule §184.45(a)(5) - (6), an analysis of past program participants that sought reimbursement for food and travel costs demonstrates that there could be an average cost per event to local governments of $3,600 for food and $600 for travel. Of the past program participants analyzed, 14% sought reimbursement for food and 10% sought reimbursement for travel. However, the estimate of average cost only applies if it is assumed that future program participants would not otherwise substitute their food and travel costs with other reimbursable event costs. For the proposed new rule §184.45(a)(7)(D), an analysis of past program participants that sought reimbursement for costs associated with the required economic impact studies shows that, without ability to continue to subsidize these costs from the trust fund, there could be an average local government cost of $7,000 per MERP event and $2,200 per ETF event based on a sampling of program participants that submitted this expense. Of the past program participants analyzed, approximately 34% sought reimbursement for their economic impact study. In the analysis of past events, the overall annual total impact to local governments could be $45,000 for MERP events and $112,000 for ETF events statewide. However, this estimate only applies if it is assumed that future program participants would not otherwise substitute the cost of their economic impact studies with other reimbursable event costs. Furthermore, while proposed new rule §184.45(a)(7)(D) may result in a cost to local governments, it will also likely have an equally positive fiscal impact to the state. For the repeal of rule §184.202(i), there would be a cost to the state, but repeal of the rule would in turn create a potential positive impact of $3.6 million to local governments participating in the program, with the assumption that the local entities are approved for reimbursement of 100% of the available fund amount. For proposed new rule §184.41(4), an analysis of previous program participants shows that approximately 23% of expenses submitted for disbursement lacked proof of payment documentation. The amount that is potentially no longer eligible for reimbursement for a 5-year average could be $11.8 million per year. However, this estimate only applies if it is assumed that future program participants would continue to seek reimbursement for costs that are not supported by proof of payment documentation, rather than provide the required documentation or otherwise substitute such costs with other reimbursable event costs. The remainder of the proposed new rules and rule repeals are not expected to result in a significant fiscal impact to local governments.

Public Benefit and Cost

Mr. Daniel has also determined that for each year of the first five years in which the proposed new rules and rule repeals are in effect, the anticipated public benefits are the more efficient and equitable regulation of the MERP, ETF, and MSRTF, increased compliance with Article 5190.14 of the Texas Revised Civil Statutes, and increased accountability for the administration of the MERP, ETF, and MSRTF. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses, micro-businesses, or local or state employment.

Submission of Comments

Written comments on the proposed new rules and rule repeals may be submitted to Nicole Ryf, Office of the Governor, Economic Development and Tourism Office, P.O. Box 12428, Austin, Texas 78711 or to *eventsfund@gov.texas.gov* with the subject line "Events Rules." The deadline for receipt of comments is 5:00 p.m. CST on August 22, 2016. All requests for a public hearing on the proposed rulemaking, submitted under the Administrative Procedure Act, must be received by the Office of the Governor no more than fifteen (15) days after the notice of proposed changes in the sections that have been published in the *Texas Register.*

SUBCHAPTER A. AUTHORITY AND APPLICABILITY, PURPOSE, CONSTRUCTION OF RULES AND GENERAL DEFINITIONS

10 TAC §§184.1 - 184.4

Statutory Authority

The rules are proposed under Texas Revised Civil Statutes, Article 5190.14, §§3A, 5A(v) and 5C(p), which require the Office of the Governor to adopt rules to ensure the efficient administration of the trust funds established under Article 5190.14, including rules related to application and receipt requirements.

Cross Reference to Statute

Article 5190.14, as amended by Senate Bills 293 and 633 and House Bill 26, 84th Regular Legislative Session.

§184.1. Authority and Applicability.

(a) Authority for this Chapter is provided in Texas Revised Civil Statutes, Article 5190.14, Sections 3A, 5A(v) and 5C(p).

(b) A request to participate in the Major Events Reimbursement Program, Events Trust Fund Program, or Motor Sports Racing Trust Fund Program that is submitted to the Office prior to the effective date of these rules is governed by the applicable rules in effect at the time the request is received by the Office.

§184.2. Purpose.

(a) The purpose of the Major Events Reimbursement Program is to reimburse local governments and local organizing committees for certain eligible costs associated with conducting major events specifically referenced in Texas Revised Civil Statutes, Article 5190.14, Section 5A, provided that all statutory and administrative requirements are satisfied.

(b) The purpose of the Events Trust Fund Program is to reimburse local governments and local organizing committees for certain eligible costs associated with conducting eligible events under Texas Revised Civil Statutes, Article 5190.14, Section 5C, provided that all statutory and administrative requirements are satisfied.

(c) The purpose of the Motor Sports Racing Trust Fund Program is to reimburse local governments and local organizing committees for certain eligible costs associated with conducting specific motor sports racing events under Texas Revised Civil Statutes, Article 5190.14, Section 5B, provided that the event is sanctioned by the Automobile Competition Committee for the United States, held at a temporary event venue, and that all statutory and administrative requirements are satisfied.

§184.3. Construction of Rules.

(a) The Office shall administer the Major Events Reimbursement Program, the Events Trust Fund Program, and the Motor Sports Racing Trust Fund program in a manner consistent with the requirements in Texas Revised Civil Statutes, Article 5190.14, and that statute shall control over any conflicting provision of these administrative rules.

(b) Unless otherwise provided by law or this chapter, the rules applicable to the Events Trust Fund Program shall also be applicable in the same manner to the Motor Sports Racing Trust Fund Program.

(c) The Chief of Staff of the Office of the Governor or his designee may, in their sole discretion, waive any provision of this chapter upon a finding that the public interest would be furthered by granting a waiver. Any such waiver must be consistent with applicable statutory law.

§184.4. General Definitions.

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

(1) Applicant--An endorsing county, endorsing municipality, or local organizing committee that is eligible to participate in the Major Events Reimbursement Program, Events Trust Fund Program, or Motor Sports Racing Trust Fund Program. The term includes one or more endorsing counties and/or endorsing municipalities acting collectively or in conjunction with a local organizing committee. The term may also include a local government corporation that meets the requirements of Texas Revised Civil Statutes, Article 5190.14, Section 12.

(2) Day--As used in this chapter, all references to "day" means a calendar day.

(3) Direct cost--Any cost that is directly attributable to the preparation or presentation of an event. The term does not include:

(A) any indirect, administrative, or overhead cost;

(B) any cost that is recouped or refunded by other parties or from event related revenue relating to the same expense or obligation; or

(C) any cost that is not directly attributable to an event.

(4) Estimate--The Office's determination of the amount of incremental increase in tax receipts that are directly attributable to the preparation or presentation of an event eligible to be deposited in the trust fund for an eligible event.

(5) Event support contract--A contract by and between a site selection organization and a local organizing committee, an endorsing municipality, or an endorsing county setting out the representations and assurances of the parties with respect to the selection of a site in this state for the location of an event, and the requirements and costs necessary (or desirable, as authorized by Texas Revised Civil Statutes, Article 5190.14, Section 5A(h) or 5B(h)) for the preparation or presentation of an event. The term includes a joinder agreement or joinder undertaking as defined by Texas Revised Civil Statutes, Article 5190.14. The term does not include a request for bid, request for proposal, bid response, or a selection letter from a site selection organization except as those documents may be incorporated by reference into the event support contract.

(6) Events Trust Fund--The fund established by the Office for the event pursuant to Texas Revised Civil Statutes, Article 5190.14, Section 5C(d).

(7) Highly competitive selection process--A process in which the site selection organization has considered sites for the event outside of Texas on a competitive basis and intends to do so in the future.

(8) Host fee or sanction fee--A cost charged by a site selection organization under an event support contract for the cost of hosting or authorizing the event.

(9) Internal billing--Costs incurred under an event support contract by a local organizing committee, an endorsing municipality, or an endorsing county for the costs of services or facilities provided for the event by an endorsing municipality or endorsing county, including, but not limited to, facility rentals and charges for police, fire, or emergency medical services.

(10) Local organizing committee--A nonprofit corporation or its successor in interest that:

(A) has been authorized by an endorsing municipality, endorsing county, or more than one endorsing municipality or county acting collectively to pursue an application and bid with a site selection organization for selection as the site of an event; or

(B) with the authorization of an endorsing municipality, endorsing county, or more than one endorsing municipality or county acting collectively, has executed an agreement with a site selection organization regarding a bid to host an event.

(11) Local share--The contribution to the fund made by or on behalf of an endorsing municipality or endorsing county pursuant to Texas Revised Civil Statutes, Article 5191.14, Section 5A(d), 5A(d-1), 5B(d), 5C(d), or 5C(d-1).

(12) Major Events Reimbursement Program Trust Fund--The trust fund established by the Office for the event pursuant to Texas Revised Civil Statutes, Article 5190.14, Section 5A(d).

(13) Market area--The geographic area within which the Office determines there is a reasonable likelihood of measurable economic impact directly attributable to the preparation for or presentation of the event and related activities.

(14) Motor Sports Racing Trust Fund--The fund established by the Office for the event pursuant to Texas Revised Civil Statutes, Article 5190.14, Section 5B(d).

(15) Office--The Economic Development and Tourism Office within the Office of the Governor.

(16) Professional services--The services of a licensed accountant, architect, attorney, professional engineer, landscape architect, land surveyor, physician, nurse, or real estate appraiser. The term does not include the services of other types of licensed professionals unless otherwise determined by the Office to be reasonably necessary (or desirable, as authorized by Texas Revised Civil Statutes, Article 5190.14, Section 5A(h) or 5B(h)) for the preparation or presentation of an approved event.

(17) Proof of payment--An official banking statement, check copy, credit card receipt, or other document required by the Office to support or document a requested disbursement from the trust fund that reflects the transmission, transfer, or payment of funds related to an event, which may be redacted of information related to transactions and balances not pertaining to the event.

(18) Publicly owned property--Any property that is owned by a governmental unit as defined by Texas Civil Practices and Remedies Code, Section 101.001(3).

(19) Travel--Includes lodging, mileage, rental car expense, airfare, toll fares, parking and meals that are incurred while a person travels.

(20) Trust fund--The fund created by the Texas Comptroller of Public Accounts, at the direction of the Office, and designated as either the Major Events Reimbursement Program Fund, Events Trust Fund, or Motor Sports Racing Trust Fund for the event.

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

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SUBCHAPTER B. MAJOR EVENTS REIMBURSEMENT PROGRAM DEFINITIONS, ELIGIBILITY, PARTICIPATION AND DEADLINES

10 TAC §§184.10 - 184.13

Statutory Authority

The rules are proposed under Texas Revised Civil Statutes, Article 5190.14, Sections 3A, 5A(v) and 5C(p), which requires the Office of the Governor to adopt rules to ensure the efficient administration of the trust funds established under Article 5190.14, including rules related to application and receipt requirements.

Cross Reference to Statute

Article 5190.14, as amended by Senate Bills 293 and 633 and House Bill 26, 84th Regular Legislative Session.

§184.10. Definitions.

The following words and terms, when used in this chapter in the context of the Major Events Reimbursement Program, shall have the following meanings:

(1) Cost--An Applicant's direct expenses and obligations necessary or desirable for the preparation or presentation of an event and related activities under an event support contract that are not recouped from or refunded by other parties.

(2) Endorsing county--A county that contains a site selected by a site selection organization for one or more events, or a county that:

(A) does not contain a site selected by a site selection organization for an event;

(B) is included in the market area for the event as designated by the Office; and

(C) is a party to an event support contract.

(3) Endorsing municipality--A municipality that contains a site selected by a site selection organization for one or more events, or a municipality that:

(A) does not contain a site selected by a site selection organization for an event;

(B) is included in the market area for the event as designated by the Office; and

(C) is a party to an event support contract.

(4) Event--This term has the same meaning as assigned by Texas Revised Civil Statutes, Article 5190.14, Section 5A(a)(4).

(5) Site selection organization--An entity expressly listed in Texas Revised Civil Statutes, Article 5190.14, Section 5A(a)(5), that conducts or considers conducting an eligible event in this state.

§184.11. Eligibility.

(a) An event is eligible for participation in the Major Events Reimbursement Program only if:

(1) the event and the site selection organization for the event are identified in Texas Revised Civil Statutes, Article 5190.14, Sections 5A(a)(4) and (5);

(2) a site selection organization selects a site in Texas through a highly competitive process after considering one or more sites that are not located in this state, for the event to be held one time or, for an event scheduled to be held each year for a period of years under an event support contract, one time each year for the period of years;

(3) a site selection organization selects a site in this state as:

(A) the sole site for the event; or

(B) the sole site for the event in a region composed of this state and one or more adjoining states;

(4) the event will not be held more than one time in any year; and

(5) the Office determines that the incremental increase in tax receipts equals or exceeds $1 million per year for the event.

(b) The requirements of subsections (a)(2) of this section do not apply to an event as described by Texas Revised Civil Statutes, Article 5190.14, Section 5A(a-2).

(c) An Applicant cannot receive disbursements for the same event under both the Major Events Reimbursement Program and the Events Trust Fund Program. Nothing contained herein prohibits the submission of an application for the Events Trust Fund Program for events that are ineligible as a matter of law to participate in the Major Events Reimbursement Program.

§184.12. Request to Participate in the Major Events Reimbursement Program.

(a) A request to establish a trust fund for the Major Event Reimbursement Program must contain:

(1) a complete and signed application;

(2) documentation from the endorsing municipality or endorsing county requesting participation in the trust fund program and signed by a person authorized to bind the municipality or county;

(3) a signed letter from the site selection organization selecting the site in Texas that includes all the information necessary to establish that the site was selected through a highly competitive selection process; and

(4) an economic impact study or other data sufficient for the Office to make the determination of the estimated incremental increase in tax revenue directly attributable to the preparation or presentation of the event, including any data for any related activities.

(A) the economic impact study and other data submitted should contain detailed information on the direct expenditures for the event in the requested market area relating to the economic activity of attendees and other persons associated with the event during a reasonable time prior to the event, during the event, and within a reasonable time immediately after the event. The study may also include information on event expenditures if available.

(B) any other data or information addressing the secondary economic impact for the event in the requested market area during the ten months immediately following the last day of the event must be stated separately from data listed in subparagraph (A) of this paragraph such that the data for each can be easily distinguished. If the applicant fails to include information listed in this subparagraph, the Office's determination of the amount of incremental tax receipts will be based solely on the submitted data.

(C) all economic impact studies and other data submitted by the applicant shall address only the incremental increase in tax receipts for the tax types identified in Texas Revised Civil Statutes, Article 5190.14, Section 5A(b)(1)-(5). Information regarding other actual or estimated economic impacts will not be considered by the Office.

(D) any economic impact study submitted shall include a certification from the person(s) who prepared the study for the application, attesting to the accuracy of the information provided.

(b) The request for participation and the economic impact report should propose the applicant's desired market area and include information to support the choice of market area. The Office shall make the final determination establishing the market area. An endorsing municipality or endorsing county that has been selected as the site for the event must be included in the market area for the event.

(c) The request for participation and the economic impact report should include a list of all event activities proposed to be included in the estimate and must include data for each activity, including, at a minimum:

(1) projected attendance figures;

(2) a description of the methodology that will be used for determining the total actual attendance at the event;

(3) the projected spending of attendees; and

(4) any anticipated expenditure information related to the activity.

(d) The request for participation must be accompanied by a certification provided by an authorized representative from each endorsing municipality, endorsing county, and local organizing committee (if applicable) attesting to the accuracy of the information provided.

(e) The Office is not required to review or act on a request for participation that does not contain all items in subsections (a) - (d) of this section.

(f) A request for participation must be submitted not earlier than one year and not later than 45 days before the date the event begins. Requests submitted outside this time frame shall not be reviewed.

(g) The Office may issue guidance to establish, interpret, or clarify requirements for the submission of requests to participate in the Major Events Reimbursement Program. Compliance with any such guidance shall be required by the Applicant. Any such guidance must be consistent with all applicable statutes and this chapter.

(h) All requests and required documentation must be submitted electronically to: eventsfund@gov.texas.gov.

(i) The Office shall make a determination of the amount of incremental increase in tax receipts not later than the 30th day after the date the Office receives the completed request for participation and all related information required by this section.

§184.13. Major Events Reimbursement Program Deadlines.

(a) Application Deadline. Applications for participation in the Major Events Reimbursement Program must be submitted not earlier than one year, and not later than 45 days, before the first day of the event.

(b) Determination Deadline. Not later than the 30th day after the date the Office receives a completed request for participation and all required information, the Office will make a determination of whether the event meets the eligibility requirements of Texas Revised Civil Statutes, Article 5190.14 for the establishment of a Major Events Reimbursement Program Fund, and a determination of the amount of incremental increase in tax receipts, as determined by the Office, that is directly attributable to the preparation or presentation of the event.

(c) Event Support Contract Submission. Before the first date of the event, the applicant shall submit an event support contract and other documentation required by section 184.31 of this chapter. If the event support contract is not timely submitted, the Office may deem the Applicant ineligible for disbursements from the trust fund established for the event.

(d) Attendance Certification Deadline. The applicant shall submit the attendance certification and supporting documentation required by section 184.30 of this chapter not later than 45 days after the last date of the event. If the attendance documentation for the event is not timely submitted, the Office may deem the applicant ineligible for disbursements from the trust fund established for the event.

(e) Local Share Submission. Not later than 90 days after the last day of the event, the applicant shall remit to the Office the local share contribution to the fund made by or on behalf of an endorsing municipality or endorsing county pursuant to Texas Revised Civil Statutes, Article 5191.14, Section 5A(d) or (d-1). The local share cannot be submitted on a weekend or state holiday. If the local share is not timely submitted, the trust fund established for the event will be closed.

(f) Disbursement Request Submission. The applicant shall submit all requests for disbursements from the trust fund and supporting documentation no later than 180 days after the last day of the event. Any disbursement requests that are not timely submitted may be ineligible for reimbursement from the trust fund established for the event.

(g) A local organizing committee, endorsing municipality, or endorsing county must provide an annual audited financial statement if requested by the Office no later than the end of the fourth month after the date the period covered by the financial statement ends.

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

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SUBCHAPTER C. EVENTS TRUST FUND PROGRAM DEFINITIONS, ELIGIBILITY, PARTICIPATION AND DEADLINES

10 TAC §§184.20 - 184.23

Statutory Authority

The rules are proposed under Texas Revised Civil Statutes, Article 5190.14, Sections 3A, 5A(v) and 5C(p), which requires the Office of the Governor to adopt rules to ensure the efficient administration of the trust funds established under Article 5190.14, including rules related to application and receipt requirements.

Cross Reference to Statute

Article 5190.14, as amended by Senate Bills 293 and 633 and House Bill 26, 84th Regular Legislative Session.

§184.20. Definitions.

The following words and terms, when used in this Chapter in the context of the Events Trust Fund Program, shall have the following meanings:

(1) Cost--An applicant's direct expenses and obligations necessary for the preparation or presentation of an event and related activities under an event support contract that are not recouped from or refunded by other parties.

(2) Endorsing county--A county that contains within its boundaries a site selected by a site selection organization for one or more events, and is a party to an event support contract.

(3) Endorsing municipality--A municipality that contains within its boundaries a site selected by a site selection organization for one or more events, and is a party to an event support contract.

(4) Event--An event or a related series of events held in this state for which a local organizing committee, endorsing county, or endorsing municipality seeks approval from a site selection organization to hold the event at a site in this state. The term includes any activities related to or associated with the event.

(5) Direct spending--The amount of incremental increase in tax receipts for the 30-day period that ends one day after the last date of the event that are directly attributable to spending related to the preparation or presentation of an event.

(6) Site selection organization--An entity that conducts or considers conducting an eligible event in this state.

§184.21. Eligibility.

(a) An event is eligible for participation in the Events Trust Fund Program only if:

(1) a site selection organization selects a site in Texas through a highly competitive process after considering one or more sites that are not located in this state, for the event to be held one time or, for an event scheduled to be held each year for a period of years under an event support contract, one time each year for the period of years;

(2) a site selection organization selects a site in this state as:

(A) the sole site for the event; or

(B) the sole site for the event in a region composed of this state and one or more adjoining states; and

(3) the event that is held not more than one time in this state or an adjoining state in any year.

(b) During any 12-month period, an applicant may not submit more than 10 events, only three of which may be nonsporting events, for reimbursement under the Events Trust Fund Program for which the Office determines that the amount of the incremental increase in tax receipts is less than $200,000. A sporting event is an event whose primary purpose, as determined by the Office, is the conduct of recreational or competitive athletic or physical activities, including individual, team, equestrian, or automotive competitions.

(c) An applicant cannot receive disbursements for the same event under both the Major Events Reimbursement Program and the Events Trust Fund Program. Nothing contained herein prohibits the submission of an application for the Events Trust Fund Program for events that are ineligible as a matter of law for participation in the Major Events Reimbursement Program.

§184.22. Request to Establish a Trust Fund.

(a) A request to establish a trust fund for the Events Trust Fund Program must contain:

(1) a complete and signed application;

(2) documentation from the endorsing municipality or endorsing county requesting participation in the trust fund program and signed by a person authorized to bind the municipality or county;

(3) a signed letter from the site selection organization selecting the site in Texas that includes all the information necessary to establish that the site was selected through a highly competitive selection process; and

(4) an economic impact study or other data sufficient for the Office to make the determination of the estimated incremental increase in tax revenue directly attributable to the preparation or presentation of the event, including any data for any related activities.

(A) the economic impact study and other data submitted must contain detailed information on the direct expenditures and direct spending data for the event for the requested market area.

(B) all economic impact studies and other data submitted by the applicant shall address only the incremental increase in tax receipts for the tax types identified in Texas Revised Civil Statutes, Article 5190.14, Section 5C(b)(1)-(5). Information regarding other actual or estimated economic impacts will not be considered by the Office.

(C) any economic impact study submitted shall include a certification from the person(s) who prepared the study for the application, attesting to the accuracy of the information provided.

(b) The request for participation and the economic impact report should propose the applicant's desired market area and include information to support the choice of market area. The Office shall make the final determination establishing the market area. An endorsing municipality or endorsing county that has been selected as the site for the event must be included in the market area for the event.

(c) The request for participation and the economic impact report should include a list of all event activities proposed to be included in the estimate and must include data for each activity, including, at a minimum:

(1) projected attendance figures;

(2) a description of the methodology that will be used for determining the total actual attendance at the event;

(3) the projected spending of attendees; and

(4) any anticipated expenditure information related to the activity.

(d) The request for participation must be accompanied by a certification provided by an authorized representative from each endorsing municipality, endorsing county, and local organizing committee (if applicable) attesting to the accuracy of the information provided.

(e) The Office is not required to review or act on a request for participation that does not contain all items in subsections (a) - (d) of this section.

(f) A request for participation must be submitted not later than 120 days before the date the event begins. Requests submitted outside this time frame shall not be reviewed.

(g) The Office may issue guidance to establish, interpret, or clarify requirements for the submission of requests to participate in the Events Trust Fund Program. Compliance with any such guidance shall be required by the Applicant. Any such guidance must be consistent with all applicable statutes and this chapter.

(h) All requests and required documentation must be submitted electronically to: eventsfund@gov.texas.gov.

(i) The Office shall make a determination of the amount of incremental increase in tax receipts not later than the 30th day after the date the Office receives the completed request for participation and all related information required by this section, and not later than three months before the date of the event.

§184.23. Events Trust Fund Program Deadlines.

(a) Application Deadline. Applications for participation in the Events Trust Fund Program should be submitted no later than 120 days before the first day of the event in order to permit the Office to timely determine the amount of incremental increase in tax by not later than three months before the date of the event.

(b) Determination Deadline. After the date the Office receives a completed request for participation and all required information, the Office will make a determination of whether the event meets the eligibility requirements of Texas Revised Civil Statutes, Article 5190.14 for the establishment of an event trust fund, and a determination of the amount of incremental increase in tax receipts, as determined by the Office, that is directly attributable to the preparation or presentation of the event by not later than three months before the date of the event.

(c) Event Support Contract Submission. Before the first date of the event, the applicant shall submit an event support contract and other documentation required by section 184.31 of this chapter. If the event support contract is not timely submitted, the Office may deem the applicant ineligible for disbursements from the trust fund established for the event.

(d) Attendance Certification Deadline. The applicant shall submit the attendance certification and supporting documentation required by Section 184.30 not later than 45 days after the last date of the event. If the attendance documentation for the event is not timely submitted, the Office may deem the applicant ineligible for disbursements from the trust fund established for the event.

(e) Local Share Submission. Not later than 90 days after the last day of the event, the applicant shall remit to the Office the local share contribution to the fund made by or on behalf of an endorsing municipality or endorsing county pursuant to Texas Revised Civil Statutes, Article 5191.14, Section 5B(d), 5C(d) or 5C(d-1). The local share cannot be submitted on a weekend or state holiday. If the local share is not timely submitted, the trust fund established for the event will be closed.

(f) Disbursement Request Submission. The applicant shall submit all requests for disbursements from the trust fund and supporting documentation by not later than 180 days after the last day of the event. Any disbursement requests that are not timely submitted may be ineligible for reimbursement from the trust fund established for the event.

(g) A local organizing committee, endorsing municipality, or endorsing county must provide an annual audited financial statement if requested by the Office no later than the end of the fourth month after the date the period covered by the financial statement ends.

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

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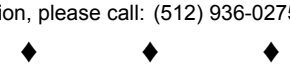

SUBCHAPTER D. REQUIRED REPORTS

10 TAC §§184.30 - 184.33

Statutory Authority

The rules are proposed under Texas Revised Civil Statutes, Article 5190.14, Sections 3A, 5A(v) and 5C(p), which requires the Office of the Governor to adopt rules to ensure the efficient administration of the trust funds established under Article 5190.14, including rules related to application and receipt requirements.

Cross Reference to Statute

Article 5190.14, as amended by Senate Bills 293 and 633 and House Bill 26, 84th Regular Legislative Session.

§184.30. Attendance Certification.

(a) Not later than 45 days after the last day of the approved event, an attendance certification based on a methodology acceptable to the Office signed by the person who signed the original request for participation or their successor under §184.12 (for the Major Events Reimbursement Program) or §184.22 (for the Events Trust Fund Program) of this chapter as applicable. The certification must include:

(1) total actual attendance at the event;

(2) the estimated number of attendees at the approved event that are not residents of Texas; and

(3) the verifiable source and methodology for such numbers. Approved attendance methodologies include:

(A) ticket sales count;

(B) turnstile count;

(C) ticket scan count;

(D) convention registration check-in count;

(E) participant totals; or

(F) another methodology that is approved by the Office in its sole discretion prior to the first day of the event.

(b) If the actual attendance figures are significantly lower than the estimated attendance numbers, the Office may reduce the amount of a disbursement for an endorsing entity under the trust fund in proportion to the discrepancy and in proportion to the amount contributed to the fund by the entity. Actual attendance at an event is considered significantly lower than estimated attendance when the difference is 25% or greater.

§184.31. Submission of Event Support Contract.

Before the first date of the event, the Applicant shall submit to the Office a complete and fully executed copy of the event support contract, any amendment to the contract, and any incorporated documentation.

§184.32. Other Information Required by the Office.

(a) Upon request of the Office, the applicant must provide to the Office any additional information, including financial information, or other information held by the applicant that the Office considers necessary to verify event related expenditures or to administer the program.

(b) If the applicant fails or refuses to timely provide any information required by statute or this section, the Office may deem the applicant ineligible for disbursements from the trust fund established for the event.

§184.33. Post Event Report Information for Major Events Reimbursement Program.

Upon request of the Office, an applicant to the Major Events Reimbursement Program must provide to the Office any information the Office finds necessary to comply with the post event reporting requirements in Texas Revised Civil Statutes, Article 5190.14, Section 5A(w).

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

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SUBCHAPTER E. DISBURSEMENT PROCESS

10 TAC §§184.40 - 184.45

Statutory Authority

The rules are proposed under Texas Revised Civil Statutes, Article 5190.14, Sections 3A, 5A(v) and 5C(p), which requires the Office of the Governor to adopt rules to ensure the efficient administration of the trust funds established under Article 5190.14, including rules related to application and receipt requirements.

Cross Reference to Statute

Article 5194.10, as amended by Senate Bills 293 and 633 and House Bill 26, 84th Regular Legislative Session.

§184.40. Disbursements for Event Costs.

(a) Disbursements from the trust fund established for the event shall be issued by the Office to reimburse only allowable direct costs that are directly attributable to the preparation or presentation of the approved event related to:

(1) preparing for and conducting an event in this state in accordance with the event support contract;

(2) the construction, improvement, or renovation of facilities to the extent authorized by law that are directly attributable to fulfilling obligations of the event support contract and that are reasonably necessary (or desirable, as authorized by Texas Revised Civil Statutes, Article 5190.14, Section 5A(h) or 5B(h)) for the conduct of the event as required by the site selection organization; or

(3) paying the principal of and interest on notes issued by an endorsing municipality or endorsing county under Texas Revised Civil Statutes, Article 5190.14, Section 5A(g), 5B(g) or 5C(g) as applicable.

(b) Disbursements from the trust fund may not be used to make payments to an applicant or any other entity that are not directly attributable to allowable costs as set forth in §184.44 (Allowable Costs). Disbursements are subject to verification or audit prior to or after payment by the Office to ensure compliance.

(c) The Office may issue guidance to establish, interpret, or clarify requirements for the disbursement requests for trust fund programs. Compliance with any such guidance shall be required by the applicant. Any such guidance must be consistent with all applicable statutes and this chapter.

§184.41. Documentation Required to Initiate Disbursement Process.

(a) To initiate the disbursement process, the applicant must electronically submit to the Office the following required documentation in a format required by the Office no later than 180 days after the last date of the event:

(1) a signed disbursement request in the form prescribed by the Office;

(2) a general explanation of the costs the disbursement request represents in the form prescribed by the Office;

(3) copies of any publications, printed materials, signage, or advertising to support any costs relating to those items that are included in the disbursement request;

(4) copies of the invoices, receipts, contracts, proof of payment, and other documents supporting the costs included in the disbursement request;

(A) Estimates of expenditures, proposals, internal billing, or purchase orders will not be accepted to support the reimbursement of a cost unless accompanied by invoices or other documentation to support that the related cost was actually incurred;

(B) Acceptable forms of documentation must show itemized costs that are directly attributable to the event, including the invoice date and the date(s) the goods were delivered or the services performed. Allowable costs attributable to event staff shall include documentation sufficient to support how such costs were calculated and shall include the description of the work performed, the dates of service, rate of pay, and the number of hours worked per day, and an accounting of any overtime pay, if applicable;

(5) if an Applicant seeks reimbursement for expenses incurred by another entity because of an obligation specified in the event support contract, copies of the invoice(s) sent by the entity to the Applicant for the expenses, and proof of the payment to the vendor;

(6) for a request submitted by a local organizing committee, documentation showing the prior approval of the disbursement request by each contributing endorsing municipality and/or endorsing county;

(7) a statement indicating whether any disbursement information provided to the Office is confidential and exempt from public disclosure under the Texas Public Information Act (Government Code, Chapter 552), including the legal citation of the exception claimed; and

(8) a spreadsheet of event expenses.

(b) An applicant shall retain all records related to an event for at least seven (7) years following the last day of the event. Such records must be made available to the Office upon request.

§184.42. Extension of Time to Submit Disbursement Documentation.

If the applicant is unable to provide all the information required for a completed disbursement request by the 180th day after the last date of the event, the Office may extend the period of time for requesting disbursement upon the receipt of a timely request for an extension from the Applicant. Any such requests from the applicant must be submitted to the Office by the 180th day after the last date of the event and must be accompanied by a narrative justification for the proposed extension of time. The Office is not required to act on any request for an extension of time, and any extension granted is within the discretion of the Office.

§184.43. Disbursement of Trust Funds.

(a) The Office will only consider a disbursement request that:

(1) is supported by an event support contract;

(2) requests reimbursement for payments or obligations for allowable costs; and

(3) is complete, supported by proof of payment documentation, and includes all event reimbursement costs being sought by the applicant for disbursement.

(b) The Office may request additional supporting documentation or justification regarding any costs submitted for a disbursement. The Office, at its sole discretion, may withhold disbursements for event costs pending the receipt of any information the Office considers necessary to appropriately document the applicant's entitlement to reimbursement.

(c) The Office shall not make any disbursements for event costs until all reporting requirements under Subchapter D (Required Reports) of this chapter are satisfied.

(d) Upon disbursement of all reimbursement payments, any unexpended balance remaining in the trust fund will be returned to each endorsing entity in proportion to the local share contributed by the entity, and any unexpended state share shall be returned to the Comptroller of Public Accounts.

(e) A disbursement made from the trust fund by the Office in satisfaction of an applicant's obligation shall be satisfied proportionately from the state and local share in the trust fund in the proportion of 6.25:1 of state funds to local share notwithstanding any agreements to the contrary made by an Applicant.

(f) If the Office determines, based on information obtained from verifiable sources, including any monitoring, inspection, review or audit conducted by the Office or its authorized representatives, that the applicant received a disbursement in excess of the amount to which the applicant is entitled under applicable statutes and this chapter, or that the applicant provided erroneous information that resulted in an overstatement of the estimated incremental tax receipt increase for an event, then the Office may withhold, offset, recoup, or otherwise require the return of any excess disbursement amounts.

§184.44. Allowable Costs.

The following costs are supportive of the trust fund program goals and are generally allowable to the extent that such costs are supported by the event support contract and not otherwise unallowable in accordance with §184.45:

(1) planning for or conducting the event in accordance with the event support contract;

(2) the cost of any structural improvement or fixture for an event, as authorized by Texas Revised Civil Statutes, Article 5190.14, Sections 5A(k) or 5C(k).

(3) financing costs for event sites;

(4) fees charged by a site selection organization, which must be paid as a condition to holding an event, including hosting fees, sanction fees, participation fees, or bid fees, provided that the amount of all such fees is clearly stated in the application for participation in the trust fund program;

(5) performance bonds or insurance required for hosting the event;

(6) temporary maintenance to property impacted by the conduct of the event that is directly related to the preparation or presentation of the event;

(7) costs that are necessary (or desirable, as authorized by Texas Revised Civil Statutes, Article 5190.14, Section 5A(h) or 5B(h)) for the public health or safety of people or animals involved in hosting, attending, or participating in the event, including:

(A) water;

(B) security;

(C) professional fire marshal or engineer requirements for event facilities and other event related property or equipment;

(D) portable restrooms, trash receptacles, and other types of sanitation necessities;

(E) shade;

(F) lighting and sound equipment required for security or public safety;

(G) traffic planning and management;

(H) severe weather planning and mitigation;

(I) way-finding signage or staff;

(J) barriers;

(K) permits and professional or consulting services necessary (or desirable, as authorized by Texas Revised Civil Statutes, Article 5190.14, Section 5A(h) or 5B(h)) for acquiring permits;

(L) stand-by services, such as stand-by medical services;

(M) "Americans with Disabilities Act" (ADA) accommodations and compliance;

(N) public health or safety command center expenses;

(O) credentials; and

(P) costs needed for police, fire, and other emergency operations staff.

(8) event facility costs, including:

(A) cost to rent an event facility, including any internal billing, if the terms of the event support contract require the Applicant to either reimburse the site selection organization for the cost to rent a facility, or to provide the facility at no cost to the site selection organization; and

(B) the purchase or rental of seating or other furnishings, supplies and equipment that are reasonable and necessary (or desirable, as authorized by Texas Revised Civil Statutes, Article 5190.14, Section 5A(h) or 5B(h)) to conduct the event;

(9) an applicant's event staffing costs incurred for services directly attributable to conducting the event that are performed within a reasonable time prior to the event, during the event, and within a reasonable time after the event, including:

(A) hourly pay or overtime for personnel attributable to public health or safety for the event;

(B) compensation of non-health and safety staff hired or contracted specifically to meet the objectives of an approved event; or

(C) compensation for referees, score keepers, timers, and other similar officials required to meet the objectives of an approved event;

(10) an applicant's professional service costs for fulfilling specific obligations of the event support contract, including for:

(A) preparing event-related documents unless otherwise unallowable under §184.45 (Unallowable Costs);

(B) fulfilling specific obligations of the event support contract; or

(C) consulting on soliciting, preparing for, or hosting the event;

(11) market-area transportation and/or parking services, but excluding personal travel, within a reasonable time prior to the event, during the event, or within a reasonable time after the event that have not otherwise been compensated or recovered from event-related revenue earned from providing the transportation and/or parking;

(12) temporary signs and banners;

(13) advertising for the event which:

(A) occurs prior to or during the event;

(B) includes the event name and date, or event name and location; and

(C) are the Applicant's obligations in the event support contract;

(14) promotional items that are created specifically to promote the event to the extent that the per-unit costs of such items are nominal in value;

(15) production costs directly associated with the production of the main event, including staging, rigging, sound and lighting systems;

(16) uniforms for event staff that are created specifically for the event;

(17) costs directly attributable to inclement weather occurring immediately before, during, or immediately after an event, except costs of damages or lost revenue;

(18) any other direct costs resulting from requirements of the event support contract that are not otherwise unallowable by state law or regulations, including §184.45 (Unallowable Costs), and which are determined by the Office to be directly attributable to the preparation or presentation of the event;

(19) costs directly attributable to the performance of the national anthem of the United States or a foreign nation at the event; and

(20) cost of a photographer or videographer that documents the event.

§184.45. Unallowable Costs.

(a) Disbursements for the following costs are prohibited, regardless of their inclusion in an event support contract:

(1) any tax listed in Texas Revised Civil Statutes, Article 5190.14;

(2) gifts of any kind, including tips, gratuities, or honoraria;

(3) grants to any person, entity, or organization;

(4) alcoholic beverages;

(5) food;

(6) travel;

(7) costs related to an applicant's application or participation in the trust fund program, including, but not limited to:

(A) representing any entity, including an applicant or related party, in front of the legislature for any reason;

(B) representing any entity, including an applicant or related party, in front of the Office for the purpose of applying to or seeking reimbursement from the trust fund;

(C) preparing an application to the reimbursement program, a disbursement request, or other event-related documents;

(D) preparing a pre-event or post-event economic impact study;

(E) preparing a pre-event attendance estimate or post-event attendance verification;

(F) conducting any pre-event or post-event survey; or

(G) costs associated with responding to requests for information relating to participation in the program, including requests for information from the Office, the Texas State Auditor's Office, or pursuant to the requirements of the Texas Public Information Act (Chapter 552, Texas Government Code).

(8) expenses related to:

(A) any prize or any other form of award or compensation for participation or competitive performance in an event, including, but not limited to, any trophy, cash, merchandise, gift cards, or pre-paid service certificates,

(B) gaming;

(C) raffles; or

(D) giveaways that do not meet the requirements of §184.44(14) (allowable costs for promotional items);

(9) costs for any personal items and services;

(10) costs for entertainment, hospitality, appearance or talent fees, and "VIP" expenses, except as permitted under §184.44(19) of this chapter;

(11) reimbursement of any cost not incurred, such as for lost profit or for an exchange-in-kind or product;

(12) damages of any kind;

(13) any cost or expense of or related to constructing an arena, stadium, or convention center;

(14) any cost or expense related to conducting usual and customary maintenance of a facility;

(15) any amount in excess of 5.0% of the cost of any structural improvement made or fixture for an event that is added to a site that is privately owned property where the improvement or fixture is expected to derive most of its value in subsequent uses of the site for future events;

(16) costs that are not direct costs;

(17) any costs, the reimbursement of which, could result in a payment to and/or from a party with an inappropriate conflict of interest, as determined by the Office;

(18) the amount of any host fees or sanction fees charged by a site selection organization as a prerequisite to holding an event that is in excess of the amount stated in the application for participation in the trust fund program; or

(19) costs of any particular expense or obligation that was recouped or refunded, or that will be recouped or refunded from another entity under the event support contract or from event related revenue relating to the same expense or obligation, the reimbursement of which could result a net surplus to the applicant.

(b) The Office may deny a disbursement for any event, cost, expense, or obligation the Office deems fiscally irresponsible or not supportive of program objective.

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

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TRD-201603424
James Person
Assistant General Counsel
Office of the Governor, Economic Development and Tourism Office
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For further information, please call: (512) 936-0275

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SUBCHAPTER F. EVENT SUPPORT CONTRACTS

10 TAC §184.50, §184.51

Statutory Authority

The rules are proposed under Texas Revised Civil Statutes, Article 5190.14, Sections 3A, 5A(v) and 5C(p), which requires the Office of the Governor to adopt rules to ensure the efficient administration of the trust funds established under Article 5190.14, including rules related to application and receipt requirements.

Cross Reference to Statute

Article 5190.14, as amended by Senate Bills 293 and 633 and House Bill 26, 84th Regular Legislative Session.

§184.50. Requirements for Event Support Contracts.

(a) An event support contract is required for any event that is participating in the Major Events Reimbursement Program, Events Trust Fund Program, or Motor Sports Racing Trust Fund Program. The parties to an event support contract shall include, at a minimum, the site selection organization and the applicant.

(b) The event support contract must establish the applicant's role and obligation in the preparation or presentation of the event, and shall set out the representations and assurances of the parties with respect to the selection of a site in this state for the location of an event, and the requirements and costs necessary (or desirable, as authorized by Texas Revised Civil Statutes, Article 5190.14, Section 5A(h) or 5B(h)) for the preparation or presentation of an event. The Office will not consider a disbursement request that is for a cost that is not supported by an event support contract.

(c) Any costs included in the event support contract that are anticipated to be paid, recovered, refunded, or offset from event-related revenue should be clearly identified.

(d) The event support contract should clearly identify any costs that are intended to be reimbursed from the events trust fund for structural improvements or fixtures for an event site where the improvement or fixture is expected to derive most of its value in subsequent uses of the site for future events.

(e) The applicant's obligations must be sufficiently described in the event support contract to allow the Office to determine the eligibility of event costs for reimbursement in accordance with Rule 184.44 (Allowable Costs). In order for the Office to make a disbursement for a cost, the event support contract must specify which types of goods, services, fixtures, equipment, facility or other property improvements, or temporary maintenance that are required to conduct the event.

(f) All requirements of the site selection organization must be set forth in the event support contract, and must be reasonable and necessary (or desirable, as authorized by Texas Revised Civil Statutes, Article 5190.14, Section 5A(h) or 5B(h)) for the preparation or presentation of the event.

§184.51. Contract Guidelines.

(a) In considering whether to make a disbursement from the trust fund, the Office will not consider a contingency clause in an event support contract as relieving an applicant's obligation to pay a cost under the contract, as mandated by Texas Revised Civil Statutes, Article 5190.14, Sections 5A(k) and 5C(k).

(b) The event support contract must not create or shift obligations or liabilities from the endorsing municipality, endorsing county, local organizing committee, or another party to the Office.

(c) The Office will not consider for reimbursement any cost that is identified in an event support contract in terms which are overly broad or too general in nature, such terms include:

(1) blanket "catch-all" terms, such as "any necessary fixtures or improvements;"

(2) references in terms such as "etc." or "miscellaneous" or "as needed" or "other;" and

(3) terms that reference the Office's decision making authority, such as "any expense allowed by Office" or "any expense allowed by statute."

(d) Regardless of whether a cost is included in an event support contract, the Office will only consider making a disbursement for direct costs that are allowable in accordance with §184.44 (Allowable Costs).

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

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James Person
Assistant General Counsel
Office of the Governor, Economic Development and Tourism Office
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For further information, please call: (512) 936-0275

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SUBCHAPTER A. MAJOR EVENTS TRUST FUND

10 TAC §§184.100 - 184.106

Statutory Authority

The repeal of Subchapter A is proposed under Texas Revised Civil Statutes, Article 5190.14, §§3A, 5A(v) and 5C(p), which requires the Office of the Governor to adopt rules to ensure the efficient administration of the trust funds established under Article 5190.14, including rules related to application and receipt requirements.

Cross Reference to Statute

Article 5194.10, as amended by Senate Bills 293 and 633 and House Bill 26, 84th Regular Legislative Session.

§184.100. Definitions.

§184.101. Eligibility.

§184.102. Request to Establish a Trust Fund.

§184.103. Reporting.

§184.104. Disbursements for Event Costs.

§184.105. Event Support Contracts.

§184.106. Allowed and Disallowed Costs.

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

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James Person
Assistant General Counsel
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SUBCHAPTER B. EVENTS TRUST FUND

10 TAC §§184.200 - 184.206

Statutory Authority

The repeal of Subchapter B is proposed under Texas Revised Civil Statutes, Article 5190.14, §§3A, 5A(v) and 5C(p), which requires the Office of the Governor to adopt rules to ensure the efficient administration of the trust funds established under Article 5190.14, including rules related to application and receipt requirements.

Cross Reference to Statute

Article 5190.14, as amended by Senate Bills 293 and 633 and House Bill 26, 84th Regular Legislative Session.

§184.200. Definitions.

§184.201. Eligibility.

§184.202. Request to Establish a Trust Fund.

§184.203. Reporting.

§184.204. Disbursements for Event Costs.

§184.205. Allowed and Disallowed Costs.

§184.206. Event Support Contracts.

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

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James Person
Assistant General Counsel
Office of the Governor, Economic Development and Tourism Office
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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 98. TEXAS HIV MEDICATION PROGRAM

SUBCHAPTER C. TEXAS HIV MEDICATION PROGRAM

DIVISION 2. ADVISORY COMMITTEE

25 TAC §98.121

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), proposes an amendment to §98.121, concerning the Texas HIV Medication Advisory Committee.

BACKGROUND AND PURPOSE

The Texas HIV Medication Advisory Committee is mandated under Texas Health and Safety Code, Chapter 85, Subchapter K, and advises the Executive Commissioner and the department in the development of procedures and guidelines for the Texas HIV Medication Program, which helps provide medications for the treatment of HIV and its related complications for low-income Texans.

The proposed rule amendment would avoid abolishment of the Texas HIV Medication Advisory Committee by August 1, 2016, as prescribed in the current rule. The purpose of the rule amendment is to extend the date of Texas HIV Medication Advisory Committee abolishment from August 1, 2016, to August 1, 2020, based on the recommendation of the Executive Commissioner to continue the Texas HIV Medication Advisory Committee. A review of department advisory committees was conducted by the commission in the Fall of 2015. The need for continuing the Texas HIV Medication Advisory Committee has been established as required in the current rule.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §98.121 would change the expiration date of the Texas Medication Advisory Committee to reflect that the need for the Texas HIV Medication Advisory Committee has been established and that it should continue until August 1, 2020.

FISCAL NOTE

Ms. Imelda Garcia, Director, Infectious Disease Prevention Section, has determined that for each year of the first five years that the section will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the section as proposed.

SMALL AND MICRO-BUSINESSES IMPACT ANALYSIS

Ms. Garcia has also determined that there will be no adverse impact on small businesses or micro-businesses required to comply with the section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the section. Therefore, an economic impact statement and regulatory flexibility analysis for small and micro-businesses are not required.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Garcia has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated will be the continued professional advice provided by the Texas HIV Medication Advisory Committee to the department in relation to the administration of the Texas HIV Medication Program.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Juanita Salinas, Department of State Health Services, TB/HIV/STD/Viral Hepatitis Unit, P.O. Box 149347, Mail Code 7909, Austin, Texas 78714-9347, (512) 206-5974 or by email to juanita.salinas@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rule has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendment is authorized by Texas Health and Safety Code, §85.003, which requires the department to act as lead agency and primary resource for AIDS and HIV policy; Health and Safety Code, §85.016, which allows for the adoption of rules; Health and Safety Code, §85.061, which establishes the Texas HIV Medication Program; Health and Safety Code, §85.272, which establishes the Texas HIV Medication Advisory Committee and its duties; and by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendment affects the Health and Safety Code, Chapters 85 and 1001; and Government Code, Chapter 531.

§98.121. Texas HIV Medication Advisory Committee.

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

(c) Committee abolished. By August 1, 2020, [~~August 1, 2016,~~] the executive commissioner will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

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

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

Filed with the Office of the Secretary of State on July 5, 2016.

TRD-201603361
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: August 21, 2016
For further information, please call: (512) 776-6972

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CHAPTER 169. ZOONOSIS CONTROL
SUBCHAPTER F. REPTILE-ASSOCIATED SALMONELLOSIS

25 TAC §169.121

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes an amendment to §169.121, concerning reptile-associated salmonellosis.

BACKGROUND AND PURPOSE

The amendment is necessary to comply with Health and Safety Code, Chapter 81, Subchapter I, "Animal-Borne Diseases," which requires retail pet stores to post signs and distribute warnings relating to reptile-associated salmonellosis to purchasers of reptiles. The signs and warnings are to be in accordance with the form and content designated by the Executive Commissioner.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 169.121 has been reviewed and the department has determined that reasons for adopting the section continue to exist because a rule on this subject is required by statute and provides guidance to retail pet stores.

SECTION-BY-SECTION SUMMARY

The amendment to §169.121 allows for consistency with the Centers for Disease Control and Prevention recommendations for preventing transmission of *Salmonella* from reptiles to humans. The amendment clarifies the requirements for retailers to post warning signs and distribute written warnings to inform purchasers that reptiles may carry *Salmonella* bacteria in accordance with Health and Safety Code, Chapter 81. This amendment also allows improved readability and comprehension of required recommendations.

FISCAL NOTE

Ms. Imelda Garcia, Director, Infectious Disease Prevention Section, has determined that for each year of the first five years that the section will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the section as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Garcia has also determined that there will be no adverse impact on small businesses or micro-businesses required to comply with the section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the section. Therefore, an economic impact statement and regulatory flexibility analysis for small and micro-businesses are not required.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Garcia has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated as a result of enforcing or administering the section will be the increased public awareness of the risk involved with having reptiles as pets as it pertains to reptile-associated salmonellosis.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Tom Sidwa, DVM, MPH, Department of State Health Services, Infectious Disease Prevention Section, Zoonosis Control Branch, MC 1956, P.O. Box 149347, Austin, Texas 78714-9347, or by email to Tom.Sidwa@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rule has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §81.004, which provides the Executive Commissioner with the authority to adopt rules necessary for the effective administration and implementation of the Communicable Disease Prevention and Control Act; Health and Safety Code, §81.352, which requires the Executive Commissioner to adopt a rule governing the form and content of the sign and written warning relating to reptile-associated salmonellosis; and Government

Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rule implements Government Code, §2001.039.

The amendment affects Health and Safety Code, Chapters 81 and 1001; and Government Code, Chapters 531 and 2001.

§169.121. Reptile-Associated Salmonellosis.

(a) The Texas Health and Safety Code, §81.352, requires retail stores that sell reptiles to post warning signs and distribute written warnings regarding reptile-associated salmonellosis to purchasers in accordance with the form and content designated by the Executive Commissioner [~~Department of State Health Services~~].

(b) The warning signs must meet the following guidelines.

(1) - (2) (No change.)

(3) At a minimum, the contents of the sign must include the following recommendations for preventing transmission of *Salmonella* from reptiles to humans.

(A) Wash your [~~Persons should always wash their~~] hands thoroughly with soap and running water after feeding reptiles, handling reptiles or reptile cages, or contacting [~~after contact with~~] reptile feces or the water from reptile containers or aquariums. If soap and water are not immediately available, use a hand sanitizer and then wash your hands with soap and water as soon as possible. Wash your hands before you touch your mouth and before you prepare, serve, or consume food or drinks. Adults should supervise hand washing for young children.

(B) Avoid contact with reptiles and any items that have been in contact with reptiles if you are a person [~~Persons~~] at increased risk for infection or serious complications of salmonellosis, which, for instance, includes [~~such as~~] children younger than 5 years of age, adults aged 65 or older [~~the elderly~~], and persons whose immune systems have been weakened by pregnancy, disease (for example, cancer), or certain medical treatments or procedures (for example, chemotherapy or organ transplantations). Keep reptiles out of households or facilities that include such at-risk persons. Consider removing any reptile from your residence and relocating it to a new home before a newborn baby is added to the household. [~~, should avoid contact with reptiles and any items that have been in contact with reptiles.~~]

[~~(C) Reptiles should be kept out of households or facilities that include children younger than 5 years of age, the elderly, or persons whose immune systems have been weakened by pregnancy, disease (for example, cancer), or certain medical treatments (for example, chemotherapy). Families expecting a new child should remove any reptile from the home before the infant arrives.~~]

(C) [~~(D)~~] Do not allow reptiles [~~Reptiles should not be allowed~~] to roam freely throughout the home or living area. Wash and disinfect surfaces that a [~~the~~] reptile or its cage has contacted. Wash any clothing that a reptile has contacted.

(D) [~~(E)~~] Keep reptiles [~~Reptiles should be kept~~] out of kitchens and other areas where food or drink is stored, prepared, served, or consumed. Do not use kitchen [~~Kitchen~~] sinks [~~should not be used~~] to bathe reptiles or to wash their dishes, cages, or aquariums. If bathtubs are used for these purposes, clean them [~~they should be cleaned~~] thoroughly and disinfect them [~~disinfected~~] with bleach. It is preferable to bathe reptiles in a container (such as a small tub or bin) designated for this use and to clean bathing containers, dishes, cages, or aquariums outside the house in a manner that prevents contact of the discarded material with other people and pets. Wear disposable gloves when washing bathing containers, [~~the~~] dishes, cages, or aquariums. Wash your hands after removing the gloves.

(4) (No change.)

(c) (No change.)

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

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Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: August 21, 2016
For further information, please call: (512) 776-6972

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SUBCHAPTER G. CAGING REQUIREMENTS AND STANDARDS FOR DANGEROUS WILD ANIMALS

25 TAC §169.131, §169.132

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §169.131 and §169.132, concerning the caging requirements and standards for dangerous wild animals.

BACKGROUND AND PURPOSE

The amendments to §169.131 and §169.132 are necessary to comply with Health and Safety Code, Chapter 822, Subchapter E, "Dangerous Wild Animals," which requires an owner of a dangerous wild animal to keep and confine the animal in accordance with caging requirements and registration established by the Executive Commissioner.

The amendment to §169.131 will provide for safe, healthy, and humane environments for the animals; prevent escape by the animals; and clarify the requirements for caging requirements relating to the structures and facilities containing dangerous wild animals in compliance with Health and Safety Code, §822.111.

The amendment to §169.132 will provide clarification of the submission process of a certificate of registration copy to the department by the holder of a certificate of registration of a dangerous wild animal as required in Health and Safety Code, §822.106(b).

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 169.131 and §169.132 have been reviewed and the department has determined that reasons for adopting these sections continue to exist because rules on this subject are mandated.

SECTION-BY-SECTION SUMMARY

The amendment to §169.131(a)(2)(B) and (B)(i) - (ii) combines the definition of "shelter" with that of "nest box and den" to aid in clarity because there was notable overlap between the definitions.

The amendment to §169.131(b)(2) adds the phrase "or equal to" to clarify the inclusion of enclosures that are exactly 1,000 square feet.

The amendment to §169.131(c)(3)(A)(i), (B)(i), and (C)(i) adds shotcrete as a possible optional construction material for large cats and canids, non-human primates, and bears with the caveat that it be built with cognizance for not creating any holds for climbing. Shotcrete is an acceptable, durable construction material commonly used in zoo displays.

The amendment to §169.131(d)(1)(D) adds the requirement for primates to be kept in covered enclosures based on a professional recommendation and supported by a survey of all owners in Texas of registered baboons, chimpanzees, gorillas, or orangutans for the fiscal impact pertaining to this new requirement. All those surveyed already keep these animals in covered enclosures; therefore, no fiscal impact is anticipated.

The amendment to §169.131(d)(1)(E)(i) - (iv) combines the minimum standards for chimpanzees, orangutans, and gorillas because the standards should be equivalent for the great apes. Based on ranging patterns, activity levels, and social structures, the area for the chimpanzees should be increased to at least that of the gorillas. Therefore, 400 square feet was chosen (halfway between Texas' current 300 square feet and the Association of Zoos and Aquariums' (AZA) 500 square feet and matching Ohio's 400 square feet for gorillas). The square footage per additional animal was set at 350 (midway between Texas' 200 and the AZA's 500). The wall heights, including those for baboons, have been amended from 8 feet to 10 feet (Ohio requires a minimum of 10 feet with at least 8 feet for useable climbing height). The department was more conservative on the area of primary enclosures than Florida or the Zoo and Aquarium Association (ZAA), both of which require/recommend 672 square feet, and the United States Zoological Association (USZA) that recommends 600 square feet for gorillas.

The amendment to §169.131(d)(2)(A) deletes the words "nest boxes" to be consistent with the amendments to the definitions in §169.131(a)(2)(B).

The amendment to §169.131(d)(2)(E)(i)(I) adds the word "covered" to clarify that this section relates to covered enclosures.

The amendment to §169.131(d)(2)(E)(i)(II) removes the word "outdoor" because these dimensions refer to any primary enclosure over 1,000 square feet (if uncovered). Additionally, the words "an attached" was added to clarify that the overhang is in addition to the height of the fence.

The amendment to §169.131(d)(2)(E)(i) and (ii) separates cheetahs from lions and tigers because they are generally not classed together with standards. Minimum enclosure heights for cheetahs did not change, so there is no anticipated fiscal impact pertaining to standards for this species.

The amendment to §169.131(d)(2)(E)(i)(II) increases the minimum enclosure heights for lions and tigers from 10 feet with a 2-foot-wide overhang to 12 feet with a 3-foot-wide overhang or from 12 feet to 16 feet without an overhang. This is partially to match the United States Department of Agriculture's (USDA) recommendations (not requirements); since the USDA has a higher height standard for these enclosures than Texas does, this amendment will prevent facilities from designing their enclosures to meet Texas' lower standards and then discover that they are not meeting the expectation of USDA inspectors. Additionally, these dimensions are conservatively compared with the AZA recommendation for a height of at least 15 feet with an overhang and ZAA recommendations for 14 feet with an overhang. Six out of seven owners of registered lions and/or tigers in Texas that were surveyed already had either covered enclosures or walls at least 16 feet in height for these animals. One of the surveyed owners expressed that they would have a fiscal impact of $36,000 if they were required to meet the proposed standards.

The USDA stated that they dealt with two escapes of tigers in about a 6-month period, with one escape causing the death of a person; one escape was over a 12-foot solid concrete wall and the other one was over a 12-foot cyclone wire fence with an 18-inch kick in (overhang). The USDA indicated that if both fences had a 3-foot kick in, escape would have been much more difficult for these animals (they do not consider a straight 12-foot tall fence to be adequate containment for big cats, except for cheetahs).

The amendment to §169.131(d)(2)(E)(iii) increases the minimum square footage from 200 to 300 for one jaguar, leopard, or cougar (halfway between Texas' 200 and ZAA's 400). This is conservative compared with Ohio's 600 square feet. The minimum height of the enclosure was increased from 8 feet to 12 feet (which matches Ohio's requirement). One owner of registered cougars and a leopard suggested that the increase in height would give these species a better opportunity to assert their natural climbing tendencies and noted that none of these dimension increases would create a fiscal impact for that owner.

The amendment to §169.131(d)(2)(E)(iv)(I) modifies the minimum square footage from 80 to 100 for one animal (halfway between Texas' 80 and ZAA's 120 and conservative compared to Ohio's 200 square feet). The square footage per additional animal was modified from 40 to 50 square feet (conservative compared to Ohio's 100).

The amendment to §169.131(d)(2)(E)(iv)(II) adds a requirement for bobcats, lynxes, ocelots, caracals, and servals to be kept in covered enclosures based on a professional recommendation and that all owners of these registered animals already keep them in covered enclosures.

The amendment to §169.131(d)(3)(D) adds a recommendation to have bears in covered enclosures or in enclosures with an overhang. It appears that trends are going toward this type of precaution.

The amendment to §169.131(d)(3)(E)(i) increases the minimum square feet for one sun bear from 200 to 300 (conservative compared with Ohio's 400) and for each additional animal from 100 to 150 (halfway between Texas' 100 and Ohio's 300). The height of an uncovered enclosure was raised from 8 feet to 12 feet (which is conservative compared with Ohio's requirements and ZAA's recommendations for 12 feet with an overhang and Kansas' requirements for 13 feet with an overhang). There are no owners of registered sun bears in Texas.

The amendment to §169.131(d)(3)(E)(ii) increases the minimum square feet for one black bear or Asiatic sun bear from 300 to 400 (primarily to meet Texas state requirements already in rule under the Texas Parks and Wildlife Department (TPWD), but it also matches Ohio's, Florida's, and ZAA's 400 square feet) and for each additional animal from 150 to 175 (halfway between Texas' 150 and Ohio's 200). The height for an uncovered enclosure was raised from 8 to 12 feet (primarily to meet requirements of the TPWD already in rule, which is conservative compared with Ohio's requirements and ZAA's recommendations for

12 feet with an overhang and Kansas' requirements for 13 feet with an overhang).

The amendment to §169.131(d)(3)(E)(iii) increases the minimum square feet for one brown bear or polar bear from 400 to 500 (which is conservative compared with Florida's requirements and AZA's recommendations for 768 square feet). The height of an uncovered enclosure was raised from 10 to 12 feet (which is conservative compared with Ohio's requirements and ZAA's recommendations for 12 feet with an overhang and Kansas' requirements for 13 feet with an overhang).

The amendment to §169.131(d)(4)(A) deletes the word "dens" to be consistent with the revisions to the definitions in §169.131(a)(2)(B).

The amendment to §169.131(d)(4)(C) adds the word "covered" to clarify that this section relates to covered enclosures.

The amendment to §169.131(d)(4)(E) deletes the wording "over 1,000 square feet" since any enclosure 1,000 square feet or less is required to be covered in §169.131(b)(2). Additionally, the wording "an attached" has been added to clarify that the overhang is in addition to the height of the fence.

The amendment to §169.132 adds pertinent information to be included on the certificate of registration from various animal registration agencies statewide, including the required $20 per animal filing fee to avoid confusion on the part of certificate owners as to the amount of the fee that needs to be submitted with their certificate copies. A procedure was established at the time of initial adoption of §169.131 in 2002 that an owner of a dangerous wild animal submitted an annual fee of $20 per animal to the department to cover the cost of filing a copy of a certificate of registration to the department, as mandated by Health and Safety Code, §822.106(b). In the past the certificate information has been recommended via sample templates from the department.

FISCAL NOTE

Ms. Imelda Garcia, Director, Infectious Disease Prevention Section, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS AND ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

Ms. Garcia has determined that there will be no adverse impact on small businesses or micro-businesses required to comply with §169.132 as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the section. There are no anticipated economic costs to persons who are required to comply with this section as proposed. There is no anticipated negative impact on local employment.

There will be an adverse impact on small businesses or micro-businesses or persons who are required to comply with §169.131 as proposed. There are currently eight registered owners of lions and tigers. Six out of seven owners of registered lions and/or tigers in Texas that were surveyed already had either covered enclosures or walls at least 16 feet in height for these animals. One surveyed owner of currently registered wild animals responded that the increase in the height standards for lion and tiger enclosures in §169.131(d)(2)(E)(i)(II) would cost that owner a one-time amount of approximately $36,000 to meet the amended requirements (9 habitats at approximately $4,000 per habitat). There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Garcia has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections will be that it enhances public health and safety by keeping dangerous wild animals contained in safe, healthy, and humane environments.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Tom Sidwa, DVM, MPH, Department of State Health Services, Infectious Disease Prevention Section, Zoonosis Control Branch, Mail Code 1956, P.O. Box 149347, Austin, Texas 78714-9347, or by email to Tom.Sidwa@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §822.111, which requires the Executive Commissioner to establish the caging requirements and standards for the keeping and confinement of dangerous wild animals; Health and Safety Code, §822.106(b), which requires the Executive Commissioner to charge a fee for filing a certificate of registration for a dangerous wild animal to be collected by the department; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of §169.131 and §169.132 implements Government Code, §2001.039.

The amendments affect Health and Safety Code, Chapters 822 and 1001; and Government Code, Chapter 531.

§169.131. Caging Requirements and Standards for Dangerous Wild Animals.

(a) Definitions.

(1) (No change.)

(2) Where specified in this section, primary enclosures for dangerous wild animals shall be equipped to provide for a safe, healthy, and humane environment for the animals; prevent escape by the animals; and protect and enhance the public's health and safety. Such equipment includes, but is not limited to:

(A) (No change.)

(B) Shelter (including such structures as nest boxes or dens)[~~, nest box, or den~~]--An enclosed structure that provides protection from the elements and from extremes in temperature that are detrimental to the health and welfare of the animal(s). [~~A structure that protects the animal(s) from the elements (weather conditions).~~] Such a structure [~~structures~~] may vary in size depending on the security and biological needs of the species; it shall be large enough to accommodate all the animals in the enclosure simultaneously. Such a structure shall be within, attached to, or adjacent to the primary enclosure and be readily accessible to the animal(s). [~~The structures are particularly described as follows.~~]

~~*[(i)*~~ ~~Shelter--A structure that provides protection from the elements and from extremes in temperature that are detrimental to the health and welfare of the animal(s). When vegetation and landscaping is available to serve as protection from the elements, access to a shelter shall also be provided during inclement weather conditions. Such shelter shall be attached to or adjacent to the primary enclosure.]~~

~~*[(ii)*~~ ~~Nest box or den--An enclosed shelter that provides a retreat area within, attached to, or adjacent to a primary enclosure of specified size, which shall provide protection from the elements and from extremes in temperature that are detrimental to the health and welfare of the animal.]~~

(C) - (D) (No change.)

(b) General Requirements.

(1) (No change.)

(2) All primary enclosures less than or equal to 1,000 square feet shall be covered at the top to prevent escape.

(3) (No change.)

(c) Structural Requirements for Primary Enclosures. In addition to the size and equipment requirements for primary enclosures, dangerous wild animals shall be caged in accordance with the following requirements.

(1) - (2) (No change.)

(3) Additional minimum requirements for specific species and hybrids of those species shall be as follows.

(A) Chimpanzees, gorillas, and orangutans.

(i) Outdoor facilities--Construction material shall consist of steel bars, 2-inch galvanized pipe, masonry block, or their strength equivalent or greater. Shotcrete walls can also be utilized if applied appropriately to avoid formation of any holds that could be used for climbing.

(ii) (No change.)

(B) Baboons, jaguars, tigers, lions, leopards, cougars, cheetahs, bears, and hyenas.

(i) Outdoor facilities--Construction material shall consist of not less than 9-gauge chain link or equivalent. Shotcrete walls can also be utilized if applied appropriately to avoid formation of any holds that could be used for climbing.

(ii) (No change.)

(C) Ocelots, servals, lynxes, bobcats, caracals, coyotes, and jackals.

(i) Outdoor facilities--Construction material shall consist of not less than 12-gauge chain link or equivalent. Shotcrete walls can also be utilized if applied appropriately to avoid formation of any holds that could be used for climbing.

(ii) (No change.)

(d) Primary Enclosure Size and Equipment Requirements. No dangerous wild animal shall be confined in any primary enclosure that contains more individual animals than specified in this section, is smaller in dimension than specified in this section, or is not equipped as specified in this section. The area occupied by pools, ponds, or lakes shall be in addition to the space requirements for the primary enclosure. Specifications in this section also pertain to hybrids of designated species.

(1) Primates.

(A) - (C) (No change.).

(D) Primates shall not be kept in uncovered enclosures.

(E) [~~(D)~~] Requirements for specific primate species are as follows:

(i) Baboons. For one animal, the primary enclosure shall have a minimum floor area of 100 square feet with a wall or fence at least 10 [~~8~~] feet high. For each additional animal, primary enclosure size shall be increased by at least 100 square feet.

(ii) Chimpanzees, orangutans, and gorillas. For one animal, the primary enclosure shall have a minimum floor area of 400 [~~200~~] square feet with a wall or fence at least 10 [~~8~~] feet high. For each additional animal, primary enclosure size shall be increased by at least 350 [~~100~~] square feet.

~~*[(iii)*~~ ~~Orangutans. For one animal, the primary enclosure shall have a minimum floor area of 200 square feet with a wall or fence at least 10 feet high. For each additional animal, primary enclosure size shall be increased by at least 200 square feet.]~~

~~*[(iv)*~~ ~~Gorillas. For one animal, the primary enclosure shall have a minimum floor area of 300 square feet with a wall or fence at least 8 feet high. For each additional animal, primary enclosure size shall be increased by at least 200 square feet.]~~

(2) Wild felines.

(A) In addition to requirements of this section, each primary enclosure shall be equipped with a shelter(s) [~~shelter(s)/nest box(es)~~] large enough to accommodate all the animals in the enclosure simultaneously.

(B) - (D) (No change.)

(E) Requirements for specific species of wild felines are as follows:

(i) Lions and[~~,~~] tigers[~~, and cheetahs~~].

(I) For one animal, a covered [~~the~~] primary enclosure shall have a minimum floor area of 300 square feet with a wall or fence at least 8 feet high. For each additional animal, primary enclosure size shall be increased by at least 150 square feet.

(II) Primary [~~Outdoor primary~~] enclosures over 1,000 square feet (if uncovered) shall have vertical jump walls at least 12 [~~10~~] feet high with an attached [~~a~~] 45-degree inward-angle overhang at least 3 [~~2~~] feet wide or jump walls at least 16 [~~12~~] feet high without an overhang. The inward-angle fencing shall be made of the same material as the vertical fencing.

(ii) Cheetahs.

(I) For one animal, a covered primary enclosure shall have a minimum floor area of 300 square feet with a wall or fence at least 8 feet high. For each additional animal, primary enclosure size shall be increased by at least 150 square feet.

(II) Primary enclosures over 1,000 square feet (if uncovered) shall have vertical jump walls at least 10 feet high with an attached 45-degree inward-angle overhang at least 2 feet wide or 12 feet high without an overhang. The inward-angle fencing shall be made of the same material as the vertical fencing.

(iii) [~~(ii)~~] Jaguars, leopards, and cougars.

(I) For one animal, the primary enclosure shall have a minimum floor area of 300 [~~200~~] square feet with a wall or fence at least 12 [~~8~~] feet high. For each additional animal, primary enclosure size shall be increased by at least 100 square feet.

(II) (Jaguars, leopards, and cougars shall not be kept in uncovered enclosures.

(iv) [~~(iii)~~] Bobcats, lynxes, ocelots, caracals, and servals.

(I) For one animal, the primary enclosure shall have a minimum floor area of 100 [~~80~~] square feet with a wall or fence at least 8 feet high. For each additional animal, primary enclosure size shall be increased by at least 50 [~~40~~] square feet.

(II) Bobcats, lynxes, ocelots, caracals, and servals shall not be kept in uncovered enclosures.

(3) Bears.

(A) - (C) (No change.)

(D) Bears should be kept in covered enclosures or enclosures with an attached 45-degree inward-angle overhang at least 3 feet wide.

(E) [~~(D)~~] Requirements for specific types of bears are as follows:

(i) Sun bears.

(I) For one animal, the primary enclosure shall have a minimum floor area of 300 [~~200~~] square feet with a wall or fence at least 8 feet high if covered or at least 12 feet high if uncovered. For each additional animal, primary enclosure size shall be increased by at least 150 [~~100~~] square feet.

(II) Each primary enclosure shall have, as a minimum, a 3-foot by 4-foot pool of water, 2 feet deep. The area occupied by the pool shall be in addition to the space requirements for the primary enclosure.

(ii) Black bears and Asiatic bears.

(I) For one animal, the primary enclosure shall have a minimum floor area of 400 [~~300~~] square feet with a wall or fence at least 8 feet high if covered or at least 12 feet high if uncovered. For each additional animal, primary enclosure size shall be increased by at least 175 [~~150~~] square feet.

(II) Each primary enclosure shall have, as a minimum, a 4-foot by 6-foot pool of water, 3 feet deep. The area occupied by the pool shall be in addition to the space requirements for the primary enclosure.

(iii) Brown bears and polar bears.

(I) For one animal, the primary enclosure shall have a minimum floor area of 500 [~~400~~] square feet with a wall or fence at least 10 feet high if covered or at least 12 feet high if uncovered. For each additional animal, primary enclosure size shall be increased by at least 200 square feet.

(II) Each primary enclosure for brown bears shall have, as a minimum, a 6-foot by 10-foot pool of water, 4 feet deep. The area occupied by the pool shall be in addition to the space requirements for the primary enclosure.

(III) Each primary enclosure for polar bears shall have, as a minimum, a 10-foot by 10-foot pool of water, 5 feet deep. The area occupied by the pool shall be in addition to the space requirements for the primary enclosure.

(4) Coyotes, jackals, and hyenas.

(A) In addition to the requirements of this section, each primary enclosure shall be equipped with a shelter(s) [~~shelter(s)/den(s)~~] that shall accommodate all the animals in the enclosure simultaneously.

(B) (No change.)

(C) For one animal, a covered [~~the~~] primary enclosure shall have a minimum floor area of 150 square feet (200 square feet for hyenas) with a wall or fence at least 6 feet high. For each additional animal, primary enclosure size shall be increased by at least 100 square feet.

(D) (No change.)

(E) Uncovered outdoor primary enclosures [~~over 1,000 square feet~~] shall have vertical jump walls at least 8 feet high with an attached [~~a~~] 45-degree inward-angle overhang at least 2 feet wide or jump walls at least 10 feet high without an overhang. The inward-angle fencing shall be made of the same material as the vertical fencing.

§169.132. Registration, Fee.

(a) Texas Health and Safety Code, §822.103, requires that a person must obtain a certificate of registration for a dangerous wild animal issued by an animal registration agency. The animal registration agency must include the following information on the certificate of registration:

(1) issuance date;

(2) certificate number;

(3) filing fee ($20 per animal) along with the department's mailing address as listed in subsection (b) of this section and a statement that the fee must be submitted to the department along with a copy of the certificate;

(4) name, address, and phone number of the owner of the dangerous wild animal;

(5) name and address of the animal registration agency;

(6) species, sex, age, color, distinguishing marks, and other features (for example, ear notch, tattoo, sterilization status) of the dangerous wild animal;

(7) the address of where the dangerous wild animal is kept;

(8) the expiration date (or a statement that the certificate expires one year from the issuance date) unless the certificate is revoked,

that the certificate is non-transferable, and that the certificate must be displayed at the location where the dangerous wild animal is kept; and

(9) and the signature of the authorized person at the animal registration agency.

(b) [~~To comply with~~] Texas Health and Safety Code, §822.106, requires that not later than the 10th day after the date a person receives the certificate of registration [~~required by Texas Health and Safety Code, Chapter 822~~], the person shall file a clear and legible copy of the certificate of registration with the Texas Department of State Health Services, Zoonosis Control, P.O. Box 149347, Mail Code 1956, Austin, Texas 78714-9347. The fee for filing the certificate is $20 per animal, submitted with the copy of the certificate.

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

Filed with the Office of the Secretary of State on July 11, 2016.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 776-6972

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 39. PUBLIC NOTICE

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §39.411 and §39.603.

If adopted, the amendments to §39.411(e)(4)(A)(i) and (ii), (e)(5) (introductory paragraph), (e)(11)(A)(iv) and (v), (e)(13), (f) (introductory paragraph), (f)(8), and (g); and §39.603 will be submitted to the United States Environmental Protection Agency as revisions to the State Implementation Plan.

Background and Summary of the Factual Basis for the Proposed Rules

On February 25, 2016, Texas Aggregates and Concrete Association (TACA) submitted a petition requesting the commission conduct rulemaking to amend public notice rules applicable to initial registration requests for authorization under the Air Quality Standard Permit for Concrete Batch Plants. The petition requested amendments to §39.411(e)(11)(A)(iii) and §39.603(a) and (b) to provide for one 30-day public notice of initial registration. On April 6, 2016, the commission considered the petition and directed the executive director to examine the request and initiate rulemaking.

The TACA petition did not address the Air Quality Standard Permit for Concrete Batch Plants with Enhanced Controls authorized under Texas Clean Air Act (TCAA), Texas Health and Safety Code (THSC), §382.05198. The public notice requirements for that standard permit are listed within the permit, and registrations for that permit are not subject to the rules in Chapter 39. Therefore, public notice requirements for that permit would not be affected by this proposed rulemaking.

The commission is authorized to adopt standard permits under THSC, §382.05195, which prescribes the procedures the commission must follow to adopt a standard permit. The commission implemented THSC, §382.05195 by adopting rules in 30 TAC Chapter 116, Subchapter F. The rules in Chapter 116, Subchapter F provide that when the executive director drafts a new (or proposes amendments to an existing) standard permit, notice of the proposed permit is published in the *Texas Register* and in newspapers. In addition, TCEQ holds a public meeting to provide stakeholders an opportunity for discussion with TCEQ staff and for submittal of comments regarding the proposed permit. The responses to comments and any changes made to the proposed permit in response to the comments are presented to the commission for consideration in an open meeting, commonly referred to as Agenda. Once adopted, the conditions of the permit will be the same for all owners and operators that register to construct and operate under the standard permit. The standard permits are not designed to be amended to include tailored permit conditions applicable to an individual registration. The Air Quality Standard Permit for Concrete Batch Plants was last amended by the commission effective December 21, 2012.

Each individual registration is subject to the public participation requirements in 30 TAC Chapters 39 and 55. Since 1985, owners or operators registering for authorization to construct and operate a concrete batch plant (under what is known today as the Air Quality Standard Permit for Concrete Batch Plants) have been subject to specific notice requirements for the proposed plant. These public notice requirements for initial registrations included the opportunity to request a contested case hearing on the individual registration. In 1999, the 76th Texas Legislature enacted House Bill (HB) 801, which made changes to notice requirements for initial registrations that were administratively complete on or after September 1, 1999. Since the rulemaking to implement HB 801 in 1999, and rule amendments adopted in 2010, have been in effect, the commission has required registrants for the concrete batch plant standard permit to publish a Notice of Receipt of Application and Intent to Obtain Permit (NORI) which solicits comments for a 15-day period; contested case hearing and public meeting requests are also solicited. At the same time the NORI is published in a newspaper of general circulation in the municipality or in the nearest municipality in which the plant will be located, the registrant is required to place a copy of the registration in a public place in the county, and to post signs at the proposed facility location. Alternative language publication and signs may also be required.

After TCEQ staff complete the technical review, registrants are required to publish Notice of Application and Preliminary Decision (NAPD), which solicits comments for a 30-day period; hearing requests are also solicited but only if at least one such request was timely made in response to the NORI. At the close of the comment period, the executive director prepares a written response to all timely-filed comments and files the response with the TCEQ's Office of Chief Clerk. Based on comments, registrants may update their registration representations as to how they will construct and operate under the standard permit. Historically, this has been very uncommon. Also, because the permit conditions in the Air Quality Standard Permit for Concrete Batch Plants are established by the commission when the standard permit is adopted, the executive director cannot change any permit conditions for an individual registration in response to comments.

During comment periods for previous concrete batch plant registrations, the public has expressed concerns that the 15-day period is often not enough time to review the registration, determine whether to comment, request a public meeting, or contested case hearing, and then to timely submit the information to the TCEQ. Specifically, with one notice instead of two, TCEQ expects there will be more clarity regarding the restrictions on the timeframe to submit hearing requests, and the notice will specify that the draft permit has not changed (and cannot change) since the first notice (NORI) was published.

Concurrently with this proposal, and published in this issue of the *Texas Register,* the commission is proposing to amend 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment, §55.152, to provide for a 30-day notice period during which comments and requests for public meeting or contested case hearing can be submitted in response to the consolidated NORI and NAPD. The 30-day period begins on the last date of newspaper publication, and the comment period is automatically extended to the close of any public meeting, as required by §55.152(b). As provided for in 30 TAC §55.201, which implements Senate Bill 709 (84th Texas Legislature, 2015), hearing requests must be based on the requestor's timely submitted comments.

The public participation requirements for renewals of registrations under the Air Quality Standard Permit for Concrete Batch Plants are not affected by the proposed amendments in Chapters 39 and 55.

Section by Section Discussion

In addition to the amendments discussed later, the proposed rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes include appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

§39.411, Text of Public Notice

Clause (iv) is proposed to be added to §39.411(e)(11)(A), which would amend requirements for the notice text for initial registrations received on or after January 1, 2017, for concrete batch plants that register to operate under the Air Quality Standard Permit for Concrete Batch Plants. The proposed clause states that the text of the notice shall include three statements, proposed as subclauses (I) - (III). First, a request for a contested case hearing must be received by the commission before the close of the 30-day comment period following the last publication of the consolidated NORI and NAPD. Second, if no hearing requests are received by the end of the 30-day comment period, there is no further opportunity to request a contested case hearing. Third, if any hearing requests are received before the close of the 30-day comment period, the opportunity to file a request for a contested case hearing is extended to 30 days after the mailing of the executive director's response to comments. Existing clause (iv) will be re-designated as clause (v).

Subsection (f) is proposed to be amended to add a reference to the consolidated notice proposed in §39.603(c). In addition, because the effective date of §39.411 will change if the proposed amendments are adopted, the references to "the effective date of this section" in §39.411(e)(4)(A)(i) and (ii), (e)(5), (f)(8) and (9), and (g) are proposed to be updated to provide for the precise date of June 18, 2010, which is the actual effective date for these particular requirements.

§39.603, Newspaper Notice

Proposed §39.603(c) would provide that, for initial registrations received on or after January 1, 2017, for authorization to construct and operate a concrete batch plant (without enhanced controls) under an air quality standard permit, owners and operators are required to publish a consolidated NORI and NAPD. The consolidated NORI and NAPD must be published no later than 30 days after the executive director declares the registration administratively complete, and the chief clerk has mailed the preliminary decision concurrently with the consolidated NORI and NAPD to the registrant. In addition, the new consolidated notice must contain the text as required by §39.411(f).

Existing subsections (c) - (e) are proposed to be re-lettered as subsections (d) - (f). References to "registrant" are proposed to be added to subsections (d) - (f) to ensure that these requirements also apply to initial registrations for a standard permit for concrete batch plants without enhanced controls.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency and no fiscal implications are expected for other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rules in Chapter 39 would require owners or operators who register to construct and operate a concrete batch plant without enhanced controls under the Air Quality Standard Permit for Concrete Batch Plants to publish a consolidated NORI and NAPD as one consolidated NORI/NAPD notice, rather than separately as required under current rules. Concrete batch plants that are public-works projects associated with a right-of-way and which are contiguous to the right-of-way of the public works project are not included in this rulemaking as they are exempt from the NORI and NAPD public notice requirement.

Under the proposed rules in Chapters 39 and 55, the period for submitting public comments and requests for a public meeting or a contested case hearing will change from the current 15 days under NORI plus an additional 30 days for submitting comments under NAPD, to one 30-day period for submitting comments and requests for a public meeting or a contested case hearing. Currently, hearing requests may be submitted in response to the NORI, but not in response to the NAPD, unless hearing requests were submitted in response to the NORI. The purpose of the NAPD is to provide opportunity for comments on the draft permit. However, the permit conditions of a Standard Permit are adopted by the commission and cannot be changed in response to comments (unlike for case-by-case permits). Thus, the additional time in the current notice process cannot result in any change to the draft permit.

Under the proposed rules, the regulated community will benefit from a more efficient notice process and issuance times, as well as an approximate 50% reduction in publication costs (one publication instead of two for English language publication and also for any required alternate language publication). The public may generally benefit by having a longer period to submit contested case hearing requests and more clarity regarding the permit conditions remaining unchanged.

No significant fiscal implications are anticipated for the agency and no fiscal implications are anticipated for other units of state or local government. Concrete batch plant registrants make arrangements and pay for their own newspaper publication and then provide proof of publication to TCEQ. This is true for both English-language newspapers and, where applicable, for alternate language publications. Under the proposed rules, the consolidated NORI/NAPD instead of two (a NORI and a NAPD) notices, will be prepared and distributed owners and operators who register to construct and operate these types of facilities. However, this is not anticipated to significantly reduce agency workload or costs for APD to issue the permits. Other units of state or local government do not construct and operate these types of facilities and therefore would not be affected.

Public Benefits and Costs

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be that the public will have a 30-day period, instead of an initial 15-day period, to submit comments and contested case hearing requests. The public will also generally benefit in that there will be one notice instead of two which will reduce confusion about the restrictions on the time to submit hearing requests, and clarify that the draft permit has not changed (and cannot change) since the first notice (NORI) was published.

These proposed rules are expected to result in some cost savings and revenue losses for businesses and no fiscal implications for individuals. Owners or operators filing registrations for concrete batch plant standard permits may experience cost savings for only being required to secure one newspaper publication notice, though in general these cost savings are not anticipated to be significant for most registrants. Over the past 11 years, the agency has issued on average, 110 concrete batch plant permits each year. The newspaper publication notice costs will be reduced by approximately 50%, because only one round of publication will be required instead of the currently required two (for English language publication and also for any required alternate language publication). One round of publication costs may be between $674 and $9,759 depending on which newspaper (newspapers in larger cities have higher costs), the day of the week, and how many words are in the notice. One registrant would then be estimated to be able to save between $674 and $9,759 in publication costs and newspapers around the state would lose a like amount in revenue for each notice.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules in for the first five-year period the proposed rules are in effect. Small or micro-businesses that apply for concrete batch plant standard permits may experience cost savings for newspaper publication notices, though the savings for small business will be slightly less than for a large business due to the fact that publication costs for small businesses were reduced in a prior rulemaking. This proposed rulemaking does not affect that previously established cost-saving measure. Small and micro-businesses would save the cost of one round of publication estimated to be between $634 and $7,522, depending on which newspaper (newspapers in larger cities have higher costs), the day of the week, and how many words are in the notice.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 39 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants, but instead would amend the notice requirements for initial registrations for concrete batch plant (without enhanced controls) standard permit authorizations, which are procedural in nature.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments to Chapter 39 would amend the notice requirements for initial registrations for concrete batch plant (without enhanced controls) standard permit authorizations. This proposed rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was developed to meet the requirements for public participation in the TCAA as identified in the Statutory Authority section of this preamble.

Written comments on the Draft Regulatory Impact Analysis may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments to Chapter 39 would amend the notice requirements for initial registrations for concrete batch plant (without enhanced controls) standard permit authorizations, which are procedural in nature. Promulgation and enforcement of the proposed rulemaking will

not burden private real property. The proposed amendments do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the amendments affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed amendments are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

The proposed rules will not require any changes to outstanding federal operating permits.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 10, 2016, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www1.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-030-039-LS. The comment period closes on August 22, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html*. For further information, please contact Janis Hudson, Environmental Law Division, at (512) 239-0466.

SUBCHAPTER H. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §39.411

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and TWC, §5.115, Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which prescribes the public participation requirements for certain applications filed with the commission; and THSC, §382.058, concerning Notice of and Hearing on Construction of Concrete Plant Under Permit by Rule, Standard Permit, or Exemption, which prescribes authorization requirements for certain concrete batch plants. In addition, the amendment is also proposed under Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; and the Federal Clean Air Act, 42 United States Code, §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements THSC, §382.056 and §382.058.

§39.411. Text of Public Notice.

(a) Applicants shall use notice text provided and approved by the agency. The executive director may approve changes to notice text before notice being given.

(b) When Notice of Receipt of Application and Intent to Obtain Permit by publication or by mail is required by Subchapters H and K of this chapter (relating to Applicability and General Provisions and Public Notice of Air Quality Permit Applications) for air quality permit applications, those applications are subject to subsections (e) - (h) of this section. When notice of receipt of application and intent to obtain permit by publication or by mail is required by Subchapters H - J and L of this chapter (relating to Applicability and General Provisions, Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, and Public Notice of Injection Well and Other Specific Applications), Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits), or for Subchapter M of this chapter (relating to Public Notice for Radioactive Material Licenses), the text of the notice must include the following information:

(1) the name and address of the agency and the telephone number of an agency contact from whom interested persons may obtain further information;

(2) the name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information;

(3) a brief description of the location and nature of the proposed activity;

(4) a brief description of public comment procedures, including:

(A) a statement that the executive director will respond to comments raising issues that are relevant and material or otherwise significant; and

(B) a statement in the notice for any permit application for which there is an opportunity for a contested case hearing, that only disputed factual issues that are relevant and material to the commission's decision that are raised during the comment period can be considered if a contested case hearing is granted;

(5) a brief description of procedures by which the public may participate in the final permit decision and, if applicable, how to request a public meeting, contested case hearing, reconsideration of the executive director's decision, a notice and comment hearing, or a statement that later notice will describe procedures for public participation, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice. The notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity;

(6) the application or permit number;

(7) if applicable, a statement that the application or requested action is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(8) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the application is available for review and copying;

(9) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application;

(10) for notices of municipal solid waste applications, a statement that a person who may be affected by the facility or proposed facility is entitled to request a contested case hearing from the commission. This statement must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice; and

(11) any additional information required by the executive director or needed to satisfy public notice requirements of any federally authorized program; or

(12) for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), if applicable, a statement that a written environmental analysis on the application has been prepared by the executive director, is available to the public for review, and that written comments may be submitted; and

(13) for Class 3 modifications of hazardous industrial solid waste permits, the statement "The permittee's compliance history during the life of the permit being modified is available from the agency contact person."

(c) Unless mailed notice is otherwise provided for under this section, the chief clerk shall mail Notice of Application and Preliminary Decision to those listed in §39.413 of this title (relating to Mailed Notice). When notice of application and preliminary decision by publication or by mail is required by Subchapters G - J and L of this chapter, the text of the notice must include the following information:

(1) the information required by subsection (b)(1) - (11) of this section;

(2) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted, or a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted. The public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(3) if the application is subject to final approval by the executive director under Chapter 50 of this title (relating to Action on Applications and Other Authorizations), a statement that the executive director may issue final approval of the application unless a timely contested case hearing request or a timely request for reconsideration (if applicable) is filed with the chief clerk after transmittal of the executive director's decision and response to public comment;

(4) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(5) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the complete application and the executive director's preliminary decision are available for review and copying;

(6) the deadline to file comments or request a public meeting. The notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity; and

(7) for radioactive material licenses under Chapter 336 of this title, if applicable, a statement that a written environmental analysis on the application has been prepared by the executive director, is available to the public for review, and that written comments may be submitted.

(d) When notice of a public meeting or notice of a hearing by publication or by mail is required by Subchapters G - J and L of this chapter, the text of the notice must include the following information:

(1) the information required by subsection (b)(1) - (3), (6) - (8), and (11) of this section;

(2) the date, time, and place of the meeting or hearing, and a brief description of the nature and purpose of the meeting or hearing, including the applicable rules and procedures; and

(3) for notices of public meetings only, a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted and a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted.

(e) When Notice of Receipt of Application and Intent to Obtain Permit by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications, the text of the notice must include the information in this subsection:

(1) the name and address of the agency and the telephone number of an agency contact from whom interested persons may obtain further information;

(2) the name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information;

(3) a brief description of the location and nature of the proposed activity;

(4) a brief description of public comment procedures, including:

(A) a statement that the executive director will respond to:

(i) all comments regarding applications for Prevention of Significant Deterioration and Nonattainment permits under Chapter 116, Subchapter B of this title (relating to New Source Review Permits) and Plant-wide Applicability Limit permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) filed on or after June 18, 2010 [~~the effective date of this section~~];

(ii) all comments regarding applications subject to the requirements of Chapter 116, Subchapter E of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63),per existing title in TAC whether for construction or reconstruction, filed on or after June 18, 2010 [~~the effective date of this section~~]; and

(iii) for all other air quality permit applications, comments raising issues that are relevant and material or otherwise significant; and

(B) a statement in the notice for any air quality permit application for which there is an opportunity for a contested case hearing, that only disputed factual issues that are relevant and material to the commission's decision that are raised during the comment period can be considered if a contested case hearing is granted;

(5) a brief description of procedures by which the public may participate in the final permit decision and, if applicable, how to request a public meeting, contested case hearing, reconsideration of the executive director's decision, a notice and comment hearing, or a statement that later notice will describe procedures for public participation, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice. Where applicable, the notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located if there is substantial public interest in the proposed activity when requested by any interested person for the following applications that are filed on or after June 18, 2010 [~~the effective date of this section~~]:

(A) air quality permit applications subject to the requirements for Prevention of Significant Deterioration and Nonattainment in Chapter 116, Subchapter B of this title;

(B) applications for the establishment or renewal of, or an increase in, a plant-wide applicability limit subject to Chapter 116 of this title; and

(C) applications subject to the requirements of Chapter 116, Subchapter E of this title, whether for construction or reconstruction;

(6) the application or permit number;

(7) if applicable, a statement that the application or requested action is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(8) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the application is available for review and copying;

(9) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application;

(10) at a minimum, a listing of criteria pollutants for which authorization is sought in the application which are regulated under national ambient air quality standards [~~(NAAQS)~~] or under state standards in Chapters 111, 112, 113, 115, and 117 of this title (relating to Control of Air Pollution from Visible Emissions and Particulate Matter, Control of Air Pollution from Sulfur Compounds, Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants, Control of Air Pollution from Volatile Organic Compounds, and Control of Air Pollution from Nitrogen Compounds);

(11) If notice is for any air quality permit application except those listed in paragraphs (12) and (15) of this subsection, the following information must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice:

(A) a statement that a person who may be affected by emissions of air contaminants from the facility or proposed facility is entitled to request a contested case hearing from the commission within the following specified time periods;

(i) for air quality permit applications subject to the requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title a statement that a request for a contested case hearing must be received by the commission by the end of the comment period or within 30 days after the mailing of the executive director's response to comments;

(ii) for air quality permit applications subject to the requirements of Chapter 116, Subchapter E of this title, whether for construction or reconstruction, a statement that a request for a contested case hearing must be received by the commission by the end of the comment period or within 30 days after the mailing of the executive director's response to comments;

(iii) for renewals of air quality permits that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted and the application does not involve a facility for which the applicant's compliance history is in the lowest classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title (relating to Compliance History), a statement that a request for a contested case hearing must be received by the commission before the close of the 15-day comment period provided in response to the last publication of Notice of Receipt of Application and Intent to Obtain Permit; [~~or~~]

(iv) for initial registrations for concrete batch plants without enhanced controls authorized by an air quality standard permit adopted by the commission under Chapter 116, Subchapter F of this title (relating to Standard Permits) received on or after January 1, 2017, the following statements:

(I) a request for a contested case hearing must be received by the commission before the close of the comment period provided in response to the last publication of the consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of

Application and Preliminary Decision in §39.603(c) of this title (relating to Newspaper Notice);

(II) if no hearing requests are received by the end of the 30-day comment period there is no further opportunity to request a contested case hearing; and

(III) if any hearing requests are received before the close of the 30-day comment period, the opportunity to file a request for a contested case hearing is extended to 30 days after the mailing of the executive director's response to comments; or

(v) [~~(iv)~~] for all air quality permit applications other than those in clauses (i) - (iv) [~~(iii)~~] of this subparagraph, a statement that a request for a contested case hearing must be received by the commission before the close of the 30-day comment period provided in response to the last publication of Notice of Receipt of Application and Intent to Obtain Permit. If no hearing requests are received by the end of the 30-day comment period following the last publication of Notice of Receipt of Application and Intent to Obtain Permit, there is no further opportunity to request a contested case hearing. If any hearing requests are received before the close of the 30-day comment period following the last publication of Notice of Receipt of Application and Intent to Obtain Permit, the opportunity to file a request for a contested case hearing is extended to 30 days after the mailing of the executive director's response to comments;

(B) a statement that a request for a contested case hearing must be received by the commission;

(C) a statement that a contested case hearing request must include the requester's location relative to the proposed facility or activity;

(D) a statement that a contested case hearing request should include a description of how the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity;

(E) a statement that only relevant and material issues raised during the comment period can be considered if a contested case hearing request is granted; and

(F) if notice is for air quality permit applications described in subparagraph (A)(v) [~~(A)(iv)~~] of this paragraph, a statement that when no hearing requests are timely received the applicant shall publish a Notice of Application and Preliminary Decision that provides an opportunity for public comment and to request a public meeting.

(12) if notice is for air quality applications for a permit under Chapter 116, Subchapter L of this title (relating to Permits for Specific Designated Facilities), filed on or before January 1, 2018, a Multiple Plant Permit under Chapter 116, Subchapter J of this title (relating to Multiple Plant Permits), or for a Plant-wide Applicability Limit under Chapter 116 of this title, a statement that any person is entitled to request a public meeting or a notice and comment hearing, as applicable from the commission;

(13) notification that a person residing within 440 yards of a concrete batch plant without enhanced controls under a standard permit adopted by the commission under Chapter 116, Subchapter F of this title [~~(relating to Standard Permits)~~] is an affected person who is entitled to request a contested case hearing;

(14) the statement: "The facility's compliance file, if any exists, is available for public review in the regional office of the Texas Commission on Environmental Quality;"

(15) if notice is for an application for an air quality permit under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review) that would authorize only emissions of greenhouse gases as defined in §101.1 of this title (relating to Definitions), a statement that any interested person is entitled to request a public meeting or a notice and comment hearing, as applicable, from the commission; and

(16) any additional information required by the executive director or needed to satisfy federal public notice requirements.

(f) The chief clerk shall mail Notice of Application and Preliminary Decision, or the consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision, as provided for in §39.603(c) of this title, to those listed in §39.602 of this title (relating to Mailed Notice). When notice of application and preliminary decision by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications, the text of the notice must include the information in this subsection:

(1) the information required by subsection (e) of this section;

(2) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(3) the location, at a public place in the county with internet access in which the facility is located or proposed to be located, at which a copy of the complete application and the executive director's draft permit and preliminary decision are available for review and copying;

(4) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's draft permit and, where applicable, preliminary decision, preliminary determination summary, and air quality analysis may be submitted, or a statement in the notice for any air quality permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted. The public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(5) the deadline to file comments or request a public meeting. The notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity. The notice must include a statement that the comment period will be for at least thirty days following publication of the Notice of Application and Preliminary Decision;

(6) if the application is subject to final approval by the executive director under Chapter 50 of this title, a statement that the executive director may issue final approval of the application unless a timely contested case hearing request or a timely request for reconsideration (if applicable) is filed with the chief clerk after transmittal of the executive director's decision and response to public comment;

(7) If the executive director prepares a Response to Comments as required by §55.156 of this title (relating to Public Comment Processing), the chief clerk will make the executive director's response to public comments available on the commission's Web site;

(8) in addition to the requirements in paragraphs (1) - (7) of this subsection, for air quality permit applications filed on or after June 18, 2010 [~~the effective date of this section~~] for permits under Chapter

116, Subchapter B, Divisions 5 of this title (relating to Nonattainment Review Permits) and 6 of this title:

(A) as applicable, the degree of increment consumption that is expected from the source or modification;

(B) a statement that the state's air quality analysis is available for comment;

(C) the deadline to request a public meeting;

(D) a statement that the executive director will hold a public meeting at the request of any interested person; and

(E) a statement that the executive director's draft permit and preliminary decision, preliminary determination summary, and air quality analysis are available electronically on the commission's Web site at the time of publication of the Notice of Application and Preliminary Decision; and

(9) in addition to the requirements in paragraphs (1) - (7) of this subsection, for air quality permit applications filed on or after June 18, 2010 [~~the effective date of this section~~] for permits under Chapter 116, Subchapter E of this title:

(A) the deadline to request a public meeting;

(B) a statement that the executive director will hold a public meeting at the request of any interested person; and

(C) a statement that the executive director's draft permit and preliminary decision are available electronically on the commission's website [~~Web site~~] at the time of publication of the Notice of Application and Preliminary Decision.

(g) When notice of a public meeting by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications filed on or after June 18, 2010 [~~the effective date of this section~~], the text of the notice must include the information in this subparagraph. Air quality permit applications filed before June 18, 2010 [~~the effective date of this section~~] are governed by the rules in Subchapters H and K of this chapter as they existed immediately before June 18, 2010 [~~the effective date of this section~~], and those rules are continued in effect for that purpose.

(1) the information required by subsection (e)(1) - (3), (4)(A), (6), (8), (9), and (16) of this section;

(2) the date, time, and place of the public meeting, and a brief description of the nature and purpose of the meeting, including the applicable rules and procedures; and

(3) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's draft permit and preliminary decision, and, as applicable, preliminary determination summary, and air quality analysis may be submitted and a statement in the notice for any air quality permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted.

(h) When notice of a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications, the text of the notice must include the following information:

(1) the information required by subsection (e)(1) - (3), (6), (9) and (16) of this section; and

(2) the date, time, and place of the hearing, and a brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

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

Filed with the Office of the Secretary of State on July 8, 2016.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 21, 2016
For further information, please call: (512) 239-6812

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SUBCHAPTER K. PUBLIC NOTICE OF AIR QUALITY PERMIT APPLICATIONS

30 TAC §39.603

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and TWC, §5.115, Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which prescribes the public participation requirements for certain applications filed with the TCEQ; and THSC, §382.058, concerning Notice of and Hearing on Construction of Concrete Plant Under Permit by Rule, Standard Permit, or Exemption, which prescribes authorization requirements for certain concrete batch plants. In addition, the amendment is also proposed under Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; and the Federal Clean Air Act, 42 United States Code, §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements THSC, §382.056 and §382.058.

§39.603. Newspaper Notice.

(a) Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit) is required to be published no later than 30 days after the executive director declares an application administratively complete. This notice must contain the text as required by §39.411(e) of this title (relating to Text of Public Notice). This notice is not required for Plant-wide Applicability Limit permit applications.

(b) Notice of Application and Preliminary Decision under §39.419 of this title (relating to Notice of Application and Preliminary Decision) is required to be published within 33 days after the chief clerk has mailed the preliminary decision concurrently with the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(f) of this title.

(c) Owners and operators who submit initial registrations on or after January 1, 2017, for authorization to construct and operate a concrete batch plant without enhanced controls under an air quality standard permit adopted by the commission under Chapter 116, Subchapter F of this title (relating to Standard Permits) shall publish a consolidated Notice of Receipt of Application and Intent to Obtain Permit (NORI) under §39.418 of this title and Notice of Application and Preliminary Decision (NAPD) under §39.419 of this title no later than 30 days after the executive director declares the registration administratively complete and the chief clerk has mailed the preliminary decision concurrently with the consolidated NORI and NAPD to the registrant. This notice must contain the text as required by §39.411(f) of this title.

(d) [~~(c)~~] General newspaper notice. Unless otherwise specified, when this chapter requires published notice of an air quality permit application or registration, the applicant or registrant shall publish notice in a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility, as follows.

(1) One notice must be published in the public notice section of the newspaper and must comply with §39.411(e) - (g) of this title.

(2) Another notice with a total size of at least six column inches, with a vertical dimension of at least three inches and a horizontal dimension of at least two column widths, or a size of at least 12 square inches, must be published in a prominent location elsewhere in the same issue of the newspaper. This notice must contain the following information:

(A) permit application or registration number;

(B) company name;

(C) type of facility;

(D) description of the location of the facility; and

(E) a note that additional information is in the public notice section of the same issue.

(e) [~~(d)~~] Alternative publication procedures for small businesses.

(1) The applicant or registrant does not have to comply with subsection (d)(2) [~~(e)(2)~~] of this section if all of the following conditions are met:

(A) the applicant or registrant and source meets the definition of a small business stationary source in Texas Water Code, §5.135 including, but not limited to, those which:

(i) are not a major stationary source for federal air quality permitting;

(ii) do not emit 50 tons or more per year of any regulated air pollutant;

(iii) emit less than 75 tons per year of all regulated air pollutants combined; and

(iv) are owned or operated by a person that employs 100 or fewer individuals; and

(B) if the applicant's or registrant's site meets the emission limits in §106.4(a) of this title (relating to Requirements for Permitting by Rule) it will be considered to not have a significant effect on air quality.

(2) The executive director may post information regarding pending air permit applications on its website, such as the permit number, company name, project type, facility type, nearest city, county, date public notice authorized, information on comment periods, and information on how to contact the agency for further information.

(f) [~~(e)~~] If an air application or registration is referred to State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings), the applicant or registrant shall publish notice once in a newspaper as described in subsection (d) [~~(c)~~] of this section, containing the information under §39.411(h) of this title. This notice must be published and affidavits filed with the chief clerk no later than 30 days before the scheduled date of the hearing.

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

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CHAPTER 55. REQUESTS FOR RECONSIDERATION AND CONTESTED CASE HEARINGS; PUBLIC COMMENT

SUBCHAPTER E. PUBLIC COMMENT AND PUBLIC MEETINGS

30 TAC §55.152

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §55.152.

If adopted, the amendments to §55.152(a)(2), (3), (6) and (7) will be submitted to the United States Environmental Protection Agency as revisions to the State Implementation Plan.

Background and Summary of the Factual Basis for the Proposed Rule

On February 25, 2016, Texas Aggregates and Concrete Association (TACA) submitted a petition requesting the commission conduct rulemaking to amend public notice rules applicable to initial registration requests for authorization under the Air

Quality Standard Permit for Concrete Batch Plants. The petition requested amendments to 30 TAC §39.411(e)(11)(A)(iii) and §39.603(a) and (b) to provide for one 30-day public notice of initial registration. On April 6, 2016, the commission considered the petition and directed the executive director to examine the request and initiate rulemaking.

The TACA petition did not address the Air Quality Standard Permit for Concrete Batch Plants with Enhanced Controls authorized under Texas Clean Air Act (TCAA), Texas Health and Safety Code (THSC), §382.05198. The public notice requirements for that standard permit are listed within the permit, and registrations for that permit are not subject to the rules in 30 TAC Chapter 39. Therefore, public notice requirements for that permit would not be affected by this proposed rulemaking.

The commission is authorized to adopt standard permits under THSC, §382.05195, which prescribes the procedures the commission must follow to adopt a standard permit. The commission implemented THSC, §382.05195 by adopting rules in 30 TAC Chapter 116, Subchapter F. The rules in Chapter 116, Subchapter F provide that when the executive director drafts a new (or proposes amendments to an existing) standard permit, notice of the proposed permit is published in the *Texas Register* and in newspapers. In addition, TCEQ holds a public meeting to provide stakeholders an opportunity for discussion with TCEQ staff and for submittal of comments regarding the proposed permit. The responses to comments and any changes made to the proposed permit in response to the comments are presented to the commission for consideration in an open meeting, commonly referred to as Agenda. Once adopted, the conditions of the permit will be the same for all owners and operators that register to construct and operate under the standard permit. The standard permits are not designed to be amended to include tailored permit conditions applicable to an individual registration. The Air Quality Standard Permit for Concrete Batch Plants was last amended by the commission effective December 21, 2012.

Each individual registration is subject to the public participation requirements in Chapters 39 and 55. Since 1985, owners and operators registering for authorization to construct and operate a concrete batch plant (under what is known today as the Air Quality Standard Permit for Concrete Batch Plants) have been subject to specific notice requirements for the proposed plant. These public notice requirements for initial registrations included the opportunity to request a contested case hearing on the individual registration. In 1999, the 76th Texas Legislature enacted House Bill (HB) 801, which made changes to notice requirements for initial registrations that were administratively complete on or after September 1, 1999. Since the rulemaking to implement HB 801 in 1999, and rule amendments adopted in 2010, have been in effect, the commission has required registrants for the concrete batch plant standard permit to publish a Notice of Receipt of Application and Intent to Obtain Permit (NORI) which solicits comments for a 15-day period; contested case hearing and public meeting requests are also solicited. At the same time the NORI is published in a newspaper of general circulation in the municipality or in the nearest municipality in which the plant will be located, the registrant is required to place a copy of the registration in a public place in the county, and to post signs at the proposed facility location. Alternative language publication and signs may also be required.

After TCEQ staff complete the technical review, registrants are required to publish Notice of Application and Preliminary Decision (NAPD), which solicits comments for a 30-day period; hearing requests are also solicited but only if at least one such request was timely made in response to the NORI. At the close of the comment period, the executive director prepares a written response to all timely-filed comments and files the response with the TCEQ's Office of Chief Clerk. Based on comments, registrants may update their registration representations as to how they will construct and operate under the standard permit. Historically, this has been very uncommon. Also, because the permit conditions in the Air Quality Standard Permit for Concrete Batch Plants are established by the commission when the standard permit is adopted, the executive director cannot change any permit conditions for an individual registration in response to comments.

During comment periods for previous concrete batch plant registrations, the public has expressed concerns that the 15-day period is often not enough time to review the registration, determine whether to comment, request a public meeting, or contested case hearing, and then to timely submit the information to the TCEQ. Specifically, with one notice instead of two, there will be more clarity regarding the restrictions on the timeframe to submit hearing requests, and the notice will specify that the draft permit has not changed (and cannot change) since the first notice (NORI) was published.

Proposed amended §55.152(a)(2) would provide for a 30-day notice period during which comments and requests for public meeting or contested case hearing can be submitted in response to the consolidated NORI and NAPD. The 30-day period begins on the last date of newspaper publication, and the public comment period is automatically extended to the close of any public meeting, as required by §55.152(b). As provided for in §55.201(c), which implements Senate Bill 709 (84th Texas Legislature, 2015), hearing requests must be based on the requestor's timely submitted comments.

Concurrently with this proposal, and published in this issue of the *Texas Register,* the commission is proposing amendments to Chapter 39, Public Notice, to provide for a consolidated NORI and NAPD.

The public participation requirements for renewals of registrations under the Air Quality Standard Permit for Concrete Batch Plants are not affected by the proposed amendments in Chapters 39 and 55.

Section Discussion

§55.152, Public Comment Period

Proposed amended §55.152(a)(2) is created by relocating some of the text of existing subsection (a)(2) to a proposed subsection (a)(3). Proposed subsection (a)(2) would provide that the close of the public comment period for standard permit registrations for concrete batch plants (without enhanced controls) would change from 15 days after the last publication of NORI, or 30 days after NAPD if a second notice is required, to 30 days after the last publication of the consolidated notice concurrently proposed in §39.603. Proposed §55.152(a)(2) would not apply to concrete batch plants temporarily located in or contiguous to the right-of-way of a public works project or to temporary concrete batch plants (without enhanced controls) operating under the standard permit that qualify for relocation.

Proposed amended subsection (a)(3) will continue to provide for the comment period applicable to air quality permit renewal applications. Existing paragraphs (3) - (6) in §55.152(a) are proposed to be re-numbered as paragraphs (4) - (7).

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule in Chapter 55 would establish a 30-day public comment period for registrations under the Air Quality Standard Permit for Concrete Batch Plants.

Under the proposed rules in Chapters 39 and 55, the period for submitting public comments will change from the current 15 days under NORI and an additional 30 days for comments under NAPD, to one 30-day period for submitting comments and hearing requests. Currently, hearing requests may be submitted in response to the NORI, but not in response to the NAPD, unless hearing requests were timely submitted in response to the NORI. The purpose of the NAPD is to provide opportunity for comments on the draft permit. However, the permit conditions of a Standard Permit are adopted by the commission and cannot be changed in response to comments (unlike for case-by-case permits). Thus, the additional time in the current notice process cannot result in any change to the draft permit and results in a longer period for the commission to approve the registration.

Concurrently with this proposal, the commission is proposing amendments to Chapter 39, for standard permits for concrete batch plants without enhanced controls. This amendment to Chapter 55 is proposed in order to maintain consistency with the proposed amendments in Chapter 39 and to address concerns with the current public comment periods for concrete batch plant standard permits. Fiscal implications, if any, with regard to the amendment proposed for the change to the public comment period are discussed in the Chapter 39 rulemaking. No fiscal implications are anticipated for the proposed amendment to Chapter 55.

Public Benefits and Costs

Mr. Horvath also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be that the public will have a 30-day period, instead of an initial 15-day period, to submit comments and requests for public meetings or contested case hearings. The public will also generally benefit in that there will be one notice instead of two which will reduce confusion about the restrictions on the time to submit hearing requests, and clarify that the draft permit has not changed (and cannot change) since the first notice (NORI) was published.

No fiscal implications are anticipated for businesses or individuals due to implementation or administration of the proposed amendment to Chapter 55. The amendment to Chapter 55 is proposed in order to maintain consistency with the proposed amendments in Chapter 39 and to address concerns with the current public comment periods for concrete batch plant standard permits. Any fiscal implications with regard to the amendment proposed for the change to the public comment period are discussed in the Chapter 39 rulemaking.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect. The amendment to Chapter 55 is proposed in order to maintain consistency with the proposed amendments in Chapter 39 and to address concerns with the current public comment periods for concrete batch plant standard permits. No fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed amendment to Chapter 55.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment to Chapter 55 is not specifically intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants, but instead would amend the public comment period for initial standard permit registrations for concrete batch plants (without enhanced controls), which are procedural in nature.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendment to Chapter 55 would amend the public comment period for initial standard permit registrations for concrete batch plants (without enhanced controls), which is procedural in nature. This proposed rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was developed to meet the requirements for public participation in the TCAA as identified in the Statutory Authority section of this preamble.

Written comments on the Draft Regulatory Impact Analysis may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendment to Chapter 55 would amend the public comment period for initial standard permit registrations for concrete batch plants (without enhanced controls), which are procedural in nature. Promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed amendment does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

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

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

The proposed rule will not require any changes to outstanding federal operating permits.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 10, 2016, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www1.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-030-039-LS. The comment period closes on August 22, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html.* For further information, please contact Janis Hudson, Environmental Law Division, at (512) 239-0466.

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.115, Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which prescribes the public participation requirements for certain applications filed with the commission; and THSC, §382.058, concerning Notice of and Hearing on Construction of Concrete Plant Under Permit by Rule, Standard Permit, or Exemption, which prescribes authorization requirements for certain concrete batch plants. In addition, the amendment is also proposed under Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; and the Federal Clean Air Act, 42 United States Code, §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements THSC, §382.056 and §382.058.

§55.152. Public Comment Period.

(a) Public comments must be filed with the chief clerk within the time period specified in the notice. The public comment period shall end 30 days after the last publication of the Notice of Application and Preliminary Decision, except that the time period shall end:

(1) 30 days after the last publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), or 30 days after Notice of Application and Preliminary Decision if a second notice is required under §39.419 of this title (relating to Notice of Application and Preliminary Decision), for an air quality permit application not otherwise specified in this section;

(2) 30 days after the last publication of the consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision under §39.603 of this title (relating to Newspaper Notice) for a registration for a concrete batch

plant without enhanced controls authorized by an air quality standard permit adopted by the commission under Chapter 116, Subchapter F of this title (relating to Standard Permits), unless the plant is to be temporarily located in or contiguous to the right-of-way of a public works project;

(3) [~~(2)~~] 15 days after the last publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title, or 30 days after Notice of Application and Preliminary Decision if a second notice is required under §39.419 of this title, for a permit renewal under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) [~~or a concrete batch plant without enhanced controls authorized by a air quality standard per TAC permit adopted by the commission under Chapter 116, Subchapter F of this title (relating to Standard Permits), unless the plant is to be temporarily located in or contiguous to the right-of-way of a public works project~~];

(4) [~~(3)~~] 45 days after the last publication of the notice of Application and Preliminary Decision for an application for a hazardous waste facility permit, or to amend, extend, or renew or to obtain a Class 3 Modification of such a permit, or 30 days after the publication of Notice of Application and Preliminary Decision for Class 3 modifications of non-hazardous industrial solid waste permits;

(5) [~~(4)~~] 30 days after the mailing of the notice of draft production area authorization under Chapter 331 of this title (relating to Underground Injection Control);

(6) [~~(5)~~] the time specified in commission rules for other specific types of applications; or

(7) [~~(6)~~] as extended by the executive director for good cause.

(b) The public comment period shall automatically be extended to the close of any public meeting.

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

Filed with the Office of the Secretary of State on July 8, 2016.

TRD-201603409
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 21, 2016
For further information, please call: (512) 239-6812

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CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER F. EMISSIONS EVENTS AND SCHEDULED MAINTENANCE, STARTUP, AND SHUTDOWN ACTIVITIES

DIVISION 3. OPERATIONAL REQUIREMENTS, DEMONSTRATIONS, AND ACTIONS TO REDUCE EXCESSIVE EMISSIONS

30 TAC §101.222

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes the amendment to §101.222. If adopted, the proposal of §101.222(k) and (l) will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rule

Texas' Rules

In 2003, TCEQ established an affirmative defense rule for "certain emissions events." The rule sets forth criteria that incentivize good operation and maintenance practices to minimize or avoid excess emissions and, if met, allow an owner or operator to avail itself of the affirmative defense.

The affirmative defense in §101.222(b) - (e) is available only for certain types of excess emissions, specifically from non-excessive upset events and unplanned maintenance, startup, and shutdown (MSS) activities. To be eligible for the affirmative defense, these events must have been unplanned and unavoidable, and properly reported.

The affirmative defense rules were last amended in 2005 and approved by EPA in 2010 (75 FedReg 68989 (November 10, 2010)). When EPA approved the Texas affirmative defense criteria as part of the Texas SIP in 2010, EPA acknowledged that there may be times when a source may not be able to meet emission limitations during periods of startup, shutdown, or malfunction (SSM). In this approval, EPA referenced its 1999 policy, stating "in the course of an enforcement action for penalties, a source could assert the affirmative defense and the burden would be on the source to prove enumerated factors, including that the period of excess emissions was minimized to the extent practicable and that the emissions were not due to faulty operations or disrepair of equipment."

EPA defended its 2010 SIP approval of §101.222(b) - (e) when this approval was challenged, and ultimately upheld by the United States Circuit Court of Appeals for the Fifth Circuit in 2013. *(Luminant Generation v. EPA,* 714 F.3d 841 (5th Cir. 2013))

Petition to EPA

On June 30, 2011, Sierra Club filed a petition for rulemaking with the EPA Administrator regarding, among other things, how state and local air agencies' rules in EPA-approved SIPs treat excess emissions during periods of SSM. In response, on February 12, 2013, EPA proposed its finding that numerous SIPs across the country were approved with "broad and loosely defined provisions to control excess emissions." Although Texas was not included in the Sierra Club's petition nor subject to the 2013 proposal, on September 17, 2014 (79 FedReg 55945), EPA supplemented its original proposal to add the Texas SIP, specifically finding that §101.222(b) - (e) is substantially inadequate to meet Federal Clean Air Act (FCAA) requirements, and adopted this position in its final rulemaking. On June 12, 2015, EPA published its final action on the petition (80 FedReg 33839). In that notice, EPA stated it was clarifying, restating, and revising its guidance concerning its interpretation of the FCAA requirements with respect to treatment in SIPs of excess emissions during periods of SSM.

Specifically, EPA rescinded its interpretation that the FCAA allows states to elect to create narrowly tailored affirmative defense provisions in SIPs. Instead, EPA promulgated its new interpretation of the FCAA as prohibiting affirmative defense provisions in SIPs based on EPA's conclusion that the enforcement structure in FCAA, §113 and §304 precludes any affirmative de-

fense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. As a result, in the final rule, EPA issued a SIP Call for 36 states, including Texas, finding that certain SIP provisions regarding excess emissions due to SSM are substantially inadequate to meet FCAA requirements and established a due date of November 22, 2016, for submittal of SIP revisions to address this finding. EPA based its final rule position on the decision in *NRDC v. EPA,* 749 F.3d (District of Columbia Circuit (D.C. Cir.)) 2014, regarding an EPA National Emission Standards for Hazardous Air Pollutants rule.

TCEQ's Response to EPA's SIP SSM Call

The commission disagrees with EPA's interpretation that an affirmative defense as to penalties is not available for enforcement of SIP violations. EPA's SSM SIP Call has been challenged, and is pending in the D.C. Circuit Court of Appeals, by the State of Texas, TCEQ, several Texas industry groups, 18 other states, approximately 23 industry groups and trade associations, and several electric generating companies. Five environmental groups have intervened on behalf of EPA.

While the commission is not proposing to remove its affirmative defense rule from the Texas SIP, the commission is proposing to add §102.222(k) to address EPA's SSM SIP Call. EPA's SSM SIP call states, "the EPA has now concluded that the enforcement structure of the CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." (80 FedReg 33851 (June 12, 2015)).

Proposed subsection (l) provides that proposed subsection (k) would not be applicable until all appeals regarding the EPA's SSM SIP Call, as it applies to §101.222(b) - (e), have extinguished and the applicable affirmative defense in those subsections is prohibited.

Subsections (k) and (l) are not severable and are proposed to be submitted to EPA for approval of both subsections as part of the Texas SIP.

Section by Section Discussion

§101.222, Determinations

Proposed §101.222(k) would state that the use of the affirmative defenses in subsections (b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action.

Proposed §101.222(l) would delay the applicability of §101.222(k) until all appeals regarding the EPA's SSM SIP Call, as it applies to §101.222(b) - (e), have extinguished and the applicable affirmative defense in those subsections is prohibited.

The commission is not proposing and does not intend to amend or remove subsections (a) - (j) and, therefore, is not soliciting comment on these subsections. The public notice period for comments on proposed subsections (k) and (l) will begin on July 8, 2016, and end on August 8, 2016.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rulemaking would add §101.222(k) and (l) to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. The proposed rule would include a delayed applicability date to put Texas in a position to comply with the EPA's SSM SIP Call while maintaining its position in the litigation concerning the EPA's SSM SIP Call. The applicability would not be effective until the appeals of the EPA's SSM SIP Call are extinguished and the affirmative defense rule is prohibited.

The rulemaking does not change the currently required information, including reporting and recordkeeping, regarding certain excess emissions that is required to be provided to TCEQ by the regulated community for owners and operators with these types of emissions under §§101.201, 101.211, and 101.222. Although the rulemaking proposes a new regulatory component, it does not include additional, new, or revised activities that affect the manner in which TCEQ conducts investigations.

No fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule. State and local governments do not typically engage in the type of activities that would generate such emissions, and the proposed rulemaking would not apply to these entities.

Public Benefits and Costs

Mr. Horvath also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be in compliance with federal law and a continuation of the public benefit currently experienced from the emissions event program.

The proposed rulemaking would add §101.222(k) and (l) to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. The proposed rule would include a delayed applicability date to put Texas in a position to comply with EPA's SSM SIP Call while maintaining its position in the litigation concerning the EPA's SSM SIP Call. The applicability would not be effective until the appeals of the EPA's SIP Call are extinguished and the affirmative defense rule is prohibited.

The rulemaking does not change the currently required information regarding certain excess emissions that is required to be provided to TCEQ, including the reporting or recordkeeping for the regulated community under §§101.201, 101.211, and 101.222. Although, the rulemaking proposes a new regulatory component, it does not include additional, new, or revised activities that affect the manner in which TCEQ conducts investigations.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect. The scope of excess emissions subject to an affirmative defense remains the same.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is necessary under federal

law and does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare an RIA.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed rule is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and the prohibition of the affirmative defense rule.

Additionally, even if the rule met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring an RIA for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rule would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the National Ambient Air Quality Standards (NAAQS) within the state. While 42 USC, §7410, generally does not require specific programs, methods, or emission reductions in order to meet the standard, state SIPs must include specific requirements as specified by 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. The specific intent of the proposed rule is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) is not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and prohibition of the affirmative defense rule.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB or bill) 633 during the 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct an RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full RIA unless the rule was a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. The commission contends that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed rule 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 proposed rule does not exceed the requirement to attain and maintain the NAAQS. For these reasons, the proposed rule falls under the exception in Texas Government Code, §2001.0225(a), because it is required by, and does not exceed, federal law.

The commission consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *(Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ); Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978))

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the proposed rule is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and prohibition of the affirmative defense rule. The proposed rule was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the TCAA), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or the Texas Constitution, §17 or §19, Article I or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to respond to the EPA's SSM SIP Call by adding new text to explain that the use of the affirmative defenses in §101.222(b) - (e) are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action, with delayed applicability until completion of the litigation and prohibition of the affirmative defense rule. The proposed rule will not create any additional burden on private real property. The proposed rule will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal 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 proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in 30 TAC Chapter 281, relating to Applications Processing, Subchapter B. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this proposed rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The proposed rule complies with this goal by ensuring that the rule meets applicable federal and state requirements for regulation of air quality in these areas. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Section 101.222 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must revise their operating permit consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking.

The commission will hold a public hearing on this proposal in Austin on August 8, 2016, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www1.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference

Rule Project Number 2016-018-101-CE. The comment period begins with newspaper publication of the notice of hearing and closes on August 8, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html.* For further information, please contact Cynthia Gandee, Program Support Section, (512) 239-0179 or Janis Hudson, Environmental Law Division, (512) 239-0466.

Statutory Authority

The rule is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The rule is also proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.0215, concerning Assessment of Emissions Due to Emissions Events, which defines "emissions event," requires owners and operators of regulated entities to meet certain requirements, and requires the commission to centrally track and collect information relating to emissions events, including the use of electronic reporting; and THSC, §382.0216, concerning Regulation of Emissions Events, which establishes and prescribes criteria for and requires responses to excessive emissions events, allows for use of corrective action plans in response to excessive emissions events, and authorizes the commission to establish an affirmative defense to a commission enforcement action for emissions events.

In addition, the rule is also proposed under Federal Clean Air Act, 42 United States Code, §§7401, *et seq.,* which requires states to submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The proposed rule will implement THSC, §§382.002, 382.011, 382.012, and 382.017.

§101.222. Demonstrations.

(a) Excessive emissions event determinations. The executive director shall determine when emissions events are excessive. To determine whether an emissions event or emissions events are excessive, the executive director will evaluate emissions events using the following criteria:

(1) the frequency of the facility's emissions events;

(2) the cause of the emissions event;

(3) the quantity and impact on human health or the environment of the emissions event;

(4) the duration of the emissions event;

(5) the percentage of a facility's total annual operating hours during which emissions events occur; and

(6) the need for startup, shutdown, and maintenance activities.

(b) Non-excessive upset events. Upset events that are determined not to be excessive emissions events are subject to an affirmative defense to all claims in enforcement actions brought for these events, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the following:

(1) the owner or operator complies with the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements). In the event the owner or operator fails to report as required by §101.201(a)(2) or (3), (b), or (e) of this title, the commission will initiate enforcement for such failure to report and for the underlying emissions event itself. This subsection does not apply when there are minor omissions or inaccuracies that do not impair the commission's ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the unauthorized emissions were caused by a sudden, unavoidable breakdown of equipment or process, beyond the control of the owner or operator;

(3) the unauthorized emissions did not stem from any activity or event that could have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices or technically feasible design consistent with good engineering practice;

(4) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions and reducing the number of emissions events;

(5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable emission limitations were being exceeded, and any necessary repairs were made as expeditiously as practicable;

(6) the amount and duration of the unauthorized emissions and any bypass of pollution control equipment were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;

(7) all emission monitoring systems were kept in operation if possible;

(8) the owner or operator actions in response to the unauthorized emissions were documented by contemporaneous operation logs or other relevant evidence;

(9) the unauthorized emissions were not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance;

(10) the percentage of a facility's total annual operating hours during which unauthorized emissions occurred was not unreasonably high; and

(11) the unauthorized emissions did not cause or contribute to an exceedance of the national ambient air quality standards (NAAQS), prevention of significant deterioration (PSD) increments, or to a condition of air pollution.

(c) Unplanned maintenance, startup, or shutdown activity. Emissions from an unplanned maintenance, startup, or shutdown activity that are determined not to be excessive are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves the emissions were from an unplanned maintenance, startup, or shutdown activity, as defined in §101.1 of this title (relating to Definitions), and all of the following:

(1) for a scheduled maintenance, startup, or shutdown activity, the owner or operator complies with the requirements of §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements). For an unscheduled maintenance, startup, and shutdown activity, the owner or operator complies with the requirements of §101.201 of this title and demonstrates that reporting under §101.211(a) of this title was not reasonably possible. Failure to report information that does not impair the commission's ability to review the activity, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the periods of unauthorized emissions from any unplanned maintenance, startup, or shutdown activity could not have been prevented through planning and design;

(3) the unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(4) if the unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were caused by a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(5) the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing emissions;

(6) the frequency and duration of operation in an unplanned maintenance, startup, or shutdown mode resulting in unauthorized emissions were minimized and all possible steps were taken to minimize the impact of the unauthorized emissions on ambient air quality;

(7) all emissions monitoring systems were kept in operation if possible;

(8) the owner or operator actions during the period of unauthorized emissions from any unplanned maintenance, startup, or shutdown activity were documented by contemporaneous operating logs or other relevant evidence; and

(9) unauthorized emissions did not cause or contribute to an exceedance of the NAAQS, PSD increments, or a condition of air pollution.

(d) Excess opacity events. Excess opacity events due to an upset that are subject to §101.201(e) of this title, or for other opacity events where there was no emissions event, are subject to an affirmative defense to all claims in enforcement actions for these events, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the following:

(1) the owner or operator complies with the requirements of §101.201 of this title. Failure to report information that does not impair the commission's ability to review the event, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the opacity was caused by a sudden, unavoidable breakdown of equipment or process beyond the control of the owner or operator;

(3) the opacity did not stem from any activity or event that could have been foreseen and avoided or planned for, and could not have been avoided by better operation and maintenance practices or by technically feasible design consistent with good engineering practice;

(4) the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing opacity;

(5) prompt action was taken to achieve compliance once the operator knew or should have known that applicable opacity limitations were being exceeded and any necessary repairs were made as expeditiously as practicable;

(6) the amount and duration of the opacity event and any bypass of pollution control equipment were minimized and all possible steps were taken to minimize the impact of the opacity on ambient air quality;

(7) all emission monitoring systems were kept in operation if possible;

(8) the owner or operator actions in response to the opacity event were documented by contemporaneous operation logs or other relevant evidence;

(9) the opacity event was not part of a frequent or recurring pattern indicative of inadequate design, operation, or maintenance; and

(10) the opacity event did not cause or contribute to a condition of air pollution.

(e) Opacity events resulting from unplanned maintenance, startup, or shutdown activity. Excess opacity events, or other opacity events where there was no emissions event, that result from an unplanned maintenance, startup, or shutdown activity that are determined not to be excessive are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves the opacity resulted from an unplanned maintenance, startup, or shutdown activity, as defined in §101.1 of this title, and all of the following:

(1) for excess opacity events that result from a scheduled maintenance, startup, or shutdown activity, the owner or operator complies with the requirements of §101.211 of this title. For excess opacity events that result from an unscheduled maintenance, startup, and shutdown activity, the owner or operator complies with the requirements of §101.201 of this title and demonstrates that reporting pursuant to §101.211(a) of this title was not reasonably possible. Failure to report information that does not impair the commission's ability to review the event, such as minor omissions or inaccuracies, will not result in enforcement action and loss of opportunity to claim the affirmative defense, unless the owner or operator knowingly or intentionally falsified the information in the report;

(2) the opacity was caused by a sudden, unavoidable breakdown of equipment or process beyond the control of the owner or operator;

(3) the periods of opacity could not have been prevented through planning and design;

(4) the opacity was not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(5) if the opacity event was caused by a bypass of control equipment, the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(6) the facility and air pollution control equipment were operated in a manner consistent with good practices for minimizing opacity;

(7) the frequency and duration of operation in a startup or shutdown mode resulting in opacity were minimized;

(8) all emissions monitoring systems were kept in operation if possible;

(9) the owner or operator actions during the opacity event were documented by contemporaneous operating logs or other relevant evidence; and

(10) the opacity event did not cause or contribute to a condition of air pollution.

(f) Obligations. Subsections (b) - (e) and (h) of this section do not remove any obligations to comply with any other existing permit, rule, or order provisions that are applicable to an emissions event or a maintenance, startup, or shutdown activity. Any affirmative defense provided by subsections (b) - (e) and (h) applies only to violations of state implementation plan requirements. An affirmative defense cannot apply to violations of federally promulgated performance or technology based standards, such as those found in 40 Code of Federal Regulations Parts 60, 61, and 63. The affirmative defense is available only for emissions that have been reported or recorded.

(g) Frequent or recurring pattern. Evidence of any past event subject to subsections (b) - (e) of this section is admissible and relevant to demonstrate a frequent or recurring pattern of events, even if all of the criteria in that subsection are proven.

(h) Planned maintenance, startup, or shutdown activity. Unauthorized emissions or opacity events from a maintenance, startup, or shutdown activity that are not unplanned that have been reported or recorded in compliance with §101.211 of this title are subject to an affirmative defense to all claims in enforcement actions brought for these activities, other than claims for administrative technical orders and actions for injunctive relief, for which the owner or operator proves all of the criteria listed in subsection (c)(1) - (9) of this section for emissions, or subsection (e)(1) - (9) of this section for opacity events and the following:

(1) the owner or operator has filed an application to authorize the emissions or opacity by the following dates:

(A) for facilities in Standard Industrial Classification (SIC) code 2911 (Petroleum Refining), one year after the effective date of this section;

(B) for facilities in major group SIC code 28 (Chemicals and Allied Products), except SIC code 2895, two years after the effective date of this section;

(C) for facilities in SIC code 2895 (Carbon Black), four years after the effective date of this section;

(D) for facilities in SIC code 4911 (Electric Services), five years after the effective date of this section;

(E) for facilities in SIC codes 1311 (Crude Petroleum and Natural Gas), 1321 (Natural Gas Liquids), 4612 (Crude Petroleum Pipelines), 4613 (Refined Petroleum Pipelines), 4922 (Natural Gas Transmission), 4923 (Natural Gas Transmission and Distribution), six years after the effective date of this section; and

(F) for all other facilities, seven years after the effective date of this section.

(2) an owner or operator who filed an application listed in paragraph (1) of this subsection has provided prompt response for any requests by the executive director for information regarding that application.

(i) The affirmative defense in subsection (h) of this section will expire upon the earlier of one year after the application deadlines in subsection (h)(1)(A) and (C) - (F) of this section, or the issuance or denial of a permit applied for under subsection (h)(1)(A) and (C) - (F) of this section, or voidance of an application filed under subsection (h)(1)(A) and (C) - (F) of this section. The affirmative defense in subsection (h) of this section will expire upon the earlier of two years after the application deadline in subsection (h)(1)(B) of this section or the issuance or denial of a permit applied for under subsection (h)(1)(B) of this section, or voidance of an application filed under subsection (h)(1)(B) of this section. If the permit application remains pending after the affirmative defense expires, the commission will use enforcement discretion for all claims in enforcement actions brought for excess emissions from planned maintenance, startup, or shutdown activities, other than claims for administrative technical orders and actions for injunctive relief for which the owner or operator proves the criteria in subsections (c) and (e) of this section, until the issuance or denial of a permit applied for under subsection (h)(1) of this section, or voidance of an application filed under subsection (h)(1) of this section.

(j) The executive director shall process permit applications referenced in subsection (h) of this section in accordance with the schedule set out in §116.114 of this title (relating to Application Review Schedule).

(k) Federal court jurisdiction. Subsections (b) - (e) of this section are not intended to limit a federal court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action.

(l) Delayed applicability. Subsection (k) of this section does not apply until all appeals regarding the United States Environmental Protection Agency's rulemaking entitled "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," published in the *Federal Register* on June 12, 2015, as it applies to subsections (b) - (e) of this section, have extinguished and the applicable affirmative defense in subsections (b) - (e) of this section is prohibited.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2141

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

SUBCHAPTER C. NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES (FCAA, §112, 40 CFR PART 63)

30 TAC §§113.100, 113.120, 113.190, 113.200, 113.290, 113.300, 113.320, 113.330, 113.340, 113.350, 113.380, 113.430, 113.450, 113.560, 113.610, 113.640, 113.660, 113.670, 113.690, 113.700, 113.710, 113.720, 113.730, 113.750, 113.780, 113.810, 113.860, 113.1040, 113.1090, 113.1130, 113.1190, 113.1200, 113.1300, 113.1390

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§113.100, 113.120, 113.190, 113.200, 113.290, 113.300, 113.320, 113.330, 113.340, 113.350, 113.380, 113.430, 113.560, 113.610, 113.640, 113.660, 113.670, 113.690, 113.700, 113.710, 113.720, 113.730, 113.750, 113.780, 113.810, 113.860, 113.1040, 113.1090, 113.1130, 113.1300, and 113.1390; and new §§113.450, 113.1190, and 113.1200.

Background and Summary of the Factual Basis for the Proposed Rules

The proposed rules would revise Chapter 113 to incorporate by reference changes that the United States Environmental Protection Agency (EPA) has made to the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Source Categories, under 40 Code of Federal Regulations (CFR) Part 63. The EPA's changes to 40 CFR Part 63 include amendments to a number of existing NESHAPs, the addition of a new NESHAP covering Wool Fiberglass Manufacturing at area sources, and the promulgation of two NESHAPs which replaced standards previously vacated by court actions. Proposed Chapter 113 would incorporate by reference amendments and additions that the EPA made to the NESHAP under 40 CFR Part 63 as published through December 31, 2015.

The Federal Clean Air Act (FCAA) Amendments of 1990, §112, requires the EPA to develop national technology-based standards for new and existing sources of hazardous air pollutants (HAPs). The compounds which are considered to be HAPs are listed in FCAA, §112(b). These technology-based standards intended to control HAP emissions are commonly called maximum achievable control technology (MACT) and generally available control technology (GACT) standards. The MACT standards are required to be based on the maximum degree of emission control that is achievable, taking into consideration cost and any non-air quality health and environmental impacts and energy requirements. GACT standards reflect a less stringent level of control (relative to MACT) and are intended to be applied to non-major sources of HAPs, known as area sources. The EPA has the option to apply either MACT or GACT to area sources, at their discretion.

The proposed rules would incorporate amendments the EPA promulgated to 31 existing MACT and GACT standards for a variety of source categories. Many of the standards covered in this rulemaking were amended by the EPA as a result of FCAA requirements that the EPA periodically conduct risk assessments on each source category and determine if changes are needed to reduce residual risks or address developments in applicable control technology. Some standards were revised by the EPA in order to remove startup, shutdown, and malfunction (SSM)-related affirmative defense provisions which were vacated in *Natural Resources Defense Council v. Environmental Protection Agency,* 749 F. 3d 1055 (District of Columbia, Circuit (D.C. Cir.) 2014). In addition, EPA finalized new standards for brick and clay manufacturing to replace the 2003 standards vacated in *Sierra Club v. Environmental Protection Agency,* 479 F. 3d 875 (District of Columbia, Circuit (D.C. Cir.) 2007).

Under federal law, affected industries are required to implement the MACT and GACT standards regardless of whether the commission or the EPA is the agency responsible for implementation. As MACT and GACT standards are promulgated or amended by the EPA, the standards are reviewed by commission staff for compatibility with current commission regulations and policies. The commission then incorporates the standards, as appropriate, into Chapter 113 through formal rulemaking procedures. Unless otherwise noted, all incorporations by reference proposed in this rulemaking are without change (meaning that the standards are incorporated as published in the CFR, with no modifications to the text of the regulation being incorporated). After each MACT or GACT standard or amendment is adopted, the commission will seek formal delegation from the EPA under 40 CFR Part 63, Subpart E, Approval of State Programs and Delegation of Federal Authorities, which implements FCAA, §112(l). Upon delegation, the commission will be responsible for administering and enforcing the MACT or GACT requirements.

The commission proposes to incorporate the following amendments that the EPA has made to the 40 CFR Part 63, General Provisions, and the federal MACT and GACT standards previously incorporated into the commission rules, by updating the federal promulgation dates and *Federal Register* (FR) citations stated in the commission rules, as discussed more specifically in the Section by Section Discussion in this preamble. The 34 amended and new standards, along with their corresponding Chapter 113 sections and original incorporation dates if applicable, are listed in the following table (Figure: 30 TAC Chapter 113--Preamble).

Figure: 30 TAC Chapter 113--Preamble

The EPA is continually in the process of revising 40 CFR Part 63 MACT and GACT regulations, and the EPA may adopt additional changes to certain standards after the proposal date of this rulemaking. The commission provides notice that in addition to the changes specifically described in the Section by Section Discussion portion of this preamble, the commission will consider the incorporation by reference of any final amendments made by the EPA after the date the revisions to Chapter 113 are proposed. The commission solicits comment on the incorporation by reference of all final actions by the EPA, whether or not specifically identified in this notice, to facilitate state delegation and implementation of the final NESHAP.

Section by Section Discussion

§113.100, General Provisions (40 Code of Federal Regulations Part 63, Subpart A)

The commission proposes to amend §113.100 by incorporating by reference all amendments to 40 CFR Part 63, Subpart A, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart A, on June 25, 2013

(78 FR 37973); February 27, 2014 (79 FR 11228); March 27, 2014 (79 FR 17340); June 30, 2015 (80 FR 37366); August 19, 2015 (80 FR 50386); September 18, 2015 (80 FR 56700); October 15, 2015 (80 FR 62390); October 26, 2015 (80 FR 65470); December 1, 2015 (80 FR 75178); and December 4, 2015 (80 FR 75817).

The June 25, 2013, amendments to CFR Part 63, Subpart A, revised 40 CFR §63.13(a) to update the mailing address used to submit reports and correspondence to EPA Region VII. Although the change to the EPA Region VII mailing address does not affect states in EPA Region VI such as Texas, it is administratively more efficient to include this amendment than to specifically exclude it. The February 27, 2014, amendments added Methods 3A and 19 to the list of methods not requiring the use of audit samples in 40 CFR §63.7(c), corrected a reference to a section of Performance Specification 2 in 40 CFR §63.8(f)(6)(iii), and revised 40 CFR §63.14 to arrange the materials that are incorporated by reference in alpha-numeric order. The March 27, 2014, amendments revised 40 CFR §63.14 to incorporate various test methods and reference materials for use with 40 CFR Part 63, Subparts JJJ and PPP. The June 30, 2015, amendments revised 40 CFR §63.14 to incorporate various test methods and reference materials for use with 40 CFR Part 63, Subpart XXX. The August 19, 2015, amendments revised 40 CFR §63.14 to incorporate various test methods and reference materials for use with 40 CFR Part 63, Subparts AA and BB. The September 18, 2015, amendments revised 40 CFR §63.14 to incorporate various test methods and reference materials for use with 40 CFR Part 63, Subpart RRR. The October 15, 2015, amendments revised 40 CFR §63.14 to incorporate various test methods and reference materials for use with 40 CFR Part 63, Subpart LL. The October 26, 2015, amendments revised 40 CFR §63.14 to incorporate various test methods and reference materials for use with 40 CFR Part 63, Subparts JJJJJ and KKKKK. The December 1, 2015, amendments revised 40 CFR §63.14 to incorporate various test methods and reference materials for use with 40 CFR Part 63, Subparts Y, CC, and UUU. The December 4, 2015, amendments revised 40 CFR §63.14 to correct certain paragraph numbering errors which were published as part of the October 26, 2015, amendments to 40 CFR §63.14.

§113.120, Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater (40 Code of Federal Regulations Part 63, Subpart G)

The commission proposes to amend §113.120 by incorporating by reference all amendments to 40 CFR Part 63, Subpart G, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart G, on February 27, 2014 (79 FR 11228). The February 27, 2014, amendments revised 40 CFR Part 63, Subpart G, to allow the use of Method 316 or Method 8260B in the SW-846 Compendium of Methods to determine HAP concentrations in wastewater streams in 40 CFR §63.144(b)(5)(i).

§113.190, Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks (40 Code of Federal Regulations Part 63, Subpart N)

The commission proposes to amend §113.190 by incorporating by reference all amendments to 40 CFR Part 63, Subpart N, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart N, on February 27, 2014 (79 FR 11228). The February 27, 2014, amendments added South Coast Air Quality Management District Method 205.1 as a testing option for measuring total chromium.

§113.200, Ethylene Oxide Emissions Standards for Sterilization Facilities (40 Code of Federal Regulations Part 63, Subpart O)

The commission proposes to amend §113.200 by incorporating by reference all amendments to 40 CFR Part 63, Subpart O, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart O, on February 27, 2014 (79 FR 11228). The February 27, 2014, amendments added California Air Resources Board Method 431 as an alternative to the procedures in 40 CFR §63.365(b) for determining the efficiency at the sterilization chamber vent and corrected an error in a reference to a section in Performance Specification 8.

§113.290, Secondary Lead Smelting (40 Code of Federal Regulations Part 63, Subpart X)

The commission proposes to amend §113.290 by incorporating by reference all amendments to 40 CFR Part 63, Subpart X, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart X, on January 3, 2014 (79 FR 367). The January 3, 2014, amendments revised regulatory text to clarify compliance dates and clarify provisions related to monitoring of negative pressure in total enclosures. The amendments also corrected typographical errors in a table listing congeners of dioxins and furans and in the testing requirements for total hydrocarbons.

§113.300, Marine Vessel Loading (40 Code of Federal Regulations Part 63, Subpart Y)

The commission proposes to amend §113.300 by incorporating by reference all amendments to 40 CFR Part 63, Subpart Y, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart Y, on February 27, 2014 (79 FR 11228), and December 1, 2015 (80 FR 75178). The February 27, 2014, amendments added Method 25B as an alternative to Method 25A in 40 CFR §63.565(d)(5) for determining the average volatile organic compound (VOC) concentration upstream and downstream of recovery devices, added Method 25B as an alternative method for determining the percent reduction in VOC in 40 CFR §63.565(d)(8), and added Method 25B as an alternative to Method 25A in determining the baseline outlet VOC concentration in 40 CFR §63.565(g). The February 27, 2014, amendments also added a requirement that Method 25B be validated according to Method 301 in §63.565(d)(10). The December 1, 2015, amendments deleted the exclusion for marine vessel loading operations at petroleum refineries and required small marine vessel loading operations and offshore marine vessel loading operations to use submerged filling.

The commission also proposes to revise the title of §113.300 to "Marine Tank Vessel Loading Operations" to maintain consistency with the title of the corresponding federal regulation in 40 CFR 63, Subpart Y.

§113.320, Phosphoric Acid Manufacturing Plants (40 Code of Federal Regulations Part 63, Subpart AA)

The commission proposes to amend §113.320 by incorporating by reference all amendments to 40 CFR Part 63, Subpart AA, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart AA, on August 19, 2015 (80 FR 50386). The August 19, 2015, amendments finalized the EPA's residual risk and technology review for the Phosphoric Acid Manufacturing and Phosphate Fertilizer Production source categories. The amendments to 40 CFR Part 63, Subpart AA, in-

cluded: numeric emission limits for previously unregulated mercury (Hg) and total fluoride emissions from calciners; work practice standards for hydrogen fluoride (HF) emissions from previously unregulated gypsum dewatering stacks and cooling ponds; clarifications to the applicability and monitoring requirements to accommodate process equipment and technology changes; removal of the exemptions for SSM; adoption of work practice standards for periods of startup and shutdown; and revised recordkeeping and reporting requirements for periods of SSM.

§113.330, Phosphate Fertilizers Production Plants (40 Code of Federal Regulations Part 63, Subpart BB)

The commission proposes to amend §113.330 by incorporating by reference all amendments to 40 CFR Part 63, Subpart BB, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart BB, on August 19, 2015 (80 FR 50386). The August 19, 2015, amendments finalized the EPA's residual risk and technology review conducted for the Phosphoric Acid Manufacturing and Phosphate Fertilizer Production source categories. The amendments to 40 CFR Part 63, Subpart BB, included: clarifications to applicability and monitoring requirements to accommodate process equipment and technology changes; removal of the exemptions for SSM; adoption of work practice standards for periods of startup and shutdown; and revised recordkeeping and reporting requirements for periods of SSM. Additionally, the commission proposes to modify the title of §113.300 to "Marine Tank Vessel Loading Operations (40 Code of Federal Regulations Part 63, Subpart Y)."

§113.340, Petroleum Refineries (40 Code of Federal Regulations Part 63, Subpart CC)

The commission proposes to amend §113.340 by incorporating by reference all amendments to 40 CFR Part 63, Subpart CC, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart CC, on June 20, 2013 (78 FR 37133), and December 1, 2015 (80 FR 75178). The June 20, 2013, amendments revised the standards for heat exchange systems to include an alternative monitoring option that would allow owners and operators at existing sources to monitor quarterly instead of monthly. The June 20, 2013, amendments also revised the definition of heat exchange system to clarify the applicability of monitoring and repair provisions for individual heat exchangers within the heat exchange system. Finally, the June 20, 2013, amendments provided for monitoring at an aggregated location for once-through cooling water heat exchange systems, provided that the combined cooling water flow rate at the monitoring location does not exceed 40,000 gallons per minute.

The December 1, 2015, amendments finalized the residual risk and technology review the EPA conducted for the Petroleum Refinery source categories regulated under Refinery MACT 1 (40 CFR Part 63, Subpart CC) and Refinery MACT 2 (40 CFR Part 63, Subpart UUU). These amendments included expanded storage vessel emission control requirements, new provisions to require and support fenceline monitoring for benzene emissions, and revised standards for decoking operations and flares used as pollution control devices. The amendments also included work practice standards for minimizing emissions from pressure relief devices (PRDs), emergency flaring events, and maintenance work on process equipment containing HAP or VOC.

§113.350, Off-Site Waste and Recovery Operations (40 Code of Federal Regulations Part 63, Subpart DD)

The commission proposes to amend §113.350 by incorporating by reference all amendments to 40 CFR Part 63, Subpart DD, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart DD, on March 18, 2015 (80 FR 14248). The March 18, 2015, amendments finalized the EPA's residual risk and technology review conducted for the Off-Site Waste and Recovery Operations source category. These amendments revised storage tank requirements to require increased control of emissions for tanks in a specific size range that also contain material above a specified vapor pressure, and revised equipment leak requirements to remove the option to comply with 40 CFR Part 61, Subpart V, instead of 40 CFR Part 63, Subpart H. The amendments also revised the standards to eliminate the SSM exemption, so that the standards in this rule apply at all times. In addition, the March 18, 2015, amendments added requirements for reporting of performance testing through the Electronic Reporting Tool (ERT); revised routine maintenance provisions; clarified provisions pertaining to open-ended valves and lines; added monitoring requirements for PRDs; and clarified provisions for certain performance test methods and procedures.

§113.380, Aerospace Manufacturing and Rework Facilities (40 Code of Federal Regulations Part 63, Subpart GG)

The commission proposes to amend §113.380 by incorporating by reference all amendments to 40 CFR Part 63, Subpart GG, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart GG, on February 27, 2014 (79 FR 11228), and December 7, 2015 (80 FR 76152). The February 27, 2014, amendments removed an incorrect reference to the location of Method 319 in 40 CFR §63.750(o). The December 7, 2015, amendments finalized the EPA's residual risk and technology review conducted for this source category. The December 7, 2015, amendments added limitations to reduce organic and inorganic emissions of HAP from specialty coating operations; removed exemptions for periods of SSM so that affected units will be subject to the emission standards at all times; and revised provisions to address recordkeeping and reporting requirements applicable to SSM. The December 7, 2015, amendments also added a requirement to report performance testing through the EPA's Compliance and Emissions Data Reporting Interface (CEDRI), and revised rule language to clarify applicability and compliance demonstration provisions.

§113.430, Primary Aluminum Reduction Plants (40 Code of Federal Regulations Part 63, Subpart LL)

The commission proposes to amend §113.430 by incorporating by reference all amendments to 40 CFR Part 63, Subpart LL, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart LL, on October 15, 2015 (80 FR 62390). The October 15, 2015, amendments finalized the EPA's residual risk and technology review conducted for the Primary Aluminum Production source category. These amendments included technology-based standards and work practice standards reflecting performance of MACT, and related monitoring, reporting, and testing requirements for several previously unregulated HAPs from various emissions sources. The amendments also finalized new and revised emission standards for certain HAP emissions from potlines using the Soderberg technology, added a requirement for electronic reporting of compliance data, and eliminated the exemptions for periods of SSM.

§113.450, Wool Fiberglass Manufacturing at Area Sources (40 Code of Federal Regulations Part 63, Subpart NN)

The commission proposes new §113.450, which would incorporate by reference the final promulgated rules in 40 CFR Part

63, Subpart NN, adopted by the EPA on July 29, 2015 (80 FR 45280). This GACT standard applies to facilities which manufacture wool fiberglass that are area sources. HAPs emitted from these facilities include chromium compounds, formaldehyde, methanol, and phenol.

§113.560, Generic Maximum Achievable Control Technology Standards (40 Code of Federal Regulations Part 63, Subpart YY)

The commission proposes to amend §113.560 by incorporating by reference all amendments to 40 CFR Part 63, Subpart YY, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart YY, on October 8, 2014 (79 FR 60898). The October 8, 2014, amendments finalized the EPA's residual risk and technology review conducted for the Acrylic and Modacrylic Fibers Production, Amino/Phenolic Resins Production and Polycarbonate Production source categories. The amendments revised the standards to require facilities to comply with the leak detection and repair requirements of 40 CFR Part 63, Subpart UU, rather than 40 CFR Part 63, subpart TT, with the exception of connectors in gas and vapor service and in light liquid service. The amendments also established standards for previously unregulated HAP emissions from spinning lines that use a spin dope produced from a solution polymerization process at existing facilities. Finally, the amendments revised requirements for PRDs, revised reporting requirements to provide for electronic reporting of certain performance test information, and eliminated the SSM exemption.

§113.610, Mineral Wool Production (40 Code of Federal Regulations Part 63, Subpart DDD)

The commission proposes to amend §113.610 by incorporating by reference all amendments to 40 CFR Part 63, Subpart DDD, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart DDD, on July 29, 2015 (80 FR 45280). The July 29, 2015, amendments finalized the EPA's residual risk and technology reviews conducted for the Mineral Wool Production and Wool Fiberglass Manufacturing source categories. The amendments to 40 CFR Part 63, Subpart DDD, included the removal of formaldehyde as a surrogate for phenol and methanol and the removal of carbon monoxide as a surrogate for carbonyl sulfide (COS). The amendments also revised cupola emission limits for COS, hydrochloric acid (HCl), and HF and finalized emission limits for formaldehyde, methanol, and phenol for bonded lines. In addition, the amendments allowed the use of EPA Methods 26A and 320 for measuring concentrations of HCl and HF, revised various performance testing requirements, added requirements for reporting of performance testing through the ERT, and added several definitions to clarify terminology used in the standards. These amendments also eliminated the SSM exemption and established work practice standards for periods of startup and shutdown.

§113.640, Pharmaceuticals Production (40 Code of Federal Regulations Part 63, Subpart GGG)

The commission proposes to amend §113.640 by incorporating by reference all amendments to 40 CFR Part 63, Subpart GGG, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart GGG, on February 27, 2014 (79 FR 11228). The February 27, 2014, amendments revised the 40 CFR §63.1251 definition of process vent to allow Method 320 as an alternative to Method 18 for demonstrating that a vent is not a process vent.

§113.660, Flexible Polyurethane Foam Production (40 Code of Federal Regulations Part 63, Subpart III)

The commission proposes to amend §113.660 by incorporating by reference all amendments to 40 CFR Part 63, Subpart III, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart III, on August 15, 2014 (79 FR 48073). The August 15, 2014, amendments finalized the EPA's residual risk and technology review conducted for the Flexible Polyurethane Foam (FPUF) Production source category. The amendments added a prohibition on the use of HAP or HAP-based products as auxiliary blowing agents for all slabstock FPUF production operations, eliminated the SSM exemption so that the standards apply at all times, added requirements for electronic reporting of performance testing through the ERT, clarified the leak detection methods allowed for diisocyanate storage vessels at slabstock foam production facilities, and added a schedule for delay of leak repairs for valves and connectors.

§113.670, Group IV Polymers and Resins (40 Code of Federal Regulations Part 63, Subpart JJJ)

The commission proposes to amend §113.670 by incorporating by reference all amendments to 40 CFR Part 63, Subpart JJJ, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart JJJ, on March 27, 2014 (79 FR 17340). The March 27, 2014, amendments finalized the EPA's residual risk and technology review conducted for the Group IV Polymers and Resins source category. The amendments added language to require electronic reporting of performance test results, added a requirement to monitor PRDs in organic HAP service, and eliminated the SSM exemption so that emission standards would apply at all times. In addition, the amendments addressed certain emissions that were not previously regulated, provided for alternative compliance demonstration methods during periods of startup and shutdown, and lifted the stay of requirements for process contact cooling towers at existing sources in one Polymers and Resins subcategory.

§113.690, Portland Cement Manufacturing Industry (40 Code of Federal Regulations Part 63, Subpart LLL)

The commission proposes to amend §113.690 by incorporating by reference all amendments to 40 CFR Part 63, Subpart LLL, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart LLL, on July 27, 2015 (80 FR 44772). The July 27, 2015, amendments clarified the definitions of rolling average, operating day, and run average; restored a table of emission limits which apply until September 9, 2015; provided a scaling alternative for sources that have a wet scrubber, tray tower, or dry scrubber relative to the HCl compliance demonstration; added a temperature parameter to the startup and shutdown requirements; and clarified language related to span values for Hg and HCl measurements. The amendments also removed an affirmative defense provision from the rule which was vacated by a court action and corrected a number of typographical and grammatical errors and errors in various dates.

§113.700, Pesticide Active Ingredient Production (40 Code of Federal Regulations Part 63, Subpart MMM)

The commission proposes to amend §113.700 by incorporating by reference all amendments to 40 CFR Part 63, Subpart MMM, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart MMM, on March 27, 2014 (79 FR 17340). The March 27, 2014, amendments finalized the EPA's residual risk and technology review conducted for this

source category. The amendments clarified that sources may submit a precompliance plan to request alternative compliance options after the compliance date has passed or construction or preconstruction applications have already been submitted. The amendments also clarified provisions for packed-bed scrubbers in 40 CFR §63.1366(b)(1)(ii), and revised the definition for "pesticide active ingredient." In addition, the amendments added language to require electronic reporting of performance test results, added a requirement to monitor PRDs in organic HAP service, and eliminated the SSM exemption so that emissions standards would apply at all times. The amendments also revised Table 1 of 40 CFR Part 63, Subpart MMM, (the General Provisions applicability table), in several respects relating to SSM requirements.

§113.710, Wool Fiberglass Manufacturing (40 Code of Federal Regulations Part 63, Subpart NNN)

The commission proposes to amend §113.710 by incorporating by reference all amendments to 40 CFR Part 63, Subpart NNN, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart NNN, on July 29, 2015 (80 FR 45280). The July 29, 2015, amendments finalized the EPA's residual risk and technology reviews conducted for the Mineral Wool Production and Wool Fiberglass Manufacturing source categories. The amendments to 40 CFR Part 63, Subpart NNN, included revised chromium and particulate matter (PM) emission limits for certain sources, new pollutant-specific emissions limits for HAPs such as methanol and phenol that were previously regulated under the surrogate compound formaldehyde, and established new emission limits for certain other HAPs that were previously unregulated. The amendments also finalized first-time GACT standards for gas-fired glass-melting furnaces at area sources, added requirements for electronically reporting performance test results through the ERT, eliminated the SSM exemption, and established revised work practice standards for periods of startup and shutdown.

§113.720, Manufacture of Amino/Phenolic Resins (40 Code of Federal Regulations Part 63, Subpart OOO)

The commission proposes to amend §113.720 by incorporating by reference all amendments to 40 CFR Part 63, Subpart OOO, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart OOO, on October 8, 2014 (79 FR 60898). The October 8, 2014, amendments finalized the EPA's residual risk and technology reviews conducted for the Acrylic and Modacrylic Fibers Production, Amino/Phenolic Resins Production (APR) and Polycarbonate Production source categories. The amendments to 40 CFR Part 63, Subpart OOO, revised the applicability of the APR new source MACT standards to include smaller capacity storage vessels and storage vessels containing liquids with lower vapor pressures. The amendments also clarified that pressure releases from PRDs in organic HAP service to the atmosphere are prohibited and specified provisions for monitoring PRDs in HAP service. In addition, the amendments established standards for certain previously-unregulated HAP emissions from storage vessels and continuous process vents at existing facilities. The amendments also added requirements for electronically reporting performance test results through the ERT and eliminated the SSM exemption.

§113.730, Polyether Polyols Production (40 Code of Federal Regulations Part 63, Subpart PPP)

The commission proposes to amend §113.730 by incorporating by reference all amendments to 40 CFR Part 63, Subpart PPP, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart PPP, on March 27, 2014 (79 FR 17340). The March 27, 2014, amendments finalized the EPA's residual risk and technology review conducted for this source category. The amendments to 40 CFR Part 63, Subpart PPP, clarified that pressure releases from PRDs in organic HAP service to the atmosphere are prohibited, and specified provisions for monitoring PRDs in HAP service. The amendments also clarified requirements for precompliance reports, added requirements for electronically reporting performance test results through the ERT, eliminated the SSM exemption, and revised associated SSM requirements.

§113.750, Secondary Aluminum Production (40 Code of Federal Regulations Part 63, Subpart RRR)

The commission proposes to amend §113.750 by incorporating by reference all amendments to 40 CFR Part 63, Subpart RRR, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart RRR, on February 27, 2014 (79 FR 11228), and September 18, 2015 (80 FR 56700). The February 27, 2014, amendments added Method 26 as an alternative to Method 26A for determining HCl concentration. The September 18, 2015, amendments finalized the EPA's residual risk and technology review conducted for this source category. These amendments revised rule language to clarify applicability of certain rule provisions to area sources and added or revised certain technical definitions. The amendments also provided criteria for changing furnace classifications and established an allowed frequency of such changes. In addition, the amendments eliminated the SSM exemption and revised associated SSM requirements, revised various provisions relating to performance testing, and added requirements for electronically reporting performance test results through the ERT.

§113.780, Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units (40 Code of Federal Regulations Part 63, Subpart UUU)

The commission proposes to amend §113.780 by incorporating by reference all amendments to 40 CFR Part 63, Subpart UUU, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart UUU, on December 1, 2015 (80 FR 75178). The December 1, 2015, amendments finalized the EPA's residual risk and technology review conducted for this source category. These amendments removed the incremental PM limit when burning liquid or solid fuels and finalized a 20% opacity limit based on a three-hour average. The amendments also added an option for bag leak detectors to be used as an alternative to a continuous opacity monitoring system, and added requirements for daily checks of the air or water pressure to spray nozzles on wet scrubbers. In addition, the amendments required periodic fluid catalytic cracking unit performance testing at a frequency of once every five years and incorporated enhanced flare operational requirements directly into the Refinery MACT. The amendments also eliminated the SSM exemption and revised associated SSM requirements, established alternative emission standards for certain startup and shutdown situations, and added requirements for reporting performance test results through the ERT.

§113.810, Ferroalloys Production: Ferromanganese and Silicomanganese (40 Code of Federal Regulations Part 63, Subpart XXX)

The commission proposes to amend §113.810 by incorporating by reference all amendments to 40 CFR Part 63, Subpart XXX, since this section was last amended. During this period, the EPA

amended 40 CFR Part 63, Subpart XXX, on June 30, 2015 (80 FR 37366). The June 30, 2015, amendments finalized the EPA's residual risk and technology review conducted for this source category. The amendments revised PM standards for electric arc furnaces, metal oxygen refining processes, and crushing and screening operations and expanded requirements to control process fugitive emissions from furnace operations, tapping, casting, and other processes. The amendments also finalized opacity limits and established required monitoring using a digital camera opacity technique in lieu of Method 9. The amendments also finalized emission standards for certain previously unregulated HAPs (formaldehyde, HCl, Hg, and polycyclic aromatic hydrocarbons). In addition, the amendments eliminated the SSM exemption and added requirements for reporting performance test results through the ERT.

§113.860, Manufacturing of Nutritional Yeast (40 CFR Part 63, Subpart CCCC)

The commission proposes to amend §113.860 by incorporating by reference all amendments to 40 CFR Part 63, Subpart CCCC, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart CCCC, on February 27, 2014 (79 FR 11228). The February 27, 2014, amendments revised Table 2 of 40 CFR Part 63, Subpart CCCC, to delete the requirement to use Methods 1, 2, 3, and 4 when measuring VOC by Method 25A. The commission also proposes to revise this section title for consistency with other sections in this subchapter, by using the full term "Code of Federal Regulations" rather than the acronym "CFR."

§113.1040, Cellulose Products Manufacturing (40 Code of Federal Regulations Part 63, Subpart UUUU)

The commission proposes to amend §113.1040 by incorporating by reference all amendments to 40 CFR Part 63, Subpart UUUU, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart UUUU, on February 27, 2014 (79 FR 11228). The February 27, 2014, amendments revised Table 4 of 40 CFR Part 63, Subpart UUUU, to allow Method 320 as an alternative to Method 18 for determining control device efficiency.

§113.1090, Reciprocating Internal Combustion Engines (40 Code of Federal Regulations Part 63, Subpart ZZZZ)

The commission proposes to amend §113.1090 by incorporating by reference all amendments to 40 CFR Part 63, Subpart ZZZZ, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart ZZZZ, on March 6, 2013 (78 FR 14457), and February 27, 2014 (79 FR 11228). The March 6, 2013, amendments corrected several typographical errors in Table 2c of 40 CFR Part 63, Subpart ZZZZ. The February 27, 2014, amendments revised Table 4 of 40 CFR Part 63, Subpart ZZZZ, to clarify that a heated probe is not necessary when using ASTM D6522 to measure oxygen or carbon dioxide concentrations and deleted the requirement to use Method 1 or 1A when testing gaseous emissions from engines with smaller ducts.

§113.1130, Industrial, Commercial, and Institutional Boilers and Process Heaters Major Sources (40 Code of Federal Regulations Part 63, Subpart DDDDD)

The commission proposes to amend §113.1130 by incorporating by reference all amendments to 40 CFR Part 63, Subpart DDDDD, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart DDDDD, on November 20, 2015 (80 FR 72790). The November 20, 2015, amendments revised the definitions of startup and shutdown and revised the work practice standards which apply during these periods. The amendments also removed affirmative defense provisions which applied during periods of malfunction. In addition, the amendments included a number of technical corrections, clarifications, and corrections of various typographical errors.

§113.1190, Brick and Structural Clay Products Manufacturing (40 Code of Federal Regulations Part 63, Subpart JJJJJ)

The commission proposes new §113.1190 by incorporating by reference the final promulgated rules in 40 CFR Part 63, Subpart JJJJJ, adopted by the EPA on October 26, 2015 (80 FR 65470). This MACT standard applies to brick and structural clay production facilities which are major sources. Brick and structural clay product manufacturing facilities typically process raw clay and shale, form the processed materials into bricks or shapes, and dry and fire the bricks or shapes. HAPs emitted from these facilities include Hg, non-Hg metal HAPs, and acid gases such as HF, hydrogen chloride, and chlorine. The standards adopted by the EPA on October 26, 2015, that are proposed to be incorporated into §113.1190, were developed in response to a 2007 court action which vacated the original brick and structural clay MACT standards adopted by the EPA in 2003 *(Sierra Club v. EPA,* 479 F.3d 875, 876 (D.C. Cir. 2007)).

§113.1200, Clay Ceramics Manufacturing (40 Code of Federal Regulations Part 63, Subpart KKKKK)

The commission proposes new §113.1200 by incorporating by reference the final promulgated rules in 40 CFR Part 63, Subpart KKKKK, adopted by the EPA on October 26, 2015 (80 FR 65470), as amended December 4, 2015 (80 FR 75817). This MACT standard applies to clay production facilities which are major sources. The Clay Ceramics Manufacturing source category includes facilities that manufacture pressed floor tile, pressed wall tile, and other pressed tile; or sanitaryware such as toilets and sinks. HAPs emitted from these facilities include Hg, non-Hg metal HAPs, dioxins, furans, and acid gases such as HF, HCl, and chlorine. The standards adopted by the EPA on October 26, 2015, that are proposed to be incorporated into §113.1200, were developed in response to a 2007 court action which vacated the original clay ceramics manufacturing MACT standard adopted by the EPA in 2003 *(Sierra Club v. EPA,* 479 F.3d 875, 876 (D.C. Cir. 2007)). The December 4, 2015, amendments corrected minor typographical errors in the standards.

§113.1300, Coal- and Oil-Fired Electric Utility Steam Generating Units (40 Code of Federal Regulations Part 63, Subpart UUUUU)

The commission proposes to amend §113.1300 by incorporating by reference all amendments to 40 CFR Part 63, Subpart UUUUU, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart UUUUU, on November 19, 2014 (79 FR 68777) and March 24, 2015 (80 FR 15510). The November 19, 2014, amendments revised numerous startup and shutdown-related provisions, including clarifications to certain definitions relating to startup and shutdown, and finalized an alternative work practice compliance option for startup and shutdown periods. The March 24, 2015, amendments required owners or operators of affected sources to submit certain required emissions and compliance reports to the EPA through the Emissions Collection and Monitoring Plan System Client Tool, and the amendments temporarily suspended the

requirement for owners or operators of affected sources to submit certain reports using the CEDRI.

§113.1390, Polyvinyl Chloride and Copolymers Production Area Sources (40 Code of Federal Regulations Part 63, Subpart DDDDDD)

The commission proposes to amend §113.1390 by incorporating by reference all amendments to 40 CFR Part 63, Subpart DDDDDD, since this section was last amended. During this period, the EPA amended 40 CFR Part 63, Subpart DDDDDD, on February 4, 2015 (80 FR 5938). The February 4, 2015, amendments withdrew the total non-vinyl chloride organic HAP process wastewater emission standards for new and existing polyvinyl chloride and copolymers area sources.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rules would incorporate by reference changes that the EPA has made to the NESHAP. The EPA's changes include amendments to 31 existing NESHAPs, the addition of a new NESHAP covering Wool Fiberglass Manufacturing at Area Sources, and the promulgation of two NESHAP which replaced standards previously vacated by court actions. The amended and new federal regulations need to be incorporated by reference into Chapter 113, Subchapter C in order to: avoid inconsistency between the federal and state rules; allow the commission to enforce MACT and GACT standards prior to receiving formal delegation of the new standards; facilitate delegation of the new MACT and GACT standards from the EPA; and to maintain existing delegation. Chapter 113 has undergone similar updates and amendments in 2013, 2007, 2005, 2003, 2000, 1999, 1998, and 1997. The proposed rules do not impose fees and do not require additional agency resources or procedures.

The proposed changes to Chapter 113 are not expected to have significant fiscal implications for TCEQ or for other units of state and local government. Facilities subject to the amended or new MACT or GACT standards are required to comply with these federal standards whether or not the commission incorporates these rules into Chapter 113. Although there will be some minor Title V federal operating permit activity necessary to update permits at sources affected by the three new MACT standards, no increase in staffing or fees are necessary to accommodate those simple permit changes. Enforcement of the proposed rules may result in some additional workload for agency staff, but it is anticipated that the agency will reallocate existing resources to meet this need. The proposed rules are not anticipated to add additional costs to the regulated community beyond what is already required to comply with the federal standards and associated federal requirements.

Public Benefits and Costs

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be: compliance with federal law, increased consistency between federal and state air quality regulations, and the maintenance of TCEQ's existing and future delegation for MACT or GACT standards.

The proposed rules are not anticipated to result in fiscal implications for businesses or individuals. The proposed changes to Chapter 113 are not anticipated to add additional costs to the regulated community beyond what is already required to comply with the federal standards. Sources affected by the MACT or GACT rules are already required to comply with these standards and therefore, fiscal implications, if any, are anticipated to be minimal as a result of their incorporation into state rules.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect for small or micro-businesses. The federal MACT and GACT amendments and new standards which would be incorporated by reference in this rulemaking may apply to some small businesses, particularly in the brick or structural clay manufacturing category. However, these federal standards apply regardless of whether or not the proposed changes to Chapter 113 are adopted.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are necessary under federal law and do not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking in light of the Regulatory Impact Analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a RIA.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of these proposed rules is to adopt amendments to a number of existing NESHAPs incorporated into Chapter 113 and adopt incorporations of three NESHAPs not yet incorporated into Chapter 113, two of which replaced standards previously vacated by court actions. The NESHAPs are promulgated by the EPA for source categories mandated by 42 United States Code (USC), §7412 and are required to be included in operating permits by 42 USC, §7661a. These NESHAPs are technology-based standards commonly referred to as MACT or GACT standards which the EPA develops to regulate emissions of HAPs as required under the FCAA. Certain sources of HAPs will be affected and stationary sources are required to comply with federal standards whether or not the commission adopts the standards or takes delegation from the EPA. As discussed in the Fiscal Note portion of this preamble, the proposed rules are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with federal MACT or GACT standards on the economy, a sector of the econ-

omy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Additionally, the rulemaking does not meet any of the four applicability criteria for requiring a RIA for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

Under 42 USC, §7661a, 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 NESHAPs, which are required under 42 USC, §7412. Similar to requirements in 42 USC, §7410, 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 USC, §7661a, and must develop and submit programs to provide for operating permits for major sources that include all applicable requirements of the FCAA.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB or bill) 633 during the 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct a RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission in order to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the proposed 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 proposed rules do not modify the federal NESHAP, but are incorporations by reference, which do not change the federal requirements.

For these reasons, the proposed 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 un-amended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *(Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ) superseded by statute on another point of law, Texas Tax Code, §112.108, Other Actions Prohibited, as recognized in, *First State Bank of Dumas v. Sharp,* 863 S.W. 2d 81, 83, (Tex. App. Austin 1993, no writ.); *Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Berry v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).)

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (See Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rules implement requirements of the FCAA. The NESHAP standards being incorporated into state law are federal technology-based standards that are required by 42 USC, §7412, required to be included in permits under 42 USC, §7661a, proposed to be adopted by reference without modification or substitution, and will not exceed any standard set by state or federal law. These rules are not an express requirement of state law. The proposed rules do not exceed a requirement of a delegation agreement or a contract between state and federal government, as the EPA delegates the NESHAP to Texas in accordance with the delegation procedures codified in 40 CFR Part 63. The amendments 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 proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public com-

ment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) 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 Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) 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 (ii) 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 proposed rulemaking action under the Texas Government Code, §2007.043. The specific intent of these proposed rules is to adopt amendments to a number of existing NESHAPs incorporated into Chapter 113 and adopt incorporations of three NESHAPs not yet incorporated into Chapter 113. The NESHAPs are promulgated by the EPA for source categories mandated by 42 USC, §7412 and required to be included in operating permits by 42 USC, §7661a. These NESHAPs are technology-based standards commonly referred to as MACT or GACT standards which the EPA develops to regulate emissions of HAPs as required under the FCAA. Certain sources of HAPs will be affected and stationary sources are required to comply with federal standards whether or not the commission adopts the standards or takes delegation from the EPA. The proposed rules will not create any additional burden on private real property. Under federal law, the affected industries will be required to comply with the NESHAPs regardless of whether the commission or the EPA is the agency responsible for implementation of the NESHAPs. The proposed 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 proposal 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 proposed rulemaking will not cause a taking under the Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal 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 proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this proposed rulemaking action 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(1), Goals). The CMP policy applicable to this rulemaking action 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, Policies for Emission of Air Pollutants). The proposed rules would incorporate federal regulations concerning emissions of HAPs from certain industries into Chapter 113, allowing the commission to enforce those standards. This would tend to benefit the environment because it would result in lower emissions of HAPs. Therefore, in accordance with 31 TAC §505.22(e), Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program, the commission affirms that this rulemaking is consistent with CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 113 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed rules are adopted, owners or operators subject to the Federal Operating Permits Program must, consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permits to include the new Chapter 113 requirements. In addition, owners and operators of area sources should be aware that federal rules require certain area source categories to obtain a federal operating permit.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 18, 2016, at 2:00 PM, in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087

or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www1.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-032-113-AI. The comment period closes on August 22, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html*. For further information, please contact Michael Wilhoit, Air Permits Division, (512) 239-1222.

Statutory Authority

The amendments and new sections are proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC. The amendments and new sections are also proposed under Texas Healthy and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning the 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, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the Texas Clean Air Act; and THSC, §382.051, concerning Permitting Authority of the 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 proposed amendments and new sections implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051.

§113.100. General Provisions (40 Code of Federal Regulations Part 63, Subpart A).

The General Provisions for the National Emission Standards for Hazardous Air Pollutants for Source Categories as specified in 40 Code of Federal Regulations (CFR) Part 63, Subpart A, are incorporated by reference as amended through December 4, 2015 (80 FR 75817), [~~February 1, 2013 (78 FR 7488)~~] with the following exceptions.

(1) The language of 40 CFR §63.5(e)(2)(i) is amended to read as follows: The executive director will notify the owner or operator in writing of approval or intention to deny approval of construction or reconstruction within 180 calendar days after receipt of sufficient information to evaluate an application submitted under 40 CFR §63.5(d). The 180-day approval or denial period will begin after the owner or operator has been notified in writing that the application is complete. The executive director will notify the owner or operator in writing of the status of the application, that is, whether the application contains sufficient information to make a determination, within 90 calendar days after receipt of the original application and within 60 calendar days after receipt of any supplementary information that is submitted.

(2) The language of 40 CFR §63.6(i)(12)(i) is amended to read as follows: The executive director will notify the owner or operator in writing of approval or intention to deny approval of a request for an extension of compliance within 60 calendar days after receipt of sufficient information to evaluate a request submitted under 40 CFR §63.6(i)(4)(i) or (i)(5). The 60-day approval or denial period will begin after the owner or operator has been notified in writing that the application is complete. The executive director will notify the owner or operator in writing of the status of the application, that is, whether the application contains sufficient information to make a determination, within 30 calendar days after receipt of the original application and within 30 calendar days after receipt of any supplementary information that is submitted.

(3) The language of 40 CFR §63.6(i)(13)(i) is amended to read as follows: The executive director will notify the owner or operator in writing of approval or intention to deny approval of a request for an extension of compliance within 60 calendar days after receipt of sufficient information to evaluate a request submitted under 40 CFR §63.6(i)(4)(ii). The 60-day approval or denial period will begin after the owner or operator has been notified in writing that the application is complete. The executive director will notify the owner or operator in writing of the status of the application, that is, whether the application contains sufficient information to make a determination, within 30 calendar days after receipt of the original application and within 30 calendar days after receipt of any supplementary information that is submitted.

(4) The language of 40 CFR §63.6(i)(13)(ii) is amended to read as follows: When notifying the owner or operator that the application is not complete, the executive director will specify the information needed to complete the application and provide notice of opportunity for the applicant to present, in writing, within 30 calendar days after they are notified of the incomplete application, additional information, or arguments to the executive director to enable further action on the application.

(5) The language of 40 CFR §63.8(e)(5)(ii) is amended to read as follows: The owner or operator of an affected source using a Continuous Opacity Monitoring System (COMS) to determine opacity compliance during any performance test required under §63.7 and described in §63.6(d)(6) shall furnish the executive director two or, upon request, three copies of a written report of the results of the COMS performance evaluation under this paragraph. The copies shall be provided at least 30 calendar days before the performance test required under §63.7 is conducted.

(6) The language of 40 CFR §63.9(i)(3) is amended to read as follows: If, in the executive director's judgment, an owner or operator's request for an adjustment to a particular time period or postmark deadline is warranted, the executive director will approve the adjustment. The executive director will notify the owner or operator in writing of approval or disapproval of the request for an adjustment within 30 calendar days of receiving sufficient information to evaluate the request.

(7) The language of 40 CFR §63.10(e)(2)(ii) is amended to read as follows: The owner or operator of an affected source using a COMS to determine opacity compliance during any performance test required under §63.7 and described in §63.6(d)(6) shall furnish the executive director two or, upon request, three copies of a written report of the results of the COMS performance evaluation conducted under §63.8(e). The copies shall be furnished at least 30 calendar days before the performance test required under §63.7 is conducted.

§113.120. Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater (40 Code of Federal Regulations Part 63, Subpart G).

The Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater Maximum Achievable Control Technology standard as specified in 40 Code

of Federal Regulations Part 63, Subpart G, is incorporated by reference as amended through February 27, 2014 (79 FR 11228) [~~December 22, 2008 (73 FR 78199)~~].

§113.190. Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks (40 Code of Federal Regulations Part 63, Subpart N).

The Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart N, is incorporated by reference as amended through February 27, 2014 (79 FR 11228) [~~September 19, 2012 (77 FR 58220)~~].

§113.200. Ethylene Oxide Emissions Standards for Sterilization Facilities (40 Code of Federal Regulations Part 63, Subpart O).

The Ethylene Oxide Emissions Standards for Sterilization Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart O, is incorporated by reference as amended through February 27, 2014 (79 FR 11228) [~~December 19, 2005 (70 FR 75320)~~].

§113.290. Secondary Lead Smelting (40 Code of Federal Regulations Part 63, Subpart X).

The Secondary Lead Smelting Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart X, is incorporated by reference as amended through January 3, 2014 (79 FR 367) [~~January 5, 2012 (77 FR 556)~~].

§113.300. Marine Tank Vessel Loading Operations (40 Code of Federal Regulations Part 63, Subpart Y).

The Marine Tank Vessel Loading Operations Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart Y, is incorporated by reference as amended through December 1, 2015 (80 FR 75178) [~~April 21, 2011 (76 FR 22566)~~].

§113.320. Phosphoric Acid Manufacturing Plants (40 Code of Federal Regulations Part 63, Subpart AA).

The Phosphoric Acid Manufacturing Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart AA, is incorporated by reference as amended through August 19, 2015 (80 FR 50386) [~~April 20, 2006 (71 FR 20446)~~].

§113.330. Phosphate Fertilizers Production Plants (40 Code of Federal Regulations Part 63, Subpart BB).

The Phosphate Fertilizers Production Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart BB, is incorporated by reference as amended through August 19, 2015 (80 FR 50386) [~~April 20, 2006 (71 FR 20446)~~].

§113.340. Petroleum Refineries (40 Code of Federal Regulations Part 63, Subpart CC).

The Petroleum Refineries Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart CC, is incorporated by reference as amended through December 1, 2015 (80 FR 75178) [~~June 30, 2010 (75 FR 37730)~~].

§113.350. Off-Site Waste and Recovery Operations (40 Code of Federal Regulations Part 63, Subpart DD).

The Off-Site Waste and Recovery Operations Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart DD, is incorporated by reference as amended through March 18, 2015 (80 FR 14248) [~~April 20, 2006 (71 FR 20446)~~].

§113.380. Aerospace Manufacturing and Rework Facilities (40 Code of Federal Regulations Part 63, Subpart GG).

The Aerospace Manufacturing and Rework Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart GG, is incorporated by reference as amended through December 7, 2015 (80 FR 76152) [~~April 20, 2006 (71 FR 20446)~~].

§113.430. Primary Aluminum Reduction Plants (40 Code of Federal Regulations Part 63, Subpart LL).

The Primary Aluminum Reduction Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart LL, is incorporated by reference as amended through October 15, 2015 (80 FR 62390) [~~April 20, 2006 (71 FR 20446)~~].

§113.450. Wool Fiberglass Manufacturing at Area Sources (40 Code of Federal Regulations Part 63, Subpart NN).

The Wool Fiberglass Manufacturing at Area Sources Generally Available Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart NN, is incorporated by reference as adopted July 29, 2015 (80 FR 45280).

§113.560. Generic Maximum Achievable Control Technology Standards (40 Code of Federal Regulations Part 63, Subpart YY).

The Generic Maximum Achievable Control Technology Standards as specified in 40 Code of Federal Regulations Part 63, Subpart YY, is incorporated by reference as amended through October 8, 2014 (79 FR 60898) [~~June 29, 2007 (72 FR 35663)~~].

§113.610. Mineral Wool Production (40 Code of Federal Regulations Part 63, Subpart DDD).

The Mineral Wool Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart DDD, is incorporated by reference as amended through July 29, 2015 (80 FR 45280) [~~December 1, 2011 (76 FR 74708)~~].

§113.640. Pharmaceuticals Production (40 Code of Federal Regulations Part 63, Subpart GGG).

The Pharmaceuticals Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart GGG, is incorporated by reference as amended through February 27, 2014 (79 FR 11228) [~~April 21, 2011 (76 FR 22566)~~].

§113.660. Flexible Polyurethane Foam Production (40 Code of Federal Regulations Part 63, Subpart III).

The Flexible Polyurethane Foam Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart III, is incorporated by reference as amended through August 15, 2014 (79 FR 48073) [~~June 23, 2003 (68 FR 37357)~~].

§113.670. Group IV Polymers and Resins (40 Code of Federal Regulations Part 63, Subpart JJJ).

The Group IV Polymers and Resins Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart JJJ, is incorporated by reference as amended through March 27, 2014 (79 FR 17340) [~~December 22, 2008 (73 FR 78199)~~].

§113.690. Portland Cement Manufacturing Industry (40 Code of Federal Regulations Part 63, Subpart LLL).

The Portland Cement Manufacturing Industry Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart LLL, is incorporated by reference as amended through July 27, 2015 (80 FR 44772) [~~February 12, 2013 (78 FR 10006)~~].

§113.700. Pesticide Active Ingredient Production (40 Code of Federal Regulations Part 63, Subpart MMM).

The Pesticide Active Ingredient Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart MMM, is incorporated by reference as amended through March 27, 2014 (79 FR 17340) [~~April 20, 2006 (71 FR 20446)~~].

§113.710. Wool Fiberglass Manufacturing (40 Code of Federal Regulations Part 63, Subpart NNN).

The Wool Fiberglass Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart NNN, is incorporated by reference as amended through July 29, 2015 (80 FR 45280) [~~April 20, 2006 (71 FR 20446)~~].

§113.720. Manufacture of Amino/Phenolic Resins (40 Code of Federal Regulations Part 63, Subpart OOO).

The Manufacture of Amino/Phenolic Resins Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart OOO, is incorporated by reference as amended through October 8, 2014 (79 FR 60898) [~~April 20, 2006 (71 FR 20446)~~].

§113.730. Polyether Polyols Production (40 Code of Federal Regulations Part 63, Subpart PPP).

The Polyether Polyols Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart PPP, is incorporated by reference as amended through March 27, 2014 (79 FR 17340) [~~April 20, 2006 (71 FR 20446)~~].

§113.750. Secondary Aluminum Production (40 Code of Federal Regulations Part 63, Subpart RRR).

The Secondary Aluminum Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart RRR, is incorporated by reference as amended through September 18, 2015 (80 FR 56700) [~~April 20, 2006 (71 FR 20446)~~].

§113.780. Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units (40 Code of Federal Regulations Part 63, Subpart UUU).

The Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart UUU, is incorporated by reference as amended through December 1, 2015 (80 FR 75178) [~~April 20, 2006 (71 FR 20446)~~].

§113.810. Ferroalloys Production: Ferromanganese and Silicomanganese (40 Code of Federal Regulations Part 63, Subpart XXX).

The Ferroalloys Production: Ferromanganese and Silicomanganese Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart XXX, is incorporated by reference as amended through June 30, 2015 (80 FR 37366) [~~April 20, 2006 (71 FR 20446)~~].

§113.860. Manufacturing of Nutritional Yeast (40 Code of Federal Regulations Part ~~[CFR]~~ 63, Subpart CCCC).

The Manufacturing of Nutritional Yeast Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart CCCC, is incorporated by reference as amended through February 27, 2014 (79 FR 12228) [~~April 20, 2006 (71 FR 20446)~~].

§113.1040. Cellulose Products Manufacturing (40 Code of Federal Regulations Part 63, Subpart UUUU).

The Cellulose Products Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart UUUU, is incorporated by reference as amended through February 27, 2014 (79 FR 11228) [~~December 22, 2008 (73 FR 78199)~~].

§113.1090. Reciprocating Internal Combustion Engines (40 Code of Federal Regulations Part 63, Subpart ZZZZ).

The Reciprocating Internal Combustion Engines Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart ZZZZ, is incorporated by reference as amended through February 27, 2014 (79 FR 11228) [~~January 30, 2013 (78 FR 6674)~~].

§113.1130. Industrial, Commercial, and Institutional Boilers and Process Heaters Major Sources (40 Code of Federal Regulations Part 63, Subpart DDDDD).

The Industrial, Commercial, and Institutional Boilers and Process Heaters Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart DDDDD, is incorporated by reference as amended through November 20, 2015 (80 FR 72790) [~~January 31, 2013 (78 FR 7138)~~].

§113.1190. Brick and Structural Clay Products Manufacturing (40 Code of Federal Regulations Part 63, Subpart JJJJJ).

The Brick and Structural Clay Products Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart JJJJJ, is incorporated by reference as adopted October 26, 2015 (80 FR 65470).

§113.1200. Clay Ceramics Manufacturing (40 Code of Federal Regulations Part 63, Subpart KKKKK).

The Clay Ceramics Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart KKKKK, is incorporated by reference as amended through December 4, 2015 (80 FR 75817).

§113.1300. Coal- and Oil-Fired Electric Utility Steam Generating Units (40 Code of Federal Regulations Part 63, Subpart UUUUU).

The Coal- and Oil-Fired Electric Utility Steam Generating Units Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart UUUUU, is incorporated by reference as amended through March 24, 2015 (80 FR 15510) [~~April 24, 2013 (78 FR 24073)~~].

§113.1390. Polyvinyl Chloride and Copolymers Production Area Sources (40 Code of Federal Regulations Part 63, Subpart DDDDDD).

The Polyvinyl Chloride and Copolymers Production Area Sources Generally Available Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart DDDDDD, is incorporated by reference as amended through February 4, 2015 (80 FR 5938) [~~April 17, 2012 (77 FR 22848)~~].

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

Filed with the Office of the Secretary of State on July 8, 2016.

TRD-201603400
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 21, 2016
For further information, please call: (512) 239-2141

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CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §114.100 and §114.305; and the repeal of §§114.211 - 114.217 and §114.219.

If adopted, the revisions to §114.100 and §114.305 would be submitted to the United States Environmental Protection Agency (EPA) as revisions to the State Implementation Plan (SIP). If the repeal of §§114.211 - 114.217 and §114.219 is adopted, the TCEQ would request to withdraw these rules from the EPA's consideration as a SIP revision.

Background and Summary of the Factual Basis for the Proposed Rules

The current state regulations for the Voluntary Accelerated Vehicle Retirement (VAVR) program, as specified in Chapter 114 Vehicle Scrappage Program rules, §§114.211 - 114.217 and §114.219, Subchapter F, Division 2 were adopted by the commission on April 19, 2000, at the request of stakeholders in the Dallas-Fort Worth (DFW) ozone nonattainment area as an air pollution control strategy to reduce nitrogen oxides (NO_x) and other emissions to assist in achieving attainment of the National Ambient Air Quality Standard for the 1990 one-hour ozone standard. The adopted VAVR program regulations and accompanying SIP revision were the result of a coordinated development process involving the EPA, the commission, local elected officials, citizens, industrial stakeholders, air quality researchers, and hired consultants. The SIP revision, which incorporated the VAVR program rules, was submitted to the EPA on April 28, 2000.

Subsequent to the adoption of the VAVR program, the Low-Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) was authorized by House Bill 2134, 77th Texas Legislature, 2001. The LIRAP provides funds to participating counties to assist low-income individuals with repairs, retrofits, or retirement of vehicles that fail an emissions test or are at least 10 years old. The LIRAP has been successfully implemented in 16 Texas counties. Due to the success of the LIRAP, the VAVR program never became a viable program in any region of the state including the DFW area that had originally requested it as an air pollution control strategy. The EPA has taken no action on the submitted SIP revision that incorporated these rules. The proposed repeal of the VAVR program would remove obsolete rules that provide no current benefit to the state and are no longer necessary since the adoption and implementation of the LIRAP.

The proposed amendments would also make minor revisions to certain test method requirements in §114.100 and §114.305. The current state regulations for the approved test method for the oxygen requirements for gasoline in §114.100 require the use of American Society for Testing and Materials (ASTM) D4815. The proposed amendments to §114.100 would require regulated entities to use the most current, or "active," version of the ASTM and prevent the use of obsolete versions of this test standard. The current state regulations for the approved test method to determine compliance with the Chapter 114 Reid vapor pressure (RVP) control requirements in §114.301 as specified in §114.305 require the use of the ASTM Test Method D5191-99 (Standard Test Method for Vapor Pressure of Petroleum Products (Mini Method)), which is the version of the ASTM test method approved by the ASTM in 1999 but is now obsolete. The most current version of the ASTM D5191 test method was approved by the ASTM in 2013. The executive director has previously approved requests from regulated entities for minor modifications to this test method, as permitted under §114.305(b), to allow the use of the newer version of this test method for consistency with the industry's current testing practices. The proposed amendment to §114.305 would require regulated entities to use the most current, or "active," version of the ASTM D5191 Test Method for determining compliance with the RVP standards specified in §114.301. This proposed action would remove the current need for the executive director to approve minor modifications to obsolete versions of this standard test method, such as the ASTM Test Method D5191-99 that is currently referenced as the approved test method.

Section by Section Discussion

To conform to TCEQ and *Texas Register* formatting requirements, non-substantive revisions would be made throughout the proposed amendments to correct citations, acronym usage, and other minor issues.

Subchapter D: Oxygen Requirements for Gasoline

§114.100, Oxygenated Fuels

The commission proposes to amend §114.100 to replace the obsolete reference to "Texas Natural Resource Conservation Commission" and "commission" with "executive director" in subsections (b), (c), and (d), and to specify the "active version" of the ASTM Test Method D4815 referenced in subsection (e)(2) for clarity and consistency with the current rules.

Subchapter F: Vehicle Retirement and Mobile Emission Reduction Credits

Division 2: Vehicle Scrappage Program

The commission proposes the repeal of Chapter 114, Subchapter F, Division 2, §§114.211 - 114.217 and §114.219, to remove the VAVR program regulations. The VAVR program is an obsolete program that provides no current benefit to the state and is no longer considered viable since the adoption and implementation of the LIRAP.

Subchapter H: Low Emission Fuels

Division 1: Gasoline Volatility

§114.305, Approved Test Methods

The commission proposes to amend §114.305 to specify that compliance with the RVP limits in §114.301 must be determined by the active version of the ASTM Test Method D5191 (Standard Test Method for Vapor Pressure of Petroleum Products (Mini Method)) for consistency with the current rules and to lessen obsolescence due to future revisions to the testing method.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Technical Lead Analyst in the Chief Financial Officer's Division, has determined that for the first five-year period the proposed rulemaking is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rulemaking would repeal the VAVR program. The proposed rulemaking would also require regulated entities to use the most current ASTM test method when determining compliance and would make non-substantive changes to address outdated or obsolete citation references as needed to provide clarity and consistency.

The proposed repeal of the VAVR program would remove rules that have become obsolete since the adoption and implementa-

tion of the LIRAP was authorized in 2001. There are no fees associated with the VAVR rules, and there were no program expenditures since the program was never implemented by the agency or any local jurisdiction. Therefore, no cost savings are anticipated due to the proposed repeal.

The ASTM test method specified in current §114.305 is obsolete. The proposed rulemaking would require the most current ASTM test method. The most current version of the ASTM test method was approved in 2013. Because this test method is already in common use, no fiscal implications are anticipated due to the addition of the test method in the rule.

The proposed amendment to §114.100 would make non-substantive changes to address outdated citation references as needed to provide clarity and consistency. These proposed changes are not expected to have any fiscal implications for units of state or local government.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rulemaking is in effect, the public is anticipated to benefit from clear and current rules for agency programs related to the control of air pollution from motor vehicles.

The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals. The proposed repeal of the VAVR program would remove obsolete rules that provide no current benefit and are no longer necessary since the adoption and implementation of the LIRAP. Businesses and individuals would not be affected by the repeal of the program since it has never been implemented.

The proposed amendments would require regulated entities to use the most current ASTM test method when determining compliance. Because this test method is already in common use, no fiscal implications are anticipated for businesses or individuals.

The proposed amendments would also make non-substantive changes to address outdated citation references and these proposed changes are not expected to have any effect on businesses or individuals.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect for small or micro-businesses. The rulemaking does not propose additional or new requirements or expand or delete the coverage of current requirements.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rulemaking is necessary under federal law and does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed this proposed rulemaking in light of the Regulatory Impact Analysis requirements of Texas Government Code, §2001.0225, and determined that this proposed rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule." 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, this proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a).

Texas Government Code, §2001.0225 applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking proposes to repeal the VAVR program and to make minor revisions to §114.100 and §114.305. The proposed revision to §114.305 would require regulated entities to use the most current, or "active," version of the ASTM D5191 Test Method for determining compliance with the RVP standards specified in §114.301. Neither of these proposed changes exceed a standard set by federal law. In addition, these proposed changes do not exceed an express requirement of state law and are not proposed solely under the general powers of the agency, but are specifically authorized by the provisions cited in the Statutory Authority section of this preamble. Finally, these changes do not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

The commission invites public comment on the Draft Regulatory Impact Analysis Determination. These comments may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The specific intent of this proposed rulemaking is to repeal the VAVR program in addition to making minor changes to require regulated entities to use the most current, or "active," version of the ASTM D5191 Test Method for determining compliance with the RVP standards specified in §114.301. Nevertheless, the commission further evaluated the proposed rulemaking and performed an assessment of whether this proposed rulemaking constitutes a "taking" under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking would not burden (constitutionally), nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations.

In addition, because the subject proposed regulations do not provide more stringent requirements, they do not burden, restrict, or limit an owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, this proposed rulemaking would not constitute a taking under Texas Government Code, Chapter 2007. For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

Consistency with the Coastal Management Program

The commission reviewed this rulemaking for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is administrative in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

This proposed rulemaking will not impact facilities with air emissions that have applicable (federal or state) requirements with the Federal Operating Permit (30 Texas Administrative Code Chapter 122).

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 18, 2016, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www1.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-010-114-AI. The comment period closes on August 22, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html*. For further information, please contact Michael Regan, Air Quality Division, at (512) 239-2988.

SUBCHAPTER D. OXYGEN REQUIREMENTS FOR GASOLINE

30 TAC §114.100

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004, as long as distribution of low emission diesel as described in the State Implementation Plan is not required prior to February 1, 2005.

The amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, and 382.202.

§114.100. Oxygenated Fuels.

(a) Beginning October 1, 1992, no person shall supply, sell, or dispense any gasoline for use as motor vehicle fuel in El Paso County during the period of October 1 through March 31 of each year, unless the gasoline has a minimum oxygen content of 2.7% by weight, except as allowed under subsection (g) of this section.

(b) No averaging, banking, or trading of oxygenate credits will be allowed until such time as a mechanism for the reporting and tracking of these credits is established by the executive director [~~Texas Natural Resource Conservation Commission (commission)~~].

(c) All gasoline storage, refining, and blending facilities; gasoline terminal and bulk plants; and gasoline transporters affected by this section shall be registered with the commission and the El Paso City-County Health District. The owner or operator of each affected facility shall provide the following information to the executive director [~~commission~~] and shall update this information, as necessary, by September 1st [~~1~~] of each year:

(1) company name, mailing address, local street address, and telephone number;

(2) name and title of the company's chief executive officer and a local contact;

(3) type of facility;

(4) commission account numbers, if applicable; and

(5) description of the affected operation.

(d) All facilities affected by this section shall maintain complete and accurate records for at least two years and shall make such records available to representatives of the executive director, United States Environmental Protection Agency (EPA) [~~commission, EPA~~], or local air pollution agency having jurisdiction in the area upon request. The information in the records shall include, but shall not be limited to, the following:

(1) for refiners/importers of oxygenated gasoline:

(A) copies of all results of tests for oxygen content performed on batches of gasoline prior to transfer. For purposes of this

rule, a batch of gasoline is considered any quantity greater than one gallon;

(B) copies of all bills of lading or transfer documents for each batch; and

(C) documents stating whether or not shipments of gasoline to any facility in a control area for use during a control period were oxygenated or non-oxygenated and stating oxygen content by weight of the gasoline, type of oxygenate used, and oxygenate content by volume.

(2) for blenders, gasoline terminals, and bulk plants:

(A) copies of all results of tests for oxygen content performed on batches of gasoline prior to transfer, or records of automated blending operations;

(B) copies of all documents stating the quantity and oxygen content of the gasoline received and the type of oxygenate received by the facility; and

(C) copies of all documents stating the quantity of gasoline shipped, whether gasoline shipments from the facility were oxygenated or non-oxygenated, and the type of oxygenate used.

(3) for gasoline transporters:

(A) copies of all documents stating the quantity of gasoline received by the transporter, whether the gasoline is oxygenated or non-oxygenated, and the type of oxygenate used; and

(B) copies of all bills of lading or transfer documents for each batch.

(4) for retailer and wholesale purchaser-consumer:

(A) copies of all documents stating the quantity of gasoline received by the facility, whether the gasoline is oxygenated or non-oxygenated, and the type of oxygenate used; and

(B) copies of all bills of lading or transfer documents for each batch.

(e) The oxygen content of gasoline at facilities affected by this section shall be determined by the following test methods:

(1) gasoline sampling methodology described in 40 Code of Federal Regulations [~~CFR~~], Part 80, Appendix D;

(2) the active version of American Society for Testing and Materials Test Method D4815 for the control periods beginning in 1992 and thereafter;

(3) EPA Oxygenate Flame Ionization Detector Test Method; or

(4) other test methods approved by EPA beginning in 1995 and thereafter.

(f) Each gasoline pump at a retail outlet from which oxygenated gasoline is dispensed shall display a legible and conspicuous label on which either the statement in paragraph (1) or [~~the statement~~] in paragraph (2) of this subsection is printed in 36-point bold type in a color contrasting with the intended background. This label shall be placed so it is clearly legible from each side of the pump from which fuel can be dispensed.

(1) A label on which the following statement is printed shall be displayed only during the period of October 1 through March 31: "The gasoline dispensed from this pump is oxygenated and will reduce carbon monoxide pollution from motor vehicles."

(2) A label on which the following statement is printed shall be displayed during the period of October 1 through March 31 and may be displayed at any other time up to year-round: "From October 1 through March 31, the gasoline dispensed from this pump is oxygenated and will reduce carbon monoxide pollution from motor vehicles."

(g) The sale or distribution of non-oxygenated gasoline in a control area during the control period shall be allowed only under the following conditions:

(1) such gasoline is segregated from oxygenated gasoline;

(2) the documents which accompany such gasoline are clearly marked as "non-oxygenated gasoline, not for sale to ultimate consumers in a control area," and shall accompany the gasoline at all times;

(3) the product is clearly labeled as "blendstock," "export," "storage," or a similar statement to prohibit improper distribution; and

(4) the non-oxygenated gasoline is in fact not sold or dispensed to ultimate consumers during the control period in the control area.

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

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Robert Martinez
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For further information, please call: (512) 239-6813

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SUBCHAPTER F. VEHICLE RETIREMENT AND MOBILE EMISSION REDUCTION CREDITS

DIVISION 2. VEHICLE SCRAPPAGE PROGRAM

30 TAC §§114.211 - 114.217, 114.219

Statutory Authority

The repealed sections are proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC. The repeal is also proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.202, concerning Vehicle Emissions

Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004, as long as distribution of low emission diesel as described in the State Implementation Plan is not required prior to February 1, 2005.

The proposed repeal implements THSC, §§382.002, 382.011, 382.012, 382.017, and 382.202.

§114.211. Purpose.

§114.212. Enterprise Operator Responsibilities.

§114.213. Vehicle Eligibility.

§114.214. Advertising.

§114.215. State Implementation Plan (SIP) Credit for the Voluntary Accelerated Vehicle Retirement Program.

§114.216. Records, Auditing, and Enforcement.

§114.217. Credit Calculations.

§114.219. Affected Counties.

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

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SUBCHAPTER H. LOW EMISSION FUELS
DIVISION 1. GASOLINE VOLATILITY

30 TAC §114.305

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004, as long as distribution of low emission diesel as described in the State Implementation Plan is not required prior to February 1, 2005.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, and 382.202.

§114.305. Approved Test Methods.

(a) Compliance with the Reid vapor pressure (RVP) limitations of §114.301 of this title (relating to Control Requirements for Reid Vapor Pressure) must [~~shall~~] be determined by the active version of the American Society for Testing and Materials [~~(ASTM)~~] Test Method D5191 [~~D5191-99~~] (Standard Test Method for Vapor Pressure of Petroleum Products (Mini Method)) for the measurement of RVP using the following correlation correction equation to calculate RVP equivalent to that determined by test methods prescribed in [~~Title~~] 40 Code of Federal Regulations (CFR) Part 80, Appendix E, Method 3, dated March 17, 1993.
Figure: 30 TAC §114.305(a) (No change.)

(b) Minor modifications to these test methods may be used, if approved by the executive director.

(c) Test methods other than those specified in subsection (a) of this section, may be used if validated by 40 CFR Part 63, Appendix A, Test Method 301 (effective December 29, 1992). For the purposes of this subsection, substitute "executive director" each place that Test Method 301 references "administrator."

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

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CHAPTER 210. USE OF RECLAIMED WATER
SUBCHAPTER F. USE OF GRAYWATER AND ALTERNATIVE ONSITE WATER

30 TAC §§210.81 - 210.85

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§210.81 - 210.85.

Background and Summary of the Factual Basis for the Proposed Rules

House Bill (HB or bill) 1902, 84th Texas Legislature (2015), amended Texas Health and Safety Code (THSC), Chapters 341 and 366, and Texas Water Code (TWC), Chapter 26, in relation to the use of graywater and alternative onsite water. The bill requires TCEQ to develop standards to allow the reuse of graywater for toilet and urinal flushing.

Additionally, the bill creates a new regulatory classification for "alternative onsite water" which the bill defines as "rainwater, air-conditioning condensate, foundation drain water, storm water, cooling tower blowdown, swimming pool backwash and drain water, reverse osmosis reject water, or any other source of water considered appropriate by the commission." The bill directs TCEQ to develop similar standards for the reuse of this new source of water similar to graywater.

The bill provides authority to TCEQ to adopt and implement rules for the inspection and annual testing of graywater and alternative onsite water systems.

The bill allows an adjustment in the drainfield size of an on-site sewage facility (OSSF) if used in conjunction with a graywater reuse system.

Lastly, the bill requires TCEQ to develop a regulatory guidance manual to explain the graywater and alternative onsite water regulations.

The bill requires amendments to Chapter 210 and 30 TAC Chapter 285, On-Site Sewage Facilities. The proposed rules allow for a reduction in the OSSF drainfield size if the OSSF is used in conjunction with a graywater reuse system, move all graywater reuse to Chapter 210, authorize toilet and urinal flushing as an additional reuse of graywater, authorize the reuse of alternative onsite water, establish uses of and treatment standards for alternative onsite water similar to graywater, incorporate nationally recognized treatment standards for graywater and alternative onsite water when used for toilet and urinal flushing, and revise bacteria limits from fecal coliform to *Escherichia coli (E. coli).*

HB 1902 retains the existing prohibition on the commission requiring a permit for the residential use of less than 400 gallons of graywater and adds alternative onsite water to the permit prohibition.

Because TCEQ does not issue permits for graywater and alternative onsite water reuse systems, the proposed rules do not include an inspection or testing program for these systems.

A regulatory guidance manual to explain the graywater and alternative onsite water regulations will be developed after adoption of this rulemaking.

A corresponding rulemaking is published in this issue of the *Texas Register* concerning Chapter 285, Subchapter H, Disposal of Graywater.

Section by Section Discussion

The proposed amendment to Chapter 210, Subchapter F changes the title from "Use of Graywater" to "Use of Graywater and Alternative Onsite Water" to reflect the inclusion of alternative onsite water in the subchapter.

§210.81, Applicability

Proposed §210.81(a) includes alternative onsite water, is clarified by noting that the graywater and alternative onsite water must be generated and used onsite, and revises the term "domestic use" to "private residence." Proposed §210.81(b) is revised to improve clarity and readability. Proposed §210.81(c) specifically notes that the rule does not apply to the design, construction, or operation of an OSSF, as these facilities are regulated by Chapter 285.

Proposed §210.81(d) includes a savings clause that retains the previous version of the rules in effect for facilities that were installed under that version of the rule. Existing facilities that were installed under the previous rule are not required to make changes to their facility to comply with the proposed rule, except as noted in proposed §210.83(j).

Lastly, proposed §210.81(e) specifically notes that the rule does not authorize the diversion or impoundment of state water. The diversion or impoundment of state water must be authorized under 30 TAC Chapter 297, relating to Water Rights, Substantive. Alternative onsite water includes stormwater which must be impounded to collect and reuse under the proposed rule. A water right permit may be required to impound the stormwater.

§210.82, General Requirements

The proposed amendment to §210.82 changes the title from "General Requirements" to "Definitions and General Requirements" to include definitions in the title.

The proposed rule adds definitions to §210.82(a) for "Alternative onsite water," "Alternative water reuse system," "Combined reuse system," and "Graywater reuse system."

The definition of "Alternative onsite water" in §210.82(a)(1) includes the same sources of water that are in the definition provided in THSC, §341.039(e), except cooling tower blowdown. The proposed rule has specific limitations on two sources of water that were included in THSC, §341.039(e): cooling tower blowdown and reverse osmosis reject water. The definition of "Alternative onsite water" specifically excludes cooling tower blowdown for the purposes of this subchapter, as that source of water must be reused in accordance with the requirements of Chapter 210, Subchapter E. Additionally, the definition of "Alternative onsite water" excludes reverse osmosis reject water generated at industrial facilities, commercial facilities, and institutions, as that source of water generated at those facilities must be reused in accordance with the requirements of Chapter 210, Subchapter E. Reverse osmosis reject water generated at private residences and agriculture facilities may be reused in accordance with the requirements of the proposed rule.

The definitions for "Alternative water reuse system," "Combined reuse system," and "Graywater reuse system," in §210.82(a)(2), (3), and (5) respectively, are necessary because the requirements, especially as they relate to design and functionality of the system when it nears maximum capacity, are different depending on the source of water routed to each system. The differences are discussed later in this preamble.

Proposed §210.82(b) establishes requirements for alternative water reuse systems used at a private residence, industrial facility, commercial facility, institution, or agriculture facility. Proposed §210.82(b)(1) establishes examples of beneficial reuses of water from alternative water reuse systems. Providing examples rather than specified uses ensures that the rule allows other uses that the commission may not consider during this rulemaking. The proposed rule also allows for the reuse of an unlimited volume of water from alternative water reuse system.

Proposed §210.82(b)(2) reiterates that reverse osmosis reject water generated at an industrial facility, commercial facility, or institution is not allowed to be stored or used in an alternative water reuse system. If an industrial facility, commercial facility, or institution wants to reuse reverse osmosis reject water or a combination of reverse osmosis reject water and other sources of alternative onsite water, it must comply with the requirements of Chapter 210, Subchapter E.

Proposed §210.82(b)(3) allows for the reuse of water from an alternative water reuse system without an authorization from the commission. Property owners are responsible for compliance with the requirements of the proposed rule.

Proposed §210.82(b)(4) - (6) limits the application rate and disposal method of water from an alternative water reuse system and includes a requirement that the system not create a nuisance, threaten human health, or damage the quality of surface water or groundwater. These requirements comply with THSC, §341.039(b) and (c)(6) - (8).

Proposed §210.82(b)(7) prohibits the reuse of swimming pool backwash and drain water within five days of adding chemicals

for shock or acid treatment. This five-day waiting period allows for the chemicals to volatilize to the air prior to reuse.

Proposed §210.82(b)(8) requires water from an alternative water reuse system that is used for toilet or urinal flushing to meet *E. coli* limits, total suspended solids limits, and requires color specific pipes for distribution. The *E. coli* and total suspended solids limits are consistent with the NSF International/American National Standards Institute (NSF/ANSI) Standard 350-2014: *On-site Residential and Commercial Water Reuse Treatment Systems.* The colored pipe complies with plumbing codes and 30 TAC Chapter 217, Subchapter M. An alternative water reuse system that stores rainwater only and the rainwater meets the potable requirements in 30 TAC §290.44 does not require the purple pipe.

Proposed §210.82(b)(9) prohibits alternative water reuse systems from having a connection to an organized wastewater collection system or OSSF. Wastewater collection systems and their associated wastewater treatment plant are not designed for inflow from alternative onsite water. The proposed rule allows for alternative water reuse systems to overflow onto the ground when the capacity of the system is exceeded; however, the authorized overflow must be induced by rainfall conditions. Failure to use the stored water in a timely manner is not an authorized overflow.

Proposed §210.82(b)(10) notes that an alternative water reuse system may be subject to backflow prevention requirements in §290.44 to protect the public water supply from cross-contamination. It is the responsibility of the property owner to determine if the system is subject to §290.44 and to comply with the applicable requirements of that rule.

Proposed §210.82(c) has general requirements for graywater reuse systems and combined reuse systems used at a private residence, industrial facility, commercial facility, institution, or agriculture facility. These requirements are in addition to the requirements in §§210.83 - 210.85. Proposed §210.82(c)(1) requires graywater reuse systems and combined reuse systems to comply with the requirements of this subchapter and the local permitting authority. Per §210.82(c)(2), if the site is connected to an organized wastewater collection system, the property owner must notify the wastewater collection system owner and the wastewater treatment plant owner of their intent to construct the system prior to construction. This notification allows the collection system and treatment plant owners to make any necessary adjustments to their system for the increased wastewater strength and reduced flows. If the site is connected to an OSSF, the property owner must notify the OSSF permitting authority of their intent to construct the system prior to construction. This notification allows the OSSF permitting authority to ensure that the OSSF is designed for the increased wastewater strength.

Proposed §210.82(b)(3) and (4) limit the application rate of water from a graywater reuse system or a combined reuse system and includes a requirement that the system not create a nuisance, threaten human health, or damage the quality of surface water or groundwater. These requirements comply with THSC, §§341.039(b) and (c)(6) - (7).

Proposed §210.82(b)(5) notes that a graywater reuse system or combined reuse system may be subject to backflow prevention requirements in §290.44 to protect the public water supply from cross-contamination. It is the responsibility of the property owner to determine if the system is subject to §290.44 and to comply with the applicable requirements of that rule.

Proposed §210.82(b)(6) requires a combined reuse system to be designed so that alternative onsite water does not enter an organized wastewater collection system or an OSSF. Alternative onsite water, especially rainwater and stormwater, can overload the OSSF or wastewater treatment facility.

§210.83, Criteria for the Domestic Use of Graywater

The proposed amendment to §210.83 changes the title from "Criteria for the Domestic Use of Graywater" to "Residential Use of Graywater and Alternative Onsite Water" to be more concise, to include alternative onsite water, and to use terminology common to the public.

Proposed §210.83(a) establishes requirements for graywater reuse systems and combined reuse systems used at a private residence. An authorization from the commission is not required for the residential use of graywater and alternative onsite water when the total combined average is less than 400 gallons per day. Proposed §210.83(b) notes that the graywater and alternative onsite water must be generated and used onsite. Proposed §210.83(c) retains the list of approved uses of graywater from the existing rule while adding toilet and urinal flushing and applying these uses to alternative onsite water.

Proposed §210.83(d) prohibits the overflow of graywater reuse systems and combined reuse systems onto the ground under any circumstances. Instead, in §210.83(d)(1) the rule requires that graywater reuse systems be designed so that the storage tank overflows into the wastewater collection system or OSSF. Proposed §210.83(d)(2) requires that combined reuse systems be designed so that the graywater can be diverted into the wastewater collection system or OSSF prior to entering the storage tank, and requires the graywater to be diverted during periods of non-use of the combined reuse system or when the storage tank reaches 80% capacity. Proposed §210.83(d)(3) requires combined reuse systems that store stormwater, rainwater, and/or foundation drain water to have an automatic shutoff system to stop the inflow of these sources of water when the system reaches 80% capacity. The 20% reserved volume in the tank is to accommodate inflows of other sources alternative onsite water.

Proposed §210.83(d)(1) and (2) prohibits graywater flows into an OSSF with a reduced effluent disposal system authorized under §285.81, as those OSSFs are not designed to handle the inflow of graywater.

Proposed §210.83(e) and (f) continues the existing requirement for graywater to be stored in tanks and retains the existing tank and piping requirements, while applying these requirements to water from an alternative water reuse system.

Proposed §210.83(g) continues the existing prohibition of disposing of graywater by spray irrigation, while applying this prohibition to water from a combined reuse system. This prohibition is consistent with THSC, §341.039(c)(8).

Proposed §210.83(h) establishes minimum standards for graywater and alternative onsite water and directs property owners to the regulatory guidance document required by THSC, §341.039 for assistance in complying with the standards. Proposed §210.83(h)(1) requires graywater and alternative onsite water to be treated to remove debris by requiring a 50-mesh screen on the storage tank inflow. Removing this debris prevents clogs in the distribution pipes and reduces organic matter in

the storage tank that can cause nuisance odors and vector attraction. Proposed §210.83(h)(2) prohibits swimming pool backwash and drain water from being reused within five days of adding chemicals for shock or acid treatment. This five-day waiting period allows for the chemicals to volatilize to the air prior to reuse. Lastly, proposed §210.83(h)(3) requires water from a graywater reuse system or a combined reuse system that is used for toilet or urinal flushing to meet *E. coli* limits, total suspended solids limits, and requires color specific pipes for distribution. The *E. coli* and total suspended solids limits in proposed §210.83(h)(3)(A) and (B) are consistent with NSF/ANSI Standard 350-2014 for single-family residential dwellings (Class R). The colored pipe in proposed §210.83(h)(3)(C) complies with plumbing codes and Chapter 217, Subchapter M.

Proposed §210.83(i) adds alternative onsite water to the existing recommendations to residential builders.

Proposed §210.83(j) clarifies the existing requirements for laundry graywater by replacing the phrase "effective date of this rule" with the exact date that the existing rules were effective, and §210.83(j)(1) is replacing "must not create a public health nuisance" with "must not create a nuisance or threaten public health," and is correcting grammatical errors in §210.83(j)(6). Additionally, proposed §210.83(j)(8) adds a recommendation that the use of detergents with significant amounts of phosphorus, sodium, or boron should be avoided. This recommendation is consistent with existing §285.81, which is being repealed and combined with this proposed rule. Lastly, the proposed §210.83(j)(9) is revised to improve readability and adds a date for alterations. The date is the effective date of the existing rule.

§210.84, Criteria for Use of Graywater for Industrial, Commercial, or Institutional Purposes

The proposed amendment to §210.84 changes the title from "Criteria for Use of Graywater for Industrial, Commercial, or Institutional Purposes" to " Industrial, Commercial, or Institutional Use of Graywater and Alternative Onsite Water" to be more concise and to include alternative onsite water.

Proposed §210.84(a) reiterates that reverse osmosis reject water generated at an industrial facility, commercial facility, or institution does not include reverse osmosis reject water, as this source of water is regulated by Chapter 210, Subchapter E.

Proposed §210.84(b) revises existing language regarding authorization from the commission for the use of graywater and alternative onsite water an industrial facility, commercial facility, or institution and moves existing §210.84(c)(1)(B) to proposed §210.84(b). These amendments improve readability.

Proposed §210.84(c) clarifies that the graywater and alternative onsite water must be generated and used onsite.

Proposed §210.84(d) prohibits the overflow of graywater reuse systems and combined reuse systems onto the ground under any circumstances. Instead, proposed §210.84(d)(1) requires that graywater reuse systems be designed and constructed so that the graywater can be diverted to a wastewater collection system, OSSF, authorized wastewater outfall, or authorized disposal area. The graywater must be diverted when the graywater reuse system is not being used or when the system reaches maximum capacity.

Proposed §210.84(d)(2) requires that combined reuse systems be designed and constructed so that the graywater can be diverted to a wastewater collection system, OSSF, authorized wastewater outfall, or authorized disposal area prior to entering the combined reuse system. The graywater must be diverted when the combined reuse system is not being used or when the system reaches 80% capacity. Additionally, proposed §210.84(d)(3) notes that combined reuse systems that store stormwater, rainwater, and/or foundation drain water must have an automatic shutoff system to stop the inflow of these sources of water when the system reaches 80% capacity. The 20% reserved volume is to accommodate inflows of other sources of alternative onsite water.

Proposed §210.84(e) retains the list of approved uses of graywater from the existing rule while applying these uses to alternative onsite water. Proposed §210.84(e)(1) - (5) revises the bacterial limits from fecal coliform to *E. coli;* however, the limit values for all uses were not revised from the existing rule, except toilet or urinal flushing in §210.84(e)(4). Additionally, in §210.84(e)(2) the applicability of bacteria limits is revised based on whether there this is public access or restricted public access to the application area rather than whether there is public contact with the water or the public is present at the time of irrigation. Proposed §210.84(e)(4) revises the bacterial limits for toilet or urinal flushing from fecal coliform to *E. coli,* revises the limit values, and adds a limit for total suspended solids. The *E. coli* and total suspended solids limit values for toilet or urinal flushing are consistent with NSF/ANSI Standard 350-2014 for commercial facilities (Class C). Proposed §210.84(e)(4)(C) revises the color of the warning on exposed pipes carrying graywater and/or alternative onsite water to be consistent with Chapter 217, Subchapter M.

Proposed §210.84(f) was revised to improve readability.

§210.85, Criteria for Use of Graywater for Irrigation and for Other Agricultural Purposes

The proposed amendment to §210.85 changes the title from "Criteria for Use of Graywater for Irrigation and for Other Agricultural Purposes" to " Agricultural Use of Graywater and Alternative Onsite Water" to be more concise and to include alternative onsite water.

Proposed §210.85(a) revises existing language regarding authorization from the commission for agricultural use of graywater and moves existing §210.85(d)(1)(B) to proposed §210.85(a). The amendment adds alternative onsite water and improves readability. Proposed §210.85(b) clarifies that the graywater and alternative onsite water must be generated and used onsite.

Proposed §210.85(c) prohibits the overflow of graywater reuse systems and combined reuse systems onto the ground under any circumstances. Instead, proposed §210.85(c)(1) requires that graywater reuse systems be designed and constructed so that the graywater can be diverted to a wastewater collection system or an OSSF. For graywater reuse systems, the graywater must be diverted when the graywater reuse system is not being used or when the system reaches maximum capacity.

Proposed §210.85(c)(2) requires that combined reuse systems be designed and constructed so that the graywater can be diverted to a wastewater collection system or an OSSF prior to entering the combined reuse system. The graywater must be diverted when the combined reuse system is not being used or when the system reaches 80% capacity. Additionally, proposed §210.85(c)(3) requires combined reuse systems that store stormwater, rainwater, and/or foundation drain water to have an automatic shutoff system to stop the inflow of these sources of water when the system reaches 80% capacity. The 20% reserved volume is to accommodate inflows of other sources of alternative onsite water.

Proposed §210.85(c)(1) and (2) also prohibits graywater flows into an OSSF with a reduced effluent disposal system authorized under §285.81, as those OSSFs are not designed to handle the inflow of graywater.

Proposed §210.85(d) retains the list of approved uses of graywater from the existing rule while adding toilet and urinal flushing and applying these uses to alternative onsite water. Proposed §210.85(d)(1) - (4) and (6) revises the bacterial limits from fecal coliform to *E. coli;* however, the limit values for all uses were not revised from the existing rule. Additionally, proposed §210.85(d)(2) notes the applicability of bacteria limits is revised based on whether there this is public access or restricted public access to the application area rather than whether there is public contact with the water or the public is present at the time of irrigation. Proposed §210.85(d)(4) clarifies that bacteria limits do not apply to the irrigation of fields that are not used for edible crops or grazing milking animals.

Proposed §210.85(d)(5) adds toilet or urinal flushing as an additional use of graywater and alternative onsite water at agricultural facilities. Proposed §210.85(d)(5)(A) - (C) requires water from a graywater reuse system or a combined reuse system that is used for toilet or urinal flushing to meet *E. coli* limits, total suspended solids limits, and requires color specific pipes for distribution. The *E. coli* and total suspended solids limits are consistent with NSF/ANSI Standard 350-2014 for commercial facilities (Class C). The colored pipe complies with plumbing codes and Chapter 217, Subchapter M.

Proposed §210.85(e) was revised to improve readability.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency and for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The proposed rules would implement HB 1902, 84th Texas Legislature, 2015. The bill requires TCEQ to develop standards to allow the reuse of graywater for toilet and urinal flushing. The bill also creates a new regulatory classification for "alternative onsite water" which is defined as "rainwater, air-conditioning condensate, foundation drain water, stormwater, cooling tower blowdown, swimming pool backwash and drain water, reverse osmosis reject water, or any other source of water considered appropriate by the commission." The bill directs TCEQ to develop similar standards for the reuse of this new source of water similar to graywater.

The bill allows an adjustment in the drainfield size of an OSSF if used in conjunction with a graywater reuse system and requires TCEQ to develop a regulatory guidance manual to explain the graywater and alternative onsite water regulations.

The proposed rules would: allow for a reduction in the OSSF drainfield size if the OSSF is used in conjunction with a graywater reuse system, move all graywater reuse to Chapter 210, authorize toilet and urinal flushing as an additional reuse of graywater, authorize the reuse of alternative onsite water, establish uses of and treatment standards for alternative onsite water similar to graywater, and establish treatment standards for graywater and alternative onsite water when used for toilet and urinal flushing.

HB 1902 retains the existing prohibition on the commission requiring a permit for the residential use of less than 400 gallons of graywater and adds alternative onsite water to the permit prohibition.

A regulatory guidance manual to explain the graywater and alternative onsite water regulations will be developed after adoption of this rulemaking.

No significant fiscal implications are anticipated for the agency or for any other unit of state or local government. The proposed rules add alternative onsite water as an additional source of water that can be reused at private residences, industrial facilities, commercial facilities, institutions, and agriculture facilities. The proposed rules also add toilet flushing as an approved reuse of graywater and alternative onsite water. The rules include treatment requirements for alternative onsite water and graywater used for toilet flushing.

Persons that want to reuse graywater or alternative onsite water for any of the approved uses must comply with the requirements of this rulemaking. Because TCEQ does not issue permits for graywater and alternative onsite water reuse systems, the proposed rules do not include an inspection or testing program for these systems.

Public Benefits and Costs

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rulemaking will be compliance with state law and the potential for a reduction in the demand for potable water that could assist the state in meeting future water supply needs.

No fiscal implications are anticipated for businesses and individuals as a result of the administration and enforcement of the proposed rules. The proposed rules do not require anything new for businesses or individuals since reusing graywater or alternative onsite water is optional. However, if a business or individual wants to reuse alternative onsite water or graywater for toilet flushing they would be required to comply with the requirements in the proposed rule. The requirements are necessary to protect human health and the environment, and to prevent damage to plumbing fixtures. The costs of complying with the rules vary depending on the type of system installed and whether the system is installed at a new construction or if retrofitting. There would also be the potential for cost savings due to the reuse of water used for landscape irrigation, toilet flushing, composting, gardening, foundation stabilization, industrial process water, dust control, and agricultural irrigation.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules do not impose any new requirements for any business or individual. Reusing graywater or alternative onsite water is optional. If a business or individual wants to reuse alternative onsite water or graywater for toilet flushing they would be required to comply with the requirements in the proposed rules.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are necessary in order to comply with state law and are not expected to result in adverse fiscal implications for small or micro-businesses.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

TCEQ reviewed the proposed rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225(a) because it does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). The following is a summary of that review.

Texas Government Code, §2001.0225 applies to a "major environmental rule" adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and the federal government to implement a state and federal program, or adopt a rule solely under the general powers of the agency instead of under a specific state law. A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As the Author's/Sponsor's Statement of Intent makes clear, the 84th Texas Legislature, 2015, enacted HB 1902 with the aim of lessening Texas' demand for freshwater resources by encouraging and expanding the allowable uses of graywater and other recycled water. By updating decades-old statutory provisions governing graywater disposal and reuse with new technologies and systems that expand the possibilities for safe reuse of graywater on commercial, industrial, and domestic properties, the statutory changes from HB 1902 would ideally result in less demand for freshwater resources for water needs that do not require freshwater standards. More specifically, the Statement of Intent articulates that "by clarifying the existing {Texas Health and Safety Code (THSC)} standards and expanding the scope and uses of graywater and alternative onsite water {and ensuring that the Texas Water Code conforms to these changes}, C.S.H.B. 1902 could act as another part of the solution to Texas' water challenges."

To expand the possibilities for safe reuse of graywater, HB 1902 brings current law and regulations up to date by directing TCEQ to, by rule, expand the sources of usable non-potable water to include "alternative onsite water" by defining and including it in relevant rule language governing graywater. HB 1902 furthers the use of graywater and alternative onsite water by allowing the indoor use of graywater for toilet and urinal flushing. Specifically, HB 1902 amends the THSC to specify that the minimum standards adopted and implemented by TCEQ rule for the use and reuse of graywater are for the indoor and outdoor use and reuse of treated graywater and alternative onsite water. HB 1902 promotes the use of graywater and alternative onsite water as viable, sustainable resources as a way to avoid or prevent a lack of water for drinking and other essential purposes, which would be a health and safety crisis.

Therefore, the specific intent of the proposed rulemaking is to lessen demand for freshwater resources for water needs that do not require freshwater standards by adopting and implementing minimum standards for the indoor and outdoor use and reuse of treated graywater and alternative onsite water for irrigation, certain domestic uses, and agricultural, commercial, and industrial uses. All of which help to prevent a health and safety crisis due to a lack of water for drinking and other essential purposes. By promoting the use and reuse of treated graywater and alternative onsite water, which helps to avoid a lack of water for drinking and other essential purposes, the proposed rules protect human health and safety, as well as water quality; however, the proposed rules will not adversely affect the economy, a sector of the economy, productivity, competition, or jobs within the state or a sector of the state. Accordingly, the commission concludes that the proposed rulemaking does not meet the definition of a "major environmental rule."

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225, for the requirement to prepare a full regulatory impact analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather creates new minimum standards and corresponding processes under state law to ensure efficient regulatory oversight, while comprehensively protecting the state's natural resources. Third, it does not come under a delegation agreement or contract with a federal program; and finally, it is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under a specific piece of State legislation from HB 1902, Texas Legislature, 2015, which amends the THSC to direct TCEQ to adopt and implement minimum standards for the indoor and outdoor use and reuse of treated graywater and alternative onsite water, while not threatening human health.

Therefore, the commission does not adopt the rule solely under the commission's general powers. The commission invites public comment on the Draft Regulatory Impact Analysis Determination.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

TCEQ evaluated the proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that analysis.

The specific purpose of the proposed rulemaking is to lessen demand for freshwater resources for water needs that do not require freshwater standards by adopting and implementing minimum standards for the indoor and outdoor use and reuse of treated graywater and alternative onsite water for irrigation, certain domestic uses, and agricultural, commercial, and industrial uses. All of which help to prevent a health and safety crisis due to a lack of water for drinking and other essential purposes. The proposed rulemaking substantially advances this stated purpose by proposing language in amended Chapter 210 that expands the sources of water that can be reused by defining "alternative onsite water" and expands the allowable use and reuse of treated graywater and alternative onsite water to include toilet and urinal flushing.

Promulgation and enforcement of the proposed rules will not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, Texas Govern-

ment Code, Chapter 2007 does not apply to these proposed rules because these rules do not impact private real property. In HB 1902, the legislature expressed that as Texans strive to more efficiently use increasingly scarce water resources, clarifying the existing standards and expanding the scope and uses of graywater and alternative onsite water, coupled with the new technologies and systems that have been created, expanding the possibilities for safe reuse of graywater on commercial, industrial, and domestic properties, graywater reuse can contribute to meeting state water needs and helping to prevent a lack of water for drinking and other essential purposes. The public has access to vast quantities of graywater as the public themselves are the producers of their own graywater. Specifically, the proposed rulemaking does not apply to or affect any landowner's rights in any private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property or reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. For graywater, there are no real property rights that have been granted for use of an individual's own graywater. These actions will not affect or burden private real property rights because the graywater and alternative onsite water are generated onsite and used onsite by the same individual.

Even if there were real property rights issued for graywater produced by the public, the commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; is designed to significantly advance the health and safety purpose; and does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). Lack of water for drinking and other essential purposes would be a health and safety crisis. This rulemaking could help to lessen the demand for freshwater resources for water needs that do not require freshwater standards, resulting in more drinking water and water for essential purposes.

Consistency with the Coastal Management Program

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

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 16, 2016, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www1.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-028-210-OW. The comment period closes on August 22, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html.* For further information, please contact Laurie Fleet, Wastewater Permitting Section, (512) 239-5445.

Statutory Authority

The amended sections are proposed under Texas Water Code (TWC), §5.013 and §5.102, which establish the commission's general jurisdiction and provides general powers of the commission over other areas of responsibility as assigned to the commission under the TWC; TWC, §5.103 and §5.105, require the commission to adopt any rule or policy necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; and TWC, §26.011, provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the Texas Commission on Environmental Quality in the public interest. Lastly, Texas Health and Safety Code (THSC), §341.039, specifically directs the commission to adopt and implement rules related to the expanded use of graywater and alternative onsite water; specifically directs the commission to adopt and implement minimum standards for the indoor and outdoor use and reuse of treated graywater and alternative onsite water for irrigation, certain domestic uses, and agricultural, commercial, and industrial uses; and requires the commission to adopt rules relating to standards for control of graywater, graywater standards, and standards for alternative onsite water. Specific statutory authorization derives from House Bill (HB) 1902, which amended TWC, §26.0311, and THSC, §341.039 and §366.012(a), relating to Standards for Control of Graywater, Graywater Standards, and Rules Concerning On-Site Disposal Systems.

The amendments implement the statutory amendments of HB 1902.

§210.81. Applicability.

(a) This subchapter applies to graywater and alternative onsite water generated and used at a private residence, commercial facility, industrial facility, institution, or agriculture facility regardless of the disposal method for other wastewater [~~for irrigation and other agricultural purposes; for domestic use; for commercial purposes; for industrial purposes; and for institutional purposes~~].

(b) This subchapter does not apply to reclaimed [~~Reclaimed~~] water which [~~use~~] is regulated by Subchapters A - E of this chapter (relating to General Provisions; General Requirements for the Production, Conveyance, and Use of Reclaimed Water; Quality Criteria and Specific Uses for Reclaimed Water; Alternative and Pre-Existing Re-

claimed Water Systems; and Special Requirements for Use of Industrial Reclaimed Water).

(c) This subchapter does not regulate the design, construction, or operation of on-site sewage facilities (OSSFs) but instead regulates the design, construction, and operation of alternative water reuse systems, combined reuse systems, and graywater reuse systems that may be located at a site that uses an OSSF. The design, construction, and operation of OSSFs are regulated by Chapter 285 of this title (relating to On-Site Sewage Facilities). [~~For the purpose of this subchapter, the term "Site" has the same meaning as defined in Chapter 305, Subchapter A of this title (relating to General Provisions).~~]

(d) An existing graywater system shall comply with the requirements of this subchapter as they existed on the date installation was completed. The previous version of this subchapter is continued in effect for this purpose.

(e) This subchapter does not authorize the diversion or impoundment of state water, as defined in Chapter 297 of this title (relating to Water Rights, Substantive).

§210.82. Definitions and General Requirements.

(a) Definitions. For the purposes of this subchapter, the following terms have the following meanings.

(1) Alternative onsite water--rainwater, air-conditioner condensate, foundation drain water, stormwater, swimming pool backwash and drain water, or reverse osmosis reject water. Cooling tower blowdown is regulated by Subchapter E of this chapter (relating to Special Requirements for Use of Industrial Reclaimed Water); therefore, for the purposes of this subchapter, all references to alternative onsite water do not include cooling tower blowdown. Reverse osmosis reject water generated at industrial facilities, commercial facilities, and institutions is regulated by Subchapter E of this chapter; therefore, for the purposes of this subchapter, all references to alternative onsite water do not include reverse osmosis reject water generated at industrial facilities, commercial facilities, and institutions. Reverse osmosis reject water generated at private residences and agriculture facilities may be used in accordance with this subchapter.

(2) Alternative water reuse system--a system designed and constructed to store and distribute one or more sources of alternative onsite water. An alternative water reuse system shall not contain, store, or distribute any graywater.

(3) Combined reuse system--a system designed and constructed to store and distribute graywater and one or more sources of alternative onsite water.

(4) Graywater--[~~is defined as~~] wastewater from[~~:~~]

[~~(1)~~] showers,[~~;~~]

[~~(2)~~] bathtubs,[~~;~~]

[~~(3)~~] handwashing lavatories,[~~;~~]

[~~(4)~~] sinks that are not used for disposal of hazardous or toxic ingredients,[~~;~~]

[~~(5)~~] sinks that are not used for food preparation or disposal,[~~;~~] and

[~~(6)~~] clothes-washing machines.

[~~(b)~~] Graywater does not include wastewater from the washing of material, including diapers, soiled with human excreta or wastewater that has come into contact with toilet waste.

(5) Graywater reuse system--a system designed and constructed to store and distribute graywater only. A graywater reuse system shall not contain, store, or distribute any source of alternative onsite water.

(b) Alternative water reuse systems. The following requirements apply to alternative water reuse systems used at a private residence, industrial facility, commercial facility, institution, or agriculture facility.

(1) Water from an alternative water reuse system may be reused for beneficial purposes including but not limited to landscape irrigation, gardening, composting, foundation stabilization, and toilet and urinal flushing. An alternative water reuse system may store and use either a single source or a combination of sources of alternative onsite water, and in any volume.

(2) Reverse osmosis reject water generated at an industrial facility, commercial facility, or an institution is prohibited from being stored and used in an alternative water reuse system. Reverse osmosis reject water generated by an industrial facility, commercial facility, or an institution is regulated by Subchapter E of this chapter.

(3) Reuse of water from an alternative water reuse system does not require authorization from the commission if used in accordance with this subchapter. The property owner is responsible for ensuring that the alternative water reuse system is properly operated and maintained to comply with the requirements of this subchapter.

(4) Water from an alternative water reuse system must be applied at a rate that will not result in ponding or pooling, or cause runoff across the property lines or onto any paved surface.

(5) Water from an alternative onsite reuse system shall not be disposed of using a spray distribution system.

(6) The storage and use of water from an alternative water reuse system must not create a nuisance, threaten human health, or damage the quality of surface water or groundwater.

(7) Swimming pool backwash and drain water cannot be used within five days of adding chemicals for shock or acid treatment.

(8) Water from an alternative water reuse system that is used for toilet or urinal flushing must meet the following requirements. Property owners may refer to the regulatory guidance document that is required by the Texas Health and Safety Code, §341.039, for assistance in complying with these requirements.

(A) For residential toilet or urinal flushing, *Escherichia coli (E. coli)* must be less than 14 most probable number (MPN) per 100 milliliters for 30-day geometric mean and less than 240 MPN per 100 milliliters maximum single grab sample. For industrial, commercial, industrial, or agricultural toilet or urinal flushing, *E. coli* must be less than 2.2 MPN per 100 milliliters for 30-day geometric mean and less than 200 MPN per 100 milliliters maximum single grab sample.

(B) Total suspended solids must be less than 10.0 milligrams per liter for 30-day geometric mean and less than 30.0 milligrams per liter maximum single grab sample.

(C) All exposed piping and piping carrying alternative onsite water within a building must be either purple pipe or painted purple; all buried piping must be either manufactured in purple, painted purple, taped with purple metallic tape, or bagged in purple; and all exposed piping must be stenciled in yellow with a warning reading "NON-POTABLE WATER." An alternative water reuse system that stores only rainwater, commonly referred to as a rainwater harvesting system, and uses the water for potable purposes in accordance with §290.44 of this title (relating to Water Distribution) is exempt from this subparagraph.

(9) An alternative water reuse system cannot have a physical connection to an organized wastewater collection system an on-site sewage facility (OSSF). When the system reaches capacity, it is allowed to overflow onto the ground only if the overflow is caused by inflow of rainwater. Overflow under these conditions is exempt from the requirement of paragraph (4) of this subsection.

(10) An alternative water reuse system may be subject to backflow prevention requirements in §290.44 of this title to protect public water supply systems from cross-contamination.

(c) Graywater reuse systems and combined reuse systems. The following requirements apply to graywater reuse systems and combined reuse systems used at a private residence, industrial facility, commercial facility, institution, or agriculture facility.

(1) [~~(c)~~] Construction of a graywater reuse system or a combined reuse system, including storage and distribution [~~disposal~~] systems, must comply with this subchapter [~~chapter~~] and any requirements of the local permitting authority.

(2) Prior to construction of a graywater reuse system or a combined reuse system, the property owner must either notify the collection system owner and the wastewater treatment plant owner if the site is connected to an organized wastewater collection system or notify the OSSF permitting authority if the site uses an OSSF of their intent to construct such a system.

(3) Water from a graywater reuse system or a combined reuse system must be applied at a rate that will not result in ponding or pooling and will not cause runoff across the property lines or onto any paved surface.

(4) The storage and use of water from a graywater reuse system or a combined reuse system must not create a nuisance, threaten human health, or damage the quality of surface water or groundwater.

(5) A graywater reuse system or combined reuse system may be subject to backflow prevention requirements in §290.44 of this title to protect public water supply systems from cross-contamination.

(6) A combined reuse system must be designed so that alternative onsite water is not allowed to enter an organized wastewater collection system or an OSSF.

§210.83. Residential [~~Criteria for the Domestic~~] Use of Graywater and Alternative Onsite Water.

(a) An authorization from the commission is not required for the residential [~~domestic~~] use of graywater and alternative onsite water from a graywater reuse system or a combined reuse system when the total combined average is less than 400 gallons per day and the water is used in accordance with this subchapter. [~~of graywater each day if:~~]

(b) [~~(1)~~] The [~~the~~] graywater and alternative onsite water must originate [~~originates~~] from a private residence.[~~;~~]

(c) Water from a graywater reuse system or a combined reuse system may only be used at the private residence for the following purposes:

(1) to minimize foundation movement and cracking;

(2) for gardening;

(3) for composting;

(4) for landscaping; or

(5) for toilet or urinal flushing.

(d) Graywater reuse systems and combined reuse systems are not authorized to overflow onto the ground under any circumstance.

(1) [~~(2)~~] Graywater reuse systems must be [~~the graywater system is~~] designed and constructed so that the storage tank required by subsection (e) of this section overflows [~~100% of the graywater can be diverted~~] to an organized wastewater collection system or an on-site sewage facility (OSSF) that does not have a reduced effluent disposal system under §285.81 of this title (relating to Criteria for Disposal of Graywater). The graywater [~~during periods of non-use of the graywater system and the discharge from the graywater system~~] must enter the organized wastewater collection system or OSSF through two backflow [~~backwater~~] valves or backflow [~~backwater~~] preventers.[~~;~~]

(2) Combined reuse systems must be designed and constructed so that 100% of the graywater can be diverted to an organized wastewater collection system or an OSSF that does not have a reduced effluent disposal system under §285.81 of this title, prior to entering the storage tank required by subsection (e) of this section. Graywater must be diverted to the organized wastewater collection system or OSSF during periods of non-use of the system or if the storage tank required by subsection (e) of this section reaches 80% capacity. The graywater must enter the organized wastewater collection system or the OSSF through two backflow valves or backflow preventers.

(3) Combined reuse systems that store stormwater, rainwater, and/or foundation drain water must have an automatic shutoff system to stop the inflow of stormwater, rainwater, and foundation drain water into the combined reuse system. The automatic shutoff system must activate when the storage tank required by subsection (d) of this section reaches 80% capacity. [~~the graywater is stored in tanks and the tanks:~~]

(e) Except as authorized by subsection (j) of this section, graywater reuse systems and combined reuse systems must store the water in tanks and the tanks must:

(1) [~~(A)~~] be [~~are~~] clearly labeled as non-potable [~~nonpotable~~] water;

(2) [~~(B)~~] [~~must~~] restrict access, especially to children;

(3) [~~(C)~~] eliminate habitat for mosquitoes and other vectors;

(4) [~~(D)~~] be [~~are~~] able to be cleaned; and

(5) [~~(E)~~] meet the structural requirements of §210.25(i) of this title (relating to Special Design Criteria for Reclaimed Water Systems). [~~;~~]

(f) [~~(4)~~] Graywater reuse systems and combined reuse systems must use [~~the graywater system uses~~] piping that meets the piping requirement of §210.25 of this title.[~~;~~]

[~~(5) the graywater is applied at a rate that:~~]

[~~(A) will not result in ponding or pooling; or~~]

[~~(B) will not cause runoff across the property lines or onto any paved surface; and~~]

(g) [~~(6)~~] Water from a graywater reuse system or a combined reuse system shall not be [~~the graywater is not~~] disposed of using a spray distribution system.

(h) The property owner is responsible for ensuring that the graywater reuse system or combined reuse system is properly operated and maintained to achieve the following requirements. Property owners may refer to the regulatory guidance document that is required by the Texas Health and Safety Code, §341.039, for assistance in complying with these requirements.

(1) Graywater and alternative onsite water shall be treated to remove debris such as lint, leaves, twigs, and branches prior to entering the storage tank by use of a 50 mesh screen.

(2) Swimming pool backwash and drain water cannot be used within five days after adding chemicals for shock or acid treatment.

(3) Water from a graywater reuse system or a combined reuse system that is used for toilet or urinal flushing must meet the following requirements.

(A) *Escherichia coli* must be less than 14 most probable number (MPN) per 100 milliliters for 30-day geometric mean and less than 240 MPN per 100 milliliters maximum single grab sample.

(B) Total suspended solids must be less than 10.0 milligrams per liter for 30-day geometric mean and less than 30.0 milligrams per liter maximum single grab sample.

(C) All exposed piping and piping carrying graywater and/or alternative onsite water within a building must be either purple pipe or painted purple; all buried piping must be either manufactured in purple, painted purple, taped with purple metallic tape, or bagged in purple; and all exposed piping must be stenciled in yellow with a warning reading "NON-POTABLE WATER."

(i) [~~(b)~~] Builders of private residences are encouraged to:

(1) install plumbing in new housing to collect graywater and alternative onsite water from all allowable sources; and

(2) design and install a subsurface distribution [~~graywater~~] system around the foundation of new housing to minimize foundation movement or cracking.

[~~(c) A graywater system as described in subsection (a) of this section may only be used:~~]

[~~(1) around the foundation of new housing to minimize foundation movement or cracking;~~]

[~~(2) for gardening;~~]

[~~(3) for composting; or~~]

[~~(4) for landscaping at the private residence.~~]

[~~(d) The graywater system must not create a nuisance or damage the quality of surface water or groundwater.~~]

(j) [~~(e)~~] Property owners [~~Homeowners~~] who have been disposing of wastewater from residential clothes-washing machines, otherwise known as laundry graywater, directly onto the ground prior to January 6, 2005, [~~before the effective date of this rule~~] may continue disposing of laundry graywater under the following conditions.

(1) The disposal area must not create a [~~public health~~] nuisance or threaten human health.

(2) Surface ponding must not occur in the disposal area.

(3) The disposal area must support plant growth or be sodded with vegetative cover.

(4) The disposal area must have limited access and use by residents and pets.

(5) Laundry graywater that has been in contact with human or animal waste must not be disposed onto the ground surface.

(6) Laundry graywater must not be disposed onto [~~to~~] an area where the soil is wet.

(7) A lint trap must be affixed to the end of the discharge line.

(8) The use of detergents that contain a significant amount of phosphorus, sodium, or boron should be avoided.

(9) [~~(f)~~] The system has not been [~~Graywater systems that are~~] altered after January 6, 2005, has not created a nuisance, and does not[~~, create a nuisance, or~~] discharge graywater from any source other than clothes-washing machines [~~are not authorized to discharge graywater under subsection (e) of this section~~].

§210.84. [~~Criteria for Use of Graywater for~~] Industrial, Commercial, or Institutional Use of Graywater and Alternative Onsite Water [~~Purposes~~].

(a) For the purposes of this section, alternative onsite water does not include reverse osmosis reject water, as this source of water is regulated by Subchapter E of this chapter (relating to Special Requirements for Use of Industrial Reclaimed Water).

(b) An authorization from the commission is not required for the use of graywater and alternative onsite water from a graywater reuse system or a combined reuse system at an industrial facility, commercial facility, or institution. Treatment required by this section does not require authorization from the commission.

(c) The graywater and alternative onsite water must be generated and used onsite.

(d) Graywater reuse systems and combined reuse systems are not authorized to overflow onto the ground under any circumstances.

[~~(a)~~] [~~Authorization. If used in accordance with this subchapter, graywater used for an industrial, commercial, or institutional purpose does not require authorization from the commission.~~]

(1) [~~(b)~~] Graywater reuse systems [~~used for industrial, commercial, or institutional purposes~~] must be designed and constructed so that 100% of the graywater can be diverted to an organized wastewater collection system, on-site sewage facility (OSSF), authorized outfall in a wastewater discharge permit, or authorized disposal area in a Texas Land Application Permit (TLAP). The graywater must be diverted to the organized wastewater collection system, OSSF, authorized outfall in a wastewater discharge permit, or authorized disposal area in a TLAP during periods of non-use of the graywater reuse system or if the system reaches maximum capacity. The [~~discharge from the~~] graywater [~~system~~] must enter the organized wastewater system or OSSF through two backflow [~~backwater~~] valves or backflow [~~backwater~~] preventers.

(2) Combined reuse systems must be designed and constructed so that 100% of the graywater can be diverted to an organized wastewater collection system, OSSF, authorized outfall in a wastewater discharge permit, or authorized disposal area in a TLAP prior to entering the combined reuse system. Graywater must be diverted to the organized wastewater collection system, OSSF, authorized outfall in a wastewater discharge permit, or authorized disposal area in a TLAP during periods of non-use of the system or if the combined reuse system reaches 80% capacity. The graywater must enter the organized wastewater collection system or the OSSF through two backflow valves or backflow preventers.

(3) Combined reuse systems that store stormwater, rainwater, and/or foundation drain water must have an automatic shutoff system to stop the inflow of stormwater, rainwater, and foundation drain water into the combined reuse system. The automatic shutoff system must activate when the combined reuse system reaches 80% capacity.

(e) [~~(c)~~] Water from a graywater reuse system or a combined reuse system [~~Graywater, as defined in §210.82(a) of this title (relating~~

~~to General Requirements),~~] may be used onsite for the following activities.

(1) Process water.

[~~(A)~~] Water from a graywater reuse system or a combined reuse system that is used for process water [~~Graywater used for industrial, commercial, or institutional purposes~~] must be treated to a standard that allows the water [~~graywater~~] to be used in operational processes.

~~[(B) Treatment described in subparagraph (A) of this paragraph does not require an authorization from the agency.]~~

(2) Landscape maintenance. Water from a graywater reuse system or a combined reuse system that [~~If graywater~~] is used for landscape maintenance[~~, the graywater~~] must meet the following limits [~~standards~~].

(A) If the water [~~graywater~~] will be applied in areas with public access [~~where the public may come into contact with the graywater~~], the water [~~graywater~~] must meet the following limits [~~standards~~]:

(i) *Escherichia coli (E. coli)* [~~Fecal coliform~~], 20 colony forming units (CFU)/100 milliliters [~~mililiters~~] (ml), geometric mean; or

(ii) *E. coli* [~~Fecal coliform~~] (not to exceed), 75 CFU/100 ml, single grab sample.

(B) If the water [~~graywater~~] will be applied in areas with restricted access to the public [~~where the public is not present during the time when irrigation activities occur or disposed of for other uses where the public would not come into contact with the graywater~~], the water [~~graywater~~] must meet the following limits [~~standards~~]:

(i) *E. coli* [~~Fecal coliform~~], 200 CFU/100 ml, geometric mean; or

(ii) *E. coli* [~~Fecal coliform~~] (not to exceed), 800 CFU/100 ml, single grab sample.

(3) Dust control. Water from a graywater reuse system or a combined reuse system that [~~If graywater~~] is used for dust control[~~, the graywater~~] must meet the *E. coli* limits [~~standards~~] in paragraph (2)(B) of this subsection.

(4) Toilet or urinal flushing. Water from a graywater reuse system or a combined reuse system that [~~If graywater~~] is used for toilet or urinal flushing must meet the following requirements.[~~:~~]

(A) *E. coli* must be less than 2.2 most probable number (MPN) per 100 ml for 30-day geometric mean and less than 200 MPN per 100 ml maximum single grab sample. [~~the fecal coliform levels must meet the limits in paragraph (2)(A) of this subsection; and~~]

(B) Total suspended solids must be less than 10.0 milligrams per liter for 30-day geometric mean and less than 30.0 milligrams per liter maximum single grab sample.

(C) [~~(B)~~] All [~~all~~] exposed piping and piping carrying graywater and/or alternative onsite water within a building must be either purple pipe or painted purple; all buried piping installed after January 6, 2005, [~~the effective date of these rules~~] must be either manufactured in purple, painted purple, taped with purple metallic tape, or bagged in purple; and all exposed piping must be stenciled in yellow [~~white~~] with a warning reading "NON-POTABLE WATER."

(5) Other uses. Water from a graywater reuse system or a combined reuse system that [~~If graywater~~] is used for other similar activities [~~where the potential for unintentional human exposure may occur, the graywater~~] must:

(A) meet the *E. coli* [~~fecal coliform~~] limits in paragraph (2)(A) of this subsection if used in a way that the public may come into contact with the water; or[~~.~~]

(B) meet the *E. coli* limits in paragraph (2)(B) of this subsection if used in a way that the public will not come into contact with the water.

(f) [~~(d)~~] Water from a graywater reuse system or a combined reuse system that is required to meet the *E. coli* limits in subsection (d)(2)(A) of this section [~~Graywater used for commercial, industrial, or institutional purposes~~] must be monitored for *E. coli* [~~fecal coliform~~] at least monthly. [~~in areas where the public may come into contact with graywater and these~~] These records must be maintained at the site and[~~. These records must~~] be readily available for inspection by the commission for a minimum of five years.

§210.85. Agricultural [~~Criteria for~~] Use of Graywater and Alternative Onsite Water [~~for Irrigation and for Other Agricultural Purposes~~].

(a) An authorization from the commission is not required for the use of graywater and alternative onsite water from a graywater reuse system or a combined reuse system for agricultural purposes. Treatment required by this section does not require authorization from the commission. [~~If used in accordance with this subchapter, graywater used for irrigation and other agricultural purposes does not require authorization from the commission.~~]

(b) The graywater and alternative onsite water must be generated and used onsite.

(c) Graywater reuse systems and combined reuse systems are not authorized to overflow onto the ground under any circumstances.

(1) [~~(b)~~] Graywater reuse systems [~~used for irrigation and other agricultural purposes~~] must be designed and constructed so that 100% of the graywater can be diverted to an organized wastewater collection system or on-site sewage facility (OSSF) that does not have a reduced effluent disposal system under §285.81 of this title (relating to Criteria for Disposal of Graywater). The graywater must be diverted during periods of non-use of the graywater reuse system or if the system reaches maximum capacity. The [~~discharge from the~~] graywater [~~system~~] must enter the organized wastewater collection system or OSSF through two backflow [~~backwater~~] valves or backflow [~~backwater~~] preventers.

(2) Combined reuse systems must be designed and constructed so that 100% of the graywater can be diverted to an organized wastewater collection system or OSSF that does not have a reduced effluent disposal system under §285.81 of this title prior to entering the combined reuse system. Graywater must be diverted to the organized wastewater collection system or OSSF during periods of non-use of the system or if the combined reuse system reaches 80% capacity. The graywater must enter the organized wastewater collection system or the OSSF through two backflow valves or backflow preventers.

(3) Combined reuse systems that store stormwater, rainwater, and/or foundation drain water must have an automatic shutoff system to stop the inflow of stormwater, rainwater, and foundation drain water into the combined reuse system. The automatic shutoff system must activate when the combined reuse system reaches 80% capacity.

(d) [~~(c)~~] Water from a graywater reuse system or a combined reuse system [~~Graywater, as defined in §210.82(a) of this title (relating to General Requirements),~~] may be used for the following activities.

(1) Process water. Water from a graywater reuse system or a combined reuse system that is

[~~(A)~~] [~~Graywater~~] used for irrigation and other agricultural purposes may be treated to a standard that allows the water [~~graywater~~] to be used in operational processes.

[~~(B) Treatment described in subparagraph (A) of this paragraph does not require an authorization from the commission.~~]

(2) Landscape maintenance. Water from a graywater reuse system or a combined reuse system that [~~If graywater~~] is used for landscape maintenance [~~, the graywater~~] must meet the following limits [~~standards~~].

(A) If the water [~~graywater~~] will be applied in areas with public access [~~where the public may come into contact with the graywater~~], the water [~~graywater~~] must meet the following limits [~~standards~~]:

(i) Escherichia coli (E. coli) [~~Fecal coliform~~], 20 colony forming units (CFU)/100 milliliters [~~mililiters~~] (ml), geometric mean; or

(ii) E. coli [~~Fecal coliform~~] (not to exceed), 75 CFU/100 ml, single grab sample.

(B) If the water [~~graywater~~] will be applied in areas with restricted access to the public [~~where the public is not present during the time when irrigation activities occur or disposed of for other uses where the public would not come into contact with the graywater~~], the water [~~graywater~~] must meet the following limits [~~standards~~]:

(i) *E. coli* [~~Fecal coliform~~], 200 CFU/100 ml, geometric mean; or

(ii) *E. coli* [~~Fecal coliform~~], 800 CFU/100 ml, single grab sample.

(3) Dust control. Water from a graywater reuse system or a combined reuse system that [~~If graywater~~] is used for dust control[~~, the graywater~~] must meet the *E. coli* limits [~~standards~~] in paragraph (2)(B) of this subsection.

(4) Irrigation of fields. Water from a graywater reuse system or a combined reuse system that [~~If graywater~~] is used to irrigate fields where edible crops are grown or fields that are pastures for milking animals, the water [~~graywater~~] must meet the *E. coli* limits [~~standards~~] in paragraph (2)(A) of this subsection. *E. coli* limits do not apply to graywater and alternative onsite water that is used to irrigate fields other than those where edible crops are grown or fields that are pastures for milking animals.

(5) Toilet or urinal flushing. Water from a graywater reuse system or a combined reuse system that is used for toilet or urinal flushing must meet the following requirements.

(A) *E. coli* must be less than 2.2 MPN per 100 ml for 30-day geometric mean and less than 200 MPN per 100 ml maximum single grab sample.

(B) Total suspended solids must be less than 10.0 milligrams per liter for 30-day geometric mean and less than 30.0 milligrams per liter maximum single grab sample.

(C) All exposed piping and piping carrying graywater and/or alternative onsite water within a building must be either purple pipe or painted purple; all buried piping must be either manufactured in purple, painted purple, taped with purple metallic tape, or bagged in purple; and all exposed piping must be stenciled in yellow with a warning reading "NON-POTABLE WATER."

(6) [~~(5)~~] Other uses. Water from a graywater reuse system or a combined reuse system that [~~If graywater~~] is used for other similar activities [~~where the potential for unintentional human exposure may occur, the graywater~~] must:

(A) meet the *E. coli* [~~fecal coliform~~] limits in paragraph (2)(A) of this subsection if used in a way that the public may come into contact with the water; or[~~.~~]

(B) meet the *E. coli* limits in paragraph (2)(B) of this subsection if used in a way that the public will not come into contact with the water.

(e) [~~(d)~~] Water from a graywater reuse system or a combined reuse system that is required to meet the *E. coli* limits in subsection (d)(2)(A) of this section [~~Graywater used for irrigation and for other agricultural purposes~~] must be monitored for *E. coli* [~~fecal coliform~~] at least monthly. These [~~in areas where the public may come into contact with graywater and the~~] records must be maintained at the site and[~~. These records must~~] be readily available for inspection by the commission for a minimum period of five years.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2141

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CHAPTER 285. ON-SITE SEWAGE FACILITIES
SUBCHAPTER H. DISPOSAL OF GRAYWATER

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §285.80; the repeal of §285.81; and new §285.81.

Background and Summary of the Factual Basis for the Proposed Rules

House Bill (HB or bill) 1902, 84th Texas Legislature (2015), amended Texas Health and Safety Code (THSC), Chapters 341 and 366, and Texas Water Code (TWC), Chapter 26, in relation to the use of graywater and alternative onsite water. The bill requires TCEQ to develop standards to allow the reuse of graywater for toilet and urinal flushing.

Additionally, the bill creates a new regulatory classification for "alternative onsite water" which the bill defines as "rainwater, air-conditioning condensate, foundation drain water, storm water, cooling tower blowdown, swimming pool backwash and drain water, reverse osmosis reject water, or any other source of water considered appropriate by the commission." The bill directs TCEQ to develop similar standards for the reuse of this new source of water similar to graywater.

The bill provides authority to TCEQ to adopt and implement rules for the inspection and annual testing of graywater and alternative onsite water systems.

The bill allows an adjustment in the drainfield size of an on-site sewage facility (OSSF) if used in conjunction with a graywater reuse system.

Lastly, the bill requires TCEQ to develop a regulatory guidance manual to explain the graywater and alternative onsite water regulations.

The bill requires amendments to 30 TAC Chapter 210, Use of Reclaimed Water, and Chapter 285. The proposed rules allow for a reduction in the OSSF drainfield size if the OSSF is used in conjunction with a graywater reuse system, move all graywater reuse to Chapter 210, authorize toilet and urinal flushing as an additional reuse of graywater, authorize the reuse of alternative onsite water, establish uses of and treatment standards for alternative onsite water similar to graywater, incorporate nationally recognized treatment standards for graywater and alternative onsite water when used for toilet and urinal flushing, and revise bacteria limits from fecal coliform to *Escherichia coli (E. coli).*

HB 1902 retains the existing prohibition on the commission requiring a permit for the residential use of less than 400 gallons of graywater, and adds use of less than 400 gallons of alternative onsite water to the prohibition.

Because TCEQ does not issue permits for graywater and alternative onsite water reuse systems, the proposed rules do not include an inspection or testing program for these systems.

A regulatory guidance manual to explain the graywater and alternative onsite water regulations will be developed after adoption of this rulemaking.

A corresponding rulemaking is published in this issue of the *Texas Register* concerning Chapter 210, Subchapter F, Use of Graywater Systems.

Section by Section Discussion

§285.80, General Requirements

The proposed rule adds language to use terms for graywater reuse systems and combined reuse systems that are consistent with the proposed amendments to Chapter 210, Subchapter F, in a concurrent rulemaking.

Proposed §285.80(b) adds a requirement that a graywater reuse system must also comply with Chapter 210, Subchapter F since the rules for those systems have been moved to that chapter.

The proposed amendment moves existing §285.81(g) to §285.80(c).

Proposed §285.80(d) requires existing graywater systems to continue to comply with the rules as the rules existed when the graywater system installation was completed. Any alterations to existing graywater systems must meet the requirements of the current rules.

Proposed §285.80(e) prohibits a reduction to OSSFs when using graywater reuse systems unless the OSSF meets the requirements of §285.81.

Proposed §285.80(f) allows only OSSFs permitted for graywater to be connected to a graywater or combined reuse system. The proposed rule allows a combined reuse system to be connected to an OSSF permitted for graywater only and requires the alternative onsite water to be diverted prior to the connection. The proposed rule prohibits an alternative water reuse system from being connected to an OSSF. The proposed rule provides the piping requirements for connecting graywater to an OSSF.

§285.81, Criteria for Disposal of Graywater

The commission proposes to repeal §285.81 and replace it with a proposed new §285.81. The requirements of the repealed section are being incorporated into Chapter 210, Subchapter F, in a concurrent rulemaking.

Proposed new §285.81 is titled, "OSSF Reduction for Single Family Residences with a Graywater Reuse System or Combined Reuse System." Proposed new §285.81 provides technical requirements for the design, permitting, and operation of OSSFs serving single family residences which have a reduction based on the presence of a graywater reuse system or a combined reuse system. The proposed rule is limited to single family residences based on the limitations of statutory language in THSC, §366.012(a)(2)(B). Additionally, from a technical perspective, graywater generation proportions from a residence are relatively well understood and defined. However, non-residence proportions of graywater are not as well defined and are subject to varying patterns of wastewater generation over time as building activity changes. This uncertain nature of present and future graywater generation in non-residences does not lend itself to OSSF reductions.

Proposed new §285.81(a) clarifies that graywater and combined reuse systems are authorized without a permit. However, OSSFs which are reduced based on the presence of a graywater or combined reuse system require a permit and submission of planning materials.

Proposed new §285.81(b) provides the allowable sizing reduction to the OSSF disposal field. The reductions outlined in Figure: 30 TAC §285.841(b) were estimated using data contained in Table 4.2 of *Design Manual, On-Site Wastewater Treatment and Disposal Systems (EPA/625/1-80/012) October 1980.*

Proposed new §285.81(c) provides that a qualified professional plumber is responsible for documenting which sewage sources will be entering the OSSF.

Proposed new §285.81(d) and Figure: 30 TAC §285.81(d) provide the design organic strength of the wastewater entering the OSSF. The numbers are based on the assumptions that sewage containing all blackwater and graywater sources within a residence will be 300 milligrams per liter five-day bio chemical oxygen demand (mg/l BOD_5) and all graywater sources have no BOD_5 concentration.

Proposed new §285.81(e) and (f) establish the qualifications needed to design OSSFs in this section and the BOD_5 effluent quality that must be achieved by the reduced OSSF. The requirements are consistent with previously adopted sections of Chapter 285.

Proposed new §285.81(g) requires property owners to set aside an area for future OSSF expansion should the property owner abandon the graywater or combined reuse system at a later date or if required by the OSSF permitting authority to expand the OSSF. The area must meet the setbacks required by §285.91(10) and shall not be used for surface improvements.

Proposed new §285.81(h) prohibits property owners from applying graywater or alternative onsite water to the surface of their reduced OSSF disposal field. This action can overload the OSSF disposal area.

Proposed new §285.81(i) prohibits any physical connection between the graywater or combined reuse system and the OSSF since the OSSF is not designed to receive graywater.

Proposed new §285.81(j) requires three days of graywater storage when a graywater or combined reuse system is used in combination with a reduced OSSF. The requirement for storage is necessary so the property owner will not apply graywater during saturated landscape conditions.

Proposed new §285.81(k) provides a mechanism to alert buyers, upon transfer of the property, of the limitations of the OSSF and their responsibilities for operating the OSSF and the graywater or combined reuse system.

Proposed new §285.81(l) requires that, at the discretion of the OSSF permitting authority, a property owner convicted or found in violation of any statute for improperly operating their graywater or combined reuse system shall expand their OSSF and have it permitted to dispose of graywater.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency and for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The proposed rules would implement HB 1902, 84th Texas Legislature, 2015. The bill requires TCEQ to develop standards to allow the reuse of graywater for toilet and urinal flushing. The bill also creates a new regulatory classification for "alternative onsite water" which is defined as "rainwater, air-conditioning condensate, foundation drain water, storm water, cooling tower blowdown, swimming pool backwash and drain water, reverse osmosis reject water, or any other source of water considered appropriate by the commission." The bill directs TCEQ to develop similar standards for the reuse of this new source of water similar to graywater.

The bill allows an adjustment in the drainfield size of an OSSF if used in conjunction with a graywater reuse system and requires TCEQ to develop a regulatory guidance manual to explain the graywater and alternative onsite water regulations.

The commission proposes to repeal §285.81 and replace it with a new §285.81. The requirements of the repealed section are proposed to be incorporated into Chapter 210, Subchapter F in a concurrent rulemaking. The proposed new §285.81 provides technical requirements for the design, permitting, and operation of OSSFs serving single family residences which have a reduction based on the presence of a graywater reuse system or a combined reuse system. The proposed rule is limited to single family residences based on the limitations of statutory language in THSC, §366.012(a)(2)(B).

There are no additional permits required by the proposed rulemaking. A permit will be issued for the OSSF no matter whether the homeowner applies for a reduced OSSF or chooses a non-reduced OSSF. Any permits or inspections by local authorities will be similar for either a reduced or non-reduced OSSF. Therefore, no fiscal implications are anticipated for the agency or other units of state and local government.

The proposed rulemaking offers an option of a reduced OSSF if a single family residential property owner has a graywater system which is in compliance with Chapter 210, Subchapter F. This is strictly an option to the property owner and, therefore, will not result in required additional costs.

A regulatory guidance manual to explain the graywater and alternative onsite water regulations will be developed after adoption of this rulemaking.

Public Benefits and Costs

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rulemaking will be compliance with state law and the potential for a reduction in the demand for potable water that could assist the state in meeting future water supply needs.

No fiscal implications are anticipated for businesses or individuals as a result of the administration and enforcement of the proposed rules. The proposed rulemaking provides for the operation of a reduced OSSF as an option for certain private single family OSSF owners.

Proposed new §285.81 provides technical requirements for the design, permitting, and operation of OSSFs serving single family residences which have a reduction based on the presence of a graywater reuse system or a combined reuse system. The proposed rule is limited to single family residences based on the limitations of statutory language in THSC, §366.012(a)(2)(B).

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules do not impose any new requirements for any business or individual. The design, permitting, and operation of OSSFs serving single family residences which have a reduction based on the presence of a graywater reuse system or a combined reuse system is optional. If a business or individual wants to reuse alternative onsite water or graywater and reduce the drainfield for their OSSF, they would be required to comply with the requirements in the proposed rules.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are necessary in order to comply with state law and are not expected to result in adverse fiscal implications for small or micro-businesses.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

TCEQ reviewed the proposed rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225(a) because it does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). The following is a summary of that review.

Texas Government Code, §2001.0225 applies to a "major environmental rule" adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and the federal government to imple-

ment a state and federal program, or adopt a rule solely under the general powers of the agency instead of under a specific state law. A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As the Author's/Sponsor's Statement of Intent makes clear, the 84th Texas Legislature, 2015, enacted HB 1902 with the aim of lessening Texas' demand for freshwater resources by encouraging and expanding the allowable uses of graywater and other recycled water. By updating decades-old statutory provisions governing graywater disposal and reuse with new technologies and systems that expand the possibilities for safe reuse of graywater on commercial, industrial, and domestic properties, the statutory changes from HB 1902 would ideally result in less demand for freshwater resources for water needs that do not require freshwater standards. More specifically, the Statement of Intent articulates that "by clarifying the existing {Texas Health and Safety Code (THSC)} standards and expanding the scope and uses of graywater and alternative onsite water {and ensuring that the Texas Water Code conforms to these changes}, C.S.H.B. 1902 could act as another part of the solution to Texas' water challenges."

To encourage the use of graywater systems, which helps to prevent a health and safety crisis due to a lack of water for drinking and other essential purposes, HB 1902 amends the THSC to direct TCEQ to adopt rules that allow for an adjustment in the size of a drainfield of an OSSF if used in conjunction with a graywater reuse system. Additionally, the proposed rulemaking adds language to §285.80 for terms for graywater reuse systems and combined reuse systems that are consistent with proposed amendments in a concurrent rulemaking involving Chapter 210, Subchapter F. As part of the same rulemaking, the commission proposes to repeal §285.81 and replace it with a new §285.81. The requirements of the repealed section are being incorporated into Chapter 210, Subchapter F, in a concurrent rulemaking.

Therefore, the specific intent of the proposed rulemaking, which amends and repeals TCEQ rules, is to implement the legislative amendments in HB 1902, which eliminates duplicate provisions with other chapters in the title, and requires the commission to adopt rules to allow an adjustment in the size of a drainfield of an OSSF if used in conjunction with a graywater or combined reuse system. All of which aim to prevent a health and safety crisis due to a lack of water for drinking and other essential purposes. The proposed rulemaking does not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Accordingly, the commission concludes that the proposed rulemaking does not meet the definition of a "major environmental rule."

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225, for the requirement to prepare a full Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather creates new minimum standards and corresponding processes under state law to ensure efficient regulatory oversight, while comprehensively protecting the state's natural resources. Third, it does not come under a delegation agreement or contract with a federal program, and finally, it is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under a specific piece of state legislation from HB 1902, Texas Legislature, 2015, which directs TCEQ to undertake this rulemaking in an effort to reasonably fulfill an obligation mandated by state law to implement the OSSF program under THSC, Chapter 366.

Therefore, the commission does not adopt the rule solely under the commission's general powers. The commission invites public comment on the Draft Regulatory Impact Analysis Determination.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

TCEQ evaluated the proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007, which applies to governmental actions which affect private property. The following is a summary of that analysis.

The specific purpose of the proposed rulemaking is to implement the legislative amendments in HB 1902, which eliminates duplicate provisions with other chapters in 30 TAC and directs the commission to adopt rules to allow an adjustment in the size of a drainfield of an OSSF if used in conjunction with a graywater or combined reuse system. All of which aim to prevent a health and safety crisis due to a lack of water for drinking and other essential purposes. The proposed rulemaking substantially advances this stated purpose by proposing language in amended Chapter 285 to expand and encourage the allowable indoor and outdoor use and reuse of treated graywater and alternative onsite water by allowing for a reduction in the size of an OSSF's drainfield.

Promulgation and enforcement of the proposed rules will not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, Texas Government Code, Chapter 2007, does not apply to these proposed rules because the rules do not impact private real property. Additionally, the public has access to vast quantities of graywater as the public themselves are the producers of their own graywater. Specifically, the proposed rulemaking does not apply to or affect any landowner's rights in any private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property or reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. For graywater, there are no real property rights that have been granted for use of an individual's own graywater. These actions will not affect or burden private real property rights because the graywater and alternative onsite water are generated onsite and used onsite by the same individual.

Even if there were real property rights issued for graywater produced by the public, the commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these proposed rules. Texas Government Code, §2007.003(b)(4), (11)(B), and (13)(A) - (C) state that the chapter does not apply to governmental actions reasonably taken to fulfill an obligation mandated by state law, to regulate OSSF, to respond a real and substantial threat to public health and safety, to significantly advance the health and safety purpose, and to not impose a greater burden than is necessary to achieve the health and safety purpose. All of the above exemptions apply to the pro-

posed rulemaking. This rulemaking is proposed pursuant to the specific requirements of THSC, Chapter 366, which requires the commission to adopt rules to protect the environment and the health and safety of Texas citizens by encouraging use of graywater or combined reuse systems by amending the OSSF regulations to allow for a reduction in the size of an OSSF's drainfield. The proposed rulemaking encourages the use of graywater or combined reuse systems to respond to a real and substantial threat to public health and safety in the form of a lack of water for drinking and other essential purposes and encouraging use of graywater or combined reuse systems advances a health and safety purpose by making efforts to address Texas' water challenges. Finally, the proposed rulemaking imposes no greater burden than is necessary to achieve the health and safety purpose, the proposed rules are similar to the predecessor rules for OSSFs and do not establish a greater burden for most types of systems. Because this is an action that is taken in response to a real and substantial threat to public health and safety; is designed to significantly advance the health and safety purpose; and does not impose a greater burden than is necessary to achieve the health and safety purpose, this action is exempt according to the provisions of Texas Government Code, §2007.003. Lack of water for drinking and other essential purposes would be a health and safety crisis. This rulemaking could help to lessen the demand for freshwater resources for water needs that do not require freshwater standards, resulting in more drinking water and water for essential purposes.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the rulemaking 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 proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

The applicable goals of the CMP are: to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone; and to balance these competing interests.

The specific CMP policies applicable to these proposed rules include Nonpoint Source Water Pollution and require, under the THSC, Chapter 366 (governing on-site sewage disposal systems) that on-site disposal systems be located, designed, operated, inspected, and maintained so as to prevent releases of pollutants that may adversely affect coastal waters. The proposed rules will ensure that OSSFs will perform properly when receiving only blackwater and, therefore, the rules are consistent with the CMP policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas, and because the proposed rules do not relax current treatment or disposal standards.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 16, 2016, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www1.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-028-210-OW. The comment period closes on August 22, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html.* For further information, please contact James McCaine, Program Support Section, (512) 239-4777.

30 TAC §285.80, §285.81

Statutory Authority

The amended section and new section are proposed under Texas Water Code (TWC), §5.013 and §5.102, which establish the commission's general jurisdiction and provides general powers of the commission over other areas of responsibility as assigned to the commission under the TWC; TWC, §5.103 and §5.105, which require the commission to adopt any rule or policy necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; and TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the Texas Commission on Environmental Quality in the public interest. Lastly, Texas Health and Safety Code (THSC), §341.039 and §366.012, which specifically direct the commission to adopt and implement rules related to the expanded use of graywater and alternative onsite water; THSC, §341.039, which directs the commission to adopt and implement minimum standards for the indoor and outdoor use and reuse of treated graywater and alternative onsite water; THSC, §366.012, which directs the commission

to adopt rules to allow for an adjustment in the size required of an on-site sewage disposal system if the system is used in conjunction with a graywater or combined reuse system that complies with the rules adopted under THSC, §341.039; and THSC, §366.011,which establishes the commission's authority over the location, design, construction, installation, and proper functioning of on-site sewage disposal systems.

The sections are adopted under the authority granted to the TCEQ by the Texas Legislature in THSC, Chapter 366. Specific statutory authorization derives from House Bill (HB) 1902, which amended TWC, §26.0311, and THSC, §341.039 and §366.012(a), relating to Standards for Control of Graywater, Standards for Graywater and Alternative Onsite Water, and Rules Concerning On-Site Disposal Sewage Disposal Systems.

The amendments implement the statutory amendments of HB 1902.

§285.80. General Requirements.

(a) For the purpose of this chapter, graywater [~~Graywater~~] is defined as wastewater from[~~:~~]

[~~(1)~~] showers;

[~~(2)~~] bathtubs;

[~~(3)~~] handwashing lavatories;

[~~(4)~~] sinks that are not used for disposal of hazardous or toxic ingredients;

[~~(5)~~] sinks that are not used for food preparation or disposal; and

[~~(6)~~] clothes-washing machines.

[~~(b)~~] Graywater does not include wastewater from the washing of material, including diapers, soiled with human excreta or wastewater that has come in contact with toilet waste.

(b) [~~(c)~~] Construction of a graywater reuse system, including storage and disposal systems, must comply with this chapter; Chapter 210, Subchapter F of this title (relating to Use of Graywater and Alternative Onsite Water); and any more stringent requirements of the local permitting authority. For the purposes of this subchapter, a graywater reuse system begins at the graywater stub-out of a single family dwelling.

(c) A graywater reuse system must not create a nuisance or damage the quality of surface water or groundwater. If a graywater reuse system creates a nuisance, threatens human health, or damages the quality of surface water or groundwater, the permitting authority may take action under §285.71 of this title (relating to Authorized Agent Enforcement of OSSFs).

(d) A graywater reuse system shall comply with the requirements of this subchapter as they existed on the date installation was completed. The previous version of this subchapter is continued in effect for this purpose. Any alterations to an existing system must comply with this chapter; Chapter 210, Subchapter F of this title; and any more stringent requirements of the local permitting authority.

(e) No reduction in the size of the on-site sewage facility (OSSF) will be allowed when using a graywater reuse system unless the OSSF meets the conditions and requirements of §285.81 of this title (relating to Criteria for Disposal of Graywater).

(f) If the OSSF has been permitted to receive graywater from a facility and is not a reduced OSSF as described in §285.81 of this title, the graywater from either a graywater reuse system or a combined reuse system authorized under Chapter 210, Subchapter F of this title may, be connected to the OSSF to dispose of the graywater during periods when graywater is not being reused. If the reuse system is a combined reuse system as defined under Chapter 210, Subchapter F of this title, the flows from alternative onsite water sources must be diverted and shall not be allowed to enter the OSSF. Alternative water reuse systems as defined in Chapter 210, Subchapter F of this title, shall not be connected to the OSSF as OSSFs are not authorized nor designed to treat or dispose of flows from alternative onsite water sources. The piping connecting the graywater to the OSSF shall meet the applicable requirements of Subchapter D of this chapter (relating to Planning, Construction, and Installation Standards for OSSFs).

§285.81. OSSF Reduction for Single Family Residences with a Graywater Reuse System or a Combined Reuse System.

(a) Graywater reuse systems and combined reuse systems are authorized in Chapter 210, Subchapter F of this title (relating to Use of Graywater and Alternative Onsite Water) without a permit or the submission of planning materials. However, on-site sewage facilities (OSSFs) described in this subsection require a permit and the submission of planning materials.

(b) Effluent disposal system sizing. If the graywater reuse system or combined reuse system serving the single family residence is in compliance with Chapter 210, Subchapter F of this title, the effluent disposal system required in §285.33 of this title (relating to Criteria for Effluent Disposal Systems) may be reduced in accordance with Table I in Figure: 30 TAC §285.81(b) of this section.
Figure: 30 TAC §285.81(b)

(c) Verification of plumbing entering the OSSF. A licensed master plumber shall document which sewage sources will be entering the OSSF. The documentation must be sealed, dated, and signed and be provided with the planning materials submitted to the OSSF permitting authority.

(d) Increased wastewater strength. When graywater is removed from the total sewage stream, the remaining sewage stream entering the OSSF will have a higher organic strength. The resulting increase in sewage strength shall be determined in accordance with Table II in Figure: 30 TAC §285.81(d) of this section.
Figure: 30 TAC §285.81(d)

(e) If the effluent disposal system does not require secondary treatment, either a professional sanitarian or a professional engineer shall demonstrate that the proposed treatment system will reduce the effluent quality down to 140 milligrams per liter five-day biochemical oxygen demand (mg/l BOD_5) prior to entering the effluent disposal system.

(f) If the effluent disposal system requires secondary treatment, then a professional engineer shall demonstrate that the proposed treatment system will reduce the effluent quality to the levels outlined in §285.32(e) of this title (relating to Criteria for Sewage Treatment Systems).

(g) If the effluent disposal system is reduced based on the presence of a graywater reuse system or a combined reuse system, a reserve area equivalent to the reduced area shall be shown to be available for future construction of a disposal field should the graywater reuse system or combined reuse system be abandoned at a later date. The reserve area shall meet the setbacks required by §285.91(10) of this title (relating to Tables) and shall not be used for any surface improvements.

(h) Graywater or alternative onsite water, as defined in Chapter 210, Subchapter F of this title, shall not be applied to the surface of a reduced effluent disposal system.

(i) The reduced effluent disposal system is not sized to accommodate graywater. Therefore, there shall not be any physical connec-

tion between the graywater reuse system or the combined reuse system and any part of the OSSF without authorization from the OSSF permitting authority.

(j) In addition to the requirements outlined in Chapter 210, Subchapter F of this title, a graywater reuse system or a combined reuse system used in association with a reduced effluent disposal system under this section must have a storage tank capable of storing a volume of three days of graywater. The storage is necessary to prevent application of graywater during periods when the landscape is saturated.

(k) Before a license to operate is issued for a reduced effluent disposal system allowed under this section, an affidavit shall be properly filed and recorded in the deed records of the county. The affidavit must include the owner's full name, the legal description of the property, a statement that the permit for the OSSF is transferred to the new owner upon transfer of the property, a statement that the effluent disposal system is reduced due to the presence of a graywater reuse system or a combined reuse system, a statement that the specified reserve area shall not contain surface improvements, and a statement that the graywater reuse system or combined reuse system cannot be connected to the OSSF without obtaining a permit from the OSSF permitting authority.

(l) If the property owner of a graywater reuse system or a combined reuse system on a property served by a reduced effluent disposal system is convicted under or found in violation of any statute for improperly operating the graywater reuse system or combined reuse system, the OSSF permitting authority may require the graywater to be connected to the OSSF. If the OSSF permitting authority requires the graywater to be connected to the OSSF, the effluent disposal system must be expanded to accommodate all the flow required in §285.91(3) of this title, and the expansion must be permitted by the OSSF permitting authority.

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

Filed with the Office of the Secretary of State on July 8, 2016.

TRD-201603397
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 21, 2016
For further information, please call: (512) 239-2141

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30 TAC §285.81

Statutory Authority

The repeal is proposed under Texas Water Code (TWC), §5.013 and §5.102, which establish the commission's general jurisdiction and provides general powers of the commission over other areas of responsibility as assigned to the commission under the TWC; TWC, §5.103 and §5.105, which require the commission to adopt any rule or policy necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; and TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the TCEQ in the public interest. Lastly, Texas Health and Safety Code (THSC), §341.039 and §366.012, which specifically direct the commission to adopt and implement rules related to the expanded use of graywater and alternative onsite water; THSC, §341.039, which directs the commission to adopt and implement minimum standards for the indoor and outdoor use and reuse of treated graywater and alternative onsite water; THSC, §366.011, which establishes the commission's authority over the location, design, construction, installation, and proper functioning of on-site sewage disposal systems; and THSC, §366.012, which directs the commission to adopt rules to allow for an adjustment in the size required of an on-site sewage disposal system if the system is used in conjunction with a graywater or combined reuse system that complies with the rules adopted under THSC, §341.039 and which requires the commission to adopt rules consistent with the policy defined in TWC, §26.0311, and THSC, §341.039 and §366.012, relating to Standards for Control of Graywater, Graywater Standards, and Rules Concerning On-Site Disposal Systems.

Specific statutory authorization derives from House Bill (HB) 1902, which amended TWC, §26.0311, and THSC, §341.039 and §366.012(a).

The repeal implements the statutory amendments of HB 1902.

§285.81. Criteria for Disposal of Graywater.

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

Filed with the Office of the Secretary of State on July 8, 2016.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 21, 2016
For further information, please call: (512) 239-2141

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CHAPTER 331. UNDERGROUND INJECTION CONTROL

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §331.9 and §331.131.

Background and Summary of the Factual Basis for the Proposed Rules

House Bill (HB) 2230, 84th Texas Legislature, 2015, authored by Representative Lyle Larson, provides authority for the TCEQ to authorize an injection well used for oil and gas waste disposal to be used for the disposal of nonhazardous brine generated by a desalination operation or nonhazardous drinking water treatment residuals (DWTR). HB 2230 adds Texas Water Code (TWC), §27.026 that allows the TCEQ to authorize, by individual permit, general permit, or by rule, a Class V injection well for the disposal of such nonhazardous brine or nonhazardous DWTR by injection into a Class II well permitted by the Railroad Commission of Texas (RRC) under TWC, Chapter 27, Subchapter C. The proposed rules are consistent with the long-standing practice of the TCEQ's Underground Injection Control (UIC) program to authorize Class V injection wells by rule.

Section by Section Discussion

In addition to proposing amendments to implement HB 2230, the commission proposes non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, and establish consistency in the rules. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble. The commission also proposes other minor amendments to be consistent with current language in Chapter 331.

§331.9, Injection Authorized by Rule

The commission proposes to amend §331.9(b)(2)(E) to update the reference to Chapter 331, Subchapter K to reflect the current title, "Additional Requirements for Class V Injection Wells Associated with Aquifer Storage and Recovery Projects" to be consistent with current language in Chapter 331.

The commission proposes §331.9(b)(2)(F) to state that an owner or operator of a Class V well authorized for disposal by injection of certain wastes into a Class II disposal well is prohibited from injecting into the well if the owner or operator fails to comply with §331.9(b)(3).

The commission proposes §331.9(b)(3) to provide authorization by rule of a Class V injection well for disposal of nonhazardous brine from a desalination operation or nonhazardous DWTR into a Class II disposal well permitted by the RRC whose operator has an active Form P-5 Organization Report in good standing with the RRC. The RRC requires the Form P-5 Organization Report for any entity performing operations within the jurisdiction of the RRC's Oil and Gas Division in accordance with Oil and Gas Statewide Rule 1. The Form P-5 Organization Report includes provisions for financial assurance for plugging and abandonment of a disposal well.

The commission proposes §331.9(b)(3)(A) to state that Chapter 331, Subchapter H (which references the standards for Class V wells) and §331.9(a) (which references the requirements for plugging and abandonment of a well authorized by rule prior to January 1, 1982, for Class V wells, motor vehicle waste disposal wells, large capacity septic systems, large capacity cesspools, subsurface fluid distribution systems, and dry wells) are not applicable to a Class V well authorized by rule to inject waste into a Class II well permitted by the RRC. The RRC's construction and closure standards for the Class II disposal well would be the applicable construction and closure standards for a Class V well authorized by rule for disposal by injection of nonhazardous brine from a desalination operation or nonhazardous DWTR into a Class II disposal well permitted by the RRC.

The commission proposes §331.9(b)(3)(B) to provide that the use or disposal of radioactive material under §331.9(b)(3) is subject to the applicable requirements of 30 TAC Chapter 336.

§331.131, Applicability

The commission proposes to amend §331.131 to exclude Class V wells authorized by rule to dispose of nonhazardous brine from a desalination operation or nonhazardous DWTR by injection into a Class II well permitted by the RRC from the requirements of Chapter 331, Subchapter H. The RRC's Class II disposal well standards would be the applicable standards for a Class V well authorized by rule for disposal by injection of nonhazardous brine from a desalination operation or nonhazardous DWTR into a Class II disposal well permitted by the RRC.

The commission also proposes to amend §331.131 to update the term "aquifer storage wells" to "aquifer storage and recovery injection wells" and to update the reference to Chapter 331, Subchapter K to reflect the current title, "Additional Requirements for Class V Injection Wells Associated with Aquifer Storage and Recovery Projects" to be consistent with current language in Chapter 331.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The proposed rules implement HB 2230. The proposed rules would allow the TCEQ to authorize a Class V injection well by individual permit, general permit, or by rule for disposal of nonhazardous desalination brine or nonhazardous DWTR into a Class II disposal well permitted by the RRC. This is known as dual authorization of a Class II-Class V well.

For dual authorization of a Class II-Class V well, the proposed rules provide that the Class II disposal well must also have an active Form P-5 Organization Report in good standing with the RRC. The proposed rules would also provide that the use or disposal of radioactive material is subject to the requirements of the agency's Radioactive Substance Rules in Chapter 336. The RRC's construction and closure standards for the Class II disposal well would be the applicable standards for a dually permitted Class II-Class V well.

Class V underground injection wells are usually shallow wells permitted for the injection of nonhazardous fluids underground. Class II underground disposal wells are deep wells permitted for the disposal of waste from oil and gas operations. If a desalination facility or a public drinking water system chooses to dispose of brine or DWTR into a Class II disposal well permitted by the RRC, the result could be a decrease in the cost of inland desalination or water treatment operations.

The effect of the proposed rules would be to expand the availability of disposal options for desalination waste and DWTR which is classified as solid waste under TCEQ jurisdiction. Local governments (city, county, water district, river authority, utility district, etc.) could be affected if they choose to use a dually-permitted Class II-Class V well for the disposal of nonhazardous desalination brine or nonhazardous DWTR. The number of governmental entities or facilities that would use a dually permitted Class II-Class V well is not known. Any fiscal implications would depend on factors unique to each specific situation and are not quantifiable at this time.

The proposed rules are not expected to have a significant fiscal impact on the TCEQ. It is not known at this time how many Class II disposal well operators would seek Class V authorization for their disposal wells, but the number is not expected to be significant. Therefore, significant change in agency workload or revenue is not expected. In addition, HB 2230 does not require the TCEQ to conduct routine investigations of dually permitted Class II-Class V wells to determine compliance with the Class V authorization issued by the TCEQ. If investigations of dually permitted Class II-Class V wells need to be conducted by TCEQ staff based on complaints received or other triggers, then new investigation protocols, procedures, checklists and training would need to be developed.

Public Benefits and Costs

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and the provision of a disposal option for nonhazardous desalination brine or nonhazardous DWTR.

No significant fiscal implications are anticipated for businesses or individuals as a result of the administration or enforcement of the proposed rules. The proposed rules do not increase or decrease requirements for TCEQ regulated entities. The proposed rulemaking provides an additional disposal option for nonhazardous desalination brine or nonhazardous DWTR.

The effect of the proposed rules would be to expand the availability of disposal options for desalination waste and DWTR which is classified as solid waste under TCEQ jurisdiction. Businesses that own or operate desalination facilities or public drinking water systems could be affected if they choose to use a dually-permitted Class II-Class V well for the disposal of nonhazardous desalination brine or nonhazardous DWTR. The number of facilities that would use a dually permitted Class II-Class V well is not known. There could be potential cost savings if facilities that generate those wastes choose to use this disposal method. Any fiscal implications would depend on factors unique to each specific situation and are not quantifiable at this time.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules would have the same effect on a small business as it does on a large business. The number of facilities that would use a dually permitted Class II-Class V well to dispose of nonhazardous desalination brine or nonhazardous DWTR is not known. There could be potential cost savings if facilities that generate those wastes choose to use this disposal method. Any fiscal implications would depend on factors unique to each specific situation and are not quantifiable at this time.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are necessary in order to comply with state law and do not adversely affect small or micro-businesses in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because this rulemaking action does not meet the Texas Government Code definition of a "major environmental rule." "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the proposed rules is to implement the statutory requirements of TWC, §27.026, enacted by HB 2230, which provides that the commission may authorize by individual permit, general permit, or by rule, a Class V injection well for the disposal of nonhazardous desalination brine or nonhazardous DWTR by injection into a Class II disposal well permitted by the RRC. The proposed rules substantially advance this purpose by providing an authorization by rule for a Class V injection well for the disposal of nonhazardous desalination brine or nonhazardous DWTR by injection into a Class II disposal well permitted by the RRC. The intent is not inconsistent with the first prong of the definition of "major environmental rule."

However, the proposal does not meet the second prong of the definition of "major environmental rule" because the rulemaking does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment or public health and safety of the state or a sector of the state or impose additional regulatory burdens that would affect the economy or a sector of the economy in a material way. The proposed rules would implement the legislative directives of HB 2230 and would not impose additional regulatory burdens that would affect the economy or a sector of the economy in a material way.

Furthermore, the proposed rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The proposed rules do not exceed a standard set by federal law, because the proposed rules are consistent with federal standards for Class V injection wells. The proposed rules do not exceed an express requirement of state law because the proposed rules are consistent with the express requirements of HB 2230 and TWC, §27.026; and with TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells. Further, the proposed rules do not exceed requirements set out in the TCEQ's UIC program authorized for the state of Texas under the federal Safe Drinking Water Act. Finally, the rulemaking is not proposed under the general powers of the agency, but is proposed under the express requirements of HB 2230 and TWC, §27.026.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated this proposed rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment is that implementation of these proposed rules would not constitute a taking of rule property.

The proposed action would implement the statutory requirements of TWC, §27.026, enacted by HB 2230. TWC, §27.026 provides that the commission may authorize, by individual permit, general permit, or by rule, a Class V injection well for the disposal of nonhazardous desalination brine or nonhazardous DWTR by injection into a Class II disposal well permitted by the RRC. The proposed rules substantially advance their purpose by amending existing commission rules to establish an authorization by rule for an existing Class II disposal well permitted by the RRC as a Class V injection well for the disposal of nonhazardous desalination brine or nonhazardous DWTR.

Promulgation of enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rulemaking does not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The proposed rules would establish an authorization by rule for an existing Class II disposal well permitted by the RRC as a Class V injection well for the disposal of nonhazardous desalination brine or nonhazardous DWTR by injection into a Class II disposal well permitted by the RRC consistent with the requirements of HB 2230. Because the proposed rules apply only to Class II disposal well operators that seek authorization to conduct the subject Class V disposal activity, the rules do not restrict or limit an owner's rights in real property or reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. Therefore, the proposed rules would not affect real property in a manner that is different than real property would have been affected without the proposed rules.

Consistency with the Coastal Management Program

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

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

The proposed rules, if adopted, will not require any revisions to federal operating permits.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 16, 2016, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www1.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-021-331-WS. The comment period closes on August 22, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html*. For further information, please contact Kathryn Hoffman, Radioactive Materials Division, (512) 239-6890.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §331.9

Statutory Authority

The amendment is proposed under the authority of the Texas Water Code (TWC), §5.103, which provides the commission the authority to propose any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; TWC, §27.019, which requires the commission to propose rules reasonably required for the regulation of injection wells; and TWC, §27.026, which allows the commission to authorize by individual permit, general permit, or by rule, a Class V injection well for the disposal by injection of nonhazardous desalination brine or nonhazardous drinking water treatment residuals (DWTR) into a Class II disposal well permitted by the Railroad Commission of Texas under TWC, Chapter 27, Subchapter C.

The proposed amendment would implement House Bill 2230, 84th Texas Legislature, 2015, which allows the commission to authorize by individual permit, general permit, or by rule, a Class V injection well for the disposal by injection of nonhazardous desalination brine or nonhazardous DWTR into a Class II disposal well permitted by the Railroad Commission of Texas under TWC, Chapter 27, Subchapter C.

§331.9. Injection Authorized by Rule.

(a) Plugging and abandonment of a well authorized by rule at any time after January 1, 1982, shall be accomplished in accordance with the standards of §331.46 of this title (relating to Closure Standards). Class V wells shall be closed according to standards under §331.133 of this title (relating to Closure Standards for Injection Wells). Motor vehicle waste disposal wells, large capacity septic systems, large capacity cesspools, subsurface fluid distribution systems, and drywells shall be closed according to standards under §331.136 of this title (relating to Closure Standards for Motor Vehicle Waste Disposal Wells, Large Capacity Septic Systems, Large Capacity Cesspools, Subsurface Fluid Distribution Systems, and Drywells).

(b) Injection into Class V wells, unless otherwise provided in subsection (c) of this section, §331.7 of this title (relating to Permit Required), or §331.137 of this title (relating to Permit for Motor Vehicle Waste Disposal Wells), is authorized under this rule.

(1) Well authorization under this section expires upon the effective date of a permit issued under §331.7 of this title.

(2) An owner or operator of a Class V well is prohibited from injecting into the well:

(A) upon the effective date of permit denial;

(B) upon failure to submit a permit application in a timely manner under subsection (c) of this section;

(C) upon failure to submit inventory information in a timely manner under §331.10 of this title (relating to Inventory of Wells Authorized by Rule);

(D) upon failure to comply with a request for information from the executive director in a timely manner; [~~or~~]

(E) upon failure to comply with provisions contained in Subchapter H of this chapter (relating to Standards for Class V Wells) and, if applicable, Subchapter K of this chapter (relating to Additional Requirements for Class V Injection Wells Associated with Aquifer Storage and Recovery Projects [~~Wells~~]); or[~~.~~]

(F) upon failure of the owner or operator to comply with provisions contained in paragraph (3) of this subsection for a Class V well that is authorized to inject certain wastes into a Class II disposal well permitted by the Railroad Commission of Texas.

(3) Unless otherwise provided in subsection (c) of this section, a disposal well authorized by an active Class II permit issued by the Railroad Commission of Texas whose operator has an active Form P-5 Organization Report in good standing with the Railroad Commission of Texas may be authorized by rule of the commission as a Class V injection well for the disposal by injection of nonhazardous brine from a desalination operation or nonhazardous drinking water treatment residuals.

(A) Subchapter H of this chapter and subsection (a) of this section are not applicable to a Class V well authorized by rule under this paragraph.

(B) The use or disposal of radioactive material under this paragraph is subject to the applicable requirements of Chapter 336 of this title (relating to Radioactive Substance Rules).

(c) The executive director may require the owner or operator of an injection well authorized by rule to apply for and obtain an injection well permit. The owner or operator shall submit a complete application within 90 days after the receipt of a letter from the executive director requesting that the owner or operator of an injection well submit an application for permit. Cases for which a permit may be required include, but are not limited to, wells not in compliance with the standards required by this section.

(d) Class IV wells injecting hazardous waste-contaminated groundwater that is of acceptable quality to aid remediation and that is being reinjected into the same formation from which it was drawn, as authorized by §331.6 of this title (relating to Prohibition of Class IV Well Injection), shall be authorized by rule.

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

Filed with the Office of the Secretary of State on July 8, 2016.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 21, 2016
For further information, please call: (512) 239-6812

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SUBCHAPTER H. STANDARDS FOR CLASS V WELLS

30 TAC §331.131

Statutory Authority

The amendment is proposed under the authority of the Texas Water Code (TWC), §5.103, which provides the commission the authority to propose any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; TWC, §27.019, which requires the commission to propose rules reasonably required for the regulation of injection wells; and TWC, §27.026, which allows the commission to authorize by individual permit, general permit, or by rule, a Class V injection well for the disposal by injection of nonhazardous desalination brine or nonhazardous drinking water treatment residuals (DWTR) into a Class II disposal well permitted by the Railroad Commission of Texas under TWC, Chapter 27, Subchapter C.

The proposed amendment would implement House Bill 2230, 84th Texas Legislature, 2015, which allows the commission to authorize by individual permit, general permit, or by rule, a Class V injection well for the disposal by injection of nonhazardous desalination brine or nonhazardous DWTR into a Class II disposal well permitted by the Railroad Commission of Texas under TWC, Chapter 27, Subchapter C.

§331.131. Applicability.

This subchapter applies [~~The sections of this subchapter apply~~] to all Class V injection wells under the jurisdiction of the commission except those Class V wells authorized by rule under §331.9(b)(3) of this title (relating to Injection Authorized by Rule). Aquifer storage and recovery injection wells must also comply with Subchapter K of this chapter (relating to Additional Requirements for Class V Injection Wells Associated with Aquifer Storage and Recovery Projects [~~Wells~~]) in addition to this subchapter.

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

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 58. OYSTERS, SHRIMP, AND FINFISH

SUBCHAPTER A. STATEWIDE OYSTER FISHERY PROCLAMATION

31 TAC §§58.21 - 58.23

The Texas Parks and Wildlife Department proposes amendments to §§58.21 - 58.23, concerning the Statewide Oyster Fishery Proclamation.

The proposed amendments are intended to maximize oyster production by temporarily closing specified areas for the planting of cultch (material, such as oyster shell, that furnishes a place for larval oysters (spat) to attach and grow to maturity), extending harvest opportunities later into the season by reducing the daily sack limit from 50 to 40, and prohibiting the take of oysters on Sundays during the recreational and commercial seasons.

Under Parks and Wildlife Code, §76.115, the department may close an area to the taking of oysters when the commission finds that the area is being overworked or damaged or the area is to be reseeded or restocked. Oyster reefs in Texas, and Galveston Bay in particular, have been impacted due to hurricanes (such as Hurricane Ike, September 2008), drought, and flooding, as well as high harvest pressure. The department's oyster habitat restoration efforts to date in Galveston Bay have resulted in a total of approximately 1,539 acres of sediment/silt-covered oyster habitat returned to productive habitat within the bay. Part of this restoration effort includes approximately $10.8 million in grants and other funding that have been secured by the department to conduct cultch planting on approximately 435 acres of sediment/silt-covered oyster habitat in Galveston Bay.

The department received grant funds from the Coastal Impact Assistance Program in 2009 to assist in restoring some of this impacted habitat. The department will be restoring approximately 28 acres of oyster reef habitat in Galveston Bay in the spring of 2016 utilizing the remainder of these grant funds with additional funding coming from the Oyster Shell Recovery and Replacement Program and from the city of Texas City. The proposed amendment would temporarily close these four areas to oyster harvest for a period of two years. Commercial oyster leases and other public oyster reefs will not be affected by the closures.

The Half-Moon Reef complex lies off Palacios Point in Matagorda County between Tres Palacios Bay and the eastern arm of Matagorda Bay and was formerly a highly productive oyster reef within the Lavaca-Matagorda Estuary. The reef had been degraded due to a variety of stressors, and as a result, The Nature Conservancy (TNC) secured funding to restore up to 40 acres within a 54-acre section of the historical reef footprint. The department implemented a temporary closure of this area in 2014 to allow cultch materials to become colonized by oysters and to allow the TNC to conduct post-construction monitoring of the reef recovery. The closure was scheduled to expire on November 1, 2016; however, the proposed amendment would extend the closure for an additional two years to further evaluate post-construction monitoring and recolonization of this habitat.

The Nature Conservancy has contracted with Texas A&M University-Corpus Christi to monitor the post-construction performance of the restored Half-Moon Reef over a five-year period at a cost of approximately $700,000. The four components of this monitoring include ecological, structural, fish usage and assessing recreational angler use of the restored reef. Extending the closure of Half-Moon Reef will allow the continuation of this post-construction monitoring.

The proposed amendment to §58.21(c), concerning Taking or Attempting to Take Oysters from Public Oyster Beds: General Rules, would close approximately 28 acres to oyster harvesting in the Galveston Bay Conditionally Approved Area TX-6 and Galveston Bay Approved Area TX-7. The Texas Department of State Health Services (DSHS) regulates shellfish sanitation and designates specific areas where oysters may be harvested for human consumption. The designation of "Conditionally Approved" or "Approved" is determined by DSHS. The proposed amendment also would extend the closure of a 54-acre area encompassing Half-Moon Reef in Matagorda Bay. The extent of the closures would be for two harvest seasons (until November 1, 2018), which will allow for repopulation of oysters in Galveston Bay (and the growth of those oysters to market size) and, in the case of Half-Moon Reef, allow for continued post-construction monitoring of this restoration project. Areas under certificates of location (sometimes referred to as private oyster leases) in TX-6 and TX-7 would not be affected by the closure. The proposed amendment also eliminates the current closure of Hannah Reef, Middle Reef (CCA), Middle Reef, and Pepper Grove Reef, where restoration efforts have been successful and harvest can resume.

The proposed amendment to §58.22, concerning Commercial Fishing, would reduce the commercial possession limit for oysters from 50 sacks per day to 40 and would close Sunday to commercial oyster harvest during the recreational and commercial seasons (November 1 of one year through April 30 of the following year). The goal is to promote efficiency in utilizing oyster resources by providing a more stable price structure for oysters taken throughout the duration of the open season. The proposed amendment is expected to lengthen the productive part of the season, both in terms of sacks per vessel landed and effective days fished.

An analysis of the proposed amendment's sack limit provisions found that the combination of these two measures could result in a total harvest reduction of approximately 17.1%, if fishing effort was equivalent to the 2014-15 season. Additional analysis shows that the average vessel during the 2014-15 season made only 44 trips during the 182-day season, ceased effort by mid-February, and experienced an average daily harvest of 23 sacks. By providing the opportunity to conduct trips further into the season and harvest more sacks per day, the proposed amendments, if adopted, are not expected to result in a reduction in total landings over the season. Reducing the daily sack limit and eliminating harvesting one day per week could extend the effective harvest season during a time when oyster yield (meat-weight to shell-weight) is highest and more valuable to the commercial industry. The department worked closely with the Oyster Advisory Workgroup in developing the proposed amendment.

The proposed amendment to §58.23, concerning Non-commercial (Recreational) Fishing, would close Sunday to recreational harvest during recreational oyster season, for the same reasons discussed earlier in this preamble concerning commercial oyster season.

Lance Robinson, Deputy Director of the Coastal Fisheries Division, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the rules.

Mr. Robinson also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be a) the potential for increased oyster production by repopulating damaged public oyster reefs and allowing these oysters to reach market size for subsequent recreational

and commercial harvest, and b) providing a more stable price structure by lengthening the productive part, both in terms of sacks per vessel landed and effective days fished, of the season.

Under provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that there will be adverse economic effects on small businesses, micro-businesses, and persons required to comply with the amendments as proposed; however, those effects will be minimal and short-term in nature. The proposed rules would affect persons licensed by the department to harvest and sell oysters taken from public water. Department data indicate that approximately 1,058 people per year purchase a license that allows the sale of oysters (508 commercial oyster boat license, 550 commercial oyster boat captain's license). To ensure that this analysis captures every small or micro-business affected by the proposed rules, the department assumes that most, if not all businesses affected by the proposed rules qualify as small or micro-businesses.

The rules as proposed would prohibit the commercial harvest of oysters from a small portion of public oyster reefs in Galveston bay and from Half-Moon Reef in Matagorda Bay, and would reduce the daily allowable harvest from 50 sacks per day to 40 while also removing Sunday as a harvest day.

The department requires commercial oyster fishermen to report oyster catch by location, weight, and selling price, though the location information is at a much larger scale than the areas proposed for closing. However, during the most recent oyster season (November 1, 2014 - April 30, 2015), 89 licensed commercial oyster boats reported landing oysters from public oyster reefs in Lower Galveston Bay where the proposed closure areas would be located. Using the same commercial landings data, the dollar value of the annual catch from the Lower Galveston Bay area by these vessels ranged from $40 to $53,100, with an average of $5,520. These values are based on reported harvest from the 66,847 acres encompassing Lower Galveston Bay. The department's commercial landings program does not allow harvest locations to be defined at the level that would be necessary to compare a closure impact for the 28 acres in the proposed areas in Lower Galveston Bay. However, since the areas proposed for temporary closure were selected for restoration due to a scarcity of oysters present on the reef, commercial harvest would be minimal, at best.

The department has considered other regulatory approaches to achieve the goal of the proposed amendments without imposing adverse economic impacts on small and microbusinesses. The department considered status quo. That alternative was rejected because the goal of the proposed amendments is to restore public oyster reefs in Galveston Bay, which is intended to increase the commercial viability of the fishery. The status quo approach would not only fail to achieve the goal of the proposed rules, but would also have the effect of degrading the long-term viability of the reef complex. Additionally, the department considered allowing a closely monitored commercial harvest while conducting the restoration effort. That alternative was rejected because it would complicate or perhaps prevent restoration of oyster reefs and would require manpower and resource commitments that would be prohibitive for the department.

In the 2014 rulemaking ((39 TexReg 6509), which implemented the initial Half-Moon Reef closure), the department determined that there would be no adverse economic impacts to small or micro-businesses as a result of the closure. Prior to the initial closure of the Half Moon Reef complex in 2014 department sampling data had shown there were few oysters living on the reef complex in Matagorda Bay and that the regulated community did not harvest from this reef. On this basis, the department has determined that a regulatory flexibility analysis under Government Code, Chapter 2006, is not necessary for the enlargement and extension of the Half-Moon Reef closure.

The proposed amendments also would reduce the daily bag limit for commercial oyster harvest from 50 sacks to 40 sacks and close Sunday to commercial oyster harvest. The combined effect of these two provisions is expected to result in a reduction in the total number of sacks harvested during the early portion of the season but an increase in the total number of sacks harvested during the later months. The effect of the proposed possession limit reduction, along with the curtailment of lawful harvesting on Sundays, should provide a more stable and consistent price structure as well as an increased harvest opportunity over the course of the season by reducing the impacts caused by large numbers of fishermen converging on reef areas during the months of November and December.

Participation in the department's trip ticket reporting system is required for all commercial licensees, and furnishes accurate records of all commercial fishing activity, including the oyster fishery. Using the reported daily landings per trip for the most recent season (November 2014 - January 2015), had a 40-sack daily possession limit and Sunday closure been in effect this year, it would have resulted in a 17.1% reduction in harvest. Of this potential harvest reduction, the closure of the fishery on Sunday would be responsible for approximately 14.1% of the reduction with the remaining 3.0% coming from the reduction to a 40 sack limit on days when the fishery is open. The reason for the small percentage contribution from lowering the sack limit is that most vessels do not currently catch the allowed daily limit. The average daily sack limit per vessel during this season was 23 (min. = 1, max. = 53). Additionally, the average vessel during the 2014-15 season made 44 day-trips during the 182-day season and ended their fishing activity in mid-February. It is expected that the potential reduction in harvest that will be accomplished by these proposed changes will be made up through trips taken later in the season when oyster quality (meat-weight to shell-weight) is higher and more valuable to the industry.

The department has determined that the proposed rules will have very little impact upon local employment at the macro or micro level and should result in increased harvest of more marketable oysters over time, which should more than compensate for increased costs of compliance associated with these proposals. As noted in the discussion of economic impacts to small and micro-businesses, the temporary loss of access to the 28

acres in Lower Galveston Bay scheduled for replanting would exert a negligible effect, as these areas are already depleted of oysters and there had been no harvest from Half-Moon Reef in Matagorda Bay prior to the initial planting of cultch in 2014. The reduction in the daily sack limit from 50 to 40 sacks per day and prohibiting harvest on Sundays are not expected to reduce overall harvest during the public season but may delay some of the harvest to later in the season when oysters will be of a higher quality and more valuable to the industry.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

The department has determined that the proposed rules are in compliance with Government Code §505.11 (Actions and Rule Amendments Subject to the Coastal Management Program).

Comments on the proposal may be submitted to Dr. Tiffany Hopper, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4650; email: tiffany.hopper@tpwd.texas.gov

The amendments are proposed under Parks and Wildlife Code, §76.115 and §76.301, which, respectively, authorize the commission to close an area to the taking of oysters when the area is to be reseeded or restocked, and regulate the taking, possession, purchase, and sale of oysters.

§58.21. Taking or Attempting to Take Oysters from Public Oyster Beds: General Rules.

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

(c) Area Closures.

(1) (No change.)

(2) No person may take or attempt to take oysters within an area described in this paragraph. The provisions of this paragraph cease effect on November 1, 2018 [~~2016~~].

(A) Galveston Bay.

(i) Todd's Dump Reef. The area within the boundaries of a line beginning at 29° 29' 55.4"N, 94° 53' 40.1"W (29.498733°N, -94.894467°W; corner marker buoy A); to 29° 29' 55.4"N, 94° 53' 30.6"W (29.498724°N, -94.891834°W; corner marker buoy B); thence to 29° 29 -46.6"N, 94° 53- 30.4"W (29.496273°N, -94.891768°W; corner marker buoy C); thence to 29° 29' 46.6"N, 94° 53' 40.2"W (29.496273°N, -94.894495°W; corner marker buoy D); and thence back to corner marker buoy A.

(ii) South Redfish Reef. The area within the boundaries of a line beginning at 29° 28' 21.1"N, 94° 49' 17.3"W (29.472517°N, -94.821472°W; corner marker buoy A); thence, to 29° 28' 08.3"N, 94° 49' 00.3"W (29.468971°N, -94.816744°W; corner marker buoy B); thence to 29° 27' 58.9"N, 94° 49' 09.7"W (29.466359°N, -94.81935°W; corner marker buoy C); thence to 29° 28' 12.0"N, 94° 49' 26.5"W (29.469989N, -94.824025°W; corner marker buoy D); and thence and back to corner marker buoy A.

(iii) Texas City 1 (Mosquito Island). The area of Middle Reef contained area within the boundaries of a line beginning at 29° 23' 52.1"N, 94° 52' 41.3"W (29.397811°N, -94.878138°W; corner marker buoy A); thence to 29° 23' 52.3"N, 94° 52' 39.2"W (29.39786°N, -94.87757°W; corner marker buoy B); thence to 29° 23' 45.1", 95° 52' 37.9"W (29.395867°N, -94.877184°W; corner marker buoy C); thence to 29° 23' 44.9"N, 95° 52' 39.9"W (29.395813°N, -94.877753°W; corner marker buoy D); and thence back to corner marker buoy A.

(iv) Texas City 2 (Fishing Pier). The area within the boundaries of a line beginning at 29° 22' 58.2"N, 94° 51' 39.7"W (29.382833°N, -94.861037°W; corner marker buoy A); thence to 29° 22' 57.5"N, 94° 51' 36.2"W (29.382645°N, -94.860069°W; corner marker buoy B); thence to 29° 22' 56.3"N, 94° 51' 36.6"W (29.382301°N, -94.860169°W; corner marker buoy C); thence to 29° 22' 57.0"N, 94° 51' 40.1"W (29.382491°N, -94.861135°W; corner marker buoy D); and thence back to corner marker buoy A.

~~*[(i)* Hannah Reef. The area within the boundaries of a line beginning at 29° 29' 17.7"N, 94° 42' 43.9"W (corner marker buoy A); to 29° 29' 2.9"N, 94° 42' 9.7"W (corner marker buoy B); thence to 29° 28' 44.3"N, 94° 42' 16.8"W (corner marker buoy C); thence to (29° 29' 0.6"N, 94° 42' 52.8"W (corner marker buoy D); and thence back to corner marker buoy A.]~~

~~*[(ii)* Middle Reef (CCA). The area within the boundaries of a line beginning at 29° 30' 49.3"N, 94° 39' 53.2"W (corner marker buoy A); thence, to 29° 30' 39.3"N, 94° 39' 40.9"W (corner marker buoy B); thence to 29° 30' 35.0"N, 94° 39' 46.1"W (corner marker buoy C); thence to 29° 30' 45.1"N, 94° 39' 58.2"W (corner marker buoy D); and thence and back to corner marker buoy A.]~~

~~*[(iii)* Middle Reef. The area of Middle Reef contained area within the boundaries of a line beginning at 29° 30' 13.5"N, 94° 39' 22.4"W (corner marker buoy A); thence to 29° 30' 2.3"N, 94° 39' 10.8"W (corner marker buoy B); thence to 29° 29' 58.2"N, 94° 39' 15.8"W (corner marker buoy C); thence to 29° 30' 10.0"N, 94° 39' 27.9"W (corner marker buoy D); and thence back to corner marker buoy A.]~~

~~*[(iv)* Pepper Grove Reef. The area within the boundaries of a line beginning at 29° 29' 49.6"N, 94° 40' 4.4"W (corner marker buoy A); thence to 29° 29' 50.0"N, 94° 39' 27.8"W (corner marker buoy B); thence to 29° 29' 21.8"N, 94° 39' 27.3"W (corner marker buoy C); thence to 29° 29' 21.4"N, 94° 39' 42.6"W (corner marker buoy D); thence to 29° 29' 15.6"N, 94° 39' 42.5"W (corner marker buoy E); thence to 29° 29' 15.4"N, 94° 40' 4.0"W (corner marker buoy F); and thence back to corner marker buoy A.]~~

(B) Matagorda Bay - Half-Moon Reef. The area within the boundaries of a line beginning at 28° 34' 18.8"N, 96° 14' 08.4"W (28.571889°N, -96.235667°W; corner marker buoy A); thence to 28° 34' 15.7N, 96° 13' 59.4"W (28.571028°N, -96.233167°W; corner marker buoy B); thence to 28° 33' 53.8"N, 96° 14' 19.5W (28.564944°N, -96.23875°W; corner marker buoy C); thence to 28° 33' 57.0"N, 96° 14' 28.5"W (28.565833°N, -96.24125°W; corner marker buoy D); and thence back to corner marker A. [~~The area within the boundaries of a line beginning at 28° 34' 18.8"N, 96° 14' 08.4"W (corner marker buoy A); thence to 28° 34' 15.7N, 96° 13' 59.4"W (corner marker buoy B); thence to 28° 33' 53.8"N, 96° 14' 19.5W (corner marker buoy C); thence to 28° 33' 57.0"N, 96° 14' 28.5"W (corner marker buoy D); and thence to 28° 34' 18.8"N, 96° 14' 08.4"W (corner marker buoy A).~~]

§58.22. Commercial Fishing.

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

(c) Seasons and Times.

(1) (No change.)

(2) Legal oyster fishing days--Monday through Saturday.

(3) [~~(2)~~] Legal oystering hours--sunrise to 3:30 p.m.

(d) Possession Limits. It is unlawful to take in one day, for pay or the purpose of sale, barter, or exchange, or any other commercial purpose, or to have on board any licensed commercial oyster boat more than:

(1) 40 [~~50~~] sacks of culled oysters of legal size; or

(2) (No change.)

(e) - (f) (No change.)

§58.23. Non-commercial (Recreational) Fishing.

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

(c) Seasons and Times.

(1) (No change.)

(2) Legal oyster fishing days-Monday through Saturday.

(3) [~~(2)~~] Legal oystering hours--sunrise to 3:30 p.m.

(d) - (e) (No change.)

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

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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4650

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CHAPTER 65. WILDLIFE
SUBCHAPTER B. DISEASE DETECTION AND RESPONSE
DIVISION 1. CHRONIC WASTING DISEASE (CWD)

The Texas Parks and Wildlife Department (the department) proposes the repeal of §65.83 and §65.88, amendments to §§65.80 - 65.82 and 65.84 - 65.86, and new §65.88 and §65.89, concerning Chronic Wasting Disease.

On July 10, 2012, the department confirmed the first known cases of Texas wildlife infected with Chronic Wasting Disease (CWD) in two free-ranging mule deer in the Hueco Mountains of far west Texas. With that discovery, Texas joined 20 other states and two Canadian provinces where CWD has been detected in free-ranging or captive environments. In response, the department adopted §§65.80 - 65.88 (37 TexReg 10231), effective January 2, 2013, to establish zones in which the unnatural movement of deer is more restricted, and to implement mandatory check stations in certain areas in order to impede or prevent the spread of CWD.

On June 30, 2015, the department received confirmation that a two-year-old white-tailed deer held in a deer breeding facility in Medina County had tested positive for CWD, which was followed by positive test results for white-tailed deer in three additional deer breeding facilities. In addition, a hunter-harvested free-ranging mule deer in Hartley County in the Texas Panhandle tested positive for CWD in the past year. In response, the department first adopted emergency rules (40 TexReg 5566) to respond immediately to the threat, then developed interim rules (41 TexReg 815) intended to function through the 2015-2016 hunting season until permanent rules could be implemented. Working closely with the Texas Animal Health Commission (TAHC), the regulated community, and key stakeholders, and with the assistance of the Center for Public Policy Dispute Resolution of the University of Texas School of Law, the department developed a rule package to implement a comprehensive CWD management strategy associated with permitted deer management practices involving the unnatural movement of live deer (41 TexReg 815). Those rules were approved for adoption by the Parks and Wildlife Commission, with changes, on June 20, 2016 (referred to herein as "comprehensive CWD management rules"). The notice of adoption for the comprehensive CWD management rules will be published in the *Texas Register* in August of this year. The repeal, amendments, and new section are necessary to harmonize the current rules in Chapter 65, Subchapter B, Division 1 with the rules in Chapter 65, Subchapter B, Division 2, which implement the comprehensive CWD management strategy and to modify types and extent of the zones in which the unnatural movement of deer and the movement of deer carcasses are restricted.

The proposed rules are a result of cooperation between the department, TAHC, and the department's CWD Task Force, comprised of wildlife-health professionals and cervid producers and are intended to protect susceptible species of exotic and native wildlife from CWD.

CWD is a fatal neurodegenerative disorder that affects some cervid species, including white-tailed deer, mule deer, elk, red deer, sika, and their hybrids (susceptible species). It is classified as a TSE (transmissible spongiform encephalopathy), a family of diseases that includes scrapie (found in sheep), bovine spongiform encephalopathy (BSE, found in cattle), and variant Creutzfeldt-Jakob Disease (vCJD) in humans.

Much remains unknown about CWD. The peculiarities of its transmission (how it is passed from animal to animal), infection rate (the frequency of occurrence through time or other comparative standard), incubation period (the time from exposure to clinical manifestation), and potential for transmission to other species are still being investigated. There is no scientific evidence to indicate that CWD is transmissible to humans. What is known is that CWD is invariably fatal to cervids, and is transmitted both directly (through deer-to-deer contact) and indirectly (through environmental contamination). Moreover, a high prevalence of the disease correlates with deer population decline in at least one free-ranging population, and human dimensions research suggests that hunters will avoid areas of high CWD prevalence. Additionally, the apparent persistence of CWD in contaminated environments represents a significant obstacle to eradication of CWD from either farmed or free-ranging cervid populations. The potential implications of CWD for Texas and its annual, multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies could be significant, unless it is contained and controlled.

The department has been concerned for over a decade about the possible emergence of CWD in free-ranging and captive deer populations in Texas. Since 2002, more than 40,000 "not detected" CWD test results have been obtained from free-ranging (i.e., not breeder) deer in Texas, and deer breeders have submitted approximately 20,000 "not detected" test results as well. The intent of the proposed rules is to reduce the probability of CWD

being spread from areas and deer breeding facilities where it might exist and to increase the probability of detecting and containing CWD if it does exist.

Under Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1, the department regulates the possession of white-tailed deer and mule deer for various purposes. Subchapter C governs permits for scientific research, zoological collection, rehabilitation, and educational display of protected wildlife, which includes deer. Subchapter E governs Triple T activities (trap, transport, and transplant), in which game animals or game birds are captured and relocated to adjust populations. Subchapter E also governs Urban White-tailed Deer Removal Permits and Permits to Trap, Transport, and Process Surplus White-tailed Deer (TTP). Unless otherwise stated, the permits issued under authority of Subchapter E are collectively referred to herein as "Triple T" permits. Subchapter L governs deer breeder permit activities, which include, among other things, possession of captive-raised deer within a facility for breeding purposes and release of such deer. Subchapters R and R-1 govern Deer Management Permit (DMP) activities for white-tailed deer and mule deer, respectively, in which free-ranging deer may be captured and temporarily retained for breeding purposes. The department notes that although DMPs for mule deer were authorized by the legislature in 2011, no DMPs for mule deer have been issued because the department has deferred promulgation of regulations pending acquisition of requisite data to develop biologically defensible rules and address disease threats, including CWD.

Triple T, deer breeder permits, and DMP all authorize release of deer under certain circumstances. Additionally, the permits governed by Parks and Wildlife Code, Chapter 43, Subchapter C, can also include permit conditions for release.

From an epidemiological point of view, the higher the density of susceptible organisms, the more likely disease transmission is to occur, if it exists in a population. Obviously, deer kept in circumstances (facilities, pens, trailers, etc.) in which densities are many times higher than what occurs naturally are more likely to both manifest and spread communicable diseases at a higher rate or in greater numbers than would occur in a free-ranging populations. Therefore, the proposed rules are designed and intended to provide reasonable assurance that once CWD is detected it is quickly isolated and not spread as a result of increased concentration of deer, the movement of live deer under permits issued by the department, or the movement of carcasses of harvested deer.

The proposed repeal of §65.83, concerning Buffer Zones, is necessary because buffer zones are being eliminated. The current rules impose a three-tiered cordon approach to address the possibility of CWD being spread via unnatural deer movements (deer breeder, Triple T, and DMP activities often involve the physical translocation of animals at distances that are far beyond what is possible by free-ranging animals). Currently, the three cordons are the Containment Zone (the area immediately surrounding the location where a CWD-positive animal has been found), the High-Risk Zone (the area surrounding or adjoining the Containment Zone), and the Buffer Zone (an area surrounding or adjoining the High-Risk Zone). The rules governing unnatural deer movement are the most rigorous in the Containment Zone and become successively less rigorous as distance from where the disease was discovered increases. The comprehensive CWD management rules (to be contained in Chapter 65, Subchapter B, Division 2) previously referenced in this preamble impose increased CWD-testing requirements for breeder deer, Triple T trap sites, and DMP sites where breeder are introduced on a statewide basis, which makes the concept of the buffer zone superfluous.

The proposed amendment to §65.80, concerning Definitions, would eliminate the definition for "buffer zone" for the reasons discussed in the proposed repeal of §65.83. The proposed amendment also would alter current paragraph (4) to eliminate the term "High-Risk Zone" and replace it with "Surveillance Zone," and to remove the language defining such zones as surrounding or being adjacent to a Containment Zone (CZ). The department has determined that the term "high-risk" could inadvertently and unnecessarily stigmatize an area, so a term that more accurately describes the function of the zone has been selected. Additionally, for reasons discussed in the proposed amendment to §65.82, concerning Surveillance Zones; Restrictions, the proposed amendment would eliminate the phrase "adjacent to or surrounding a CZ" from the definition. The proposed amendment also would alter the definition of "susceptible species" in current paragraph (6) to clarify that the term includes parts of animals and is not restricted to a whole animal.

The proposed amendment to §65.81, concerning Containment Zones; Restrictions, would redefine the boundaries of the CZ currently in effect and create a new CZ in the Texas Panhandle to address the discovery of CWD in Hartley County. The proposal would modify the current CZ by decreasing its current geographical extent in Culberson, El Paso, and Hudspeth counties. The contraction of the CZ in those counties is possible because the department's surveillance efforts indicate that CWD has not likely spread beyond the Hueco Mountains. Several factors (e.g., cervid population parameters, cervid behavior and life history, historical surveillance intensity, clear boundaries, etc.) are considered when determining the appropriate extent of a CZ or SZ. For example, when CWD was detected just across the New Mexico border in 2012, there was more than a strong possibility that infected mule deer were present in Texas, since the movement of desert mule deer can be as much as 25-30 linear miles.

The proposed amendment to §65.81 would alter the provisions of paragraph (2)(C) by adding language to allow the recapture of deer that have escaped from a deer breeding facility within a CZ if specifically authorized under a hold order or herd plan issued by TAHC. The department has determined that escaped breeder deer may be epidemiologically significant in some instances and that recapture should be permitted if authorized by TAHC.

Under current §65.81(2)(A), the movement of deer into, out of, or within a CZ is prohibited, except for department-authorized research. The proposed amendment to §65.81 would add new paragraph (2)(D) to allow TC 1 deer breeding facilities within a CZ to release breeder deer to immediately adjoining acreage (provided the release site and the breeding facility share the same ownership and the release site is high-fenced as required by the comprehensive CWD rules alluded to previously in this preamble). Because TC 1 breeding facilities (more thoroughly described in the comprehensive CWD management rules) represent the lowest risk of spreading CWD, the department considers the release of such breeder deer to adjoining acreage under the same ownership to present a very low risk, but all other movement of breeder deer would continue to be prohibited.

The proposed amendment to §65.81 also changes the term "deer breeder facility" to "deer breeding facility" for purposes of consistency.

The proposed amendment to §65.82, concerning High-Risk Zones; Restrictions, would change the title of the section to Surveillance Zones: Restrictions, as previously noted in this preamble, shrink the current zone in effect for far west Texas, create two new zones (one to address the additional CWD discovery in the Texas Panhandle and one to address the discovery of CWD in deer breeding facilities in Medina County), and allow the unnatural movement of deer within a SZ under certain circumstances. A Surveillance Zone (SZ) is a geographic area within which the department has determined, using the best available science and data, that the presence of CWD could reasonably be expected. With respect to proposed new paragraph (1)(C), the department is creating a Surveillance Zone in portions of Bandera, Medina, and Uvalde counties, but not a CZ. The reason for not creating a CZ is two-fold. First, the CWD discovery in this part of the state occurred in breeder deer and deer breeding facilities, which are required by law to be designed and built to both prevent the free movement of deer and contact with free-ranging deer, which coincidentally is imperative for the control and management of CWD. Second, the facilities where CWD was discovered are operating under TAHC herd plans, which restrict deer movement and require CWD testing at an equal or higher level to what is required in a CZ.

Under the current provisions of §65.82, the unnatural movement of deer was restricted to breeder deer being transferred to or from a deer breeding facility that had achieved "Certified" status in the TAHC Herd Certification Program. With the adoption of the comprehensive CWD management rules alluded to earlier in this preamble, the testing, TAHC herd status, and herd inventory requirements of current §65.82 with respect to breeder deer are no longer necessary in §65.82; however, because the comprehensive CWD management rules create a classification system that identifies breeding facilities and prospective DMP and Triple T trap sites that are epidemiologically determined to present limited risk of CWD transfer, the proposed amendment would add new subparagraphs (B)-(D) to paragraph (2) to address that fact and prescribe the criteria under which those activities would be allowed.

Proposed new §65.82(2)(B) would address deer breeding facilities and provide that except as provided by the provisions of Division 2 of Subchapter B (the comprehensive CWD management rules), TC 1 breeding facilities within a SZ may transfer, receive, or liberate breeder deer within or beyond the SZ, because they represent a low risk of CWD. Similarly, the proposed amendment would allow TC 2 breeding facilities to receive deer from any deer breeder in the state authorized to transfer deer and to transfer, receive, or liberate deer within the SZ, but not beyond the SZ. TC 2 breeding facilities are those facilities that are not directly linked to a CWD-positive facility but at the same time cannot provide sufficient epidemiological data to achieve TC 1 status; therefore, because breeder deer transferred from breeding facility to breeding facility are always within a high-fenced area, which the comprehensive CWD management rules also require for release sites, these activities can be allowed within the SZ without increasing the chance of spreading CWD beyond the SZ in the event the disease does occur within the SZ. The proposed amendment to §65.82 also would add new subparagraph (B)(ii) to allow the recapture of deer that have escaped from a deer breeding facility within a SZ if specifically authorized under a hold order or herd plan issued by TAHC. As stated previously in this preamble, the department has determined that escaped breeder deer may be epidemiologically significant in some instances and that recapture should be permitted only if authorized by TAHC.

Proposed new §65.82(2)(C) would address the movement of deer pursuant to Triple T permits and would provide for the approval of Triple T releases in a SZ, but prohibit trapping for Triple T purposes within a SZ. From an epidemiological standpoint, the release of deer within a SZ does not present a significant risk of spreading or accelerating the spread of CWD, and in any case, the department will not approve a release that would result in deer densities greater than the habitat conditions and deer populations at the release site can sustain, which would be the major concern in evaluating disease propagation potential. Conversely, the trapping of deer from within a SZ, because the source population's disease potential is unknown, represents an unacceptable risk of disease propagation in the absence of adequate sampling data to provide sufficient confidence that CWD does not exist within that area.

Proposed new §65.82(2)(D) would address the movement of deer pursuant to a DMP and would provide for the issuance of DMPs in SZs with the proviso that any breeder deer introduced to a DMP must be released to the designated release site and cannot be returned to a deer breeding facility. A DMP authorizes the trapping and temporary detention of free-ranging deer at the trap site for breeding purposes. Breeder deer may be introduced to a DMP pen as well, but since the epidemiological status of free-ranging deer within high-fenced enclosures is unknown, it is problematic to allow breeder deer exposed to such deer to be returned to a breeding facility.

The proposed amendment to §65.84, concerning Powers and Duties of the Executive Director, would alter the terminology used in the section in order to conform the terminology with the changes proposed elsewhere in this rulemaking.

The proposed amendment to §65.85, concerning Mandatory Check Stations, would make nonsubstantive changes to terminology to comport the section with amendments being made to other sections.

The proposed amendment to §65.86, concerning Preemption, would create an exception for the comprehensive CWD management rules contained in Division 2 of the subchapter. The current provision allows Division 1 to control in instances of conflict with other provisions of Chapter 65, but in order for the proposed amendments to function as intended, the current rule must be amended to allow regulatory primacy for the provisions of Division 2 in the event of conflicts.

Proposed new §65.88, concerning Deer Carcass Movement Restrictions, would set forth the conditions under which certain parts of a susceptible species harvested within a CZ or SZ could be lawfully transported from the CZ or SZ where the harvest occurred.

Proposed new §65.88(a) would prohibit the possession or transport of certain parts of a susceptible species (white-tailed deer or mule deer) taken in a state, province, or other place outside Texas where CWD has been detected in free-ranging or captive herds. CWD prions are known to be present in tissues of infected animals, especially brain, spinal cord and viscera; thus, carcasses with these tissues entering Texas from other states and countries where CWD has been confirmed represent a source of environmental contamination and a potential infection pathway to free-ranging and farmed deer in Texas. For the same reason, proposed new subsection (a)(2) would prohibit the transport of

any part of a susceptible species from within a CZ or SZ, except in compliance with the proposed new section.

Proposed new §65.88(b) would establish exceptions to subsection (a), consisting of various types of processing that would have to take place in order to lawfully transport susceptible species from the place of harvest. The exceptions consist of meat that has been cut up and packaged (boned or filleted); a carcass that has been reduced to quarters with no brain or spinal tissue present; a cleaned hide (skull and soft tissue must not be attached or present); whole skull (or skull plate) with antlers attached, provided the skull or skull plate has been completely cleaned of all soft tissue; finished taxidermy products; cleaned teeth; or tissue prepared and packaged for delivery to and use by a diagnostic or research laboratory. In general, these types of processing reflect the removal of the types of tissues that are known to concentrate CWD prions.

Proposed new §65.88(c) would provide that the exceptions created by subsection (b) apply if the susceptible species is processed within the CZ or SZ where it was harvested. In order to minimize the potential that brain or spinal tissue potentially infected with CWD could be transported beyond a CZ or SZ and present a risk of environmental contamination, the processing of the susceptible species must occur within the CZ or SZ where the animal is killed. The only exceptions are the transport of the head to a check station for tissue extraction and the transport of a head to a taxidermist.

Proposed new §65.88(d) would allow a susceptible species harvested in a CZ or SZ and processed in accordance with the provisions of subsections (b) and (c) to be transported from the CZ or SZ, provided it is accompanied by a department-issued check-station receipt, which must remain with the susceptible species until it reaches a final destination. At the current time, the only mandatory check stations in Texas are located in the one CZ that has been established in west Texas; however, additional mandatory check stations will be designated in the Panhandle area in Dallam, Deaf Smith, Hartley, Moore, Parmer, Potter, Randall, Oldham, and Sherman counties. Therefore, the proposed provision would allow the transport of susceptible species only if the required processing has occurred and the head has been presented at a check station.

Proposed new §65.88(e) would allow susceptible species harvested from a CZ or SZ, other state, Canadian province, or other place outside of Texas to be transported to a taxidermist for taxidermy purposes; however, in order to minimize the potential for environmental contamination, all brain material, soft tissue, spinal column and any unused portions of the head would be required to be disposed of in a landfill permitted by the Texas Commission on Environmental Quality (TCEQ). The proposed new subsection does not exempt hunters within a CZ or SZ from the requirement, except as specifically authorized by the department, to submit the head of a susceptible species harvested within a CZ or SZ to a check station for tissue collection.

Proposed new §65.88(f) would exempt deer harvested in Surveillance Zone 3 from the mandatory check station requirement and documentation requirements of the section. The department was approached by concerned county officials and landowners in Medina County who committed to organizing a volunteer hunter and landowner effort to provide the department with a sufficient number of valid "not detected" CWD test results, which would allow the department to make an epidemiologically sound determination about the prevalence (if any) of CWD within Surveillance Zone 3.

Proposed new §65.89, concerning Penalties, would state the statutory penalties for violations of the proposed new rules for ease of reference.

Mr. Mitch Lockwood, Big Game Program Director, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state and local governments as a result of enforcing or administering the rules as proposed, as department personnel currently allocated to the administration and enforcement of the affected department programs will administer and enforce the rules as part of their current job duties and testing costs associated with the rules will be absorbed within current budgetary resources.

Mr. Lockwood also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be the protection of free-ranging, native deer from communicable diseases, thus ensuring the public of continued enjoyment of the resource and also ensuring the continued beneficial economic impacts of hunting in Texas. Additionally, the protection of free-ranging deer herds will have the simultaneous collateral benefit of protecting captive herds, and maintaining the economic viability of deer breeding operations.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), in April 2008, the Office of the Attorney General issued guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. These guidelines state that "[g]enerally, there is no need to examine the indirect effects of a proposed rule on entities outside of an agency's regulatory jurisdiction." The guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. The guidelines also list examples of the types of costs that may result in a "direct economic impact." Such costs may include costs associated with additional recordkeeping or reporting requirements; new taxes or fees; lost sales or profits; changes in market competition; or the need to purchase or modify equipment or services. As explained in more detail below, the department has determined that except for deer breeders, the proposed rules will not have an adverse impact on small or micro-businesses.

The department recognizes that Triple T and DMP holders in many cases obtain such permits as part of an effort to enhance the antler quality or increase the density of a deer herd located on a specific property. In turn, such landowners may seek to obtain a higher fee for hunting opportunities based on the perception of a higher-quality hunting experience. However, adverse economic impacts to the pricing structure of hunting opportunity as a result of the proposed new rules, if they occur, are indirect at best. The rules do not directly impact a landowner's ability to charge a fee for a hunting opportunity on the landowner's property. In addition, any deer that are introduced to a property as a result of Triple T or DMP activities continue to be a public resource.

Scientific Educational, Zoological, and Rehabilitation Permits

There will be no adverse economic impacts to persons holding permits issued under Parks and Wildlife Code, Chapter 43, Subchapter C (permits for rehabilitation, scientific collection, edu-

cational display, and zoological display). Current rules (31 TAC §69.44(b) and §69.302) prohibit the sale of protected wildlife held under those permits. Since persons possessing these permits undertake permitted activities on a non-profit basis, any person or entity involved in permitted activities would not be engaged in such activities for the purpose of making a profit and would thus not be considered a small or micro-business as defined in Government Code, §2006.001.

Triple T Permits

There will be no adverse economic effects to holders of Triple T permits. Triple T permits authorize only the trapping, transporting, and transplantation of a public resource, and wildlife trapped under a Triple T may not be sold, bartered, or exchanged for anything of value (Parks and Wildlife Code, §1.011; 31 TAC §69.117(a)(6)). Therefore, persons engaged in such activities would not suffer a direct adverse economic impact from the proposed rules. Current department rules governing Triple T permit issuance provide for the denial of a permit if the department determines that release of a game animal or game bird may detrimentally affect existing populations or systems (31 TAC §65.103(c)(3)). The rules as proposed would further clarify this authority by prohibiting the trapping of susceptible species from within a CZ or SZ since trapping and moving susceptible species from within a CZ or SZ would have the potential to detrimentally affect other populations of deer by exposure to animals possibly infected with CWD.

Deer Management Permits

There will be no adverse economic impact to holders of DMPs. As noted previously, the department has not promulgated rules governing DMPs for mule deer; therefore, the only DMP activities affected by the proposed new rules would be DMPs issued for white-tailed deer in SZ 2 or 3. A DMP authorizes the permittee to temporarily detain free-ranging white-tailed deer for breeding purposes, including deer introduced to the DMP pen via Triple T permit and/or deer breeder permit. Except for breeder deer, which under normal circumstances may be returned to a breeding facility, deer held pursuant to a DMP must be released following breeding activities in a DMP pen and may not be sold (Parks and Wildlife Code, §§1.011, 43.621; 31 TAC §65.133(g)). As a result, persons engaged in such activities would not suffer a direct small or micro-business adverse economic effect from the proposed rules.

Deer Breeder Permits

Parks and Wildlife Code, §43.357(a), authorizes a person to whom a breeder permit has been issued to "engage in the business of breeding breeder deer in the immediate locality for which the permit was issued" and to "sell, transfer to another person, or hold in captivity live breeder deer for the purpose of propagation." As a result, unlike the other permits impacted by the proposed rules, breeder permits authorize persons to engage in business activities.

Government Code, §2006.001(1), defines a small or micro-business as a legal entity "formed for the purpose of making a profit" and "independently owned and operated." A micro-business is a business with 20 or fewer employees. A small business is defined as a business with fewer than 100 employees, or less than $6 million in annual gross receipts. Although the department does not require holders of breeder permits to provide financial information to the department, the department believes that many if not all persons holding deer breeder permits would qualify as a small or micro-business. Since the rules as proposed would impact the ability of a deer breeder to engage in certain activities undertaken to generate a profit, the proposed rules may have an adverse impact on persons holding a deer breeder permit.

The proposed new rules would result in potential adverse economic impacts to one deer breeder with a breeding facility in proposed SZ 2 and 12 deer breeders with breeding facilities in proposed SZ 3. There are no breeding facilities located in any existing or proposed CZ. Of the 13 breeding facilities directly affected by the rules as proposed, six are designated as TC 3 breeding facilities. Under the comprehensive CWD management rules alluded to previously in this rulemaking, TC 3 breeding facilities are prohibited from or limited in transferring or releasing deer. The department notes that when the comprehensive CWD management rules become effective, many TC 3 breeding facilities will become TC 2 breeding facilities, although those under a TAHC hold order will remain at TC 3 status. Thus, the amendments as proposed do not impose any direct economic impact on TC 3 breeding facilities because those facilities are already prevented by other rules from engaging in deer movement and are under hold orders and herd plans issued by TAHC, which remain in effect until epidemiological confidence can be established that CWD is not present in those facilities. The remaining breeding facilities directly affected by the proposed rules are TC 2 breeding facilities in Medina, Bandera, and Uvalde counties and none of the facilities are under a TAHC hold order. The proposed rules allow TC 2 facilities to transfer breeder deer to and from other breeding facilities and release sites with a SZ, but prohibit any activity that would result in the movement of deer beyond the SZ. Thus, these 13 breeding facilities could experience adverse economic impacts. The extent of such adverse economic impact would consist of loss of revenue as a result of being unable to move deer into or beyond the SZ. The dollar value of the adverse economic impact is dependent on the volume of deer produced or acquired by any given permittee, which can vary from a few deer to hundreds of deer, and upon the cost of the deer, which can vary from hundreds of dollars to many thousands of dollars. The department does not require deer breeders to report the sale or purchase prices of breeder deer; however, publicly available information indicates that sale prices, especially for buck deer, may be significant. The sale price for a single deer may range from hundreds of dollars to many thousands of dollars.

Although a deer breeder permit confers the privilege to buy and sell breeder deer and many deer breeders participate in a market for breeder deer, other deer breeders are interested only in breeding and liberating deer on their own properties for hunting opportunity. Once a breeder deer is liberated, it cannot be returned to a breeding facility. Thus, if a deer breeder is engaged primarily in buying and selling deer, the potential adverse economic impact is greater than that for a deer breeder who engages in deer breeding activities primarily for purposes of release onto that person's property. The department notes that the designation of a SZ is not necessarily permanent and that the department can change the size and shape of a SZ depending on assessments of prevalence and extent of CWD within a CZ as epidemiological certainty is resolved. The department also notes that the comprehensive CWD management rules alluded to elsewhere in this preamble provide a pathway for all TC 2 breeding facilities to attain TC 1 status within three years. (Under the proposed rules, TC 1 facilities in a SZ may transfer deer anywhere for any purpose, provided there is compliance with the department's regulations regarding transfer of deer.) Therefore, any adverse economic impacts to deer breeders as a result of

CZ designations could be temporary. The estimated costs of performing tests necessary to reach TC 1 status are as set out in the proposal for the comprehensive CWD management rules (41 TexReg 2853).

No other small or microbusinesses or persons required to comply would incur any immediate direct adverse economic impacts.

The department notes that because CWD has been proven to be transmissible by direct contact (including through fences) and via environmental contamination, there may be adverse economic impacts unrelated to the proposed rules in the event that CWD is confirmed near a breeding facility due to the possible reluctance of potential customers to purchase deer from a facility in an area where CWD has been confirmed. Additionally, if CWD is detected within a breeding facility, there could be lost revenue to the permittee since potential purchasers who are aware of the potential of CWD would likely refrain from purchasing deer from such a facility. Thus, the proposed rules, by providing a mechanism to minimize the spread of CWD, could also protect the economic interests of the regulated community.

The department considered several alternatives to achieve the goals of the proposed new rules while reducing potential adverse impacts on small and micro-businesses and persons required to comply. The department considered proposing no rules. This alternative was rejected because a regulation that clearly sets out the restrictions on the regulated community is necessary to stem the spread of CWD. The department concluded that the need to protect the wildlife resources that sustain the state's multi-billion-dollar hunting industry outweighs the temporary adverse impacts to small and micro-businesses and persons required to comply.

The department also considered CZs and SZs that are more narrowly drawn. This alternative was rejected because the size of a CZ or SZ is biologically determined by using the best science and data available, correlated to the susceptible species. If the department chose to implement smaller CZs and SZs, it would increase the risk of spreading CWD and introduce regulatory confusion.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule. Any impacts resulting from the discovery of CWD in or near private real property would be the result of the discovery of CWD and not the proposed rules.

Comments on the proposed rule may be submitted to Mitch Lockwood, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (830) 792-9677 (e-mail: *mitch.lockwood@tpwd.state.tx.us);* or via the department's website at www.tpwd.state.tx.us.

31 TAC §§65.80 - 65.82, 65.84 - 65.86, 65.88, 65.89

The amendments and new rules are proposed under the authority of Parks and Wildlife Code, Chapter 43, Subchapter C, which requires the commission to adopt rules to govern the collecting, holding, possession, propagation, release, display, or transport of protected wildlife for scientific research, educational display, zoological collection, or rehabilitation; Subchapter E, which requires the commission to adopt rules for the trapping, transporting, and transplanting of game animals and game birds, urban white-tailed deer removal, and trapping and transporting surplus white-tailed deer; Subchapter L, which authorizes the commission to make regulations governing the possession of breeder deer held under the authority of the subchapter; Subchapter R, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that white-tailed deer may be temporarily detained in an enclosure; Subchapter R-1, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that mule deer may be temporarily detained in an enclosure (although as noted previously, the department has not yet established the DMP program for mule deer authorized by Subchapter R-1); and §61.021, which provides that no person may possess a game animal at any time or in any place except as permitted under a proclamation of the commission.

The proposed amendments and new rules affect Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1 and Chapter 61.

§65.80. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. All other words in this subchapter shall have the meanings assigned by Parks and Wildlife Code.

(1) Adult deer--A white-tailed deer or mule deer that is 16 months of age or older.

[~~(2) Buffer Zone (BZ)--A department-defined geographic area in this state adjacent to or surrounding a HRZ, within which the department, using the best available science and data, has determined that an elevated probability of discovering CWD exists.~~]

(2) [~~(3)~~] Containment Zone (CZ)--A department-defined geographic area in this state within which CWD has been detected or the department has determined, using the best available science and data, CWD detection is probable.

(3) [~~(4)~~] Eligible mortality--Any lawfully possessed adult deer that has died.

(4) [~~(5)~~] Surveillance Zone (SZ) [~~High-Risk Zone (HRZ)~~]--A department-defined geographic area in this state [~~adjacent to or surrounding a CZ,~~] within which the department has determined, using the best available science and data, that the presence of CWD could reasonably be expected.

(5) [~~(6)~~] Susceptible species--Any species or part of a species of wildlife resource that is susceptible to CWD.

§65.81. Containment Zones; Restrictions.

The areas described in paragraph (1) of this section are CZs.

(1) Containment Zones.

(A) Containment Zone 1: That portion of the state within the boundaries of a line beginning in Culberson County where U.S. Highway (U.S.) 62-180 enters from the State of New Mexico; thence southwest along U.S. 62-180 to F.M. 1111 in Hudspeth County; thence south on F.M. 1111 to I.H. 10 [~~the intersection with State Highway (S.H.) 54; thence south along S.H. 54 to Interstate Highway (I.H.) 10;~~] thence west along I.H. 10 to S.H. 20; thence northwest along [~~to~~] S.H. 20 to Farm-to Market Road (F.M.) 1088; thence south along F.M. 1088 to the Rio Grande; thence northwest along the Rio Grande to the Texas-New Mexico border.

(B) Containment Zone 2: That portion of the state within the boundaries of a line beginning where I.H. 40 enters from

the State of New Mexico in Deaf Smith County; thence east along I.H. 40 to U.S. 385 in Oldham County; thence north along U.S. 385 to the Oklahoma state line.

(C) [~~(B)~~] Existing CZs may be modified and additional CZs may be designated as necessary by the executive director as provided in §65.84 of this title (relating to Powers and Duties of the Executive Director).

(2) Restrictions.

(A) Except as provided in this section or §65.87 of this title (relating to Exception), no person within a CZ shall conduct, authorize or cause any activity involving the movement of a susceptible species under a permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter C, E, L, R, or R-1. Such prohibited activity, includes, but is not limited to transportation, introduction, removal, authorizing the transportation, introduction or removal of, or causing the transportation, introduction or removal of a live susceptible species into, out of, or within a CZ.

(B) If the department receives an application for a deer breeder permit for a new facility that is to be located within an area designated as a CZ, the department will issue the permit but will not authorize the possession of susceptible species within the facility so long as the CZ designation exists.

(C) Deer that escape from a deer breeding [~~breeder~~] facility within a CZ may not be recaptured unless specifically authorized under a hold order or herd plan issued by the Texas Animal Health Commission.

(D) A TC 1 deer breeding facility located in a CZ may release breeder deer to immediately adjoining acreage if the release site and the breeding facility share the same ownership, but may not transfer deer to or from any other location. Breeder deer may not be transferred to or from a TC 2 or TC 3 deer breeding facility located within a CZ.

§65.82. Surveillance Zones; Restrictions [~~High Risk Zones; Restrictions~~].

The areas described in paragraph (1) of this section are SZs [~~HRZs~~].

(1) Surveillance Zones [~~High Risk Zones~~].

(A) Surveillance [~~High-Risk~~] Zone 1: That portion of the state lying within a line beginning where U.S. 285 enters from the State of New Mexico in Reeves County; thence southeast along U.S. 285 to R.M. 652; thence west along R.M. 652 to Rustler Springs Rd./FM 3541 in Culberson County; thence south along Rustler Springs Rd./F.M. 3541 to F.M. 2185; thence south along F.M. 2185 to Nevel Road; thence west along Nevel Road to County Road 501; thence south along County Road 501 to Weatherby Road; thence south along Weatherby Road to F.M. 2185; thence southwest along to F.M. 2185 to S.H. 54; thence south on S.H. 54 to U.S. 90; thence south along U.S. 90 to the Culberson County line; thence southwest along the Culberson County line to the Rio Grande River in Hudspeth County; thence north along the Rio Grande to F.M. 1088; thence northeast along F.M. 1088 to S.H. 20; thence southeast along S.H. 20 to I.H. 10; thence southeast along I.H. 10 to F.M 1111; thence north on F.M. 1111 to U.S. 62/180; thence east and north along U.S. 62/180 to the New Mexico state line in Culberson County [~~in Reeves County where the Pecos River enters from New Mexico; thence southeast along the Pecos River to Interstate Highway (I.H.) 20; thence west along I.H. 20 to I.H. 10; thence west along I.H. 10 to the Culberson County line; thence southwest along the Culberson County line to the Rio Grande; thence northwest along the Rio Grande to F.M. 192 in Hudspeth County; thence northeast along F.M. 192 to S.H. 20; thence southeast along S.H. 20 to I.H. 10; thence east along I.H. 10 to S.H. 54 in Hudspeth County; thence north along S.H. 54 to U.S. 62-180; thence northwest along U.S. 62-180 to the Texas-New Mexico border~~].

(B) Surveillance Zone 2. That portion of the state lying within a line beginning at the New Mexico state line where U.S. 60 enters Texas; thence northeast along U.S. 60 to U.S. 87 in Randall County; thence north along U.S. 87 to I.H. 27; thence north along U.S. 87/I.H. 27 to U.S. 287 in Moore County; thence north along US 287 to the Oklahoma state line.

(C) Surveillance Zone 3. That portion of the state lying within a line beginning at U. S. 90 in Hondo in Medina County; thence west along U.S. Highway 90 to F.M. 187 in Uvalde County; thence north along F.M. 187 to F. M. 470 in Bandera County; thence east along F.M. 470 to Tarpley in Bandera County; thence south along F.M. 462 to U.S. 90 in Hondo.

(D) [~~(B)~~] Existing SZs [~~HRZs~~] may be modified and additional SZs [~~HRZs~~] may be designated as necessary by the executive director as provided in §65.84 of this title (relating to Powers and Duties of the Executive Director).

(2) Restrictions.

(A) Except as provided in §65.87 of this title (relating to Exception) and subparagraph (B) of this paragraph, no person within a SZ [~~an HRZ~~] may conduct, authorize or cause any activity involving the movement of a susceptible species, into, out of, or within a SZ [~~an HRZ~~] under a permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter C, E, L, R, or R-1. Such prohibited activity, includes, but is not limited to transportation, introduction, removal, authorizing the transportation, introduction or removal, or causing the transportation, introduction or removal of a live susceptible species into, out of, or within a SZ [~~an HRZ~~].

(B) Breeder Deer.

(i) Except as provided in Division 2 of this subchapter, a breeding facility that is within a SZ and designated as a:

(I) TC 1 breeding facility may:

(-a-) transfer to or receive breeder deer from any other deer breeding facility in this state; and

(-b-) transfer breeder deer anywhere in this state for purposes of liberation, including to release sites within the SZ.

(II) TC 2 breeding facility may:

(-a-) receive deer from any facility in the state that is authorized to transfer deer; and

(-b-) transfer deer to a breeding facility or release site that is within the same SZ; but

(-c-) is prohibited from transferring deer to any facility outside of the SZ.

(ii) Deer that escape from a breeding facility within a SZ may not be recaptured unless specifically authorized under a hold order or herd plan issued by the Texas Animal Health Commission.

(C) Permits to Transplant Game Animals and Game Birds (Triple T permit). The department may authorize the release of susceptible species in a SZ under the provisions of a Triple T permit issued by the department under the authority of Parks and Wildlife Code, Chapter 43, Subchapter E and the provisions of Subchapter C of this chapter, but the department will not authorize the trapping of deer within a SZ for purposes of a Triple T permit.

(D) Deer Management Permit (DMP). The department may issue a DMP for a facility in a SZ; however, any breeder deer in-

troduced to a DMP facility must be released and may not be transferred to any deer breeding facility.

[(B) No person shall:]

[(i) introduce, remove, authorize the introduction or removal, or cause the introduction or removal of a live susceptible species into or from a deer breeder facility permitted under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter L, that is located in a HRZ unless:]

[(I) CWD test results of "not detected" have been returned from an accredited test facility on all eligible mortalities that occurred within the facility within the preceding five-year period;]

[(II) the facility has obtained Level "C" status as defined by 4 TAC §40.3 (relating to Herd Status Plans for Cervidae); and]

[(III) the department has confirmed that the herd inventory record maintained by the department is accurate; or]

[(ii) transport, authorize the transport, or cause the transport of a susceptible species into a HRZ unless:]

[(I) the requirements of clause (i)(I) - (III) of this subparagraph have been met; and]

[(II) the susceptible species are transported to a deer breeder facility permitted under Parks and Wildlife Code, Chapter 43, Subchapter L.]

[(C) No person shall liberate a susceptible species within an HRZ.]

[(D) Deer that escape from deer breeder facility within HRZ may not be recaptured.]

§65.84. Powers and Duties of the Executive Director.

(a) The executive director may designate any geographic area in this state a CZ or SZ[, HRZ, or BZ] if the area meets the applicable definition set forth in §65.80 of this title (relating to Definitions).

(b) The executive director shall notify the presiding officer of the commission prior to taking any action under the provisions of subsection (a) of this section.

(c) The executive director shall ensure that the department makes a reasonable effort to provide public notice in the event that a CZ or SZ[, HRZ, or BZ] is declared.

(d) The designation of a CZ or SZ[, HRZ, or BZ] under the provisions of subsection (a) of this section is:

(1) effective immediately; and

(2) applicable to all permits issued under the provisions of Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1.

(e) The department shall initiate rulemaking to adopt any CZ or SZ[, HRZ, or BZ] designated by the executive director as soon as practicable.

§65.85. Mandatory Check Stations.

(a) The department may establish mandatory check stations in any CZ or SZ or portion of a CZ or SZ [CZ, HRZ, or BZ] for the purpose of collecting biological information on susceptible species taken within a CZ or SZ [CZ, HRZ, or BZ].

(b) In a CZ or SZ [CZ, HRZ, or BZ] where mandatory check stations have been established, the intact, unfrozen head of any susceptible species that has been killed must be presented to a designated check station within 24 hours of take by the person or representative of the person who killed the susceptible species, unless otherwise authorized in writing by department personnel.

(c) The department will issue documentation for each specimen of a susceptible species that is presented at a check station. The department-issued documentation must remain with the specimen until it reaches the possessor's final destination.

(d) A person who fails or refuses to comply with this section commits an offense.

§65.86. Preemption.

Except as provided in Division 2 of this subchapter, to [To] the extent a provision of this subchapter conflicts with a provision of another subchapter of this chapter, this subchapter controls.

§65.88. Deer Carcass Movement Restrictions.

(a) Except as provided in this section, no person may:

(1) transport into this state or possess any part of a susceptible species from a state, Canadian province, or other place outside of Texas where CWD has been detected in free-ranging or captive herds; or

(2) transport or cause the transport of any part of a susceptible species from a property within a CZ or SZ.

(b) Subsection (a) of this section does not apply to susceptible species processed in accordance with this subsection, provided the applicable requirements of subsections (c) - (e) of this section have been met:

(1) meat that has been cut up and packaged (boned or filleted);

(2) a carcass that has been reduced to quarters with no brain or spinal tissue present;

(3) a cleaned hide (skull and soft tissue must not be attached or present);

(4) a whole skull (or skull plate) with antlers attached, provided the skull plate has been completely cleaned of all soft tissue;

(5) finished taxidermy products;

(6) cleaned teeth; or

(7) tissue prepared and packaged for delivery to and use by a diagnostic or research laboratory.

(c) For susceptible species harvested in a CZ or SZ, the provisions of subsection (b) of this section are applicable only if the susceptible species is processed within the CZ or SZ where the susceptible species was harvested, except for the transport of an intact head to a designated check station.

(d) A susceptible species harvested in a CZ or SZ and processed in accordance with the provisions of subsections (b) and (c) of this section may be transported from the CZ or SZ, provided it is accompanied by a department-issued check-station receipt, which shall remain with the susceptible species until it reaches a final destination.

(e) The skinned or unskinned head of a susceptible species from a CZ or SZ, other state, Canadian province, or other place outside of Texas may be transported to a taxidermist for taxidermy purposes, provided all brain material, soft tissue, spinal column and any unused portions of the head are disposed of in a landfill in Texas permitted by the Texas Commission on Environmental Quality (TCEQ).

(f) The provisions of subsections (a)(2) and (b) - (d) of this section do not apply to deer harvested in Surveillance Zone 3 as described in §65.82 of this title (relating to Surveillance Zones; Restrictions).

§65.89. Penalties.

A person who violates any provision of this subchapter commits an offense and is subject to the penalties prescribed by Parks and Wildlife Code, Chapter 43, Subchapter C, E, L, R or R-1, and Chapter 61, as applicable.

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

Filed with the Office of the Secretary of State on July 11, 2016.

TRD-201603442
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 21, 2016
For further information, please call: (512) 389-4775

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31 TAC §65.83, §65.88

Statutory Authority

The repeals are proposed under the authority of Parks and Wildlife Code, Chapter 43, Subchapter C, which requires the commission to adopt rules to govern the collecting, holding, possession, propagation, release, display, or transport of protected wildlife for scientific research, educational display, zoological collection, or rehabilitation; Subchapter E, which requires the commission to adopt rules for the trapping, transporting, and transplanting of game animals and game birds, urban white-tailed deer removal, and trapping and transporting surplus white-tailed deer; Subchapter L, which authorizes the commission to make regulations governing the possession of breeder deer held under the authority of the subchapter; Subchapter R, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that white-tailed deer may be temporarily detained in an enclosure; Subchapter R-1, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that mule deer may be temporarily detained in an enclosure (although as noted previously, the department has not yet established the DMP program for mule deer authorized by Subchapter R-1); and §61.021, which provides that no person may possess a game animal at any time or in any place except as permitted under a proclamation of the commission.

The proposed repeals affect Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1 and Chapter 61.

§65.83. Buffer Zones.

§65.88. Penalties.

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

Filed with the Office of the Secretary of State on July 11, 2016.

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General Counsel
Texas Parks and Wildlife Department
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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 98. DAY ACTIVITY AND HEALTH SERVICES

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§98.1, 98.2, 98.11, 98.62, and new §98.200, in Chapter 98, Adult Day Care and Day Activity and Health Services Requirements.

BACKGROUND AND PURPOSE

The purpose of the proposed amendments and new section is to implement changes made by Senate Bill (S.B.) 1999, 84th Legislature, Regular Session, 2015. Senate Bill 1999 amended the title of Texas Human Resources Code (THRC), Chapter 103, from Adult Day Care to Day Activity and Health Services, and made additional conforming amendments to the chapter. The proposed amendments change the title of Chapter 98 and change terminology throughout the chapter to conform to S.B. 1999. In addition, the proposed amendments restate the purpose of the chapter more succinctly, delete unnecessary definitions, and amend definitions for consistency and clarity. The term "DAHS facility" is redefined to be consistent with the type of facility that must be licensed under THRC Chapter 103. The term "DAHS facility," as currently used in Chapter 98, refers to an entity that contracts with DADS to provide DAHS in accordance with Subchapter H. For that reason, a new section, §98.200, is proposed to clarify that Subchapter H applies only to a licensed DAHS facility that contracts with DADS to provide DAHS. At a later date, the rules in Subchapter H will be amended to change "DAHS facility" to another term that reflects that the entities referenced in Subchapter H are those that contract with DADS to provide DAHS. Other proposed amendments update terminology, including replacing "client" with "individual," and referring to the Texas Board of Nursing. The proposed amendments clarify the meaning of the rules by restructuring provisions, deleting passive voice, and using consistent terminology.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §98.1 more succinctly states the purpose of the chapter, which is to provide licensing procedures and standards, as well as contracting requirements for DAHS facilities.

The proposed amendment to §98.2 deletes the definitions of "adult day care facility" and adds definitions of "DAHS," "DAHS facility," and "DAHS program" that are consistent with THRC, Chapter 103. The amendment deletes definitions of "contract manager," "DHS," and "handicapped person" because the terms are not used in Chapter 98. The term "individual plan of care" is deleted because the term "plan of care" is defined. The term "facility" is used throughout Chapter 98 to refer to a licensed DAHS facility, so that term remains in the definitions. In addition, the definitions of "registered nurse" and "licensed vocational nurse" are amended to refer to the Texas Board of Nursing. Editorial changes are made to other definitions to clarify their meanings.

The proposed amendment to §98.11 updates terminology to comply with THRC, Chapter 103. Other changes clarify the meaning of the rules by restructuring provisions, deleting passive voice, and using consistent terminology.

The proposed amendment to §98.62 updates terminology to comply with THRC, Chapter 103. The amendment refers to the Texas Board of Nursing instead of the Board of Nurse Examiners. The amendment also deletes references to the Texas Board of Licensure for Nursing Facility Administrators. A person receiving services from a DAHS facility is referred to as "individual," rather than a "client." Other changes clarify the meaning of the rules by restructuring provisions, deleting passive voice, and using consistent terminology.

Proposed new §98.200 clarifies that Subchapter H applies only to DAHS facilities that contract with DADS to provide DAHS.

FISCAL NOTE

David Cook, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new section are in effect, enforcing or administering the amendments and new section does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and new section may have an adverse economic effect on small businesses or micro-businesses that operate DAHS facilities, if they must update terminology in business materials, such as signage and business cards. The changes in terminology are required by statute so no alternatives were considered. DADS is unable to estimate the potential cost to small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Mary T. Henderson, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments and new section are in effect, the public benefit expected as a result of enforcing the amendments and new section is that the terminology in rules will be consistent with the governing statute and more respectful to persons receiving services in a DAHS facility.

Ms. Henderson anticipates that there may be an economic cost to persons who are required to comply with the amendments to reflect the new terminology in business materials, such as signage and business cards, but the cost is expected to be minimal. The amendments and new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Lorraine Brady at (512) 438-2235 in DADS Policy, Rules and Curriculum, Regulatory Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-15R19, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or emailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or emailed by midnight on the last day of the comment period. When faxing or emailing comments, please indicate "Comments on Proposed Rule 15R19" in the subject line.

SUBCHAPTER A. INTRODUCTION

40 TAC §98.1, §98.2

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation of and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §103.004 and §103.006, which provide that the HHSC executive commissioner shall adopt rules governing licensure of day activity and health services facilities; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The amendments implement Texas Government Code, §531.0055; and Texas Human Resources Code, §§103.004, 103.006, and 161.021.

§98.1. Purpose.

The purpose of this chapter is to: [~~implement the provisions of the Human Resources Code, Chapter 103, by providing licensing procedures, establishing standards for quality adult day care, and a safe and sanitary environment for clients of adult day care facilities; and to implement 45 Code of Federal Regulations (CFR), Part 96, Title XX of the Social Security Act, and 42 CFR §440.130(d), Title XIX of the Social Security Act to provide for the care, treatment, health, safety, and welfare of Medicaid clients' day activity and health services in adult day care facilities. Day Activity and Health Services must comply with the following additional requirements found in Chapter 20 of this title (relating to Cost Determination Process), Chapter 12, Subchapter A of this title (relating to Child and Adult Care Food Program), Chapter 48 of this title (relating to Community Care for the Aged and Disabled), Chapter 49 of this title (relating to Contracting for Community Care Services), Chapter 69 of this title (relating to Contracted Services), and Chapter 79 of this title (relating to Legal Services).~~]

(1) implement Texas Human Resources Code, Chapter 103, by establishing licensing procedures and standards for a DAHS facility; and

(2) establish requirements for a DAHS facility contracting with DADS to provide DAHS under Title XIX or Title XX of the Social Security Act.

§98.2. Definitions.

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

(1) Abuse--The negligent or willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly or disabled person by the person's caretaker, family member, or other individual who has

an ongoing relationship with the person, or sexual abuse of an elderly or disabled person, including any involuntary or nonconsensual sexual conduct that would constitute an offense under Texas Penal Code, §21.08, [~~Penal Code~~] (indecent exposure) or Texas Penal Code, Chapter 22, [~~Penal Code~~] (assaultive offenses) committed by the person's caretaker, family member, or other individual who has an ongoing relationship with the person.

(2) Adult--A person 18 years of age or older, or an emancipated minor.

[~~(3) Adult day care facility--A facility that provides services under an Adult Day Care Program on a daily or regular basis, but not overnight, to four or more elderly or handicapped persons who are not related by blood, marriage, or adoption to the owner of the facility.~~]

[~~(4) Adult day care program--A structured, comprehensive program that is designed to meet the needs of adults with functional impairments through an individual plan of care by providing health, social, and related support services in a protective setting.~~]

(3) [~~(5)~~] Affiliate--With respect to a:

(A) partnership, each partner of the partnership [~~thereof~~];

(B) corporation, each officer, director, principal stockholder, and subsidiary; and each person with a disclosable interest;

(C) natural person, which includes each:

(i) person's spouse;

(ii) partnership and each partner thereof of which said person or any affiliate of said person is a partner; and

(iii) corporation in which the [~~said~~] person is an officer, director, principal stockholder, or person with a disclosable interest.

(4) [~~(6)~~] Ambulatory--Mobility not relying on walker, crutch, cane, other physical object, or use of wheelchair.

(5) [~~(7)~~] Applicant--A person applying for a license under Texas Human Resources Code, Chapter 103.

(6) [~~(8)~~] Authorization--A case manager's decision, before DAHS begins [~~services begin~~] and before payment can be made, that DAHS may be provided to an individual.

(7) [~~(9)~~] Case manager--A DADS employee who is responsible for DAHS case management activities. Activities include eligibility determination, individual enrollment, assessment and reassessment of an individual's need, service plan development, and intercession on the individual's behalf.

(8) [~~(10)~~] Caseworker--Case manager.

(9) [~~(11)~~] Client--Individual.

(10) [~~(12)~~] Construction, existing--See definition of existing building.

(11) [~~(13)~~] Construction, new--Construction begun after April 1, 2007.

(12) [~~(14)~~] Construction, permanent--A building or structure that meets a nationally recognized building code's details for foundations, floors, walls, columns, and roofs.

[~~(15) Contract manager--A DADS employee, designated as the primary contact point between the facility and DADS, who is responsible for the overall management of the DAHS contract.~~]

(13) [~~(16)~~] DADS--The Department of Aging and Disability Services.

(14) DAHS--Day activity and health services. Health, social, and related support services.

(15) [~~(17)~~] DAHS facility--A facility that provides services under a day activity and health services program on a daily or regular basis, but not overnight, to four or more elderly persons or persons with disabilities who are not related by blood, marriage or adoption to the owner of the facility. [~~An entity that contracts with DADS to provide day activity and health services.~~]

(16) [~~(18)~~] DAHS program--A structured, comprehensive program offered by a DAHS facility that is designed to meet the needs of adults with functional impairments by providing DAHS in accordance with individual plans of care in a protective setting. [~~Day activity and health services (DAHS)--Structured program services designed to meet the needs of an adult by providing health, social, and related services in a DAHS facility.~~]

(17) [~~(19)~~] Days--Calendar days, [~~not workdays,~~] unless otherwise specified [~~noted in the text.~~].

(18) [~~(20)~~] Department--Department of Aging and Disability Services.

[~~(21) DHS--Formerly, this term referred to the Texas Department of Human Services; it now refers to DADS.~~]

(19) [~~(22)~~] Dietitian consultant--A registered dietitian; a person licensed by the Texas State Board of Examiners of Dietitians; or a person with a bachelor's [~~baccalaureate~~] degree with major studies in food and nutrition, dietetics, or food service management.

(20) [~~(23)~~] Direct service staff--An employee or contractor of a facility who directly provides [~~direct~~] services to individuals, [~~clients,~~] including the director, a licensed nurse, the activities director, and an attendant. An attendant includes a [~~is a person who may provide direct services to clients of the facility such as a facility bus~~] driver, food service worker, aide, janitor, porter, maid, and laundry worker. A dietitian consultant is not a member of the direct service staff.

(21) [~~(24)~~] Director--The person responsible for the overall operation of a facility.

(22) [~~(25)~~] Elderly person--A person 65 years of age or older.

(23) [~~(26)~~] Existing building--A building or portion thereof that, at the time of initial inspection by DADS, is used as an adult day care occupancy, as defined by Life Safety Code, NFPA 101, 2000 edition, Chapter 17 for existing adult day care occupancies; or has been converted from another occupancy or use to an adult day care occupancy, as defined by Chapter 16 for new adult day care occupancies. [~~In these standards, except where defined otherwise, a building either occupied as an adult day care facility at the time of initial inspection by DADS or converted to occupancy as an adult day care facility.~~]

(24) [~~(27)~~] Exploitation--An illegal or improper act or process of a caretaker, family member, or other individual, who has an ongoing relationship with the elderly person or person with a disability, using the resources of an elderly person or person with a disability for monetary or personal benefit, profit, or gain without the informed consent of the elderly person or person with a disability.

(25) [~~(28)~~] Facility--A licensed DAHS facility. [~~An adult day care facility, unless otherwise specified.~~]

(26) [~~(29)~~] Fence--A barrier to prevent elopement of an individual [~~a client~~] or intrusion by an unauthorized person, consisting

of posts, columns, or other support members, and vertical or horizontal members of wood, masonry, or metal.

(27) [~~(30)~~] FM [~~approval~~]--FM Global. A corporation whose approval of a product indicates a level of testing and certification that is acceptable to DADS. [~~A third-party certification of a product by FM (formerly known as Factory Mutual Insurance Company). FM approval provides third-party certification and testing of products acceptable to DADS.~~]

(28) [~~(31)~~] Fraud--A deliberate misrepresentation or intentional concealment of information to receive or to be reimbursed for service delivery to which an individual is not entitled.

(29) [~~(32)~~] Functional impairment--A condition that requires assistance with one or more personal care services [~~including bathing, dressing, preparing meals, feeding, grooming, taking self-administered medication, toileting, and ambulation~~].

[~~(33) Handicapped person--As used in this chapter, the term "person with disabilities" is used in place of the term "handicapped person" as that term is used in Texas Human Resources Code, Chapter 103.~~]

(30) [~~(34)~~] Health assessment--An assessment of an individual by a facility used to develop the individual's plan of care. [~~A plan of care that identifies the specific needs of a client and how those needs will be addressed by a facility.~~]

(31) [~~(35)~~] Health services--Services [~~Health services~~] that include personal care, nursing, and therapy services. [~~Personal care services include services listed under the definition of functional impairment in this section. Nursing services may include the administration of medications; physician-ordered treatments, such as dressing changes; and monitoring the health condition of the individual. Therapy services may include physical, occupational, or speech therapy.~~]

(A) Personal care services include:

(i) bathing;

(ii) dressing;

(iii) preparing meals;

(iv) feeding;

(v) grooming;

(vi) taking self-administered medication;

(vii) toileting;

(viii) ambulation; and

(ix) assistance with other personal needs or maintenance.

(B) Nursing services may include:

(i) the administration of medications;

(ii) physician-ordered treatments, such as dressing changes; and

(iii) monitoring the health condition of the individual.

(C) Therapy services may include:

(i) physical;

(ii) occupational; and

(iii) speech therapy.

(32) [~~(36)~~] Human services--Include the following services: [~~All of the following major areas constitute human services:~~]

(A) personal social services, including:

(i) DAHS;

(ii) counseling;

(iii) in-home care; and

(iv) protective services;

(B) health services, including:

(i) home health;

(ii) family planning;

(iii) preventive health programs;

(iv) nursing facility; and

(v) hospice;

(C) education services, meaning:

(i) all levels of school;

(ii) Head Start; and

(iii) vocational programs;

(D) housing and urban environment services, including public housing;

(E) income transfer services, including;

(i) Temporary Assistance for Needy Families; and

(ii) Supplemental Nutrition Assistance Program; and

(F) justice and public safety services, including:

(i) parole and probation; and

(ii) rehabilitation.

[~~(A) personal social services (day care, counseling, in-home care, protective services);~~]

[~~(B) health services (home health, family planning, preventive health programs, nursing home, hospice);~~]

[~~(C) education services (all levels of school, Head Start, vocational programs);~~]

[~~(D) housing and urban environment services (Section 8, public housing);~~]

[~~(E) income transfer services (Temporary Assistance for Needy Families, Food Stamps); and~~]

[~~(F) justice and public safety services (parole and probation, rehabilitation).~~]

(33) [~~(37)~~] Human service program--An intentional, organized, ongoing effort designed to provide good to others. The characteristics of a human service program [~~programs are that they~~] are:

(A) dependent on public resources and are planned and provided by the community;

(B) directed toward meeting human needs arising from day-to-day socialization, health care, and developmental experiences; and

(C) used to aid, rehabilitate, or treat people [~~those~~] in difficulty or need.

(34) [~~(38)~~] Individual--A person who applies for or is receiving services [~~provided~~] at a [~~an adult day care or DAHS~~] facility.

[~~(39) Individual plan of care--A written plan developed by a DAHS facility that documents functional impairment of and the health, social, and related support needed by an individual. The plan is developed jointly with and approved by the individual responsible party.~~]

(35) [~~(40)~~] Licensed vocational nurse (LVN)--A person [~~currently~~] licensed by the Texas Board of Nursing [~~Nurse Examiners for the State of Texas~~] who works under the supervision of a registered nurse (RN) or a physician.

(36) [~~(41)~~] Life Safety Code, NFPA 101--The Code for Safety to Life from Fire in Buildings and Structures, NFPA 101, a publication of the National Fire Protection Association, Inc. that: [~~The Life Safety Code, NFPA 101, addresses those construction, protection, and occupancy features necessary to minimize danger to life from fire, including smoke, fumes, or panic. The Life Safety Code, NFPA 101, establishes minimum criteria for the design of egress features so as to permit prompt escape of occupants from buildings or, where desirable, into safe areas within the building.~~]

(A) addresses the construction, protection, and occupancy features necessary to minimize danger to life from fire, including smoke, fumes, or panic; and

(B) establishes minimum criteria for the design of egress features so as to permit prompt escape of occupants from buildings or, where desirable, into safe areas within the building.

(37) [~~(42)~~] Long-term care facility--A facility that provides care and treatment or personal care services to four or more unrelated persons, including: [~~a nursing facility, an assisted living facility, and a facility serving persons with mental retardation and related conditions.~~]

(A) a nursing facility licensed under Texas Health and Safety Code, Chapter 242;

(B) an assisted living facility licensed under Texas Health and Safety Code, Chapter 247; and

(C) an intermediate care facility serving individuals with an intellectual disability or related conditions licensed under Texas Health and Safety Code, Chapter 252.

(38) [~~(43)~~] Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, and [~~or~~] delivery of services. Management services do not include contracts solely for maintenance, laundry, or food services.

(39) [~~(44)~~] Manager--A person having a contractual relationship to provide management services to a facility.

(40) [~~(45)~~] Medicaid-eligible--An individual who is eligible for Medicaid.

(41) [~~(46)~~] Medically related [~~Medically-related~~] program--A human services program under the human services-health services category in the definition of human services in this section.

(42) [~~(47)~~] Neglect--The failure to provide for one's self [~~oneself~~] the goods or services, including medical services, that are necessary to avoid physical harm, mental anguish, or mental illness; or the failure of a caregiver to provide these goods or services.

(43) [~~(48)~~] NFPA--The National Fire Protection Association. NFPA is an organization that develops codes, standards, recommended practices, and guides through a consensus standards development process approved by the American National Standards Institute.

(44) [~~(49)~~] NFPA 10--Standard for Portable Fire Extinguishers. A standard developed by NFPA for the selection, installation, inspection, maintenance, and testing of portable fire extinguishing equipment.

(45) [~~(50)~~] NFPA 13--Standard for the Installation of Sprinkler Systems. A standard developed by NFPA for the minimum requirements for the design and installation of automatic fire sprinkler systems, including the character and adequacy of water supplies and the selection of sprinklers, fittings, pipes, valves, and all maintenance and accessories.

(46) [~~(51)~~] NFPA 70--National Electrical Code. A code developed by NFPA for the installation of electric conductors and equipment.

(47) [~~(52)~~] NFPA 72--National Fire Alarm Code. A code developed by NFPA for the application, installation, performance, and maintenance of fire alarm systems and their components.

(48) [~~(53)~~] NFPA 90A--Standard for the Installation of Air Conditioning and Ventilating Systems. A standard developed by NFPA for systems for the movement of environmental air in structures that serve spaces over 25,000 cubic feet or buildings of certain heights and construction types, or both.

(49) [~~(54)~~] NFPA 90B--Standard for the Installation of Warm Air Heating and Air-Conditioning Systems. A standard developed by the NFPA for systems for the movement of environmental air in one- or two-family dwellings and structures that serve spaces not exceeding 25,000 cubic feet.

(50) [~~(55)~~] NFPA 96--Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations. A standard developed by NFPA that provides the minimum fire safety requirements related to the design, installation, operation, inspection, and maintenance of all public and private cooking operations, except for single-family residential usage.

(51) [~~(56)~~] Nurse--A registered nurse (RN) or a licensed vocational nurse (LVN) licensed in the state of Texas.

(52) [~~(57)~~] Nursing services--Services provided by a nurse, including: [~~licensed nursing personnel, which include observation; promotion and maintenance of health; prevention of illness and disability; management of health care during acute and chronic phases of illness; guidance and counseling of individuals and families; and referral to physicians, other health care providers, and community resources when appropriate.~~]

(A) observation;

(B) promotion and maintenance of health;

(C) prevention of illness and disability;

(D) management of health care during acute and chronic phases of illness;

(E) guidance and counseling of individuals and families; and

(F) referral to physicians, other health care providers, and community resources when appropriate.

(53) [~~(58)~~] Person--An individual, corporation, or association.

(54) [~~(59)~~] Person with a disclosable interest--A [~~A person with a disclosable interest is any~~] person who owns five percent interest in any corporation, partnership, or other business entity that is required to be licensed under Texas Human Resources Code, Chapter 103. A

person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company unless such entity participates in the management of the facility.

(55) [~~(60)~~] Person with a disability [~~disabilities~~]--A person whose functioning is sufficiently impaired to require frequent medical attention, counseling, physical therapy, therapeutic or corrective equipment, or another person's attendance and supervision.

(56) [~~(61)~~] Physician's orders--An order [~~for DAHS~~] that is signed and dated by a medical doctor (MD) or doctor of osteopathy (DO) who is licensed to practice medicine in the state of Texas. The DADS physician's order form used by a DAHS facility that contracts with DADS must include the MD's or DO's [~~physician's~~] license number.

(57) [~~(62)~~] Plan of care--A written plan, based on a health assessment and developed jointly by a facility and an individual or the individual's responsible party, that documents the functional impairment of the individual and the DAHS needed by the individual. [~~See definition of health assessment.~~]

(58) [~~(63)~~] Protective setting--A setting in which an individual's safety is ensured by the physical environment by staff [~~or personnel (staff)~~].

(59) [~~(64)~~] Registered nurse (RN)--A person [~~currently~~] licensed by the Texas Board of Nursing [~~Nurse Examiners for the State of Texas~~] to practice professional nursing.

(60) [~~(65)~~] Related support services--Services [~~Provision of services~~] to an [~~the~~] individual, family member, or caregiver [~~other caregivers~~] that may improve the person's [~~their~~] ability to assist with an individual's independence and functioning. Services include: [~~information and referral, transportation, teaching caregiver skills, respite, counseling, instruction and training, and support groups.~~]

(A) information and referral;

(B) transportation;

(C) teaching caregiver skills;

(D) respite;

(E) counseling;

(F) instruction and training; and

(G) support groups.

(61) [~~(66)~~] Responsible party--A person designated by an [~~Anyone the~~] individual as the individual's [~~designates as his~~] representative.

(62) [~~(67)~~] Safety--Protection [~~Action taken to protect~~] from injury or loss of life due to [~~such~~] conditions such as fire, electrical hazard, unsafe building or site conditions, and the presence of hazardous materials.

(63) [~~(68)~~] Sanitation--Protection [~~Action taken to protect~~] from illness, the transmission of disease, or loss of life due to unclean surroundings, the presence of disease transmitting insects or rodents, unhealthful conditions or practices in the preparation of food and beverage, or the care of personal belongings.

(64) [~~(69)~~] Semi-ambulatory--Mobility relying on a walker, crutch, cane, other physical object, or independent use of wheelchair.

(65) [~~(70)~~] Serious injury--An injury requiring emergency medical intervention or treatment by medical personnel, either at a facility or at an emergency room or medical office.

(66) [~~(71)~~] Social activities--Therapeutic, educational, cultural enrichment, recreational, and other [~~social~~] activities in a facility [~~on site~~] or in the community provided as part of [~~in~~] a planned program to meet the social needs and interests of an [~~the~~] individual.

(67) [~~(72)~~] UL--Underwriters Laboratories, Inc.--A corporation whose approval of a product indicates a level of testing and certification that is [~~UL approval provides third-party certification and testing of products~~] acceptable to DADS.

(68) [~~(73)~~] Working with people--Responsible for the delivery of services to individuals either directly or indirectly. Experience as a manager would meet this definition; however, an administrative support position such as a bookkeeper does not. Experience does not have to be in a paid capacity. [~~A person serving as a minister receiving an expense allowance in money plus free housing qualifies for experience in working with people.~~]

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

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Lawrence Hornsby
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SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §98.11

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation of and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §103.004 and §103.006, which provide that the HHSC executive commissioner shall adopt rules governing licensure of day activity and health services facilities; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The amendment implements Texas Government Code, §531.0055; and Texas Human Resources Code, §§103.004, 103.006, and 161.021.

§98.11. Criteria for Licensing.

(a) A person must not establish or operate a DAHS facility in Texas without a license issued by DADS in accordance with Texas Human Resources Code, Chapter 103, and this chapter [~~be licensed to establish or operate an adult day care facility in Texas~~].

(b) An applicant for a license must submit a complete application form and license fee to DADS.

(c) An applicant for a license must affirmatively demonstrate [~~show~~] that the DAHS facility meets:

(1) [~~the facility meets~~] the standards of the Life Safety Code, NFPA 101, 2000 edition;

(2) [~~the facility meets~~] the construction standards in Subchapter C of this chapter (relating to Facility Construction Procedures); and

(3) [~~the facility meets~~] the requirements for operation based on an on-site survey.

(d) DADS may deny an application that remains incomplete after 120 days.

(e) Before issuing a license, DADS considers the background and qualifications of:

(1) the applicant or license holder:

(2) a person with a disclosable interest;

(3) an affiliate of the applicant or license holder;

(4) a director; and

(5) a manager.

(f) DADS issues a license if it finds that the DAHS facility, and any person described in subsection (e) of this section, meets all requirements of this chapter. The license is valid for two years, except as provided by §98.15(b)(1) of this subchapter (relating to Renewal Procedures and Qualifications). [~~The maximum allowable number of clients specified on the license must not be exceeded.~~]

(g) A facility must not provide services to more individuals than the number of individuals specified on its license.

(h) [~~(g)~~] A facility must prominently and conspicuously post its license for display in a public area of the facility that is readily accessible to individuals, employees, and visitors. [~~The license must be posted in the area where clients are admitted and be viewable by clients and their legal guardians.~~]

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

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SUBCHAPTER D. LICENSURE AND PROGRAM REQUIREMENTS

40 TAC §98.62

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation of and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §103.004 and §103.006, which provide that the HHSC executive commissioner shall adopt rules governing licensure of day activity and health services facilities; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The amendment implements Texas Government Code, §531.0055; and Texas Human Resources Code, §§103.004, 103.006, and 161.021.

§98.62. Program Requirements.

(a) Staff qualifications.

(1) Director. A facility must employ a director.

(A) The director must:

(i) have graduated from an accredited four-year college or university and have no less than one year of experience in working with people in a human service or medically related [~~medically-related~~] program, or have an associate degree or 60 semester hours from an accredited college or university with three years of experience [~~in~~] working with people in a human service or medically related [~~medically-related~~] program; [~~or~~]

(ii) be an RN [~~a registered nurse~~] with one year of experience in a human service or medically related [~~medically-related~~] program; [~~or~~]

(iii) meet the training and experience requirements for a license as a nursing facility administrator under Texas Administrative Code (TAC), Title 40, Chapter 18, [~~the rules of the Texas Board of Licensure for~~] Nursing Facility Administrators; or

(iv) have met, on July 16, 1989, the qualifications for a director required [~~the position under the requirements in effect~~] at that time and have served continuously in the capacity of director [~~of a Texas Department of Human Services-certified facility~~] since that date.

(B) The director must show evidence of 12 [~~contact~~] hours of annual continuing education in at least two of the following areas:

(i) individual and provider rights and responsibilities, abuse, neglect, exploitation and confidentiality;

(ii) basic principles of supervision;

(iii) skills for working with individuals, families, and other professional service providers;

(iv) individual characteristics and needs;

(v) community resources;

(vi) basic emergency first aid, such as cardiopulmonary resuscitation (CPR) [~~CPR~~] or choking; or

(vii) federal laws, such as Americans with Disabilities Act, Civil Rights Act of 1991, the Rehabilitation Act of 1993, and the Family and Medical Leave Act of 1993.

(C) The activities director may fulfill the function of [~~facility~~] director if the activities director [~~he~~] meets the qualifications for facility director.

(D) One person may not serve as facility nurse, activities director, and [~~facility~~] director, regardless of qualifications.

(E) The facility must have a policy regarding the delegation of responsibility in the director's [administrator's] absence from the facility[, not to exceed 10 working days].

(F) The facility must notify the DADS regional office in which the facility is located if the director is absent from the facility for more than 10 working days [request a waiver from Long Term Care-Regulatory (LTC-R) Regional Office for exceptional circumstances. Exceptional circumstances include, but are not limited to, hospitalization, death, etc].

(2) Nurse. A [The] facility must employ a nurse [must be a registered nurse (RN) or a licensed vocational nurse (LVN)].

(A) An [The] RN must have a [current] license from the Texas Board of Nursing [Nurse Examiners for the State of Texas] and [must] practice in compliance with the Nurse Practice Act and rules and regulations of the Texas Board of Nursing [Nurse Examiners].

(B) An [The] LVN must have a [current] license from the Texas Board of Nursing [Vocational Nurse Examiners of Texas] and [must] practice in compliance with the Nurse Practice Act [Vocational Nurse Act] and rules and regulations of the Texas Board of Nursing [Board of Vocational Nurse Examiners].

(C) If a nurse serving as director leaves the facility to perform other duties related to [the provisions of] the DAHS [day care] program, an LVN or another RN must fulfill the duties of the facility nurse.

(D) A facility [Licensed facilities] that does [do] not have a DAHS [Day Activity and Health Services (DAHS)] contract, but has [have] a Special Services to Persons with Disabilities contract, is [are] not required to have an RN [a registered nurse] on duty, if [as long as] the individual [client] receiving services has no medical needs and is able to self-administer medication [self medicate].

(3) Activities director. A facility must employ an activities director.

(A) Except as provided in subparagraph (B) of this paragraph, an [The] activities director must have graduated from [be] a high school or have a certificate recognized by a state of the United States as the equivalent of a high-school diploma [graduate (or equivalent)] and have:

(i) a bachelor's degree from an accredited college or university, and [plus] one year of full-time experience [in] working with [the] elderly people or people with disabilities in a human service or medically related [medically-related] program; [or]

(ii) 60 semester hours from an accredited college or university, and [plus] two years of full-time experience [in] working with [the] elderly people or people with disabilities in a human service or medically related [medically-related] program; or

(iii) completed an [a state-approved] activities director's course, and [plus] two years of full-time experience [in] working with [the] elderly people or people with disabilities in a human service or medically related [medically-related] program.

(B) An activities director [Anyone] hired before [prior to] May 1, 1999, [as an activities director] with four years of full-time experience [in] working with elderly people or people with disabilities in a human service or medically related [medically-related] program is not subject to the requirements of subparagraph (A) of this paragraph[, will be considered a qualified activities director].

(4) Attendants. An attendant [Attendants] must be at least 18 years of age [old or older] and may be employed as a driver, aide, cook, janitor, porter, housekeeper, or laundry worker [include, but are not limited to, bus drivers, aides, cooks, janitors, porters, maids, and laundry workers].

(A) If a [the] facility employs a [bus] driver, the driver must have a current operator's license, issued by the Texas Department of Public Safety, which is appropriate for the class of vehicle used to transport individuals [clients].

(B) If an attendant handles food in the facility, the attendant [he] must meet [the] requirements of [described in] the [Texas] Department of State Health Services rules on food service sanitation as described in [under] 25 TAC, Chapter 228, Subchapters A - J [§§229.161-229.171 and §§229.173-175] (relating to Texas Food Establishments).

(5) Food service personnel. If a [the] facility prepares meals on site, the facility must have sufficient food service personnel to prepare meals and snacks. Food service personnel must meet the requirements of [described in] the [Texas] Department of State Health Services rules on food service sanitation as described in [under] 25 TAC, Chapter 228, Subchapters A - J [§§229.161-229.171 and §§229.173-229.175] (relating to Texas Food Establishments).

(6) Additional requirements for a facility that contracts with DADS [Day Activity and Health Services (DAHS) employees].

(A) Housekeeper. A [DAHS] facility that contracts with DADS may employ a part-time or full-time housekeeper.

(B) Driver. If a facility that contracts with DADS [DAHS facility] employs a [part-time or full-time] driver, the driver must:

(i) operate the facility's vehicles in a safe manner; and

(ii) maintain adult cardiopulmonary resuscitation (CPR) certification.

(b) Staffing. A [ratio. The] facility must ensure that:

(1) the ratio of direct service staff to individuals [clients] is at least one to eight, which must be maintained during provision of all DAHS [covered services] except during facility-provided transportation;

(2) at least one RN or LVN is working at the facility for at least eight hours per day and sufficient nurses are at the facility to meet the nursing needs of the individuals at all times [at a minimum, one registered nurse or licensed vocational nurse must be working on site, eight hours per day. The facility may schedule nursing hours according to client needs. Sufficient licensed nursing staff must be on site to meet the nursing needs of the clients];

(3) the facility director routinely works at least [a minimum of] 40 hours per week performing duties relating to the provision of the DAHS program; [adult day care services; and]

(4) the activities director routinely works at least 40 hours a week;[.]

(5) individuals [clients] whose needs cannot be met by the facility are not admitted or retained; and[. Sufficient staff must be on duty at all times to meet the needs of the clients. The facility is responsible for all care provided at the facility.]

(6) sufficient staff are on duty at all times to meet the needs of the individuals who are served by the facility.

(c) Staff health. All direct service staff must be free of communicable diseases.

(1) A [The] facility must screen all employees for tuberculosis within two weeks of employment and annually, according to Cen-

ter for Disease Control and Prevention (CDC) screening guidelines. All persons providing services under an outside resource contract must also screen all employees for tuberculosis within two weeks of employment and annually according to CDC [~~Center for Disease Control~~] screening guidelines. [~~When requested to do so by the facility, persons providing services under an outside resource contract must provide evidence of compliance with this requirement.~~]

(2) If an employee contracts [~~employees contract~~] a communicable disease that is transmissible to individuals through food handling or direct individual care, the facility must exclude the employee [~~must be excluded~~] from providing these services while the employee is infectious [~~as long as a period of communicability is present~~].

(d) Staff responsibilities.

(1) [~~Facility director.~~] The facility director [~~is responsible for~~]:

(A) manages the DAHS program and [~~managing the adult day care program and/or~~] the facility;

(B) trains and supervises [~~training and supervising~~] facility staff;

(C) monitors [~~monitoring~~] the facility building and grounds to ensure compliance;

(D) maintains [~~maintaining~~] all financial and individual [~~client~~] records;

(E) develops [~~developing~~] relationships with community groups and agencies for identification and referral of individuals [~~clients~~];

(F) maintains [~~maintaining~~] communication with an individual's [~~the client's~~] family members or responsible parties;

(G) assures [~~assuring~~] the development and maintenance of the individual's [~~individual~~] plan of care; and

(H) ensures [~~ensuring~~] that, if the facility director [~~he~~] serves as the RN [~~nurse~~] consultant, the facility director fulfills [~~during the same eight-hours-per-day period, he is fulfilling his~~] the responsibility as director.

(2) [~~Facility nurse.~~] The facility nurse [~~is responsible for~~]:

(A) assesses an individual's [~~assessing the client's~~] nursing and medical needs;

(B) develops an individual's [~~developing a client's individual~~] plan of care;

(C) obtains [~~obtaining~~] physician's orders for medication and treatments to be administered;

(D) determines [~~determining~~] whether self-administered medications have been appropriately taken, applied, or used;

(E) enters, dates, and signs [~~entering, dating, and signing~~] monthly progress notes on medical care provided;

(F) administers [~~administering~~] medication and treatments;

(G) provides [~~providing~~] health education; and

(H) maintains [~~maintaining~~] medical records.

(3) [~~Activities director.~~] The activities director [~~is responsible for~~]:

(A) plans and directs [~~planning and directing~~] the daily program of activities, including physical fitness exercises or other recreational activities;

(B) records the individual's [~~recording the client's~~] social history;

(C) assists the individual's [~~assisting the client's~~] related support needs;

(D) assures [~~assuring~~] that the identified related support services are included in the individual's [~~client's individual~~] plan of care; and

(E) signs and dates [~~signing and dating~~] monthly progress notes about social and related support services activities provided.

(4) An [~~Attendant. The~~] attendant [~~is responsible for~~]:

(A) provides [~~providing~~] personal care services to assist with activities of daily living [~~(assistance with activities of daily living)~~];

(B) assists [~~assisting~~] the activities director with recreational activities; and

(C) provides [~~providing~~] protective supervision through observation and monitoring [~~(observation and monitoring)~~].

(5) Food service personnel[~~. Food service personnel are responsible for~~]:

(A) prepare [~~preparing~~] meals and snacks; and

(B) maintain [~~maintaining~~] the kitchen area and utensils in a safe and sanitary condition.

(6) A facility must obtain consultation at least four hours per month from a dietitian consultant [~~Dietitian consultant~~].

(A) [~~The facility must receive consultation at least four hours each month from a dietitian.~~] The dietitian consultant plans and [~~and/or~~] reviews menus and must:

(i) [~~prior~~] approve and sign [~~each~~] snack and luncheon menus [~~menu~~];

(ii) review menus monthly to ensure that substitutions were appropriate; and

(iii) develop a [~~any~~] special diet for an individual, if [~~diets~~] ordered by a physician [~~physicians for individual clients.~~].

(B) A facility must obtain consultation from a [~~The~~] dietitian consultant, even if the facility has [~~is required for all facilities, those that have their~~] meals delivered from another facility with a [~~its own~~] dietitian consultant or the facility contracts for the preparation and delivery of meals with a contractor that employs a registered dietician. A consultant who provides [~~may provide~~] consultation to several facilities must provide [~~as long as each facility receives~~] at least four hours of consultation per [~~a~~] month to each facility. [~~The four hours cannot be "shared" by several facilities.~~]

[~~(C) Facilities that contract for the preparation and delivery of meals with management companies employing their own registered dietitians are required to have the four hours of consultation from a dietitian consultant.~~]

(7) If a facility employs an LVN as the facility nurse, the facility must ensure that an RN consultant provides consultation at the facility at least four hours per week. [~~Registered nurse consultant. In facilities where the nurse is a licensed vocational nurse, a registered nurse consultant must provide on-site consultation four hours~~

~~per week.~~] The RN consultant must document the consultation provided. The RN consultant must provide the consultation [~~during the time~~] when individuals [~~clients~~] are present in the facility. The RN consultant may provide the following types of assistance:

(A) review [~~reviewing~~] plans of care and suggest [~~suggesting~~] changes, if appropriate;

(B) assess individuals' [~~assessing clients'~~] health conditions;

(C) consult [~~consulting~~] with the LVN in solving problems involving [~~client~~] care and service planning;

(D) counsel individuals [~~counseling clients~~] on [~~their~~] health needs;

(E) train, consult, and assist [~~training, consulting, and assisting~~] the LVN to maintain [~~in maintaining~~] proper medical records; and

(F) provide [~~providing~~] in-service training for direct service staff.

(e) Training.

(1) Initial training.

(A) A [~~The~~] facility must:

(i) provide direct service [~~all~~] staff with training in the fire, disaster, and evacuation procedures within three workdays after the start of employment and document the training in the facility records; and[~~. The training must be documented in the facility records.~~]

(ii) provide direct service [~~delivery~~] staff a minimum of 18 hours of training during the first three months after the start of employment and document the training in the facility records. [~~Training must be documented in the facility records. Training must include:~~]

~~*(I)* any nationally or locally recognized adult cardiopulmonary resuscitation (CPR) course/certification;~~

~~*(II)* first aid; or~~

~~*(III)* orientation to health care delivery including the following components:~~

~~(-a-) safe body function and mechanics;~~

~~(-b-) personal care techniques and procedures; and~~

~~(-c-) overview of client population served at the facility; and~~

~~*(IV)* identification and reporting of abuse, neglect, or exploitation.~~

(B) The training provided in accordance with subparagraph (A)(ii) of this paragraph must include: [~~Staff employed as substitutes on an infrequent and irregular basis are not required to have 18 hours of initial training. Substitute and consultant staff must receive a minimum of three hours of orientation. Substitutes for direct service staff used by a facility on a regular basis must meet all training requirements as specified under this subsection.~~]

(i) any nationally or locally recognized adult CPR course or certification;

(ii) first aid; or

(iii) orientation to health care delivery, including the following topics:

(I) safe body function and mechanics;

(II) personal care techniques and procedures; and

(III) overview of the population served at the facility; and

(iv) identification and reporting of abuse, neglect, or exploitation.

(2) Ongoing training.

(A) A [~~The~~] facility must provide at least [~~a minimum of~~] three hours of ongoing training to direct service staff quarterly. The facility must ensure that direct delivery staff maintain current certification in CPR.

(B) A [~~The~~] facility must practice evacuation procedures with staff and individuals at least [~~clients not less than~~] once a month. The facility must document evacuation results [~~must be documented~~] in the facility records.

(f) Medications.

(1) Administration.

(A) A facility must ensure that a person who holds a current license under state law that authorizes the licensee to administer medications administers medications to individuals [~~Clients~~] who choose not to or cannot self-administer their medications [~~must have their medications administered by a person who holds a current license under state law which authorizes the licensee to administer medications~~].

(B) A facility must ensure that all [~~All~~] medication prescribed to an individual that is administered at the facility is [~~clients must be~~] dispensed through a pharmacy or by a prescribing healthcare professional [~~the client's treating physician or dentist~~].

(C) A facility may administer physician [~~Physician~~] sample medications at the facility if [~~may be given to a client by the facility provided~~] the medication has specific dosage instructions for the individual [~~client~~].

(D) A facility must record an individual's [~~Each client's~~] medications [~~must be listed~~] on the individual's [~~an individual client's~~] medication profile record. The recorded information must be obtained from the prescription label and must include[~~, but is not limited to,~~] the medication name, strength, dosage, amount received, directions for use, route of administration, prescription number, pharmacy name, and the date each medication was issued by the pharmacy.

(2) Assistance with self-administration. A nurse may assist [~~self administration. Assistance~~] with self-administration [~~self administration~~] of an individual's [~~client's~~] medication if the individual is unable to administer the medication [~~regimen by licensed nursing staff may be provided to clients who are incapable of self-administering~~] without assistance. Assistance with self-administration of medication [~~self-medication includes, and~~] is limited to the following activities:

(A) reminding an individual [~~reminders~~] to take [~~their~~] medications at the prescribed time;

(B) opening and closing containers or packages [~~and replacing lids~~];

(C) pouring prescribed dosage according to the individual's medication profile record;

(D) returning medications to the proper locked areas;

(E) obtaining medications from a pharmacy; and

(F) listing on an individual's [individual client's] medication profile record the medication name, strength, dosage, amount received, directions for use, route of administration, prescription number, pharmacy name, and the date each medication was issued by the pharmacy.

(3) Self-administration.

(A) A nurse must counsel an individual who self-administers medication or treatment at least once per month to ascertain if the individual continues to be able to self-administer the medication or treatment. The facility must keep a written record of the counseling. [Clients who self-administer their own medications must be counseled at least once a month by licensed nursing staff to ascertain if the clients continue to be capable of self-administering their medications and/or treatments. A written record of counseling must be kept by the facility.]

(B) A facility may permit an individual who chooses to keep the individual's medication locked in the facility's central medication storage area to enter or have access to the area for the purpose of self-administering medication or treatment. A facility staff member must remain in or at the storage area the entire time the individual is present. [Clients who choose to keep their medications locked in the central medication storage area may be permitted entrance or access to the area for the purpose of self-administering their own medication and/or treatment regimen. A facility staff member must remain in or at the storage area the entire time any client is present.]

(4) General.

(A) A [The] facility director, an [the] activities director, or a facility nurse must immediately report to an individual's prescribing healthcare professional [the client's physician] and responsible party any unusual reactions to a medication or treatment [medications or treatments].

(B) When a [the] facility supervises or administers [the] medications, the facility must document in writing if an individual [a written record must be kept when the client] does not receive or take the medication and treatment as prescribed [his medications and/or treatments as prescribed]. The documentation must include the date and time the dose should have been taken, and the name and strength of medication missed.

(5) Storage.

(A) A [The] facility must provide a locked area for all medications, which may include:[. Examples of areas include, but are not limited to:]

(i) a central storage area; and

(ii) a medication cart.

(B) A facility must store an individual's medication separately from other individuals' medications within the storage area. [Each client's medication must be stored separately from other clients' medications within the storage area.]

(C) A facility must store medication requiring refrigeration in a locked refrigerator that is used only for medication storage or in a separate, permanently attached, locked medication storage box in a refrigerator. [A refrigerator must have a designated and locked storage for medications requiring refrigeration. Medications requiring refrigeration must be stored in a refrigerator used only for medicine storage or in a separate, permanently attached, and locked medication storage box in a refrigerator.]

(D) A facility must store poisonous [Poisonous] substances and medications labeled for "external use only" [must be stored] separately within the locked [medical] area.

(E) A facility must [The medication room or cabinet medication storage area must have a separate, permanently attached cabinet, box, or drawer with a lock to] store drugs covered by Schedule II of the Controlled Substances Act of 1970 in a locked, permanently attached cabinet, box, or drawer that is separate from the locked storage area for other medications.

(6) Disposal.

(A) A facility must keep medication that is [Medications] no longer being used by an individual [the client] for the following reasons [must be kept] separate from current medications and ensure the medication is [are to be] disposed of by a registered pharmacist licensed in the State of Texas:

(i) the medication has been [medications] discontinued by order of the prescribing professional [physician];

(ii) the individual [medications which remain after a client] is deceased; or

(iii) the expiration date of the medications has [which have] passed [the expiration date].

(B) A facility must dispose of needles [Needles] and hypodermic syringes with needles attached [must be disposed] as required by 25 TAC [1], Chapter 1, Subchapter K (relating to the Definition, Treatment, and Disposal of Special Waste from Health Care Related Facilities).

(C) A facility must obtain a signed receipt from an individual or the individual's responsible party if the facility releases medication to the individual [Medications kept in a central storage area are released to discharged clients when a receipt has been signed by the client] or responsible party.

(g) Accident, injury, or acute illness.

(1) A [The] facility must stock and maintain in a single location first aid supplies to treat burns, cuts, and poisoning.

(2) In the event of accident or injury to an individual requiring emergency medical, dental, or nursing care, or in the event of [apparent] death of an individual, a[, the adult day care] facility must:

(A) make arrangements for emergency care or [and/or] transfer to an appropriate place for treatment, including: [(including, but not limited to, physician's office, clinic, or hospital);]

(i) a physician's office;

(ii) a clinic; or

(iii) a hospital;

(B) immediately notify an individual's [the client's] physician and [next of kin,] responsible party, or agency who admitted the individual to [placed the client in] the facility; and

(C) describe and document the accident, injury, or illness on a separate report. The report must contain a statement of final disposition and be maintained on file.

(h) Menus.

(1) A facility must plan, date, and post a menu [Menus must be planned] at least two weeks in advance and maintain a copy of the menu. A facility[, dated, maintained on file, and posted in the facility. Meals] must serve meals [be served] according to approved menus.

(2) A facility must ensure that a special diet meal [~~Special diet meals~~] ordered by an individual's healthcare professional [~~the client's physician~~] and developed by the dietician consultant is [~~must be~~] labeled with the individual's [~~client's~~] name and type of diet.

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

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Department of Aging and Disability Services
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For further information, please call: (512) 438-2235

SUBCHAPTER H. DAY ACTIVITY AND HEALTH SERVICES (DAHS) CONTRACTUAL REQUIREMENTS

40 TAC §98.200

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation of and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §103.004 and §103.006, which provide that the HHSC executive commissioner shall adopt rules governing licensure of day activity and health services facilities; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The new section implements Texas Government Code, §531.0055; and Texas Human Resources Code, §§103.004, 103.006, and 161.021.

§98.200. Applicability.

Subchapter H of this chapter applies only to a DAHS facility that contracts with DADS to provide DAHS under Title XIX or Title XX of the Social Security Act.

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

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