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Thomas Estrada

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Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(800) 226-7199
(512) 463-5561
FAX (512) 463-5569
http://www.sos.state.tx.us
subadmin@sos.state.tx.us

Secretary of State –
Geoffrey S. Connor
Director - Dan Procter

Staff
Ada Aulet
Leti Benavides
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Kris Hogan
Roberta Knight
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IN ADDITION

THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code, Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the *Texas Register*. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. You may view copies of opinions at http://www.oag.state.tx.us. To request copies of opinions, please fax your request to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Request for Opinions

Opinion No. GA-0270

Ms. Cynthia L. Reed

Executive Director

Texas Building and Procurement Commission

Post Office Box 13047

Austin, Texas 78711

Re: Whether the state owns Republic Square in the City of Austin, and if so, whether only the legislature may act to convey a state interest in the property (RQ-0225-GA)

S U M M A R Y

The disposition of state-owned land is a matter over which the legislature has exclusive control, and the power of a state agency or official to convey state property may be exercised only under the legislature's authorization. Assuming that the state continues to own Republic Square in the City of Austin, section 2204.102 of the Government Code authorizes the Governor to sell an easement in the property, including an easement in an abutting street to the street's center, to the United States to construct a federal courthouse. As a result, although the legislature may act to convey a state interest in Republic Square, a legislative act is not necessary to convey an easement in Republic Square to the United States. However, the City of Austin, a home-rule municipality with authority to vacate, abandon, or close city streets, is the appropriate Texas authority to vacate a street abutting Republic Square.

Opinion No. GA-0271

The Honorable Wayne Smith

Chair, Committee on County Affairs

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether health care providers administering vaccinations in hospitals under the federal Medicare program are immune from liability for injuries caused by the vaccine (RQ-0227-GA)

S U M M A R Y

Section 161.001(a) of the Health and Safety Code does not provide immunity from liability for persons who administer vaccines or immunizing agents in a hospital setting to individuals covered by the federal Medicare program.

Opinion No. GA-0272

Ms. Lisa Ivie Miller

Commissioner

Office of Fire Fighters' Pension Commissioner

Post Office Box 12577

Austin, Texas 78711

Re: Whether the Office of Fire Fighters' Pension Commissioner may charge an administrative fee to participating departments in its retirement system (RQ-0230-GA)

S U M M A R Y

The Office of Fire Fighters' Pension Commissioner may not charge an administrative fee to participating departments in its retirement system.

Opinion No. GA-0273

The Honorable Donna R. Bennett

Henderson County District Attorney

173rd Judicial District

109 West Corsicana, Suite 103

Athens, Texas 75751

Re: Whether the district attorney of the 173rd Judicial District may simultaneously hold a part-time teaching position at Trinity Valley Community College and receive compensation for doing so (RQ-0234-GA)

S U M M A R Y

The district attorney of the 173rd Judicial District may simultaneously hold a compensated part-time teaching position at Trinity Valley Community College.

Opinion No. GA-0274

Ms. Dale Beebe Farrow

Executive Director

Texas Board of Professional Engineers

1917 IH-35 South

Austin, Texas 78741

Re: Validity of engineering documents prepared and sealed by a licensed engineer who is employed by an unregistered firm (RQ-0235-GA)

S U M M A R Y

An engineering document issued by an engineer and properly sealed is not invalid under the Texas Engineering Practice Act, Occupations Code chapter 1001, regardless of the registration status of the firm employing the engineer.

Opinion No. GA-0275

Mr. Thomas A. Davis Jr., Director

Texas Department of Public Safety

5805 North Lamar Boulevard

Post Office Box 4087

Austin, Texas 78773-0001

Re: Whether section 1702.323(e) of the Occupations Code makes a paralegal or other person working under an attorney's direct supervision subject to regulation by the Texas Private Security Board (RQ-0232-GA)

S U M M A R Y

Chapter 1702 of the Occupations Code, the Private Security Act, exempts from regulation by the Texas Private Security Board an attorney while engaged in the practice of law." TEX. OCC. CODE ANN. § 1702.324(b)(9) (Vernon 2004). An employee who works for an exempt attorney is not engaged in the business or employment of investigating, conduct which is regulated by chapter 1702, but rather is employed by the attorney in connection with the attorney's legal practice, conduct which is not regulated by chapter 1702. Section 1702.323(e) of the Occupations Code does not require a paralegal or other employee working under an exempt attorney's direct supervision to obtain an investigations company license or otherwise make such a person subject to Board regulation under chapter 1702.

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

TRD-200407188
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: December 8, 2004

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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 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT

16 TAC §26.469

The Public Utility Commission of Texas (commission) proposes new §26.469, relating to Municipal Authorized Review of a Certificated Telecommunication Provider's Business Records. The proposed new rule will define the authorized review of a provider's business records by a municipality pursuant to Texas Local Government Code, §283.056(c)(3). Project Number 29719 is assigned to this proceeding.

Liz Kayser, Policy Analyst, Telecommunications Division, and Mark Gladney, Staff Attorney, Telecommunications Legal Section, have determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state government as a result of enforcing or administering the section, but there will be some fiscal implications for local government, insomuch as local governments may have the costs of pursuing an authorized review of a provider's business records and will have the benefit of potentially discovering misreported access lines.

Liz Kayser and Mark Gladney have determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be the ability of the municipality to conduct an authorized review of a certificated telecommunication provider's (CTP) business records to ensure that providers are complying with the reporting requirements of Texas Local Government Code, Chapter 283. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is some anticipated economic cost to persons who are required to comply with the section as proposed, but the public benefit of enabling municipalities to conduct statutorily allowed authorized reviews should outweigh those costs.

Liz Kayser and Mark Gladney have also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, or deemed necessary by commission staff, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Tuesday, March 15, 2005, at 10:00 a.m.. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed new section may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711- 3326, within 30 days after publication. Sixteen copies of comments to the proposed rule are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 29719.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. This new section is also proposed under the Texas Local Government Code §283.056(c)(3) and §283.058, which grant the commission the jurisdiction over municipalities and certificated telecommunications providers necessary to enforce the whole of Chapter 283 and to ensure that all other legal requirements are enforced in a competitively neutral, non-discriminatory, and reasonable manner.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and Texas Local Government Code §283.056 and §283.058.

§26.469. Municipal Authorized Review of a Certificated Telecommunication Provider's Business Records.

(a) Purpose. This section establishes uniform guidelines for a municipal authorized review of a certificated telecommunications provider's (CTP) access line reports, pursuant to Texas Local Government Code §283.056(c)(3).

(b) Application. This section applies to all municipalities and CTPs in the State of Texas except to the extent exempt under §26.468(c) of this title (relating to Procedures for Standardized Access Line Reports and Enforcement Relating to Quarterly Reporting).

(c) Municipal Authorized Review Procedural Guidelines

(1) Municipalities are encouraged to informally ask questions about access line counts or municipal fee payments with the appropriate CTP in a timely manner. CTPs are encouraged to provide reasonable answers to access line count and municipal fee payment questions of the municipalities in a timely manner.

(2) Not later than 90 days after the filing of a CTP's quarterly report of access lines, as required by §26.468 of this title, a municipality shall notify a CTP of its intent to conduct an authorized review of the CTP's business records to ensure compliance with access line reporting requirements. This notification shall be in writing and sent via certified mail to the CTP contact person named on the commission's Municipal Access Line Reporting System (MARS) website and shall include a summary of the municipality's concern(s) and/or reason(s) for the review. Such notice may be modified and amended in a subsequent written notice using the same process.

(3) Not later than 21 days from the CTP's receipt of notice under paragraph (2) of this subsection, the CTP shall provide to the requesting municipality a written list of the types of business records that are necessary to conduct an authorized review as requested in the notice, with brief descriptions for identification purposes.

(4) The municipality shall determine which business records from the list provided by the CTP will be subject to review and provide written notice to the CTP. The CTP shall provide the requested business records within 30 days from the municipality's written request. The CTP shall provide the business records to the municipality in the following manner:

(A) The CTP shall provide access to the requested business records on its premises.

(B) The on-premises review shall be conducted at the principal Texas office of the CTP, unless otherwise agreed by the CTP and the municipality.

(C) Business records shall remain the property of the CTP and may not be removed or reproduced without the express written permission of the CTP.

(D) Business records may be produced in a compatible electronic format or paper copy at the discretion of the CTP.

(5) A CTP may redact customer-specific proprietary information as necessary for compliance with federal or state law. Information deemed confidential or proprietary by the CTP must be so noted, and each participating party and its representative(s) shall protect such confidential or proprietary information as provided in Texas Local Government Code §283.005. CTPs may require all persons participating in the authorized review to execute a non-disclosure agreement prior to providing access to documents or other information.

(d) Commission Resolution of Disputed Issues

(1) Informal dispute resolution. If cooperative efforts between the parties have failed to resolve all issues related to the authorized review, the commission staff may mediate any dispute(s) filed by the CTP or the municipality.

(2) Formal complaint to the commission. A formal complaint may be filed with the commission by either a CTP or Municipality to resolve remaining disputed issues not settled by informal dispute resolution pursuant to paragraph (1) of this subsection. The commission shall provide notice of the filing of a formal complaint to all municipalities and all CTPs in accordance with established commission procedural rules.

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

Filed with the Office of the Secretary of State on December 2, 2004.

TRD-200407101
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 936-7223

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PART 8. TEXAS RACING COMMISSION

CHAPTER 313. OFFICIALS AND RULES OF HORSE RACING

SUBCHAPTER A. OFFICIALS

The Texas Racing Commission proposes amendments to §§313.1, 313.4, 313.22, 313.41, 313.43, 313.45, 313.53, and 313.60, in conjunction with the Commission's review of Chapter 313. In accordance with Government Code, §2001.039, the Commission has reviewed Chapter 313 and has determined that it should be readopted, with changes to the above-referenced sections. The Commission finds that the reasons for Chapter 313 with the proposed changes continue to exist.

This subchapter specifies which officials must be present at live horse race meetings conducted in this state and their respective powers and duties. In general, the proposed amendments conform the rules to the Commission's current rule style, eliminate obsolete provisions, and correct typographical errors. In addition, the amendments to §§313.1 and 313.4 clarify the executive secretary's authority to approve racing officials appointed by a racetrack association. The amendment to §313.22, clarifies the standards by which the stewards should exercise their discretion in resolving disputes over racing matters. The amendment to §313.41 authorizes the racing secretary to delegate his or her duties to another racing office employee and clarifies the deadline for posting weights in handicap races.

Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, has 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 enforcing the amendments.

Ms. Flowerday has determined also that for each of the first five years the amendments are in effect the anticipated public benefit will be that the Commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced. There are no fiscal implications for small or micro-businesses. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Flowerday has determined also that the proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal may be submitted on or before January 21, 2005, to Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, by mail to P.O. Box 12080, Austin, Texas 78711-2080, by fax to 512-833-6907, or by e-mail to paula.flowerday@txrc.state.tx.us.

DIVISION 1. GENERAL PROVISIONS

16 TAC §313.1, §313.4

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§313.1. Racetrack Officials.

(a) Except as otherwise approved by the executive secretary[~~provided by this section~~], the following officials must be present at each horse race meeting conducted in this state:

(1) three stewards;

(2) at least two commission veterinarians;

(3) an official starter;

(4) at least one placing judge;

(5) a paddock judge;

(6) a clerk of scales;

(7) an official timer;

(8) a horseshoe inspector;

(9) [~~a director of racing;~~]

[~~(10)~~] a racing secretary and handicapper;

(10) [~~(11)~~] an assistant racing secretary;

(11) [~~(12)~~] a stakes coordinator;

(12) [~~(13)~~] a mutuel manager;

(13) [~~(14)~~] a horse identifier;

(14) [~~(15)~~] a track superintendent;

(15) [~~(16)~~] a jockey room custodian;

(16) [~~(17)~~] a stable superintendent;

(17) [~~(18)~~] at least one morning clocker;

(18) [~~(19)~~] a horsemen's bookkeeper; and

(19) [~~(20)~~] two outriders.

(b) (No change.)

§313.4. Approval of Officials.

(a) (No change.)

(b) Not later than the 30th day before the first day of a race meeting, an association shall submit to the executive secretary the name of each individual appointed to serve as an official at the race meeting. The executive secretary may require the association to submit a brief job description for each of the officials and a summary of the proposed official's qualifications. The executive secretary may refuse to approve an individual as an official if the executive secretary determines the individual lacks sufficient qualifications to perform the duties of the official position.

(c) (No change.)

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

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407053
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 833-6699

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DIVISION 2. DUTIES OF STEWARDS

16 TAC §313.22

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§313.22. General Duties.

(a) In addition to the other duties described in these Rules [~~Chapter 307 of this title (relating to Practice and Procedure)~~], the stewards have the general authority and supervision over the conduct of each race and all licensees at a racetrack during a race meeting. If a question arises during a race meeting regarding the operations of a racetrack or the conduct of racing that is not covered by the Act or the Rules, the stewards shall resolve the question in conformity with custom, precedent, justice, and the best interest of racing.

(b) The stewards are authorized to:

(1) interpret and enforce the Act and the Rules and to determine all questions, disputes, complaints, or objections relating to racing matters in accordance with the applicable laws, taking into consideration such factors as, but not limited to, custom, precedent, justice, and the best interest of racing;

(2) issue rulings, which supersede any orders of the association, on racing matters that may change the conduct of a race or race meeting;

(3) review applications for individual licenses submitted at the racetrack, hold hearings on applications for individual licenses, and deny temporary or permanent licenses for grounds authorized by the Act or the Rules;

(4) approve a substitute jockey, assistant trainer, or other substitute licensees requested by a trainer;

(5) appoint a substitute official;

(6) require a jockey, trainer, or other licensee to review a video replay of a race in which the person participated;

(7) examine or order the examination of a horse or the ownership papers, certificates, or other documents pertaining to a horse's identification;

(8) determine whether a disqualification is warranted if a foul or a riding infraction occurs; and

(9) perform any other duty necessary on behalf of the Commission to ensure a race meeting is conducted in accordance with the Act and the Rules.

(c) (No change.)

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

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407054
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 833-6699

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DIVISION 3. DUTIES OF OTHER OFFICIALS

16 TAC §§313.41, 313.43, 313.45, 313.53, 313.60

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§313.41. Racing Secretary.

(a) (No change.)

(b) The racing secretary may delegate to the assistant racing secretary or other racing office employee any duty imposed on the racing secretary.

(c) In handicap races, the racing secretary shall assign weight to each horse and shall post the weights in handicaps before 10:30 a.m. on the day set for publication of the assigned weights.

§313.43. Official Timer.

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

(c) For back-up purposes, the official timer shall also use[~~used~~] a stop watch to time all races, and in time trials the official timer shall ensure that at least two stop watches are used by the stewards or their designees.

§313.45. Clerk of Scales.

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

(c) The clerk of scales shall notify the stewards of any change of jockeys, alteration of colors, or weight change[~~extra weight declared for a horse~~].

(d) The clerk of scales shall:

(1) provide the association with a report of the weight carried in each race and the names of the jockeys, specifying any overweight; and

(2) provide to the horsemen's bookkeeper a program that indicates all jockey changes and the [~~complete~~] order of finish for each race.

(e) - (f) (No change.)

§313.53. Mutuel Manager.

(a) In addition to other duties described in these Rules, the[~~The~~] mutuel manager shall supervise the operations of the pari-mutuel department of the association and its employees. The mutuel manager shall ensure the accuracy of the amounts in all pools and the amounts to be paid on winning wagers.

(b) (No change.)

§313.60. Test Barn Technicians.

The test barn technicians shall perform any duty required by the test barn supervisor and shall assist in the collection of [~~urine~~] specimens for testing and in the maintenance of the test barn facilities.

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

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407055
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 833-6699

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SUBCHAPTER B. ENTRIES, SCRATCHES, AND ALLOWANCES

The Texas Racing Commission proposes amendments to §§313.101, 313.108, 313.110, 313.135, 313.136, 313.165, and 313.166, in conjunction with the Commission's review of Chapter 313. In accordance with Government Code, §2001.039, the Commission has reviewed Chapter 313 and has determined that it should be readopted, with changes to the above-referenced sections. The Commission finds that the reasons for Chapter 313 with the proposed changes continue to exist.

This subchapter prescribes the requirements and procedures for entries, scratches, and weight allowances. The proposed amendments conform the rules to the Commission's current rule style, eliminate obsolete provisions, and correct typographical errors.

Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, has 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 enforcing the amendments.

Ms. Flowerday has also determined that for each of the first five years the amendments are in effect the anticipated public benefit will be that the Commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced. There are no fiscal implications for small or micro-businesses. There is no anticipated economic cost to an individual required to comply with the amendments as proposed. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal may be submitted on or before January 21, 2005, to Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, by mail to P.O. Box 12080, Austin, Texas 78711-2080, by fax to 512-833-6907, or by e-mail to paula.flowerday@txrc.state.tx.us.

DIVISION 1. ENTRIES

16 TAC §§313.101, 313.108, 313.110

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§313.101. Entry Procedure.

(a) (No change.)

(b) Except as otherwise provided by this section, an entry must be in writing on a form provided by the association. [~~The form must be signed by the horse's owner, trainer or assistant trainer, or jockey agent authorized in writing by the trainer.~~]

(c) - (e) (No change.)

§313.108. Preferred List.

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

(d) An "in today" horse has least preference.

§313.110. Coupled Entries.

(a) (No change.)

[~~(b) When a person makes a double entry in an overnight race coupled as a single wagering interest, the person must make a preference for one horse. A second choice has preference over an "in-today" horse.~~]

(b) [~~(c)~~] If two horses entered in a race are owned in whole or in part by the same individual or entity, or if the trainer owns an interest in either horse, the entry shall be coupled as a single wagering interest.

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

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407056
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 833-6699

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DIVISION 2. SCRATCHES

16 TAC §313.135, §313.136

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§313.135. Scratch by Stewards.

(a) The stewards may scratch a horse from a race when, in the opinion of a [~~the commission~~] veterinarian licensed by the Commission, the horse cannot give its best efforts to win the race due to a physical disability or other physical cause. A horse scratched from a race under this subsection shall be placed on the veterinarian's list and is ineligible to start in a race in Texas until removed from the list by the commission veterinarian.

(b) (No change.)

§313.136. Scratches in Stakes Races.

[~~(a)~~] A horse entered in a stakes race may be scratched from the race at any time before one hour before post time for the race.

[~~(b) A horse that is not named through the entry box at the time designated by the racing secretary is automatically scratched from the stakes race.~~]

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

Filed with the Office of the Secretary of State on December 1, 2004.

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Paula C. Flowerday
Executive Secretary
Texas Racing Commission
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For further information, please call: (512) 833-6699

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DIVISION 3. ALLOWANCES AND PENALTIES

16 TAC §313.165, §313.166

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§313.165. Sex Allowance.

Except in a race for which the conditions expressly state otherwise, a thoroughbred or Arabian[~~arabian~~] filly may claim the following allowances:

(1) a filly that is two years old is allowed three pounds;

(2) a filly that is three years of age or older is allowed:

(A) five pounds, beginning[~~between~~] January 1 and ending August 31; and

(B) three pounds beginning[~~between~~] September 1 and ending December 31.

§313.166. Apprentice Allowance.

(a) An apprentice jockey is entitled to ride with a five-pound weight allowance in all thoroughbred and Arabian races except handicap or stakes races beginning with the jockey's first mount and continuing for 12 months after the date of the jockey's fifth winning mount.

(b) - (c) (No change.)

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

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SUBCHAPTER C. CLAIMING RACES

16 TAC §313.303, §313.312

The Texas Racing Commission proposes amendments to §313.303 and §313.312, in conjunction with the Commission's review of Chapter 313. In accordance with Government Code, §2001.039, the Commission has reviewed Chapter 313 and has determined that it should be readopted, with changes to the above-referenced sections. The Commission finds that the reasons for Chapter 313 with the proposed changes continue to exist.

This subchapter prescribes the requirements and procedures for claiming races. In general, the proposed amendments conform the rules to the Commission's current rule style, eliminate obsolete provisions, and correct typographical errors. The amendment to §313.312 eliminates the requirement that the claimant of a horse be notified of a positive test.

Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, has 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 enforcing the amendments.

Ms. Flowerday has also determined that for each of the first five years the amendments are in effect the anticipated public benefit will be that the Commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced. There are no fiscal implications for small or micro-businesses. There is no anticipated economic cost to an individual required to comply with the amendments as proposed. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal may be submitted on or before January 21, 2005, to Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, by mail to P.O. Box 12080, Austin, Texas 78711-2080, by fax to 512-833-6907, or by e-mail to paula.flowerday@txrc.state.tx.us.

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§313.303. Effective Time of Claim.

(a) A person who has a valid claim to a horse becomes the owner of the horse when the horse steps[~~goes~~] on to the racetrack for the race. This subsection applies regardless of whether the horse reaches the starting gate and regardless of subsequent injury to the horse during or after the race.

(b) On the day claimed, a claimed horse runs in the interest of and for the account of the owner from whom the horse was claimed.

§313.312. Protests.

[(~~a~~)] A person wishing to protest the claim of a horse must file the protest with the stewards not later than one hour after the stewards declared the race official.

[(b) On a finding by the laboratory director that a test specimen from a horse claimed under this subchapter contained a prohibited drug, chemical or other substance, the executive secretary shall notify the claimant of the positive test.]

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

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SUBCHAPTER D. RUNNING OF THE RACE
DIVISION 1. JOCKEYS

16 TAC §313.405

The Texas Racing Commission proposes an amendment to §313.405, concerning whips and other equipment, in conjunction with the Commission's review of Chapter 313. In accordance with Government Code, §2001.039, the Commission has reviewed Chapter 313 and has determined that it should be readopted, with changes to the above-referenced sections. The Commission finds that the reasons for Chapter 313 with the proposed changes continue to exist.

This subchapter prescribes the requirements and procedures for the actual running of horse races. The amendment to §313.405 eliminates the use of the term "apprentice jockey" in this one rule, to clarify that all Commission rules that applicable to jockeys apply to apprentice jockeys as well.

Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendments.

Ms. Flowerday has also determined that for each of the first five years the amendment is in effect the anticipated public benefit will be that the Commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced. There are no fiscal implications for small or micro-businesses. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal may be submitted on or before January 21, 2005, to Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, by mail to P.O. Box 12080, Austin, Texas 78711-2080, by fax to 512-833-6907, or by e-mail to paula.flowerday@txrc.state.tx.us.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§313.405. Whips and Other Equipment.

(a) - (d) (No change.)

(e) A jockey [or ~~apprentice~~ ~~jockey~~] may not ride in a race unless the jockey [or ~~apprentice~~ ~~jockey~~] wears a safety vest. A safety vest may weigh no more than two pounds and must be designed to provide shock absorbing protection to the upper body of at least a rating of five, as defined by the British Equestrian Trade Association.

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

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Texas Racing Commission
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16 TAC §313.410

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Racing Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Racing Commission proposes the repeal of §313.410, concerning contracts for jockeys, in conjunction with the Commission's review of Chapter 313. In accordance with Government Code, §2001.039, the Commission has reviewed Chapter 313 and has determined that it should be readopted, with the repeal of the above-referenced section. The Commission finds that the reasons for Chapter 313 with the proposed changes continue to exist.

This subchapter prescribes the requirements and procedures for the actual running of horse races. The repeal of §313.410 is appropriate because it is obsolete and extends beyond the level of regulation desired by the Commission.

Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing the repeal.

Ms. Flowerday has also determined that for each of the first five years the repeal is in effect the anticipated public benefit will be that the Commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced. There are no fiscal implications for small or micro-businesses. There is no anticipated economic cost to an individual required to comply with the repeal as proposed. The proposal has no effect on the

state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal may be submitted on or before January 21, 2005, to Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, by mail to P.O. Box 12080, Austin, Texas 78711-2080, by fax to 512-833-6907, or by e-mail to paula.flowerday@txrc.state.tx.us.

The repeal is proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§313.410. Contracts and Certificates for Jockeys.

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

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SUBCHAPTER E. TRAINING FACILITIES

16 TAC §313.505, §313.507

The Texas Racing Commission proposes amendments to §313.505 and §313.507, in conjunction with the Commission's review of Chapter 313. In accordance with Government Code, §2001.039, the Commission has reviewed Chapter 313 and has determined that it should be readopted, with changes to the above-referenced sections. The Commission finds that the reasons for Chapter 313 with the proposed changes continue to exist.

This subchapter prescribes the licensing requirements for training facilities and the procedures for conducting official workouts. In general, the proposed amendments conform the rules to the Commission's current rule style, eliminate obsolete provisions, and correct typographical errors. The amendment to §313.507 raises the license fee for a training facility employee license to $20.

Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for local government as a result of enforcing the amendments. The Commission will generate additional revenue from license fees for training facility employees; that additional revenue is estimated to be less than $100 per year.

Ms. Flowerday has also determined that for each of the first five years the amendments are in effect the anticipated public benefit will be that the Commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced. There are no fiscal implications for small or micro-businesses. The anticipated economic cost to an individual who seeks a license as a training facility employee will be $20 per year. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal may be submitted on or before January 21, 2005, to Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, by mail to P.O. Box 12080, Austin, Texas 78711-2080, by fax to 512-833-6907, or by e-mail to paula.flowerday@txrc.state.tx.us.

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§313.505. Workout Requirements.

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

(d) A training race conducted at a licensed pari-mutuel racetrack may be used as an official workout. The distance of an official workout must be at least:

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

(e) - (h) (No change.)

§313.507. Employees of Training Facilities.

(a) The general manager and chief executive officer of a licensed training facility must obtain a training facility employee license from the Commission. The license fee for a training facility employee license is $20 [~~$15~~]. A training facility employee license may be denied, suspended, or revoked for any of the grounds listed in the Act, §7.04.

(b) - (c) (No change.)

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

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CHAPTER 315. OFFICIALS AND RULES FOR GREYHOUND RACING

SUBCHAPTER A. OFFICIALS

The Texas Racing Commission proposes amendments to §§315.1-315.2, 315.31-315.32, and 315.36-315.37, in conjunction with the Commission's review of Chapter 315. In accordance with Government Code, §2001.039, the Commission has reviewed Chapter 315 and has determined that it should be readopted, with changes to the above-referenced sections. The Commission finds that the reasons for Chapter 315 with the proposed changes continue to exist.

This subchapter specifies which officials must be present at live greyhound race meetings conducted in this state and their respective powers and duties. In general, the proposed amendments conform the rules to the Commission's current rule style, eliminate obsolete provisions, and correct typographical errors. In addition, the amendments to §313.1 clarifies the executive secretary's authority to approve racing officials appointed by a racetrack association.

Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, has 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 enforcing the amendments.

Ms. Flowerday has determined also that for each of the first five years the amendments are in effect the anticipated public benefit will be that the Commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced. There are no fiscal implications for small or micro-businesses. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Flowerday has determined also that the proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal may be submitted on or before January 21, 2005, to Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, by mail to P.O. Box 12080, Austin, Texas 78711-2080, by fax to 512-833-6907, or by e-mail to paula.flowerday@txrc.state.tx.us.

DIVISION 1. APPOINTMENT OF OFFICIALS

16 TAC §315.1, §315.2

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§315.1. Required Officials.

(a) The following officials must be present at each greyhound race conducted in this state:

(1) [~~a presiding racing judge;~~]

[~~(2)~~] three[~~two~~] racing judges;

(2) [~~(3)~~] a commission veterinarian;

(3) [~~(4)~~] an association veterinarian;

(4) [~~(5)~~] a racing secretary;

(5) [~~(6)~~] an assistant racing secretary;

(6) [~~(7)~~] a paddock judge;

(7) [~~(8)~~] a starter;

(8) [~~(9)~~] a clerk of scales;

(9) [~~(10)~~] a mutuel manager;

(10) [~~(11)~~] a chart writer;

(11) [~~(12)~~] a photofinish operator and timer;

(12) [~~(13)~~] a kennel master; and

(13) [~~(14)~~] a mechanical lure operator.

(b) An individual may not serve as an official unless the individual has been approved by the executive secretary. Not later than the 30th day before the first day of a race meeting, an association shall submit to the executive secretary the name of each individual and qualified substitutes appointed to serve as an official at the race meeting and a summary of the proposed official's qualifications. The executive secretary may refuse to approve an individual as an official if the executive secretary determines the individual lacks sufficient qualifications to perform the duties of the official position. If the executive secretary determines that an individual is qualified to perform the duties required of the official position for which the individual is submitted and may be issued a license by the Commission, the executive secretary shall approve the appointment of the individual.

(c) (No change.)

§315.2. Racing Judges.

(a) To be eligible to be employed as a racing judge, an individual must:

(1) have experience as an official at a pari-mutuel greyhound racetrack or demonstrate to the executive secretary's satisfaction that the individual has sufficient experience in a racing related field to perform the duties of a racing judge;

(2) pass an optical examination conducted annually indicating 20-20 vision, corrected, and the ability to distinguish colors;

(3) agree to a complete investigation into the individual's background to ensure the individual's integrity is above reproach;

(4) pass a written examination prescribed by the executive secretary; and

(5) [~~and~~] demonstrate to the executive secretary's satisfaction that the individual's income from sources other than as a racing judge is unrelated to patronage of or employment by a licensee of the Commission.

(b) (No change.)

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

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Paula C. Flowerday
Executive Secretary
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For further information, please call: (512) 833-6699

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DIVISION 2. DUTIES

16 TAC §§315.31, 315.32, 315.36, 315.37

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§315.31. Racing Judges.

(a) In addition to the other duties described in these Rules[~~Chapter 307 of this title (relating to Practice and Procedure)~~], the racing judges shall supervise and exercise general authority over the conduct of the race meeting for which they are appointed and over the licensees participating in racing at that race meeting. If a question arises during a race meeting regarding the conduct of racing that is not addressed by the Act or a rule of the Commission[~~commission~~], the racing judges shall resolve the question in conformity with custom, precedent, justice, and the best interest of racing.

(b) (No change.)

(c) The racing judges are authorized to:

(1) interpret and enforce the Act and the Rules[~~rules~~] of the Commission[~~commission~~] and to determine all questions, disputes, complaints, or objections relating to racing matters in accordance with the applicable laws;

(2)-(4) (No change.)

(5) supervise entries, [~~declarations,~~] scratches, and substitutions, and refuse an entry or transfer of entries;

(6)-(9) (No change.)

(10) perform any other duty necessary on behalf of the commission to ensure a race meeting is conducted in accordance with the Act and the Rules[~~rules~~] of the Commission[~~commission~~].

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

(g) The racing judges may not declare a race official until they have determined which greyhounds finished first, second, third, and fourth. The racing judges shall immediately notify the mutuel [~~mutual~~] department of the numbers of the first four greyhounds.

(h)-(i) (No change.)

§315.32. Commission Veterinarian.

The commission veterinarian shall supervise all veterinary practices on association grounds, advise the executive secretary [~~,~~] and the racing judges on all veterinary matters, and perform all other duties required by the executive secretary or the Rules.

§315.36. Mutuel Manager.

(a) In addition to the other duties described in these Rules, the[~~The~~] mutuel manager shall supervise the operations of the pari-mutuel department of the association and its employees. The mutuel manager shall ensure the accuracy of the amounts in all pools and the amounts to be paid on winning wagers.

(b) (No change.)

§315.37. Racing Secretary.

(a) The racing secretary shall supervise the operations of the racing office and its employees. The racing secretary shall:

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

(3) receive all entries [~~and declarations~~];

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

(b) (No change.)

(c) The racing secretary may demand and inspect owners' and trainers' licenses and all documents relating to trainers and owners, partnership agreements, [~~the appointment of authorized agents,~~] and the adoption of assumed names to satisfy the racing secretary of the validity of the documents.

(d) Immediately after the entries for a race are closed and compiled [~~and the declarations have been made~~], the racing secretary shall post a list of the entries in a conspicuous place. Before accepting a greyhound entry, the racing secretary shall determine whether all relevant kennel owners, owners, and trainers have been properly licensed.

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

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SUBCHAPTER B. ENTRIES AND PRE-RACE PROCEDURES

16 TAC §§315.101 - 315.103, 315.106 - 315.108, 315.110, 315.111

The Texas Racing Commission proposes amendments to §§315.101-315.103, 315.106-315.108, and 315.110-315.111, in conjunction with the Commission's review of Chapter 315. In accordance with Government Code, §2001.039, the Commission has reviewed Chapter 315 and has determined that it

should be readopted, with changes to the above-referenced sections. The Commission finds that the reasons for Chapter 315 with the proposed changes continue to exist.

This subchapter prescribes the requirements and procedures for entries, scratches, sales, and other pre-race matters. In general, the proposed amendments conform the rules to the Commission's current rule style, eliminate obsolete provisions, and correct typographical errors. In addition, the amendment to §315.101 clarifies the type of identifying information the racetrack must have on file for each greyhound before it races. The amendment to §315.107 eliminates provisions relating to the sale of greyhounds which duplicate language in §315.104. The amendment to §315.110 clarifies the standards by which the racing judges should exercise their discretion in scratching a greyhound from a race. The amendment to §315.111 clarifies the schooling requirements for greyhounds that have not raced for 30 days.

Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, has 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 enforcing the amendments.

Ms. Flowerday has also determined that for each of the first five years the amendments are in effect the anticipated public benefit will be that the Commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced and will ensure the racing greyhounds are competitive and healthy. There are no fiscal implications for small or micro-businesses. There is no anticipated economic cost to an individual required to comply with the amendments as proposed. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal may be submitted on or before January 21, 2005, to Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, by mail to P.O. Box 12080, Austin, Texas 78711-2080, by fax to 512-833-6907, or by e-mail to paula.flowerday@txrc.state.tx.us.

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§315.101. Registration.

(a) (No change.)

(b) Before[~~The kennel owner for~~] a greyhound may[~~that is to~~] be schooled, entered, or raced at a racetrack, a National Greyhound Association certificate of registration, the racing history and the last four performance lines for the greyhound, if applicable, must be on file with the racing secretary[~~an association shall file a certificate of registration for the greyhound with the racing secretary, with the racing history and the last four performance lines for the greyhound, if applicable~~]. The racing judges may inspect the certificates of registration at any time.

(c) (No change.)

§315.102. Entry Procedure.

(a) The racing secretary shall receive entries to the active list [~~and declarations for a race~~]. The racing secretary may refuse to accept an entry if the racing secretary reasonably believes that the entry is prohibited by these Rules[~~rules~~].

(b)-(e) (No change.)

(f) The racing officials may require a person in whose name a greyhound is entered to produce proof that the greyhound is owned only by persons licensed to participate in pari-mutuel racing. The racing judges may scratch [~~declare~~] the greyhound from the[~~out of a~~] race if the person fails to comply with a demand made under this subsection.

(g)-(j) (No change.)

(k) In a purse race, there may not be more than two double entries. When a full active list is achieved and maintained, a double entry may not be entered until all single interests eligible for the performance are used. Double entries may be used at the discretion of the racing secretary when the active list is low or unbalanced with approval of the racing judges. A double entry shall be uncoupled for wagering purposes.

(l) (No change)

[~~(m) If a race does not fill and is cancelled, the racing secretary shall conspicuously post the names of the greyhounds that had entered the race not later than 9:00 p.m. of the day the race is cancelled.~~]

§315.103. Eligibility to Enter or Start.

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

(c) A greyhound may not start in a race unless each person owning an interest in the greyhound or accepting a trainer's percentage, or having an interest in its winnings, at the time of entry into the race, is licensed by the Commission[~~commission~~] and the name of each person is registered with the racing secretary. In a stakes race, each person owning an interest in the greyhound or accepting a trainer percentage, or having an interest in its winnings, must be licensed at the time of the race.

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

§315.106. Liability for Entry Fee.

(a) A greyhound that is drawn[~~entered~~] in a purse race shall start in the race, unless the greyhound is [~~declared or~~] scratched.

(b) (No change.)

§315.107. Payments of Nominating, Sustaining and Starting Fees.

[~~(a) If a greyhound is sold with any of its engagements, the seller may not strike the greyhound out of the engagements. If the sale is made by private contract, the written acknowledgment of both parties that the greyhound is sold with the engagements is necessary to entitle the seller or buyer to the benefit of this section. If certain engagements are specified, only those are sold with the greyhound.~~]

[~~(b) If a greyhound is sold at public auction, the advertised conditions of the sale constitute the agreement of the parties, and if certain engagements are specified, only those are sold with the greyhound.~~]

(a) [~~(c)~~] If a stakes race is not run for any reason, the association shall refund all nominating, sustaining, and starting fees paid, if any.

(b) [~~(d)~~] In an emergency, an association may postpone or cancel a race or stakes race with the approval of the racing judges. The association shall refund all nominating, subscribing and starting fees for a race under this section.

§315.108. Qualifying Time.

(a) An association, with the approval of the racing judges, shall establish qualifying times for all distances.

(b)-(c) (No change.)

§315.110. Scratches.

(a) A greyhound may be scratched from a race only with the approval of the racing judges. A request to scratch a greyhound may be made only by the kennel owner or[~~,~~] trainer [~~, or authorized agent of the owner or trainer~~]. The request must be filed with the racing secretary at least 30 minutes before the time designated for the drawing of post positions or the time designated by the racing secretary.

(b) A scratch that occurs as a result of a violation of a racing rule carries a penalty and/or suspension of the greyhound for six race days. The racing judges shall review the cause for a scratch and may take disciplinary action. If a greyhound is scratched because the kennel owner or trainer of the greyhound fails to have the greyhound at the paddock[~~track~~] at the appointed time for weighing-in, the racing judges may impose [~~take~~] disciplinary action against the person responsible.

(c) (No change.)

(d) The racing judges may scratch a greyhound from a race if they determine circumstances exist which would prevent the greyhound from making its best effort, the greyhound may not legally participate in the race, or the participation of the greyhound would negatively effect the competitiveness of the race or the wagering public[~~for sufficient cause~~].

(e) (No change.)

§315.111. Schooling.

(a) A greyhound that has never raced must be properly schooled at least twice in the presence of the racing judges and must, in the opinion of the racing judges, be sufficiently experienced before the greyhound may start[~~be entered~~] in a race. A greyhound that has not had an official start in ten racing days must participate in an official schooling race at its established weight to be eligible to enter a race. A greyhound that has not raced officially for more than thirty days must school at least twice.

(b) (No change.)

(c) A greyhound that transfers from a racetrack outside of Texas must school at least once before it may start in a race other than a stakes or futurity race. A greyhound that transfers from a Texas racetrack may start in a race without additional schooling if the greyhound has raced in the ten-day period preceding the race. A greyhound that has not raced officially for more than thirty days must school at least twice.

(d) To be official, at least six greyhounds must race in a schooling race, except by permission of the [~~presiding~~] racing judges[~~judge~~]. Leadouts must be used in an official schooling race, and the greyhounds must race at their established racing weight and start from the box wearing blankets. The association shall provide photofinish equipment for official schooling races.

(e)-(g) (No change.)

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

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407066
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 833-6699

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SUBCHAPTER C. RACE PROCEDURES

16 TAC §§315.201 - 315.203, 315.205, 315.210, 315.211

The Texas Racing Commission proposes amendments to §§315.201-315.203, 315.205, and 315.210-315.211, in conjunction with the Commission's review of Chapter 315. In accordance with Government Code, §2001.039, the Commission has reviewed Chapter 315 and has determined that it should be readopted, with changes to the above-referenced sections. The Commission finds that the reasons for Chapter 315 with the proposed changes continue to exist.

This subchapter prescribes the requirements and procedures for the conduct of greyhound races. In general, the proposed amendments conform the rules to the Commission's current rule style, eliminate obsolete provisions, and correct typographical errors. The amendments to §§315.201 and 315.202 clarify the authority of the racing judges with respect to weigh-in and weight changes.

Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, has 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 enforcing the amendments.

Ms. Flowerday has also determined that for each of the first five years the amendments are in effect the anticipated public benefit will be that the Commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced. There are no fiscal implications for small or micro-businesses. There is no anticipated economic cost to an individual required to comply with the amendments as proposed. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal may be submitted on or before January 21, 2005, to Paula C. Flowerday, Executive Secretary for the Texas Racing Commission, by mail to P.O. Box 12080, Austin, Texas 78711-2080, by fax to 512-833-6907, or by e-mail to paula.flowerday@txrc.state.tx.us.

The amendments are proposed under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules regulating horse or greyhound racing; §3.021 which authorizes the Commission to adopt rules to regulate workouts at training facilities; §3.07, which authorizes the Commission to adopt rules specifying the authority and duties of racing officials; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks; and §6.061, which authorizes the Commission to regulate inappropriate or unsafe conditions at pari-mutuel racetracks.

The statute affected by the proposal is Texas Civil Statutes, Article 179e. No other code, articles, or statutes are affected by this proposal.

§315.201. Racing Weight.

(a) (No change.)

(b) Each greyhound entered in a race in a performance must be weighed in by the prescribed time approved by the racing judges [~~at least one hour before the post time for the first race of that performance~~].

(c) The greyhound's kennel owner, trainer, assistant trainer or[~~,~~] kennel helper [~~, or authorized agent of the owner~~] shall deliver the greyhound to the weighing-in room in sufficient time to have the greyhound weighed in in accordance with this section.

(d)-(g) (No change.)

§315.202. Changes in Established Weight.

(a) A kennel owner or trainer for a greyhound may change the established racing weight for a greyhound by filing a written request by the change and obtaining written consent of the racing judges. The greyhound may not race at the new weight before the third [~~fourth~~] day after the date the racing judges consent. A weight change at an official schooling race goes into effect on approval of the racing judges.

(b) A greyhound that is granted a change of more than one pound in established racing weight must school twice[~~at least once~~] at the new weight, and more if ordered by the racing judges, before being eligible to start at the new weight.

[~~(c) A greyhound that has not schooled officially or raced for at least three weeks may establish a new racing weight, with written consent of the racing judges, and may be officially schooled immediately on receipt of the consent.~~]

(c) [~~(d)~~] The racing judges may weigh a greyhound entered in a race at any time after entry until post time for the race.

§315.203. Placement in Lockout.

Immediately after being weighed in, a greyhound shall be placed in the lockout kennel under the supervision of the paddock judge. Only the paddock judge, commission veterinarian, kennel master, clerk of scales, leadout, racing judge, or representative of the Commission[~~commission~~] may enter the lockout kennel. A kennel owner or trainer may accompany a greyhound into the lockout kennel under the direct supervision of a racing judge or a designee of the racing judges.

§315.205. Equipment.

During a race, a greyhound must wear a racing muzzle with a white tip and a blanket displaying the official program number for the greyhound.

§315.210. Prize [~~Price~~] Distribution in Dead Heats.

(a) (No change.)

(b) If the owners who are to divide a prize cannot agree as to which owner is to have a nondivisible prize, such as a trophy, the [~~presiding~~] racing judges[~~judge~~] shall distribute the nondivisible prize by lot.

§315.211. Objections.

(a) An objection regarding a race, other than the actual running of the race, must be made by an owner, kennel owner or [~~the authorized agent of the owner, a~~] trainer of a greyhound engaged in the race, or an official. An objection must be made to the racing judges, who may require that the objection be made in writing with a copy sent immediately to the executive secretary.

(b) (No change.)

(c) Pending a decision on an objection, any money or prize to which a greyhound that is the subject of the objection would be entitled [~~,~~] shall be held until the objection is decided.

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

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407067
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 111. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR MATHEMATICS

SUBCHAPTER B. MIDDLE SCHOOL

19 TAC §§111.22 - 111.24

The State Board of Education (SBOE) proposes amendments to §§111.22 - 111.24, concerning the Texas Essential Knowledge and Skills (TEKS) for mathematics. The sections establish the curriculum standards for middle school mathematics, Grades 6-8. The proposed amendments would refine and align secondary mathematics TEKS. Amendments to high school mathematics TEKS are also proposed in this issue.

Following a November 2003 directive from the SBOE to provide a schedule for reviewing the TEKS, Texas Education Agency (TEA) staff proposed a 2004-2005 TEKS review calendar. The TEKS review process will follow the same timeline as the textbook adoption process, as appropriate. The SBOE issued Proclamation 2004 in May 2004, calling for instructional materials in the area of secondary mathematics.

TEA staff has proceeded with the review process for the secondary mathematics TEKS in the areas of: mathematics, Grades 6-8 (including Grade 6 Spanish mathematics); Algebra I and II; Geometry; Precalculus; and Mathematical Models with Applications. A work group of teachers, central office staff, and university personnel was assembled to review these TEKS. After the work group refined and aligned the secondary mathematics TEKS, the draft revisions were placed on the TEA web site in the form of a survey to collect feedback from the public for 30 days beginning in mid-May 2004. A summary of the survey results was provided to the SBOE at its July 2004 meeting. The draft revisions were also provided to a review panel consisting of three highly regarded mathematics experts.

During the September 2004 meeting, the SBOE was presented with a description of the expert reviewers' comments on the TEKS. During the September and November 2004 meetings,

the SBOE was provided with an explanation of the changes for alignment and refinement of the TEKS. Examples of the proposed amendments include revisions for precision in language, mathematical correctness, and parallel language from Grades 6-12.

Once the secondary mathematics TEKS are updated through the amendments to 19 TAC Chapter 111, Subchapters B and C, the SBOE will be asked to take action to amend Proclamation 2004 to include the updated TEKS.

Susan Barnes, associate commissioner for standards and programs, has 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 enforcing or administering the amendments. Normal business costs would be associated with the TEKS updating process for the Texas Education Agency, including staff travel, meeting accommodations, and production and dissemination of documents.

Dr. Barnes has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments would include better alignment of the TEKS and coordination of the TEKS revision with the textbook adoption process. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendments.

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

The amendments are proposed under the Texas Education Code, §7.102, which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments; and §28.025, which authorizes the SBOE to by rule determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum.

The amendments implement the Texas Education Code, §§7.102, 28.002, and 28.025.

§111.22. Mathematics, Grade 6.

(a) Introduction.

(1) Within a well-balanced mathematics curriculum, the primary focal points at Grade 6 are using ratios to describe direct proportional relationships involving number, geometry, measurement, [~~and~~] probability, and adding and subtracting decimals and fractions.

(2) Throughout mathematics in Grades 6-8, students build a foundation of basic understandings in number, operation, and quantitative reasoning; patterns, relationships, and algebraic thinking; geometry and spatial reasoning; measurement; and probability and statistics. Students use concepts, algorithms, and properties of rational numbers to explore mathematical relationships and to describe increasingly complex situations. Students use algebraic thinking to describe how a change in one quantity in a relationship results in a change in the other; and they connect verbal, numeric, graphic, and symbolic representations of relationships. Students use geometric properties and relationships, as well as spatial reasoning, to model and analyze situations and solve problems. Students communicate information about geometric figures [~~objects~~] or situations by quantifying attributes, generalize procedures from measurement experiences, and use the procedures to solve problems. Students use appropriate statistics, representations of data, reasoning, and concepts of probability to draw conclusions, evaluate arguments, and make recommendations.

(3) Problem solving in meaningful contexts, language and communication, connections within and outside mathematics, and formal and informal reasoning underlie all content areas in mathematics. Throughout mathematics in Grades 6-8, students use these processes together with graphing technology [~~(at least four-function calculators for whole numbers, decimals, and fractions)~~] and other mathematical tools such as manipulative materials to develop conceptual understanding and solve problems as they do mathematics.

(b) Knowledge and skills.

(1) Number, operation, and quantitative reasoning. The student represents and uses rational numbers in a variety of equivalent forms. The student is expected to:

(A) compare and order non-negative rational numbers;

(B) generate equivalent forms of rational numbers including whole numbers, fractions, and decimals;

(C) use integers to represent real-life situations;

(D) write prime factorizations using exponents; [~~and~~]

(E) identify factors of a positive integer, [~~and multiples including~~] common factors, and the greatest common factor of a set of positive integers; and [~~common multiples.~~]

(F) identify multiples of a positive integer and common multiples and the least common multiple of a set of positive integers.

(2) Number, operation, and quantitative reasoning. The student adds, subtracts, multiplies, and divides to solve problems and justify solutions. The student is expected to:

(A) model addition and subtraction situations involving fractions with objects, pictures, words, and numbers;

(B) use addition and subtraction to solve problems involving fractions and decimals;

(C) use multiplication and division of whole numbers to solve problems including situations involving equivalent ratios and rates; [~~and~~]

(D) estimate and round to approximate reasonable results and to solve problems where exact answers are not required; and [~~.~~]

(E) use order of operations to simplify whole number expressions (without exponents) in problem solving situations.

(3) Patterns, relationships, and algebraic thinking. The student solves problems involving direct proportional relationships. The student is expected to:

(A) use ratios to describe proportional situations;

(B) represent ratios and percents with concrete models, fractions, and decimals; and

(C) use ratios to make predictions in proportional situations.

(4) Patterns, relationships, and algebraic thinking. The student uses letters as variables in mathematical expressions to describe how one quantity changes when a related quantity changes. The student is expected to:

(A) use tables and symbols to represent and describe proportional and other relationships such as those involving conversions, arithmetic sequences (with a constant rate of change), perimeter and [,] area [, ~~etc.~~]; and

(B) use tables of data to generate formulas representing [~~to represent~~] relationships involving perimeter, area, volume of a rectangular prism, etc. [, ~~from a table of data.~~]

(5) Patterns, relationships, and algebraic thinking. The student uses letters to represent an unknown in an equation. The student is expected to formulate equations [~~an equation~~] from [~~a~~] problem situations described by linear relationships [~~situation~~].

(6) Geometry and spatial reasoning. The student uses geometric vocabulary to describe angles, polygons, and circles. The student is expected to:

(A) use angle measurements to classify angles as acute, obtuse, or right;

(B) identify relationships involving angles in triangles and quadrilaterals; and

(C) describe the relationship between radius, diameter, and circumference of a circle.

(7) Geometry and spatial reasoning. The student uses coordinate geometry to identify location in two dimensions. The student is expected to locate and name points on a coordinate plane using ordered pairs of non-negative rational numbers.

(8) Measurement. The student solves application problems involving estimation and measurement of length, area, time, temperature, volume [~~capacity~~], weight, and angles. The student is expected to:

(A) estimate measurements (including circumference) and evaluate reasonableness of results;

(B) select and use appropriate units, tools, or formulas to measure and to solve problems involving length (including perimeter [~~and circumference~~]), area, time, temperature, volume [~~capacity~~], and weight;

(C) measure angles; and

(D) convert measures within the same measurement system (customary and metric) based on relationships between units.

(9) Probability and statistics. The student uses experimental and theoretical probability to make predictions. The student is expected to:

(A) construct sample spaces using lists and [,] tree diagrams [, ~~and combinations~~]; and

(B) find the probabilities of a simple event and its complement and describe the relationship between the two.

(10) Probability and statistics. The student uses statistical representations to analyze data. The student is expected to:

(A) select and use an appropriate representation for presenting and displaying [~~draw and compare~~] different graphical representations of the same data including line plot, line graph, bar graph, and stem and leaf plot;

(B) identify mean (using concrete objects and pictorial models), [~~use~~] median, mode, and range of a set of [~~to describe~~] data;

(C) sketch circle graphs to display data; and

(D) solve problems by collecting, organizing, displaying, and interpreting data.

(11) Underlying processes and mathematical tools. The student applies Grade 6 mathematics to solve problems connected to everyday experiences, investigations in other disciplines, and activities in and outside of school. The student is expected to:

(A) identify and apply mathematics to everyday experiences, to activities in and outside of school, with other disciplines, and with other mathematical topics;

(B) use a problem-solving model that incorporates understanding the problem, making a plan, carrying out the plan, and evaluating the solution for reasonableness;

(C) select or develop an appropriate problem-solving strategy from a variety of different types, including drawing a picture, looking for a pattern, systematic guessing and checking, acting it out, making a table, working a simpler problem, or working backwards to solve a problem; and

(D) select tools such as real objects, manipulatives, paper/pencil, and technology or techniques such as mental math, estimation, and number sense to solve problems.

(12) Underlying processes and mathematical tools. The student communicates about Grade 6 mathematics through informal and mathematical language, representations, and models. The student is expected to:

(A) communicate mathematical ideas using language, efficient tools, appropriate units, and graphical, numerical, physical, or algebraic mathematical models; and

(B) evaluate the effectiveness of different representations to communicate ideas.

(13) Underlying processes and mathematical tools. The student uses logical reasoning to make conjectures and verify conclusions. The student is expected to:

(A) make conjectures from patterns or sets of examples and nonexamples; and

(B) validate his/her conclusions using mathematical properties and relationships.

§111.23. Mathematics, Grade 7.

(a) Introduction.

(1) Within a well-balanced mathematics curriculum, the primary focal points at Grade 7 are using direct proportional relationships in number, geometry, measurement, and probability; applying addition, subtraction, multiplication, and division of decimals, fractions, and integers; and using statistical measures to describe data.

(2) Throughout mathematics in Grades 6-8, students build a foundation of basic understandings in number, operation, and quantitative reasoning; patterns, relationships, and algebraic thinking; geometry and spatial reasoning; measurement; and probability and statistics. Students use concepts, algorithms, and properties of rational numbers to explore mathematical relationships and to describe increasingly complex situations. Students use algebraic thinking to describe how a change in one quantity in a relationship results in a change in the

other; and they connect verbal, numeric, graphic, and symbolic representations of relationships. Students use geometric properties and relationships, as well as spatial reasoning, to model and analyze situations and solve problems. Students communicate information about geometric figures [~~objects~~] or situations by quantifying attributes, generalize procedures from measurement experiences, and use the procedures to solve problems. Students use appropriate statistics, representations of data, reasoning, and concepts of probability to draw conclusions, evaluate arguments, and make recommendations.

(3) Problem solving in meaningful contexts, language and communication, connections within and outside mathematics, and formal and informal reasoning underlie all content areas in mathematics. Throughout mathematics in Grades 6-8, students use these processes together with graphing technology [~~(at least four-function calculators for whole numbers, decimals, and fractions)~~] and other mathematical tools such as manipulative materials to develop conceptual understanding and solve problems as they do mathematics.

(b) Knowledge and skills.

(1) Number, operation, and quantitative reasoning. The student represents and uses numbers in a variety of equivalent forms. The student is expected to:

(A) compare and order integers and positive rational numbers;

(B) convert between fractions, decimals, whole numbers, and percents mentally, on paper, or with a calculator; and

(C) represent squares and square roots using geometric models.

(2) Number, operation, and quantitative reasoning. The student adds, subtracts, multiplies, or divides to solve problems and justify solutions. The student is expected to:

(A) represent multiplication and division situations involving fractions and decimals with [~~concrete~~] models, including concrete objects, pictures, words, and numbers;

(B) use addition, subtraction, multiplication, and division to solve problems involving fractions and decimals;

(C) use models, such as concrete objects, pictorial models, and number lines, to add, subtract, multiply, and divide integers and connect the actions to algorithms;

(D) use division to find unit rates and ratios in proportional relationships such as speed, density, price, recipes, and student-teacher ratio;

(E) simplify numerical expressions involving order of operations and exponents;

(F) select and use appropriate operations to solve problems and justify the selections; and

(G) determine the reasonableness of a solution to a problem.

(3) Patterns, relationships, and algebraic thinking. The student solves problems involving direct proportional relationships. The student is expected to:

(A) estimate and find solutions to application problems involving percent; and

(B) estimate and find solutions to application problems involving proportional relationships such as similarity, scaling, unit costs, and related measurement units.

(4) Patterns, relationships, and algebraic thinking. The student represents a relationship in numerical, geometric, verbal, and symbolic form. The student is expected to:

(A) generate formulas involving unit conversions, perimeter, area, circumference, volume, and scaling;

(B) graph data to demonstrate relationships in familiar concepts such as conversions, perimeter, area, circumference, volume, and scaling; and

(C) use words and symbols to describe the relationship between the terms in an arithmetic [~~a~~] sequence (with a constant rate of change) and their positions in the sequence.

(5) Patterns, relationships, and algebraic thinking. The student uses equations to solve problems. The student is expected to:

(A) use concrete and pictorial models to solve equations and use symbols to record the actions; and

(B) formulate [~~a possible~~] problem situations [~~situation~~] when given a simple equation and formulate an equation when given a problem situation.

(6) Geometry and spatial reasoning. The student compares and classifies two- and three-dimensional figures [~~shapes and solids~~] using geometric vocabulary and properties. The student is expected to:

(A) use angle measurements to classify pairs of angles as complementary or supplementary;

(B) use properties to classify [~~shapes including~~] triangles and [~~,~~] quadrilaterals [~~, pentagons, and circles~~];

(C) use properties to classify three-dimensional figures [~~solids~~], including pyramids, cones, prisms, and cylinders; and

(D) use critical attributes to define similarity.

(7) Geometry and spatial reasoning. The student uses coordinate geometry to describe location on a plane. The student is expected to:

(A) locate and name points on a coordinate plane using ordered pairs of integers; and

(B) graph reflections across the horizontal or vertical axis and graph translations on a coordinate plane.

(8) Geometry and spatial reasoning. The student uses geometry to model and describe the physical world. The student is expected to:

(A) sketch three-dimensional figures [~~a solid~~] when given the top, side, and front views;

(B) make a net (two-dimensional model) of the surface area of a three- dimensional figure [~~solid~~]; and

(C) use geometric concepts and properties to solve problems in fields such as art and architecture.

(9) Measurement. The student solves application problems involving estimation and measurement. The student is expected to: [~~estimate measurements and solve application problems involving length (including perimeter and circumference), area, and volume.~~]

(A) estimate measurements and solve application problems involving length (including perimeter and circumference) and area of polygons and other shapes;

(B) connect models for volume of prisms (triangular and rectangular) and cylinders to formulas of prisms (triangular and rectangular) and cylinders; and

(C) estimate measurements and solve application problems involving volume of prisms (rectangular and triangular) and cylinders.

(10) Probability and statistics. The student recognizes that a physical or mathematical model can be used to describe the experimental and theoretical probability of real-life events. The student is expected to:

(A) construct sample spaces for simple or composite experiments [~~compound events (dependent and independent)~~]; and

(B) find the [~~approximate~~] probability of independent events [~~a compound event through experimentation~~].

(11) Probability and statistics. The student understands that the way a set of data is displayed influences its interpretation. The student is expected to:

(A) select and use an appropriate representation for presenting and displaying relationships among collected data, including line plot, line graph, bar graph, stem and leaf plot, circle graph, and Venn diagrams, and justify the selection; and

(B) make inferences and convincing arguments based on an analysis of given or collected data.

(12) Probability and statistics. The student uses measures of central tendency and range to describe a set of data. The student is expected to:

(A) describe a set of data using mean, median, mode, and range; and

(B) choose among mean, median, mode, or range to describe a set of data and justify the choice for a particular situation.

(13) Underlying processes and mathematical tools. The student applies Grade 7 mathematics to solve problems connected to everyday experiences, investigations in other disciplines, and activities in and outside of school. The student is expected to:

(A) identify and apply mathematics to everyday experiences, to activities in and outside of school, with other disciplines, and with other mathematical topics;

(B) use a problem-solving model that incorporates understanding the problem, making a plan, carrying out the plan, and evaluating the solution for reasonableness;

(C) select or develop an appropriate problem-solving strategy from a variety of different types, including drawing a picture, looking for a pattern, systematic guessing and checking, acting it out, making a table, working a simpler problem, or working backwards to solve a problem; and

(D) select tools such as real objects, manipulatives, paper/pencil, and technology or techniques such as mental math, estimation, and number sense to solve problems.

(14) Underlying processes and mathematical tools. The student communicates about Grade 7 mathematics through informal and mathematical language, representations, and models. The student is expected to:

(A) communicate mathematical ideas using language, efficient tools, appropriate units, and graphical, numerical, physical, or algebraic mathematical models; and

(B) evaluate the effectiveness of different representations to communicate ideas.

(15) Underlying processes and mathematical tools. The student uses logical reasoning to make conjectures and verify conclusions. The student is expected to:

(A) make conjectures from patterns or sets of examples and nonexamples; and

(B) validate his/her conclusions using mathematical properties and relationships.

§111.24. Mathematics, Grade 8.

(a) Introduction.

(1) Within a well-balanced mathematics curriculum, the primary focal points at Grade 8 are using basic principles of algebra to analyze and represent both proportional and non-proportional linear relationships and using probability to describe data and make predictions.

(2) Throughout mathematics in Grades 6-8, students build a foundation of basic understandings in number, operation, and quantitative reasoning; patterns, relationships, and algebraic thinking; geometry and spatial reasoning; measurement; and probability and statistics. Students use concepts, algorithms, and properties of rational numbers to explore mathematical relationships and to describe increasingly complex situations. Students use algebraic thinking to describe how a change in one quantity in a relationship results in a change in the other; and they connect verbal, numeric, graphic, and symbolic representations of relationships. Students use geometric properties and relationships, as well as spatial reasoning, to model and analyze situations and solve problems. Students communicate information about geometric figures [~~objects~~] or situations by quantifying attributes, generalize procedures from measurement experiences, and use the procedures to solve problems. Students use appropriate statistics, representations of data, reasoning, and concepts of probability to draw conclusions, evaluate arguments, and make recommendations.

(3) Problem solving in meaningful contexts, language and communication, connections within and outside mathematics, and formal and informal reasoning underlie all content areas in mathematics. Throughout mathematics in Grades 6-8, students use these processes together with graphing technology [~~(at least four-function calculators for whole numbers, decimals, and fractions)~~] and other mathematical tools such as manipulative materials to develop conceptual understanding and solve problems as they do mathematics.

(b) Knowledge and skills.

(1) Number, operation, and quantitative reasoning. The student understands that different forms of numbers are appropriate for different situations. The student is expected to:

(A) compare and order rational numbers in various forms including integers, percents, and positive and negative fractions and decimals;

(B) select and use appropriate forms of rational numbers to solve real-life problems including those involving proportional relationships;

(C) approximate (mentally and with calculators) the value of irrational numbers as they arise from problem situations (such as π, $\sqrt{2}$); and

(D) express numbers in scientific notation, including negative exponents, in appropriate problem situations [~~using a calculator~~].

(2) Number, operation, and quantitative reasoning. The student selects and uses appropriate operations to solve problems and justify solutions. The student is expected to:

(A) select [~~and use~~] appropriate operations to solve problems involving rational numbers and justify the selections;

(B) use appropriate operations to solve problems involving [~~add, subtract, multiply, and divide~~] rational numbers in problem situations;

(C) evaluate a solution for reasonableness; and

(D) use multiplication by a constant factor (unit rate) to represent proportional relationships [~~; for example, the arm span of a gibbon is about 1.4 times its height, $a = 1.4h$~~].

(3) Patterns, relationships, and algebraic thinking. The student identifies proportional or non-proportional linear relationships in problem situations and solves problems. The student is expected to:

(A) compare and contrast proportional and non-proportional linear relationships; and

(B) estimate and find solutions to application problems involving percents and other proportional relationships such as similarity and rates.

(4) Patterns, relationships, and algebraic thinking. The student makes connections among various representations of a numerical relationship. The student is expected to generate a different representation of data given another [~~one~~] representation of data (such as a table, graph, equation, or verbal description).

(5) Patterns, relationships, and algebraic thinking. The student uses graphs, tables, and algebraic representations to make predictions and solve problems. The student is expected to:

(A) predict, [~~estimate,~~] find, and justify solutions to application problems using appropriate tables, graphs, and algebraic equations; and

(B) find and evaluate [~~use~~] an algebraic expression to determine [~~find~~] any term in an arithmetic [~~a~~] sequence (with a constant rate of change).

(6) Geometry and spatial reasoning. The student uses transformational geometry to develop spatial sense. The student is expected to:

(A) generate similar figures [~~shapes~~] using dilations including enlargements and reductions; and

(B) graph dilations, reflections, and translations on a coordinate plane.

(7) Geometry and spatial reasoning. The student uses geometry to model and describe the physical world. The student is expected to:

(A) draw three-dimensional figures [~~solids~~] from different perspectives;

(B) use geometric concepts and properties to solve problems in fields such as art and architecture;

(C) use pictures or models to demonstrate the Pythagorean Theorem; and

(D) locate and name points on a coordinate plane using ordered pairs of rational numbers.

(8) Measurement. The student uses procedures to determine measures of three- dimensional figures [~~solids~~]. The student is expected to:

(A) find lateral and total surface area of prisms, pyramids, and cylinders using concrete models and nets (two-dimensional models);

(B) connect models [~~to formulas for volume~~] of prisms, cylinders, pyramids, spheres, and cones to formulas for volume of these objects; and

(C) estimate measurements [~~answers~~] and use formulas to solve application problems involving lateral and total surface area and volume.

(9) Measurement. The student uses indirect measurement to solve problems. The student is expected to:

(A) use the Pythagorean Theorem to solve real-life problems; and

(B) use proportional relationships in similar two-dimensional figures or similar three-dimensional figures [~~shapes~~] to find missing measurements.

(10) Measurement. The student describes how changes in dimensions affect linear, area, and volume measures. The student is expected to:

(A) describe the resulting effects on perimeter and area when dimensions of a shape are changed proportionally; and

(B) describe the resulting effect on volume when dimensions of a solid are changed proportionally.

(11) Probability and statistics. The student applies concepts of theoretical and experimental probability to make predictions. The student is expected to:

(A) find the probabilities of dependent and independent [~~compound~~] events [~~(dependent and independent)~~];

(B) use theoretical probabilities and experimental results to make predictions and decisions; and

(C) select and use different models to simulate an event.

(12) Probability and statistics. The student uses statistical procedures to describe data. The student is expected to:

(A) select the appropriate measure of central tendency or range to describe a set of data and justify the choice for a particular situation [~~purpose~~];

(B) draw conclusions and make predictions by analyzing trends in scatterplots; and

(C) select and use an appropriate representation for presenting and displaying relationships among collected data, including line plots, line graphs, stem and leaf plots, [~~construct~~] circle graphs, bar graphs, box and whisker plots, [~~and~~] histograms, and Venn diagrams, with and without the use of technology.

(13) Probability and statistics. The student evaluates predictions and conclusions based on statistical data. The student is expected to:

(A) evaluate methods of sampling to determine validity of an inference made from a set of data; and

(B) recognize misuses of graphical or numerical information and evaluate predictions and conclusions based on data analysis.

(14) Underlying processes and mathematical tools. The student applies Grade 8 mathematics to solve problems connected to

everyday experiences, investigations in other disciplines, and activities in and outside of school. The student is expected to:

(A) identify and apply mathematics to everyday experiences, to activities in and outside of school, with other disciplines, and with other mathematical topics;

(B) use a problem-solving model that incorporates understanding the problem, making a plan, carrying out the plan, and evaluating the solution for reasonableness;

(C) select or develop an appropriate problem-solving strategy from a variety of different types, including drawing a picture, looking for a pattern, systematic guessing and checking, acting it out, making a table, working a simpler problem, or working backwards to solve a problem; and

(D) select tools such as real objects, manipulatives, paper/pencil, and technology or techniques such as mental math, estimation, and number sense to solve problems.

(15) Underlying processes and mathematical tools. The student communicates about Grade 8 mathematics through informal and mathematical language, representations, and models. The student is expected to:

(A) communicate mathematical ideas using language, efficient tools, appropriate units, and graphical, numerical, physical, or algebraic mathematical models; and

(B) evaluate the effectiveness of different representations to communicate ideas.

(16) Underlying processes and mathematical tools. The student uses logical reasoning to make conjectures and verify conclusions. The student is expected to:

(A) make conjectures from patterns or sets of examples and nonexamples; and

(B) validate his/her conclusions using mathematical properties and relationships.

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

Filed with the Office of the Secretary of State on November 29, 2004.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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SUBCHAPTER C. HIGH SCHOOL

19 TAC §§111.32 - 111.36

The State Board of Education (SBOE) proposes amendments to §§111.32 - 111.36, concerning the Texas Essential Knowledge and Skills (TEKS) for mathematics. The sections establish the curriculum standards for the following high school mathematics courses: Algebra I, Algebra II, Geometry, Precalculus, and Mathematical Models with Applications. The proposed amendments would refine and align secondary mathematics TEKS. Amendments to middle school mathematics TEKS are also proposed in this issue.

Following a November 2003 directive from the SBOE to provide a schedule for reviewing the TEKS, Texas Education Agency (TEA) staff proposed a 2004-2005 TEKS review calendar. The TEKS review process will follow the same timeline as the textbook adoption process, as appropriate. The SBOE issued Proclamation 2004 in May 2004, calling for instructional materials in the area of secondary mathematics.

TEA staff has proceeded with the review process for the secondary mathematics TEKS in the areas of: mathematics, Grades 6-8 (including Grade 6 Spanish mathematics); Algebra I and II; Geometry; Precalculus; and Mathematical Models with Applications. A work group of teachers, central office staff, and university personnel was assembled to review these TEKS. After the work group refined and aligned the secondary mathematics TEKS, the draft revisions were placed on the TEA web site in the form of a survey to collect feedback from the public for 30 days beginning in mid-May 2004. A summary of the survey results was provided to the SBOE at its July 2004 meeting. The draft revisions were also provided to a review panel consisting of three highly regarded mathematics experts.

During the September 2004 meeting, the SBOE was presented with a description of the expert reviewers' comments on the TEKS. During the September and November 2004 meetings, the SBOE was provided with an explanation of the changes for alignment and refinement of the TEKS. Examples of the proposed amendments include revisions for precision in language, mathematical correctness, and parallel language from Grades 6-12.

Once the secondary mathematics TEKS are updated through the amendments to 19 TAC Chapter 111, Subchapters B and C, the SBOE will be asked to take action to amend Proclamation 2004 to include the updated TEKS.

Susan Barnes, associate commissioner for standards and programs, has 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 enforcing or administering the amendments. Normal business costs would be associated with the TEKS updating process for the Texas Education Agency, including staff travel, meeting accommodations, and production and dissemination of documents.

Dr. Barnes has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments would include better alignment of the TEKS and coordination of the TEKS revision with the textbook adoption process. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendments.

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

The amendments are proposed under the Texas Education Code, §7.102, which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments; and §28.025, which authorizes the SBOE to by rule determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum.

The amendments implement the Texas Education Code, §§7.102, 28.002, and 28.025.

§111.32. Algebra I (One Credit).

(a) Basic understandings.

(1) Foundation concepts for high school mathematics. As presented in Grades K-8, the basic understandings of number, operation, and quantitative reasoning; patterns, relationships, and algebraic thinking; geometry; measurement; and probability and statistics are essential foundations for all work in high school mathematics. Students will continue to build on this foundation as they expand their understanding through other mathematical experiences.

(2) Algebraic thinking and symbolic reasoning. Symbolic reasoning plays a critical role in algebra; symbols provide powerful ways to represent mathematical situations and to express generalizations. Students use symbols in a variety of ways to study relationships among quantities.

(3) Function concepts. A function is a fundamental mathematical concept; it expresses a special kind of relationship between two quantities. [Functions represent the systematic dependence of one quantity on another.] Students use functions to determine one quantity from another, to represent and model problem situations, and to analyze and interpret relationships.

(4) Relationship between equations and functions. Equations and inequalities arise as a way of asking and answering questions involving functional relationships. Students work in many situations to set up equations and inequalities and use a variety of methods to solve them [these equations].

(5) Tools for algebraic thinking. Techniques for working with functions and equations are essential in understanding underlying relationships. Students use a variety of representations (concrete, pictorial, numerical, symbolic, [algorithmic,] graphical, and verbal), tools, and technology ([,] including, but not limited to, [powerful and accessible hand-held] calculators with graphing capabilities, data collection devices, and computers) to [with graphing capabilities and] model mathematical situations to solve meaningful problems.

(6) Underlying mathematical processes. Many processes underlie all content areas in mathematics. As they do mathematics, students continually use problem-solving, [computation in problem-solving contexts,] language and communication, and reasoning (justification and proof) to make connections within and outside mathematics. Students also use [, and reasoning, as well as] multiple representations, technology, applications and modeling, and numerical fluency in problem-solving contexts [justification and proof].

(b) Knowledge and skills. [Foundations for functions: knowledge and skills and performance descriptions.]

(1) Foundations for functions. The student understands that a function represents a dependence of one quantity on another and can be described in a variety of ways. The student is expected to: [Following are performance descriptions.]

(A) describe [The student describes] independent and dependent quantities in functional relationships ; [.]

(B) gather and record [The student gathers and records] data and use[, or uses] data sets [,] to determine functional [(systematic)] relationships between quantities; [.]

(C) describe [The student describes] functional relationships for given problem situations and write [writes] equations or inequalities to answer questions arising from the situations; [.]

(D) represent [The student represents] relationships among quantities using concrete models, tables, graphs, diagrams, verbal descriptions, equations, and inequalities; and [.]

(E) interpret and make decisions, predictions, and critical judgments [The student interprets and makes inferences] from functional relationships.

(2) Foundations for functions. The student uses the properties and attributes of functions. The student is expected to: [Following are performance descriptions.]

(A) identify and sketch [The student identifies and sketches] the general forms of linear ($y = x$) and quadratic ($y = x^2$) parent functions; [.]

(B) identify [For a variety of situations, the student identifies the] mathematical domains and ranges and determine [determines] reasonable domain and range values for given situations, both continuous and discrete; [.]

(C) interpret [The student interprets] situations in terms of given graphs or creates situations that fit given graphs; and[.]

(D) collect and organize [In solving problems, the student collects and organizes] data, make and interpret [makes and interprets] scatterplots (including recognizing positive, negative, or no correlation for data approximating linear situations), and model, predict, and make [models, predicts, and makes] decisions and critical judgments in problem situations.

(3) Foundations for functions. The student understands how algebra can be used to express generalizations and recognizes and uses the power of symbols to represent situations. The student is expected to: [Following are performance descriptions.]

(A) use [The student uses] symbols to represent unknowns and variables; and[.]

(B) look [Given situations, the student looks] for patterns and represent [represents] generalizations algebraically.

(4) Foundations for functions. The student understands the importance of the skills required to manipulate symbols in order to solve problems and uses the necessary algebraic skills required to simplify algebraic expressions and solve equations and inequalities in problem situations. The student is expected to: [Following are performance descriptions.]

(A) find [The student finds] specific function values, simplify [simplifies] polynomial expressions, transform and solve [transforms and solves] equations, and factor [factors] as necessary in problem situations; [.]

(B) use [The student uses] the commutative, associative, and distributive properties to simplify algebraic expressions; and[.]

(C) connect equation notation with function notation, such as $y = x + 1$ and $f(x) = x + 1$.

[~~(c) Linear functions: knowledge and skills and performance descriptions.~~]

(5) [~~(1)~~] Linear functions. The student understands that linear functions can be represented in different ways and translates among their various representations. The student is expected to: [~~Following are performance descriptions.~~]

(A) determine [~~The student determines~~] whether or not given situations can be represented by linear functions; [~~.~~]

(B) determine [~~The student determines~~] the domain and range [~~values~~] for [~~which~~] linear functions in [~~make sense for~~] given situations; and[~~.~~]

(C) use, translate, and make connections [~~The student translates~~] among [~~and uses~~] algebraic, tabular, graphical, or verbal descriptions of linear functions.

(6) [~~(2)~~] Linear functions. The student understands the meaning of the slope and intercepts of the graphs of linear functions and zeros of linear functions and interprets and describes the effects of changes in parameters of linear functions in real-world and mathematical situations. The student is expected to: [~~Following are performance descriptions.~~]

(A) develop [~~The student develops~~] the concept of slope as rate of change and determine [~~determines~~] slopes from graphs, tables, and algebraic representations; [~~.~~]

(B) interpret [~~The student interprets~~] the meaning of slope and intercepts in situations using data, symbolic representations, or graphs; [~~.~~]

(C) investigate, describe, and predict [~~The student investigates, describes, and predicts~~] the effects of changes in m and b on the graph of $y = mx + b$; [~~.~~]

(D) graph and write [~~The student graphs and writes~~] equations of lines given characteristics such as two points, a point and a slope, or a slope and y-intercept; [~~.~~]

(E) determine [~~The student determines~~] the intercepts of the graphs of linear functions and zeros of linear functions from graphs, tables, and algebraic representations; [~~.~~]

(F) interpret and predict [~~The student interprets and predicts~~] the effects of changing slope and y-intercept in applied situations; and [~~.~~]

(G) relate [~~The student relates~~] direct variation to linear functions and solve [~~solves~~] problems involving proportional change.

(7) [~~(3)~~] Linear functions. The student formulates equations and inequalities based on linear functions, uses a variety of methods to solve them, and analyzes the solutions in terms of the situation. The student is expected to: [~~Following are performance descriptions.~~]

(A) analyze [~~The student analyzes~~] situations involving linear functions and formulate [~~formulates~~] linear equations or inequalities to solve problems; [~~.~~]

(B) investigate [~~The student investigates~~] methods for solving linear equations and inequalities using concrete models, graphs, and the properties of equality, select [~~selects~~] a method, and solve [~~solves~~] the equations and inequalities; and[~~.~~]

(C) interpret and determine [~~For given contexts, the student interprets and determines~~] the reasonableness of solutions to linear equations and inequalities.

(8) [~~(4)~~] Linear functions. The student formulates systems of linear equations from problem situations, uses a variety of methods to solve them, and analyzes the solutions in terms of the situation. The student is expected to: [~~Following are performance descriptions.~~]

(A) analyze [~~The student analyzes~~] situations and formulate [~~formulates~~] systems of linear equations in two unknowns to solve problems; [~~.~~]

(B) solve [~~The student solves~~] systems of linear equations using concrete models, graphs, tables, and algebraic methods; and[~~.~~]

(C) interpret and determine [~~For given contexts, the student interprets and determines~~] the reasonableness of solutions to systems of linear equations.

[~~(d) Quadratic and other nonlinear functions: knowledge and skills and performance descriptions.~~]

(9) [~~(1)~~] Quadratic and other nonlinear functions. The student understands that the graphs of quadratic functions are affected by the parameters of the function and can interpret and describe the effects of changes in the parameters of quadratic functions. The student is expected to: [~~Following are performance descriptions.~~]

(A) determine [~~The student determines~~] the domain and range [~~values~~] for [~~which~~] quadratic functions in [~~make sense for~~] given situations; [~~.~~]

(B) investigate, describe, and predict [~~The student investigates, describes, and predicts~~] the effects of changes in a on the graph of $y = ax^2 + c$; [~~$y = ax^2$.~~]

(C) investigate, describe, and predict [~~The student investigates, describes, and predicts~~] the effects of changes in c on the graph of $y = ax^2 + c$; and [~~$y = x^2 + c$.~~]

(D) analyze [~~For problem situations, the student analyzes~~] graphs of quadratic functions and draw [~~draws~~] conclusions.

(10) [~~(2)~~] Quadratic and other nonlinear functions. The student understands there is more than one way to solve a quadratic equation and solves them using appropriate methods. The student is expected to: [~~Following are performance descriptions.~~]

(A) solve [~~The student solves~~] quadratic equations using concrete models, tables, graphs, and algebraic methods; and[~~.~~]

(B) make connections among the solutions (roots) [~~The student relates the solutions~~] of quadratic equations, the zeros of their related functions, and the horizontal intercepts (x-intercepts) of the graph [~~to the roots~~] of the function [~~their functions~~].

(11) [~~(3)~~] Quadratic and other nonlinear functions. The student understands there are situations modeled by functions that are neither linear nor quadratic and models the situations. The student is expected to: [~~Following are performance descriptions.~~]

(A) use [~~The student uses~~] patterns to generate the laws of exponents and apply [~~applies~~] them in problem-solving situations; [~~.~~]

(B) analyze [~~The student analyzes~~] data and represent [~~represents~~] situations involving inverse variation using concrete models, tables, graphs, or algebraic methods; and[~~.~~]

(C) analyze [~~The student analyzes~~] data and represent [~~represents~~] situations involving exponential growth and decay using concrete models, tables, graphs, or algebraic methods.

§111.33. Algebra II (One-Half to One Credit).

(a) Basic understandings.

(1) Foundation concepts for high school mathematics. As presented in Grades K-8, the basic understandings of number, operation, and quantitative reasoning; patterns, relationships, and algebraic thinking; geometry; measurement; and probability and statistics are essential foundations for all work in high school mathematics. Students continue to build on this foundation as they expand their understanding through other mathematical experiences.

(2) Algebraic thinking and symbolic reasoning. Symbolic reasoning plays a critical role in algebra; symbols provide powerful ways to represent mathematical situations and to express generalizations. Students study algebraic concepts and the relationships among them to better understand the structure of algebra.

(3) Functions, equations, and their relationship. The study of functions, equations, and their relationship is central to all of mathematics. Students perceive functions and equations as means for analyzing and understanding a broad variety of relationships and as a useful tool for expressing generalizations.

(4) Relationship between algebra and geometry. Equations and functions are algebraic tools that can be used to represent geometric curves and figures; similarly, geometric figures can illustrate algebraic relationships. Students perceive the connections between algebra and geometry and use the tools of one to help solve problems in the other.

(5) Tools for algebraic thinking. Techniques for working with functions and equations are essential in understanding underlying relationships. Students use a variety of representations (concrete, pictorial, numerical, symbolic, [algorithmic,] graphical, and verbal), tools, and technology[,] (including, but not limited to, [powerful and accessible hand-held] calculators with graphing capabilities, data collection devices, and computers) to [with graphing capabilities and] model mathematical situations to solve meaningful problems.

(6) Underlying mathematical processes. Many processes underlie all content areas in mathematics. As they do mathematics, students continually use problem-solving, [computation in problem-solving contexts,] language and communication, and reasoning (justification and proof) to make connections within and outside mathematics. Students also use [, and reasoning, as well as] multiple representations, technology, applications and modeling, and numerical fluency in problem-solving contexts [justification and proof].

(b) Knowledge and skills. [Foundations for functions: knowledge and skills and performance descriptions.]

(1) Foundations for functions. The student uses properties and attributes of functions and applies functions to problem situations. The student is expected to: [Following are performance descriptions.]

(A) identify [For a variety of situations, the student identifies] the mathematical domains and ranges of functions and determine [determines] reasonable domain and range values for continuous and discrete [given] situations; and [.]

(B) collect and organize [In solving problems, the student collects data and records results, organizes the] data, make and interpret [makes] scatterplots, fit [fits] the graph of a [curves to the appropriate parent] function to the data, interpret [interprets] the results, and proceed [proceeds] to model, predict, and make decisions and critical judgments.

(2) Foundations for functions. The student understands the importance of the skills required to manipulate symbols in order to solve problems and uses the necessary algebraic skills required to simplify algebraic expressions and solve equations and inequalities in problem situations. The student is expected to: [Following are performance descriptions.]

(A) use [The student uses] tools including [matrices,] factoring[,] and properties of exponents to simplify expressions and to transform and solve equations; and [.]

(B) use [The student uses] complex numbers to describe the solutions of quadratic equations.

[(C) The student connects the function notation of $y =$ and $f(x) =$.]

(3) Foundations for functions. The student formulates systems of equations and inequalities from problem situations, uses a variety of methods to solve them, and analyzes the solutions in terms of the situations. The student is expected to: [Following are performance descriptions.]

(A) analyze [The student analyzes] situations and formulate [formulates] systems of equations in two or more unknowns or inequalities in two [or more] unknowns to solve problems; [.]

(B) use [The student uses] algebraic methods, graphs, tables, or matrices, to solve systems of equations or inequalities; and [.]

(C) interpret and determine [For given contexts, the student interprets and determines] the reasonableness of solutions to systems of equations or inequalities for given contexts.

[(c) Algebra and geometry: knowledge and skills and performance descriptions.]

(4) [(1)] Algebra and geometry. The student connects algebraic and geometric representations of functions. The student is expected to: [Following are performance descriptions.]

(A) identify and sketch [The student identifies and sketches] graphs of parent functions, including linear $(f(x) = x)$ [$(y = x)$], quadratic $(f(x) = x^2)$ [$(y = x^2)$], [square root $(y = \sqrt{x})$, inverse $(y = 1/x)$,] exponential $(f(x) = a^x)$ [$(y = a^x)$], and logarithmic $(f(x) = \log_a x)$ [$(y = \log_a x)$] functions, absolute value of x $(f(x) = |x|)$, square root of x $(f(x) = \sqrt{x})$, and reciprocal of x $(f(x) = 1/x)$; [.]

(B) extend [The student extends] parent functions with parameters such as a in $f(x) = a/x$ [m in $y = mx$] and describe the effects of the [describes] parameter changes on the graph of parent functions; and[.]

(C) describe and analyze the relationship between a function and its inverse [The student recognizes inverse relationships between various functions].

(5) [(2)] Algebra and geometry. The student knows the relationship between the geometric and algebraic descriptions of conic sections. The student is expected to: [Following are performance descriptions.]

(A) describe [The student describes] a conic section as the intersection of a plane and a cone; [.]

(B) [In order to] sketch graphs of conic sections to relate [, the student relates] simple parameter changes in the equation to corresponding changes in the graph; [.]

(C) identify [The student identifies] symmetries from graphs of conic sections; [.]

(D) identify [The student identifies] the conic section from a given equation; and [.]

(E) use [The student uses] the method of completing the square.

[~~(d) Quadratic and square root functions: knowledge and skills and performance descriptions.~~]

(6) [~~(1)~~] Quadratic and square root functions. The student understands that quadratic functions can be represented in different ways and translates among their various representations. The student is expected to: [~~Following are performance descriptions.~~]

(A) determine [~~For given contexts, the student determines~~] the reasonable domain and range values of quadratic functions, as well as interpret and determine [~~interprets and determines~~] the reasonableness of solutions to quadratic equations and inequalities; [~~.~~]

(B) relate [~~The student relates~~] representations of quadratic functions, such as algebraic, tabular, graphical, and verbal descriptions; and [~~.~~]

(C) determine [~~The student determines~~] a quadratic function from its roots or a graph.

(7) [~~(2)~~] Quadratic and square root functions. The student interprets and describes the effects of changes in the parameters of quadratic functions in applied and mathematical situations. The student is expected to: [~~Following are performance descriptions.~~]

(A) use [~~The student uses~~] characteristics of the quadratic parent function to sketch the related graphs and connect [~~connects~~] between the $y = ax^2 + bx + c$ and the $y = a(x - h)^2 + k$ symbolic representations of quadratic functions; and [~~.~~]

(B) use [~~The student uses~~] the parent function to investigate, describe, and predict the effects of changes in a, h, and k on the graphs of $y = a(x - h)^2 + k$ form of a function in applied and purely mathematical situations.

(8) [~~(3)~~] Quadratic and square root functions. The student formulates equations and inequalities based on quadratic functions, uses a variety of methods to solve them, and analyzes the solutions in terms of the situation. The student is expected to: [~~Following are performance descriptions.~~]

(A) analyze [~~The student analyzes~~] situations involving quadratic functions and formulate [~~formulates~~] quadratic equations or inequalities to solve problems; [~~.~~]

(B) analyze and interpret [~~The student analyzes and interprets~~] the solutions of quadratic equations using discriminants and solve [~~solves~~] quadratic equations using the quadratic formula; [~~.~~]

(C) compare and translate [~~The student compares and translates~~] between algebraic and graphical solutions of quadratic equations; and [~~.~~]

(D) solve [~~The student solves~~] quadratic equations and inequalities using graphs, tables, and algebraic methods.

(9) [~~(4)~~] Quadratic and square root functions. The student formulates equations and inequalities based on square root functions, uses a variety of methods to solve them, and analyzes the solutions in terms of the situation. The student is expected to: [~~Following are performance descriptions.~~]

(A) use [~~The student uses~~] the parent function to investigate, describe, and predict the effects of parameter changes on the graphs of square root functions and describe [~~describes~~] limitations on the domains and ranges; [~~.~~]

(B) relate [~~The student relates~~] representations of square root functions, such as algebraic, tabular, graphical, and verbal descriptions; [~~.~~]

(C) determine [~~For given contexts, the student determines~~] the reasonable domain and range values of square root functions, as well as interpret and determine [~~interprets and determines~~] the reasonableness of solutions to square root equations and inequalities; [~~.~~]

(D) determine solutions of [~~The student solves~~] square root equations [~~and inequalities~~] using graphs, tables, and algebraic methods; [~~.~~]

(E) determine solutions of square root inequalities using graphs and tables;

(F) [~~(E)~~] analyze [~~The student analyzes~~] situations modeled by square root functions, formulate [~~formulates~~] equations or inequalities, select [~~selects~~] a method, and solve [~~solves~~] problems; and[~~.~~]

(G) [~~(F)~~] connect [~~The student expresses~~] inverses of square root functions with quadratic functions [~~using square root functions~~].

[~~(e) Rational functions: knowledge and skills and performance descriptions.~~]

(10) Rational functions. The student formulates equations and inequalities based on rational functions, uses a variety of methods to solve them, and analyzes the solutions in terms of the situation. The student is expected to: [~~Following are performance descriptions.~~]

(A) [~~(1)~~] use [~~The student uses~~] quotients of polynomials to describe the graphs of rational functions, predict the effects of parameter changes, describe [~~describes~~] limitations on the domains and ranges, and examine [~~examines~~] asymptotic behavior; [~~.~~]

(B) [~~(2)~~] analyze [~~The student analyzes~~] various representations of rational functions with respect to problem situations; [~~.~~]

(C) [~~(3)~~] determine [~~For given contexts, the student determines~~] the reasonable domain and range values of rational functions, as well as interpret and determine [~~interprets and determines~~] the reasonableness of solutions to rational equations and inequalities; [~~.~~]

(D) [~~(4)~~] determine the solutions of [~~The student solves~~] rational equations [~~and inequalities~~] using graphs, tables, and algebraic methods; [~~.~~]

(E) determine solutions of rational inequalities using graphs and tables;

(F) [~~(5)~~] analyze [~~The student analyzes~~] a situation modeled by a rational function, formulate [~~formulates~~] an equation or inequality composed of a linear or quadratic function, and solve [~~solves~~] the problem; and[~~.~~]

(G) [~~(6)~~] use The student uses direct and inverse variation] functions to model and [~~as models to~~] make predictions in problem situations involving direct and inverse variation.

[~~(f) Exponential and logarithmic functions: knowledge and skills and performance descriptions.~~]

(11) Exponential and logarithmic functions. The student formulates equations and inequalities based on exponential and logarithmic functions, uses a variety of methods to solve them, and analyzes the solutions in terms of the situation. The student is expected to: [~~Following are performance descriptions.~~]

(A) [~~(1)~~] develop [~~The student develops~~] the definition of logarithms by exploring and describing the relationship between exponential functions and their inverses; [~~.~~]

(B) [~~(2)~~] use [~~The student uses~~] the parent functions to investigate, describe, and predict the effects of parameter changes on the graphs of exponential and logarithmic functions, describe [~~describes~~] limitations on the domains and ranges, and examine [~~examines~~] asymptotic behavior; [~~.~~]

(C) [~~(3)~~] determine [~~For given contexts, the student determines~~] the reasonable domain and range values of exponential and logarithmic functions, as well as interpret and determine [~~interprets and determines~~] the reasonableness of solutions to exponential and logarithmic equations and inequalities; [~~.~~]

(D) [~~(4)~~] determine solutions of [~~The student solves~~] exponential and logarithmic equations [~~and inequalities~~] using graphs, tables, and algebraic methods; [~~.~~]

(E) determine solutions of exponential and logarithmic inequalities using graphs and tables; and

(F) [~~(5)~~] analyze [~~The student analyzes~~] a situation modeled by an exponential function, formulate [~~formulates~~] an equation or inequality, and solve [~~solves~~] the problem.

§111.34. Geometry (One Credit).

(a) Basic understandings.

(1) Foundation concepts for high school mathematics. As presented in Grades K-8, the basic understandings of number, operation, and quantitative reasoning; patterns, relationships, and algebraic thinking; geometry; measurement; and probability and statistics are essential foundations for all work in high school mathematics. Students continue to build on this foundation as they expand their understanding through other mathematical experiences.

(2) Geometric thinking and spatial reasoning. Spatial reasoning plays a critical role in geometry; geometric [~~shapes and~~] figures provide powerful ways to represent mathematical situations and to express generalizations about space and spatial relationships. Students use geometric thinking to understand mathematical concepts and the relationships among them.

(3) Geometric figures and their properties. Geometry consists of the study of geometric figures of zero, one, two, and three dimensions and the relationships among them. Students study properties and relationships having to do with size, shape, location, direction, and orientation of these figures.

(4) The relationship between geometry, other mathematics, and other disciplines. Geometry can be used to model and represent many mathematical and real-world situations. Students perceive the connection between geometry and the real and mathematical worlds and use geometric ideas, relationships, and properties to solve problems.

(5) Tools for geometric thinking. Techniques for working with spatial figures and their properties are essential in understanding underlying relationships. Students use a variety of representations (concrete, pictorial, numerical, symbolic, graphical, and verbal [~~algebraic, and coordinate~~]), tools, and technology [~~,~~] (including, but not limited to, [~~powerful and accessible hand-held~~] calculators with graphing capabilities, data collection devices, and computers) [~~with graphing capabilities~~] to solve meaningful problems by representing and transforming figures[~~, transforming figures,~~] and analyzing relationships[~~, and proving things about them~~].

(6) Underlying mathematical processes. Many processes underlie all content areas in mathematics. As they do mathematics, students continually use problem-solving, [~~computation in problem-solving contexts,~~] language and communication, connections within and outside mathematics, and reasoning (justification and proof). Students also use [~~, as well as~~] multiple representations, technology, applications and modeling, and numerical fluency in problem solving contexts [~~justification and proof~~].

(b) Knowledge and skills. [~~Geometric structure: knowledge and skills and performance descriptions.~~]

(1) Geometric structure. The student understands the structure of, and relationships within, an axiomatic system. The student is expected to: [~~Following are performance descriptions.~~]

(A) develop [~~The student develops~~] an awareness of the structure of a mathematical system, connecting definitions, postulates, logical reasoning, and theorems; [~~.~~]

(B) recognize [~~Through~~] the historical development of geometric systems and know[~~, the student recognizes that~~] mathematics is developed for a variety of purposes; and[~~.~~]

(C) compare and contrast [~~The student compares and contrasts~~] the structures and implications of Euclidean and non-Euclidean geometries.

(2) Geometric structure. The student analyzes geometric relationships in order to make and verify conjectures. The student is expected to: [~~Following are performance descriptions.~~]

(A) use [~~The student uses~~] constructions to explore attributes of geometric figures and to make conjectures about geometric relationships; and [~~.~~]

(B) make [~~The student makes and verifies~~] conjectures about angles, lines, polygons, circles, and three-dimensional figures and determine the validity of the conjectures, choosing from a variety of approaches such as coordinate, transformational, or axiomatic.

(3) Geometric structure. The student applies [~~understands the importance of~~] logical reasoning to justify and prove mathematical statements[~~, justification, and proof in mathematics~~]. The student is expected to: [~~Following are performance descriptions.~~]

(A) determine the validity [~~The student determines if the converse~~] of a conditional statement, its converse, inverse, and contrapositive; [~~is true or false.~~]

(B) construct and justify [~~The student constructs and justifies~~] statements about geometric figures and their properties; [~~.~~]

(C) use logical reasoning [~~The student demonstrates what it means~~] to prove statements are true and find counter examples to disprove [~~mathematically that~~] statements that are false; [~~true.~~]

(D) use [~~The student uses~~] inductive reasoning to formulate a conjecture; and [~~.~~]

(E) use [~~The student uses~~] deductive reasoning to prove a statement.

(4) Geometric structure. The student uses a variety of representations to describe geometric relationships and solve problems. The student is expected to select [~~Following is a performance description. The student selects an appropriate representation (concrete, pictorial, graphical, verbal, or symbolic) in order to solve problems.~~]

[~~(c) Geometric patterns: knowledge and skills and performance descriptions.~~]

(5) Geometric patterns. The student uses a variety of representations to describe geometric relationships and solve problems [~~identifies, analyzes, and describes patterns that emerge from two- and three-dimensional geometric figures~~]. The student is expected to: [~~Following are performance descriptions.~~]

(A) [~~(1)~~] use [~~The student uses~~] numeric and geometric patterns to develop algebraic expressions representing geometric properties; [~~to make generalizations about geometric properties, including properties of polygons, ratios in similar figures and solids, and angle relationships in polygons and circles.~~]

(B) use numeric and geometric patterns to make generalizations about geometric properties, including properties of polygons, ratios in similar figures and solids, and angle relationships in polygons and circles;

(C) [~~(2)~~] use [~~The student uses~~] properties of transformations and their compositions to make connections between mathematics and the real world, [~~in applications~~] such as tessellations; and [~~or fractals.~~]

(D) [~~(3)~~] identify and apply [~~The student identifies and applies~~] patterns from right triangles to solve meaningful problems, including special right triangles (45-45-90 and 30-60-90) and triangles whose sides are Pythagorean triples.

[~~(d) Dimensionality and the geometry of location: knowledge and skills and performance descriptions.~~]

(6) [~~(1)~~] Dimensionality and the geometry of location. The student analyzes the relationship between three-dimensional geometric figures [~~objects~~] and related two-dimensional representations and uses these representations to solve problems. The student is expected to: [~~Following are performance descriptions.~~]

(A) describe and draw the intersection of a given plane with various [~~The student describes, and draws cross sections and other slices of~~] three- dimensional geometric figures; [~~objects.~~]

(B) use [~~The student uses~~] nets to represent and construct three- dimensional geometric figures; and [~~objects.~~]

(C) use orthographic and isometric views [~~The student uses top, front, side, and corner views~~] of three-dimensional geometric figures [~~objects~~] to represent and construct three-dimensional geometric figures [~~create accurate and complete representations~~] and solve problems.

(7) [~~(2)~~] Dimensionality and the geometry of location. The student understands that coordinate systems provide convenient and efficient ways of representing geometric figures and uses them accordingly. The student is expected to: [~~Following are performance descriptions.~~]

(A) use [~~The student uses~~] one- and two-dimensional coordinate systems to represent points, lines, rays, line segments, and figures; [~~.~~]

(B) use [~~The student uses~~] slopes and equations of lines to investigate geometric relationships, including parallel lines, perpendicular lines, and special segments of triangles and other polygons; and [~~.~~]

(C) derive and use [~~The student develops and uses~~] formulas involving length, slope, [~~including distance~~] and midpoint.

[~~(e) Congruence and the geometry of size: knowledge and skills and performance descriptions.~~]

(8) [~~(1)~~] Congruence and the geometry of size. The student uses tools to determine measurements of geometric figures and extends measurement concepts to find perimeter, area, [~~perimeter,~~] and volume in problem situations. The student is expected to: [~~Following are performance descriptions.~~]

(A) find [~~The student finds~~] areas of regular polygons, circles, and composite figures; [~~.~~]

(B) find [~~The student finds~~] areas of sectors and arc lengths of circles using proportional reasoning; [~~.~~]

(C) derive, extend, and use [~~The student develops, extends, and uses~~] the Pythagorean Theorem; and [~~.~~]

(D) find [~~The student finds~~] surface areas and volumes of prisms, pyramids, spheres, cones, [~~and~~] cylinders, and composites of these figures in problem situations.

(9) [~~(2)~~] Congruence and the geometry of size. The student analyzes properties and describes relationships in geometric figures. The student is expected to: [~~Following are performance descriptions.~~]

(A) formulate and test [~~Based on explorations and using concrete models, the student formulates and tests~~] conjectures about the properties of parallel and perpendicular lines based on explorations and concrete models; [~~.~~]

(B) formulate and test [~~Based on explorations and using concrete models, the student formulates and tests~~] conjectures about the properties and attributes of polygons and their component parts based on explorations and concrete models; [~~.~~]

(C) formulate and test [~~Based on explorations and using concrete models, the student formulates and tests~~] conjectures about the properties and attributes of circles and the lines that intersect them based on explorations and concrete models; and[~~.~~]

(D) analyze [~~The student analyzes~~] the characteristics of polyhedra and other three-dimensional figures and their component parts based on explorations and concrete models.

(10) [~~(3)~~] Congruence and the geometry of size. The student applies the concept of congruence to justify properties of figures and solve problems. The student is expected to: [~~Following are performance descriptions.~~]

(A) use [~~The student uses~~] congruence transformations to make conjectures and justify properties of geometric figures including figures represented on a coordinate plane; and[~~.~~]

(B) justify and apply [~~The student justifies and applies~~] triangle congruence relationships.

[~~(f) Similarity and the geometry of shape: knowledge and skills and performance descriptions.~~]

(11) Similarity and the geometry of shape. The student applies the concepts of similarity to justify properties of figures and solve problems. The student is expected to: [~~Following are performance descriptions.~~]

(A) [~~(1)~~] use and extend [~~The student uses~~] similarity properties and transformations to explore and justify conjectures about geometric figures; [~~.~~]

(B) [~~(2)~~] use [~~The student uses~~] ratios to solve problems involving similar figures; [~~.~~]

(C) [~~(3)~~] develop, apply, and justify [~~In a variety of ways, the student develops, applies, and justifies~~] triangle similarity relationships, such as right triangle ratios, trigonometric ratios, and Pythagorean triples using a variety of methods; and [~~.~~]

(D) [~~(4)~~] describe [~~The student describes~~] the effect on perimeter, area, and volume when one or more dimensions [~~length, width, or height~~] of a figure are [~~three-dimensional solid is~~] changed and apply [~~applies~~] this idea in solving problems.

§111.35. Precalculus (One-Half to One Credit).

(a) General requirements. The provisions of this section shall be implemented beginning September 1, 1998, and at that time shall

supersede §75.63(bb) of this title (relating to Mathematics). Students can be awarded one-half to one credit for successful completion of this course. Recommended prerequisites: Algebra II, Geometry.

(b) Introduction.

(1) In Precalculus, students continue to build on the K-8, Algebra I, Algebra II, and Geometry foundations as they expand their understanding through other mathematical experiences. Students use symbolic reasoning and analytical methods to represent mathematical situations, to express generalizations, and to study mathematical concepts and the relationships among them. Students use functions, equations, and limits as useful tools for expressing generalizations and as means for analyzing and understanding a broad variety of mathematical relationships. Students also use functions as well as symbolic reasoning to represent and connect ideas in geometry, probability, statistics, trigonometry, and calculus and to model physical situations. Students use a variety of representations (concrete, pictorial, numerical, symbolic, [~~algorithmic,~~] graphical, and verbal), tools, and technology (including, but not limited to, calculators with graphing capabilities, data collection devices, and computers) to model functions and equations and solve real-life problems.

(2) As students do mathematics, they continually use problem-solving, language and communication, connections within and outside mathematics, and reasoning (justification and proof). Students also use multiple representations, technology, applications and modeling, [~~justification and proof,~~] and numerical fluency [~~computation~~] in problem-solving contexts.

(c) Knowledge and skills.

(1) The student defines functions, describes characteristics of functions, and translates among verbal, numerical, graphical, and symbolic representations of functions, including polynomial, rational, power (including radical), exponential, logarithmic, trigonometric, and piecewise-defined functions. The student is expected to:

(A) describe parent functions symbolically and graphically, including $f(x) = x^n$ [~~$y = x^n$~~], $f(x) = 1n\ x$ [~~$y = ln\ x$~~], $f(x) = log_a\ x$ [~~$y = log_a\ x$~~], $f(x) = 1/x$ [~~$y = 1/x$~~], $f(x) = e^x$ [~~$y = e^x$~~], $f(x) = |x|$, $f(x) = a^x$ [~~$y = a^x$~~], $f(x) = sin\ x$ [~~$y = sin\ x$~~], $f(x) = arcsin\ x$, etc.;

(B) determine the domain and range of functions using graphs, tables, and symbols;

(C) describe symmetry of graphs of even and odd functions;

(D) recognize and use connections among significant values [~~points~~] of a function (zeros, [~~roots,~~] maximum values [~~points~~], [~~and~~] minimum values, etc. [~~points~~]), points on the graph of a function, and the symbolic representation of a function; and

(E) investigate the concepts of continuity, end behavior, [~~vertical and horizontal~~] asymptotes, and limits and connect these characteristics to functions represented graphically and numerically [~~the graph of a function~~].

(2) The student interprets the meaning of the symbolic representations of functions and operations on functions to solve meaningful problems [~~within a context~~]. The student is expected to:

(A) apply basic transformations, including $a \cdot f(x)$, $f(x) + d$, $f(x - c)$, $f(b \cdot x)$, and compositions with absolute value functions, including $|f(x)|$, and $f(|x|)$, to the parent functions;

(B) perform operations including composition on functions, find inverses, and describe these procedures and results verbally, numerically, symbolically, and graphically; and

(C) investigate identities graphically and verify them symbolically, including logarithmic properties, trigonometric identities, and exponential properties.

(3) The student uses functions and their properties, tools and technology, to model and solve meaningful [~~real-life~~] problems. The student is expected to:

(A) investigate properties of trigonometric and polynomial functions;

(B) [~~(A)~~] use functions such as logarithmic, exponential, trigonometric, polynomial, etc. to model real-life data;

(C) [~~(B)~~] use regression to determine the appropriateness of a linear function to model real-life data (including using technology to determine the correlation coefficient);

(D) [~~(C)~~] use properties of functions to analyze and solve problems and make predictions; and

(E) [~~(D)~~] solve problems from physical situations using trigonometry, including the use of Law of Sines, Law of Cosines, and area formulas and incorporate radian measure where needed.

(4) The student uses sequences and series as well as tools and technology to represent, analyze, and solve real-life problems. The student is expected to:

(A) represent patterns using arithmetic and geometric sequences and series;

(B) use arithmetic, geometric, and other sequences and series to solve real-life problems;

(C) describe limits of sequences and apply their properties to investigate convergent and divergent series; and

(D) apply sequences and series to solve problems including sums and binomial expansion.

(5) The student uses conic sections, their properties, and parametric representations, as well as tools and technology, to model physical situations. The student is expected to:

(A) use conic sections to model motion, such as the graph of velocity vs. position of a pendulum and motions of planets;

(B) use properties of conic sections to describe physical phenomena such as the reflective properties of light and sound;

(C) convert between parametric and rectangular forms of functions and equations to graph them; and

(D) use parametric functions to simulate problems involving motion.

(6) The student uses vectors to model physical situations. The student is expected to:

(A) use the concept of vectors to model situations defined by magnitude and direction; and

(B) analyze and solve vector problems generated by real-life situations.

§111.36. Mathematical Models with Applications (One-Half to One Credit).

(a) General requirements. The provisions of this section shall be implemented beginning September 1, 1998. Students can be awarded one-half to one credit for successful completion of this course. Recommended prerequisite: Algebra I.

(b) Introduction.

(1) In Mathematical Models with Applications, students continue to build on the K-8 and Algebra I foundations as they expand their understanding through other mathematical experiences. Students use algebraic, graphical, and geometric reasoning to recognize patterns and structure, to model information, and to solve problems from various disciplines. Students use mathematical methods to model and solve real-life applied problems involving money, data, chance, patterns, music, design, and science. Students use mathematical models from algebra, geometry, probability, and statistics and connections among these to solve problems from a wide variety of advanced applications in both mathematical and nonmathematical situations. Students use a variety of representations (concrete, pictorial, numerical, symbolic, [~~algorithmic,~~] graphical, and verbal), tools, and technology (including, but not limited to, calculators with graphing capabilities, data collection devices, and computers) to link modeling techniques and purely mathematical concepts and to solve applied problems.

(2) As students do mathematics, they continually use problem-solving, language and communication, connections within and outside mathematics, and reasoning (justification and proof). Students also use multiple representations, technology, applications and modeling, [~~justification and proof,~~] and numerical fluency [~~computation~~] in problem-solving contexts.

(c) Knowledge and skills.

(1) The student uses a variety of strategies and approaches to solve both routine and non- routine problems. The student is expected to:

(A) compare and analyze various methods for solving a real-life problem;

(B) use multiple approaches (algebraic, graphical, and geometric methods) to solve problems from a variety of disciplines; and

(C) select a method to solve a problem, defend the method, and justify the reasonableness of the results.

(2) The student uses graphical and numerical techniques to study patterns and analyze data. The student is expected to:

(A) interpret information from various graphs, including line graphs, bar graphs, circle graphs, histograms, [~~and~~] scatterplots, line plots, stem and leaf plots, and box and whisker plots to draw conclusions from the data;

(B) analyze numerical data using measures of central tendency, variability, and correlation in order to make inferences;

(C) analyze graphs from journals, newspapers, and other sources to determine the validity of stated arguments; and

(D) use regression methods available through technology to describe various models for data such as linear, quadratic, exponential, etc., select the most appropriate model, and use the model to interpret information.

(3) The student develops and implements a plan for collecting and analyzing data in order to make decisions. The student is expected to:

(A) formulate a meaningful question, determine the data needed to answer the question, gather the appropriate data, analyze the data, and draw reasonable conclusions;

(B) communicate methods used, analyses [~~analysis~~] conducted, and conclusions drawn for a data-analysis project by written report, visual display, oral report, or multi-media presentation; and

(C) determine the appropriateness of a model for making predictions from a given set of data.

(4) The student uses probability models to describe everyday situations involving chance. The student is expected to:

(A) compare theoretical and empirical probability; and

(B) use experiments to determine the reasonableness of a theoretical model such as binomial, geometric, etc.

(5) The student uses functional relationships to solve problems related to personal income. The student is expected to:

(A) use rates, linear functions, and direct variation to solve problems involving personal finance and budgeting, including compensations and deductions;

(B) solve problems involving personal taxes; and

(C) analyze data to make decisions about banking.

(6) The student uses algebraic formulas, graphs, and amortization models to solve problems involving credit. The student is expected to:

(A) analyze methods of payment available in retail purchasing and compare relative advantages and disadvantages of each option;

(B) use amortization models to investigate home financing and compare buying and renting a home; and

(C) use amortization models to investigate automobile financing and compare buying and leasing a vehicle.

(7) The student uses algebraic formulas, numerical techniques, and graphs to solve problems related to financial planning. The student is expected to:

(A) analyze types of savings options involving simple and compound interest and compare relative advantages of these options;

(B) analyze and compare coverage options and rates in insurance; and

(C) investigate and compare investment options including stocks, bonds, annuities, and retirement plans.

(8) The student uses algebraic and geometric models to describe situations and solve problems. The student is expected to:

(A) use geometric models available through technology to model growth and decay in areas such as population, biology, and ecology;

(B) use trigonometric ratios and functions available through technology to calculate distances and model periodic motion; and

(C) use direct and inverse variation to describe physical laws such as Hook's, Newton's, and Boyle's laws.

(9) The student uses algebraic and geometric models to represent patterns and structures. The student is expected to:

(A) use geometric transformations, symmetry, and perspective drawings to describe mathematical patterns and structure in art and architecture; and

(B) use geometric transformations, proportions, and periodic motion to describe mathematical patterns and structure in music.

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

Filed with the Office of the Secretary of State on November 29, 2004.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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PART 8. WINDHAM SCHOOL DISTRICT

CHAPTER 300. GENERAL PROVISIONS

19 TAC §300.1

The Windham School District (WSD) Board of Trustees proposes to amend §300.1 Presentations to the Windham School District Board of Trustees. The purpose of the amendments are to rename the Rule title and clarify procedure for presenting public testimony on agenda items versus presenting public comment on topics under the jurisdiction of the board.

David McNutt, Chief Financial Officer for WSD, has determined that for the first five years the rule will be in effect, enforcing or administering the rule does not have foreseeable implications related to costs or revenues for state or local government. Mr. McNutt has also determined that there will be no economic impact on persons required to comply with the rule. There will be no effect on small and micro-businesses. The anticipated public benefit as a result of enforcing the rule will be to enhance public access to the WSD Board of Trustees.

Comments should be directed to Dr. Ron Bradford, Superintendent, Windham School District, P.O. Box 40, Huntsville, Texas 77342-0040, superintendent@wsd.tx.org. Written comments from the general public should be received within 30 days of the publication of this proposal.

The proposed revisions are under Texas Education Code, Sections 19.001 - 19.004, which establishes the Windham School District and the policymaking role of the Texas Board of Criminal Justice, and Texas Government Code, Chapter 551, the Open Meetings Act.

Cross Reference to Statutes: Texas Education Code, Sections 19.001 et seq., and Texas Government Code, Chapter 551, The Open Meetings Act.

§300.1. Public Testimony and Comments to the Windham School District Board of Trustees.

(a) Policy. The Windham School District (WSD) Board of Trustees (Board) is committed to provide access and opportunity for public testimony on items that are part of the Board's posted agenda as provided for in this subsection and in subsection (b) of this section. The Board also invites public comment on issues within the jurisdiction of the Board as provided for in this subsection and in subsection (c) of this section.[, and invites public testimony on items that are part of the Board's posted agenda as provided for in subsection (b) of this section. The Board defines its areas of jurisdiction in Windham School District Policy 1.00 and Texas Board of Criminal Justice Policy BP-01.01. Both policies are available at the Board office at the address in subsection (d) of this section. BP-01.01 is also available on the Internet at http://tdcj.state.tx.us/policy/policy-home.htm.] Persons outside the agency who wish to have items placed on the Board agenda are invited to follow the procedure in subsection (d) of this section. [Twice a year at the first and fourth regularly called meetings of the Board, which are typically held in January and July, an opportunity shall be provided for public presentations on issues that are not part of the Board's posted agenda. The location of these meetings will alternate between Austin and Huntsville.] Public testimony and public comments [presentations] shall be:

(1) subject to the requirements and restrictions of subsections (b), (c), (e), (f), (g) and (h) [(g)] of this section;

(2) pertinent to issues under the jurisdiction of the Board, as determined by the Chairman and the Superintendent; and

(3) pertinent to WSD policies, procedures, standards, and rules, while actual disputes that are properly the subject of the appeals process for contract non-renewal or employee termination, the employee grievance system, the employee disciplinary system or pending litigation shall be addressed through those processes.

(b) Public testimony on posted agenda topics. [Registration.] Persons who desire to make public testimony [presentations] to the Board [shall complete registration cards which shall be made available at the entry to the place where the Board's scheduled meeting is to be held. Completed registration cards] must provide, on the date of the meeting, a completed registration card to the Board's support staff [be provided to the Executive Assistant to the Chairman] at least ten (10) minutes prior to the meeting's posted start time [for the beginning of the meeting for registration the day of the meeting]. Registration cards shall be made available at the entry to the place where the Board's scheduled meeting is to be held and [Pre-registration to present public comment must provide the information listed in this subsection. Pre-registration must be provided to the Board office at P.O. Box 13084, Austin Texas 78711, no earlier than the first day of the even-numbered month preceding the Board meeting for which the registration is intended, and no later than seven (7) days prior to the same meeting. The registration cards] shall include blanks in which all of the following information must be disclosed:

(1) name of the person making a presentation;

(2) a statement as to whether the person is being reimbursed for the presentation, and if so, the name of the person or entity on whose behalf the presentation is made;

(3) a statement as to whether the presenter has registered as a lobbyist in relationship to the matter in question;

(4) a reference to the agenda item, [if applicable,] that the person wishes to discuss before the Board;

(5) an indication as to whether the presenter wishes to speak for or against the proposed agenda item, [if applicable]; and

(6) a statement verifying that all factual information to be presented shall be true and correct to the best of the knowledge of the speaker.

(c) Public comments on non-posted topics. [Presentation timing. The Chairman of the Windham School District Board of Trustees shall have discretion in setting reasonable limits on the time to be allocated for each presentation. If several persons wish to address the Board on the same agenda item, it shall be within the discretion of the Chair to request that persons who wish to address the same side of the

~~issue coordinate their comments or limit their comments to an expression of support for views previously articulated by persons speaking on the same side of an issue. The Chairman shall provide an opportunity for presentation by a person who has submitted a registration card prior to the Board's taking action on the item that the person indicates a wish to discuss if the presentation applies to an item on the agenda.~~]

(1) The Board defines its areas of jurisdiction in Board Policies 1.00 and 2.00, available at the Board office at the address in subsection (d) of this section, or on the Internet at http://www.windhamschooldistrict.org/csd/policy/. Twice a year at the first and fourth regularly called meetings of the Board, which are typically held in January and July, an opportunity shall be provided for public comment on issues that are not part of the Board's posted agenda but are within the jurisdiction of the Board.

(2) Persons who desire to make public comments to the Board must provide, on the date of the meeting, a completed registration card to the Board's support staff at least ten (10) minutes prior to the meeting's posted start time. Registration cards shall be made available at the entry to the place where the Board's scheduled meeting is to be held.

(3) Pre-registration is also available for individuals interested in speaking at the bi-annual public comment periods. Pre-registration must be submitted to the Board office either through first class mail (P.O. Box 13084, Austin Texas 78711) or email (tbcj@tdcj.state.tx.us), and must take place no earlier than the first day of the even-numbered month preceding the Board meeting for which the registration is intended, and no later than seven (7) days prior to the same meeting.

(4) Registration cards and pre-registration submissions must disclose the following information:

(A) name of the person making the presentation;

(B) a statement as to whether the person is being reimbursed for the presentation, and if so, the name of the person or entity on whose behalf the presentation is made;

(C) a statement as to whether the presenter has registered as a lobbyist in relationship to the matter in question;

(D) the topic on which the person shall speak; and

(E) a statement verifying that all factual information to be presented shall be true and correct to the best of the knowledge of the speaker.

(d) Requests that issues be placed on an agenda. Persons outside the agency who wish to have an agenda item posted for discussion shall address their request to the Chairman, Windham School District Board of Trustees, P.O. Box 13084, Austin, Texas 78711. Such requests should be submitted by the first day of the even-numbered month preceding the board meeting for which the request is intended and are subject to the requirements of the registration card in subsection (b). The decision whether to calendar a matter for discussion before the full Board, a Board committee, a Board liaison, or with a designated staff member, shall be within the discretion of the Chairman.

(e) Presentation timing. The Chairman shall have discretion in setting reasonable limits on the time to be allocated for public testimony or public comment. If several persons wish to address the Board on the same agenda item, it shall be within the discretion of the Chairman to request that persons who wish to address the same side of the issue coordinate their comments, or limit their comments to an expression of support for views previously articulated by persons speaking on the same side of an issue. For public testimony on posted agenda topics, the Chairman shall provide an opportunity for said testimony by a person who has submitted a registration card to occur prior to the Board taking action on the item denoted on the registration card.

(f) [~~(e)~~] Disability accommodation. Persons with disabilities who have special communication or accommodation needs and who plan to attend a meeting may contact the Board Office in Austin. Requests should be made at least two (2) days before a meeting. The Board will make every reasonable effort to accommodate these needs.

(g) [~~(f)~~] Conduct and decorum. The Board will receive public testimony and public comments [~~input~~] as authorized by this section, subject to the following additional guidelines.

(1) Questioning of those making presentations shall only occur on public testimony associated with posted agenda topics and shall be reserved to Board members and staff recognized by the Chairman;

(2) Presentations shall remain pertinent to the issue denoted on the registration card [~~being discussed~~];

(3) A person who is determined by the Chairman to be disrupting a meeting must immediately cease the disruptive activity or leave the meeting room if ordered to do so by the Chairman; and

(4) A person may not assign a portion of his or her time to another speaker.

(h) [~~(g)~~] A person may not carry a prohibited weapon, an illegal knife, a club, or a handgun [~~, or~~] to include a licensed concealed handgun at a meeting of the Board.

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

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407132
Carl Reynolds
General Counsel
Windham School District
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 463-0422

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS STATE BOARD OF MEDICAL EXAMINERS

CHAPTER 163. LICENSURE

The Texas State Board of Medical Examiners proposes an amendment to §163.1(13), regarding the definition of substantial equivalence and the repeal of 163.15, regarding visiting physician permit.

The amendment is necessary to establish requirements for medical school education completed outside the U.S. or Canada to ensure that the education is substantially equivalent at a U.S. school. The repeal is necessary as the subject matter now appears in 22 TAC §172.5 effective November 7, 2004.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the amendment and repeal are in effect there will be no

fiscal implications to state or local government as a result of enforcing the amendment and repeal as proposed. There will be no effect to individuals required to comply with the amendment and repeal as proposed.

Ms. Shackelford also has determined that for each year of the first five years the amendment and repeal as proposed are in effect the public benefit anticipated as a result of enforcing the amendment and repeal will be updated rules concerning licensure. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Colleen Klein, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

22 TAC §163.1

The amendment is proposed under the authority of the Occupations Code Annotated, §155.0031 and §155.004 which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§163.1. Definitions.

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

(1) Acceptable approved medical school--A medical school or college located in the United States or Canada that has been accredited by the Liaison Committee on Medical Education or the American Osteopathic Association Bureau of Professional Education.

(2) Acceptable unapproved medical school--A school or college located outside the United States or Canada that:

(A) is substantially equivalent to a Texas medical school; and

(B) has not been disapproved by another state physician licensing agency unless the applicant can provide evidence that the disapproval was unfounded.

(3) Affiliated hospital--Affiliation status of a hospital with a medical school as defined by the Liaison Committee on Medical Education and documented by the medical school in its application for accreditation.

(4) Applicant--One who files an application as defined in this section.

(5) Application--An application is all documents and information necessary to complete an applicant's request for licensure including the following:

(A) forms furnished by the board, completed by the applicant:

(i) all forms and addenda requiring a written response must be typed or printed in ink;

(ii) photographs must meet United States Government passport standards;

(B) all documents required under section 163.5 of this title (relating to Licensure Documentation); and

(C) the required fee, payable by check through a United States bank.

(6) Board--Texas State Board of Medical Examiners

(7) Continuous--12 month periods of uninterrupted postgraduate training with no absences greater than 21 days, unless such absences have been approved by the training program.

(8) Eligible for licensure in country of graduation--An applicant must be eligible for licensure in the country in which the medical school is located except for any citizenship requirements.

(9) Examinations accepted by the board for licensure.

(A) United States Medical Licensing Examination (USMLE), with a score of 75 or better, or a passing grade if applicable, on each step, with all steps passed within seven years;

(B) Federation Licensing Examination (FLEX), on or after July 1, 1985, passage of both components within seven years with a score of 75 or better on each component;

(C) Federation Licensing Examination (FLEX), before July 1, 1985, with a FLEX weighted average of 75 or better in one sitting;

(D) National Board of Medical Examiners Examination (NBME) or its successor with all steps passed within seven years;

(E) National Board of Osteopathic Medical Examiners Examination (NBOME) or its successor with all steps passed within seven years;

(F) Medical Council of Canada Examination (LMCC) or its successor, with all steps passed within seven years;

(G) State board licensing examination, passed before January 1, 1977, (with the exception of Virgin Islands, Guam, Tennessee Osteopathic Board or Puerto Rico then the exams must be passed before July 1, 1963); or

(H) One of the following examination combinations with a score of 75 or better on each part, level, component, or step, all parts, levels, components, or steps must be passed within seven years:

(i) FLEX I plus USMLE 3;

(ii) USMLE 1 and USMLE 2 (including passage of the clinical skills component if applicable), plus FLEX II;

(iii) NBME I or USMLE 1, plus NBME II or USMLE 2 (including passage of the clinical skills component if applicable), plus NBME III or USMLE 3;

(iv) NBME I or USMLE 1, plus NBME II or USMLE 2 (including passage of the clinical skills component if applicable), plus FLEX II;

(v) NBOME I, plus NBOME II, plus FLEX II;

(vi) the NBOME Part I or COMLEX Level I and NBOME Part II or COMLEX Level II and NBOME Part III or COMLEX Level III.

(I) An applicant must pass each part of an examination within three attempts, except that an applicant who has passed all but one part of an examination within three attempts may take the remaining part of the examination one additional time.

(J) Notwithstanding subparagraph (I) of this paragraph, an applicant is considered to have satisfied the requirements of this section if the applicant:

(i) passed all but one part of an examination approved by the board within three attempts and passed the remaining part of the examination within five attempts;

(ii) is specialty board certified by a specialty board that:

(I) is a member of the American Board of Medical Specialties; or

(II) is a member of the Bureau of Osteopathic Specialists; and

(iii) completed in this state an additional two years of postgraduate medical training approved by the board.

(K) An applicant who has not passed an examination for licensure in a ten-year period prior to the filing date of the application must:

(i) pass a monitored specialty certification examination or formal evaluation, a monitored recertification examination or formal evaluation, or a monitored examination of continued demonstration of qualifications by a board that is a member of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists within the preceding ten years;

(ii) obtain through extraordinary circumstances, unique training equal to the training required for specialty certification as determined by a committee of the board and approved by the board, including but not limited to participation for at least six months in a training program approved by the board within twelve months prior to the application for licensure; or

(iii) pass the Special Purpose Examination (SPEX) within the preceding ten years.

(10) Good professional character--An applicant for licensure must not be in violation of or committed any act described in the Medical Practice Act, Tex. Occ. Code Ann. §§164.051-.053.

(11) One-year training program--a program that is one continuous year of postgraduate training approved by the board that is:

(A) accepted for certification by a specialty board that is a member of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists; or

(B) accredited by one of the following:

(i) the Accreditation Council for Graduate Medical Education, or its predecessor;

(ii) the American Osteopathic Association;

(iii) the Committee on Accreditation of Preregistration Physician Training Programs, Federation of Provincial Medical Licensing Authorities of Canada;

(iv) the Royal College of Physicians and Surgeons of Canada; or

(v) the College of Family Physicians of Canada; or

(C) a postresidency program, usually called a fellowship, performed in the U.S. or Canada and approved by the board for additional training in a medical specialty or subspecialty.

(12) Sixty (60) semester hours of college courses--60 semester hours of college courses other than in medical school that are acceptable to The University of Texas at Austin for credit on a bachelor of arts degree or a bachelor of science degree; the entire primary, secondary, and premedical education required in the country of medical school graduation, if the medical school is located outside the United States or Canada; or substantially equivalent courses as determined by the board.

(13) Substantially equivalent to a Texas medical school - A medical school or college that is an institution of higher learning designed to select and educate medical students; provide students with the opportunity to acquire a sound basic medical education through training in basic sciences and clinical sciences. [~~; provide advancement of knowledge through research; develop programs of graduate medical education to produce practitioners, teachers, and researchers; and afford opportunity for postgraduate and continuing medical education. The school must provide resources, including faculty and facilities, sufficient to support a curriculum offered in an intellectual environment that enables the program to meet these standards. The faculty of the school shall actively contribute to the development and transmission of new knowledge. The medical school shall contribute to the advancement of knowledge and to the intellectual growth of its students and faculty through scholarly activity, including research.~~] The school should provide information about the school's program of advancement of knowledge through research; the school's development of programs of graduate medical education to produce practitioners, teachers, and researchers; and, the school's program to provide opportunity for postgraduate and continuing medical education, for the board's consideration. In addition to be determined substantially equivalent to a Texas medical school, the [~~The~~] medical school's characteristics [~~school~~] shall include, but not be limited to, the following [~~characteristics~~]:

(A) The facilities for basic sciences and clinical training (i.e., laboratories, hospitals, library, etc.) shall be adequate to ensure opportunity for proper education.

(B) The admissions standards shall ensure that the medical school has a pool of applicants sufficiently large and possessing United States national level qualifications to fill its entering class. Medical schools must select students who possess the intelligence, integrity, and personal and emotional characteristics necessary for them to become effective physicians. [~~be substantially equivalent to a Texas medical school.~~]

(C) The basic sciences curriculum shall include the contemporary content of those expanded disciplines that have been traditionally titled gross anatomy, biochemistry, biology, [~~histology,~~] physiology, microbiology, immunology, pathology, pharmacology, and neuroscience, as defined by the Texas Higher Education Coordinating Board, the Liaison Council on Medical Education, and/or the American Osteopathic Association Bureau of Professional Education.

(D) The fundamental clinical subjects, which shall be offered in the form of required patient-related clerkships, are internal medicine, obstetrics and gynecology, pediatrics, psychiatry, [~~neurology,~~] family practice, [~~introduction to patient/physical examination,~~] and surgery, as defined by the Texas Higher Education Coordinating Board, the Liaison Council on Medical Education, and/or American Osteopathic Association Bureau of Professional Education .

(E) The curriculum shall be of at least 130 weeks in duration.

(F) There must be integrated institutional responsibility for the overall design, management and evaluation of a coherent and coordinated curriculum.

(G) For schools that have geographically separated programs, the principal academic officer of each geographically remote site must coordinate the curriculum with an academic officer of the medical school responsible for organizing the educational program.

[~~(F) The school shall provide advancement of knowledge through research.~~]

~~[(G) The school shall develop programs of graduate medical education to produce practitioners, teachers, and researchers.]~~

~~[(H) The school shall provide opportunity for postgraduate and continuing medical education.]~~

~~[(I) Medical education courses must be centrally organized, integrated and controlled into a continuous program which was conducted, monitored and approved by the medical school which issues the degree.]~~

(14) Texas Medical Jurisprudence Examination (JP exam): the ethics examination developed by the board for licensure that must be passed by an applicant for licensure within three attempts with a score 75 or better.

(15) Three-year training program--three continuous years of postgraduate training in the United States or Canada, progressive in nature and acceptable for specialty board certification in one specialty area that is:

(A) accredited by one of the following:

(i) the Accreditation Council for Graduate Medical Education;

(ii) the American Osteopathic Association;

(iii) the Committee on Accreditation of Preregistration Physician Training Programs, Federation of Provincial Medical Licensing Authorities of Canada;

(iv) the Royal College of Physicians and Surgeons of Canada;

(v) the College of Family Physicians of Canada; or

(vi) all programs approved by the board after August 25, 1984; or

(B) a board-approved program for which a Faculty Temporary Permit was issued; or

(C) a postresidency program, usually called a fellowship, for additional training in a medical specialty or subspecialty, approved by the Texas State Board of Medical Examiners.

(b) The following words and terms, (concerning Telemedicine/Practice Across State Line/Practice of Medicine Definitions) when used in this chapter shall have the following meanings unless the context clearly indicates otherwise.

(1) Act that is part of patient care service--Any diagnosis, assessment, or treatment including the taking of diagnostic imaging studies as well as the preparation of pathological material for examination.

(2) Episodic consultation--Consultation on an irregular or infrequent basis involving no more than 24 patients of a physician's diagnostic or therapeutic practice per calendar year. Multiple consultations may be performed for one or more patients up to 24 patients per calendar year.

(3) Informal consultation--Consultation performed outside the context of a contractual relationship and on an irregular or infrequent basis without the expectation of or exchange of direct or indirect compensation.

(4) Patient care service initiated in this state--Any act constituting the practice of medicine as defined in this chapter in which the patient is physically located in Texas at the time of diagnosis, treatment, or testing.

(5) Person--An individual unless otherwise expressly made applicable to a partnership, association, or corporation.

(6) Practice of medicine--A person shall be considered to be practicing medicine under any of the following circumstances listed in subparagraphs (A) - (D) of this paragraph. This definition does not negate the responsibility of applicants to demonstrate engagement in the active practice of medicine as set forth in section 163.11 of this title (relating to Active Practice of Medicine).

(A) the person publicly professes to be a physician or surgeon and diagnoses, treats, or offers to treat any mental or physical disease or disorder, or any physical deformity or injury by any system or method or to effect cures thereof;

(B) the person diagnoses, treats or offers to treat any mental or physical disease or disorder, or any physical deformity or injury by any system or method and to effect cures thereof and charges therefor, directly or indirectly, money or other compensation;

(C) the person exercises medical judgment, renders an opinion, or gives advice concerning the diagnosis or treatment of a patient, or makes any determination regarding the appropriate or necessary medical response to a particular patient's medical condition that affects the medical care of the patient; or

(D) the person is physically located in another jurisdiction, other than the state of Texas, and through any medium performs an act that is part of patient care service initiated in this state that would affect the diagnosis or treatment of the patient.

(7) State--Any state, territory, or insular possession of the United States and the District of Columbia.

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

Filed with the Office of the Secretary of State on December 6, 2004.

TRD-200407140
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 305-7016

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22 TAC §163.15

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas State Board of Medical Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the authority of the Occupations Code Annotated, §155.0031 and §155.004 which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§163.15. Visiting Physician Permit.

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

Filed with the Office of the Secretary of State on December 6, 2004.

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Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 305-7016

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER Q. ACTUARIAL OPINION AND MEMORANDUM REGULATION

28 TAC §§3.1601 - 3.1611

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

The Texas Department of Insurance proposes the repeal of §§3.1601 - 3.1611, concerning Insurance Code Article 3.28 and the submission of actuarial opinions and their supporting memoranda with the annual statement of life insurance companies. The sections are proposed for repeal to facilitate the proposal of new §§3.1601 - 3.1608, concerning the submission of actuarial opinions required by Insurance Code Article 3.28. The department is proposing new §§3.1601 - 3.1608 which appear elsewhere in this issue of the *Texas Register*.

Betty Patterson, Senior Associate Commissioner, Financial Program has determined that, for the first five years the repeal of the sections will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal, and there will be no effect on local employment or local economy as result of the proposal.

Ms. Patterson also has determined that, for each year of the first five years the repeal of the sections will be in effect, the public benefit anticipated as a result of the repeal of the sections will be the elimination of obsolete regulations. There will be no cost to the general public, or small or micro business or individuals who are required to comply with the repeal as proposed.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on January 17, 2005 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be submitted to Betty Patterson, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149099, Austin, Texas 78714-9099. A request for a public hearing should be submitted separately to the Office of the Chief Clerk.

The repeal of the sections is proposed under the Insurance Code Article 3.28 and §36.001. Insurance Code Article 3.28, §2A, authorizes and requires the department to define the specific requirements of actuarial opinions required under Article 3.28, including matters deemed to be necessary to the scope of such opinions, as well as to prescribe the qualifications of the persons who may certify to such opinions. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and others laws of this state.

Insurance Code Article 3.28 is affected by the proposed repeal.

§3.1601. Purpose.
§3.1602. Scope.
§3.1603. Commissioner Discretion.
§3.1604. Definitions.
§3.1605. General Requirements.
§3.1606. Required Opinions.
§3.1607. Statement of Actuarial Opinion Not Including an Asset Adequacy Analysis.
§3.1608. Statement of Actuarial Opinion Based on an Asset Adequacy Analysis.
§3.1609. Description of Actuarial Memorandum.
§3.1610. Additional Considerations for Analysis.
§3.1611. Disciplinary Action.

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

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407069
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 463-6327

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28 TAC §§3.1601 - 3.1608

The Texas Department of Insurance proposes new §§3.1601 - 3.1608, concerning the submission of actuarial opinions and their supporting memoranda with the annual statements of life insurance companies. Insurance Code Article 3.28 §2A(a) requires every life insurance company doing business in this state to annually submit to the department the opinion of a qualified actuary that states whether the reserves and related actuarial items held in support of the policies and contracts of the insurer are computed appropriately, are based on assumptions which satisfy contractual provisions, are consistent with prior reported amounts and comply with applicable laws of this state. The existing Subchapter Q provides exemptions for life insurance companies with regard to the inclusion of an asset adequacy analysis with the actuarial opinion. The new subchapter will require all life insurance companies, with the exception of life insurance companies that only do business in Texas, to provide an actuarial opinion based on an asset adequacy analysis with their

2005 annual statement and thereafter. In addition to an actuarial opinion based on an asset adequacy analysis, the proposed sections require the preparation of an actuarial memorandum including an asset adequacy analysis and a regulatory asset adequacy issues summary. Proposed §3.1601 states the purpose of Subchapter Q. Proposed §3.1602 states the scope and applicability of the subchapter. Proposed §3.1603 provides the commissioner may require a life insurance company that only does business in Texas to provide an actuarial opinion based on an asset adequacy analysis in accordance with the subchapter when he or she determines such an opinion is necessary. Proposed §3.1604 defines terms used in the subchapter. Proposed §3.1605 describes the general requirements for an actuarial opinion required by Insurance Code Article 3.28. Proposed §3.1606 describes the requirements for an actuarial opinion based on an asset adequacy analysis. Proposed §3.1607 describes the requirements for an actuarial memorandum including an asset adequacy analysis and a regulatory asset adequacy issues summary. Proposed §3.1608 provides an exemption for life insurance companies that only do business in Texas. Such companies do not have to perform the asset adequacy analysis required by §3.1606 unless directed by the commissioner to do so under §3.1603. The proposed sections are substantially based on the National Association of Insurance Commissioners "Model Actuarial Opinion and Memorandum Regulation." The existing §§3.1601 - 3.1611 are proposed for repeal elsewhere in this issue of the *Texas Register*.

Betty Patterson, Senior Associate Commissioner, Financial Program, has determined that for each year of the first five years the proposed sections will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Patterson has determined that for each year of the first five years the sections are in effect, the public benefits anticipated as a result of the proposed sections will be more consistent and stronger standards for reserves held by life insurance companies. These standards support adequate reserve levels in light of the assets held for such reserves and provide for a summary of analysis performed by the actuary to assist regulatory review. Other public benefits anticipated as a result of these proposed sections include information to companies to better manage risks inherent to its business including those related to assets in support of reserves. The estimated cost of providing an actuarial opinion based on an asset adequacy analysis, an actuarial memorandum and a regulatory asset issues summary will vary widely depending on an insurer's total assets that support actuarial liabilities, types of assets that support actuarial liabilities, number of products and complexity of products. Under the existing sections, some insurers are exempted from providing an actuarial opinion based on an asset adequacy analysis if they meet the criteria in existing §3.1606. Under the proposed sections all insurers will be required to provide an actuarial opinion based on an asset adequacy analysis, unless an insurer only does business in Texas. This change will result in approximately twenty-five additional domestic insurers being required to perform an asset adequacy analysis. The additional cost associated with the preparation of an actuarial opinion based on asset adequacy analysis depends on the type of analysis involved which ranges from the more involved cash flow testing to simpler and less costly methods based on actuarial judgment pursuant to actuarial standards of practice. The amount of the costs are primarily a function of the complexity of a company's asset and liability structures. More complex structures may require cash flow testing, while simpler structures may not require such detailed analysis. Based on a sampling of industry actuaries who are familiar with asset adequacy analysis costs, they estimate that such costs for the first year may range from $2,000 to $5,000 for a small company with simple products, $5,000 to $20,000 for a small company with more complex products, $5,000 to $10,000 for medium companies with simple products and $10,000 to $40,000 for medium companies with more complex products. Industry actuaries further estimate subsequent years' costs to be half of the first year costs. Costs in subsequent years include reviewing the assumptions, updating the model to appropriately reflect current products and assets, and running any projections. Large companies have been required to perform asset adequacy analysis under the existing Subchapter, therefore, their costs will not change as a result of the proposed subchapter. The cost per hour of labor (i.e. actuarial services) is not expected to vary because a company is small, medium or large. Rather, more hours of labor may be required as the size, type and complexity of the assets and liabilities may increase. Such actuarial costs per hour of labor range from $100 per hour to $250 per hour based on the department's experience. Higher per hour costs may occur if additional specialized expertise is required for the very complicated assets and liabilities. The department believes it is unlikely that micro and small businesses will require the same level of expertise required by large businesses. As noted above, the costs depend on the complexity of the business and the size of the company. For these reasons, the cost of compliance for micro and small businesses should be far less than the cost of compliance of large businesses. The department finds it is neither legal nor feasible to waive the proposed sections for micro or small businesses as Insurance Code Article 3.28 requires all life insurers to provide the department an actuarial opinion based on an asset adequacy analysis unless exempted by rule. The proposed exemption of life insurance companies that only do business in Texas from the requirement to perform an asset adequacy analysis reduces the cost of compliance for these companies. Generally, they are less complex than companies that engage in business in more than one state and since Texas is the domiciliary state, they are more closely monitored. Such companies may still have to provide an asset adequacy analysis if the commissioner determines one is necessary.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on January 17, 2005, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment should be simultaneously submitted to Betty Patterson, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. A request for a public hearing should be submitted separately to the Office of the Chief Clerk.

The new sections are proposed under Insurance Code Article 3.28 and §36.001. Insurance Code Article 3.28, §2A, authorizes and requires the department to define the specific requirements of actuarial opinions required under Article 3.28, including matters deemed to be necessary to the scope of such opinions, as well as to prescribe the qualifications of the persons who may certify to such opinions. Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

Insurance Code Article 3.28 is affected by §§3.1601 - 3.1608.

§3.1601. Purpose.

The purpose of this subchapter is to prescribe guidelines and standards for the activities described in paragraphs (1) - (3) of this section:

(1) the submission of a statement of actuarial opinion in accordance with Insurance Code Article 3.28, §2A, and for memoranda in support of such opinion;

(2) the appointment of an appointed actuary; and

(3) guidance as to the meaning of "adequacy of reserves."

§3.1602. Scope and Applicability.

(a) This subchapter shall apply to all life insurance companies doing business in this state and to all life insurance companies which are authorized to reinsure life insurance, annuities or accident and health insurance business in this state.

(b) This subchapter shall be applied in a manner that allows the appointed actuary to utilize his or her professional judgment in performing the asset analysis and developing the actuarial opinion and supporting memoranda, consistent with relevant actuarial standards of practice; however, the commissioner shall have the authority to specify specific methods of actuarial analysis and actuarial assumptions when, in the commissioner's judgment, these specifications are necessary for an acceptable opinion to be rendered relative to the adequacy of reserves and related items.

(c) This subchapter shall be applicable to the actuarial opinion for the 2005 Annual Statement and thereafter.

(d) A statement of opinion on the adequacy of the reserves and related actuarial items based on an asset adequacy analysis in accordance with §3.1606 of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis), and a memorandum in support thereof in accordance with §3.1607 of this title (relating to Description of Actuarial Memorandum Including an Asset Adequacy Analysis and Regulatory Asset Adequacy Issues Summary), shall be required each year, unless exempt under §3.1608 of this title (relating to Asset Adequacy Analysis Exemption).

§3.1603. Commissioner Discretion.

The commissioner may require any company, otherwise exempt from asset adequacy analysis requirements in this subchapter, to provide an actuarial opinion and actuarial memorandum which complies with the asset adequacy analysis requirements in this subchapter including requirements in §3.1606 of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis) and in §3.1607 of this title (relating to Description of Actuarial Memorandum Including an Asset Adequacy Analysis and Regulatory Asset Adequacy Issues Summary) if, in the opinion of the commissioner, an asset adequacy analysis is necessary with respect to the company.

§3.1604. Definitions.

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

(1) AVR--Asset valuation reserve.

(2) Actuarial opinion--The opinion of an appointed actuary regarding the adequacy of the reserves and related actuarial items based on an asset adequacy analysis in accordance with §3.1606 of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis) and with applicable Actuarial Standards of Practice.

(3) Actuarial Standards Board--The board established by the American Academy of Actuaries to develop and promulgate standards of actuarial practice.

(4) Annual statement--That financial statement as of December 31st of the preceding year required to be filed annually by the company with the Texas Department of Insurance.

(5) Appointed actuary--A qualified actuary who is appointed or retained to prepare the statement of actuarial opinion required by this subchapter, either directly by or by the authority of the board of directors through an executive officer of the company other than the qualified actuary.

(6) Asset adequacy analysis--An analysis that meets the standards and other requirements referred to in §3.1605(d) of this title (relating to General Requirements).

(7) Company--A life insurance company or reinsurer subject to the provisions of this subchapter which includes a stipulated premium insurance company insuring or assuming risk for coverages under Insurance Code §884.307 or §884.402.

(8) IMR--Interest maintenance reserve.

(9) Qualified actuary--An individual who:

(A) is a member in good standing of the American Academy of Actuaries;

(B) is qualified to sign statements of actuarial opinion for life and health insurance company annual statements in accordance with the American Academy of Actuaries qualification standards for actuaries signing such statements;

(C) is familiar with the valuation requirements applicable to life and health insurance companies;

(D) has not been found by the commissioner (or if so found has subsequently been reinstated as a qualified actuary), following appropriate notice and opportunity for hearing, to have:

(i) violated any provision of, or any obligation imposed by, the Insurance Code or other law in the course of his or her dealings as a qualified actuary;

(ii) been found guilty of fraudulent or dishonest practices;

(iii) demonstrated his or her incompetency, lack of cooperation, or untrustworthiness to act as a qualified actuary;

(iv) submitted to the commissioner during the past five years, pursuant to this subchapter, an actuarial opinion or memorandum that the commissioner rejected because it did not meet the provisions of this subchapter including standards set by the Actuarial Standards Board; or

(v) resigned or been removed as an actuary within the past five years as a result of acts or omissions indicated in any adverse report on examination or as a result of failure to adhere to generally acceptable actuarial standards; and

(E) has not failed to notify the commissioner of any action taken by any commissioner of any other state similar to that under subparagraph (D) of this paragraph.

§3.1605. General Requirements.

(a) Submission of statement of actuarial opinion. Any statement of actuarial opinion required by this subchapter shall be submitted in accordance with paragraphs (1) - (2) of this subsection.

(1) There is to be included on or attached to page one of the annual statement for each year beginning with the year in which this subchapter becomes effective the statement of an appointed actuary, entitled "Statement of Actuarial Opinion," setting forth an opinion

relating to reserves and related actuarial items held in support of policies and contracts, in accordance with §3.1606 of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis).

(2) Upon written request by the company, the commissioner may grant an extension of the date for submission of the statement of actuarial opinion.

(b) Appointment of actuary. The company shall give the commissioner timely written notice of the name, title (and, in the case of a consulting actuary, the name of the firm) and manner of appointment or retention of each person appointed or retained by the company as an appointed actuary and shall state in the notice that the person is a qualified actuary. Once notice is furnished, no further notice is required with respect to this person, provided that the company shall give the commissioner timely written notice in the event the actuary ceases to be appointed or retained as an appointed actuary or to meet the requirements for a qualified actuary. If any person appointed or retained as an appointed actuary replaces a previously appointed actuary, the notice shall so state and give the reasons for replacement.

(c) Standards for asset adequacy analysis. The asset adequacy analysis required by this subchapter:

(1) shall conform to the Standards of Practice as promulgated from time to time by the Actuarial Standards Board and any additional standards set forth in this subchapter, which standards are to form the basis of the statement of actuarial opinion in accordance with this subchapter; and

(2) shall be based on methods of analysis as are deemed appropriate for such purposes by the Actuarial Standards Board.

(d) Liabilities to be covered. The liabilities to be covered shall be in accordance with paragraphs (1) - (3) of this subsection.

(1) Under authority of Insurance Code Article 3.28, §2A, the statement of actuarial opinion shall apply to all in force business on the statement date, whether directly issued or assumed, regardless of when or where issued, for example, annual statement reserves in Exhibits 5, 6 and 7, and claim liabilities in Exhibit 8, Part 1 and equivalent items in the separate account statement or statements.

(2) If the appointed actuary determines as the result of asset adequacy analysis that a reserve should be held in addition to the aggregate reserve held by the company and calculated in accordance with methods set forth in Insurance Code Article 3.28, §§6, 7, 10, and 11, and other applicable Insurance Code provisions, the company shall establish the additional reserve.

(3) Additional reserves established under paragraph (2) of this subsection and deemed not necessary in subsequent years may be released. Any amounts released shall be disclosed in the actuarial opinion for the applicable year. The release of such reserves would not be deemed an adoption of a lower standard of valuation.

§3.1606. Statement of Actuarial Opinion Based On an Asset Adequacy Analysis.

(a) General description. The statement of actuarial opinion required by this section shall consist of the following paragraphs:

(1) a paragraph identifying the appointed actuary and his or her qualifications, recommended language is provided in subsection (b)(1) of this section;

(2) a scope paragraph, recommended language is provided in subsection (b)(2) of this section, identifying the subjects on which an opinion is to be expressed and describing the scope of the appointed actuary's work, including a tabulation delineating the reserves and related actuarial items that have been analyzed for asset adequacy and the method of analysis, and identifying the reserves and related actuarial items covered by the opinion that have not been so analyzed;

(3) a reliance paragraph, recommended language is provided in subsection (b)(3) of this section, describing those areas, if any, where the appointed actuary has deferred to other experts in developing data, procedures or assumptions, (e.g., anticipated cash flows from currently owned assets, including variation in cash flows according to economic scenarios) supported by a statement of each such expert with the information prescribed by subsection (e) of this section; and

(4) an opinion paragraph expressing the appointed actuary's opinion with respect to the adequacy of the supporting assets to mature the liabilities, recommended language is provided in subsection (b)(6) of this section.

(5) One or more additional paragraphs will be needed in individual company cases as follows:

(A) if the appointed actuary considers it necessary to state a qualification of his or her opinion;

(B) if the appointed actuary must disclose an inconsistency in the method of analysis or basis of asset allocation used at the prior opinion date with that used for this opinion;

(C) if the appointed actuary must disclose whether additional reserves as of the prior opinion date are released as of this opinion date, and the extent of the release; or

(D) if the appointed actuary chooses to add a paragraph briefly describing the assumptions that form the basis for the actuarial opinion.

(b) Recommended language. The following paragraphs are to be included in the statement of actuarial opinion in accordance with this section. The language is that which should be included in typical circumstances in a statement of actuarial opinion. The language may be modified as needed to meet the circumstances of a particular case, but the appointed actuary should use language which clearly expresses his or her professional judgment. Regardless of the language used, the opinion shall retain all pertinent aspects of the language provided in this section.

(1) The opening paragraph should generally indicate the appointed actuary's relationship to the company and his or her qualifications to sign the opinion.

(A) For a company actuary, the opening paragraph of the actuarial opinion should include a statement such as:
Figure: 28 TAC §3.1606(b)(1)(A)

(B) For a consulting actuary, the opening paragraph should include a statement such as:
Figure: 28 TAC §3.1606(b)(1)(B)

(2) The scope paragraph should include a statement such as:
Figure: 28 TAC §3.1606(b)(2)

(3) If the appointed actuary has relied on other experts to develop certain portions of the analysis, the reliance paragraph should include a statement such as:
Figure: 28 TAC §3.1606(b)(3)

(4) If the appointed actuary has examined the underlying asset and liability records, the reliance paragraph should include a statement such as:
Figure: 28 TAC §3.1606(b)(4)

(5) If the appointed actuary has not examined the underlying records, but has relied upon data (e.g., listings and summaries of policies in force or asset records) prepared by the company, the reliance paragraph should include a statement such as:
Figure: 28 TAC §3.1606(b)(5)

(6) The opinion paragraph should include a statement such as:
Figure: 28 TAC §3.1606(b)(6)

(c) Assumptions for new issues. The adoption for new issues or new claims or other new liabilities of an actuarial assumption that differs from a corresponding assumption used for prior new issues or new claims or other new liabilities is not a change in actuarial assumptions within the meaning of this section.

(d) Adverse opinions. If the appointed actuary is unable to form an opinion, then he or she shall refuse to issue a statement of actuarial opinion. If the appointed actuary's opinion is adverse or qualified, then he or she shall issue an adverse or qualified actuarial opinion explicitly stating the reasons for the opinion. This statement should follow the scope paragraph and precede the opinion paragraph.

(e) Reliance on information furnished by other persons. If the appointed actuary relies on the certification of others on matters concerning the accuracy or completeness of any data underlying the actuarial opinion, or the appropriateness of any other information used by the appointed actuary in forming the actuarial opinion, the actuarial opinion should so indicate the persons the actuary is relying upon and a precise identification of the items subject to reliance. In addition, the persons on whom the appointed actuary relies shall provide a certification that precisely identifies the items on which the person is providing information and a statement as to the accuracy, completeness or reasonableness, as applicable, of the items. This certification shall include the signature, title, company, address and telephone number of the person rendering the certification, as well as the date on which it is signed.

(f) Alternate option.

(1) Insurance Code Article 3.28 gives the commissioner broad authority to accept the valuation of a foreign insurer when that valuation meets the requirements applicable to a company domiciled in this state in the aggregate. As an alternative to the requirements of subsection (b)(6) of this section, the commissioner may make one or more of the following additional approaches available to the opining actuary:

(A) a statement that the reserves "meet the requirements of the insurance laws and regulations of the State of (state of domicile) and the formal written standards and conditions of this state for filing an opinion based on the law of the state of domicile." If the commissioner chooses to allow this alternative, a formal written list of standards and conditions shall be made available. If a company chooses to use this alternative, the standards and conditions in effect on July 1 of a calendar year shall apply to statements for that calendar year, and they shall remain in effect until they are revised or revoked. If no list is available, this alternative is not available.

(B) a statement that the reserves "meet the requirements of the insurance laws and regulations of the State of (state of domicile) and I have verified that the company's request to file an opinion based on the law of the state of domicile has been approved and that any conditions required by the commissioner for approval of that request have been met." If the commissioner chooses to allow this alternative, a formal written statement of such allowance shall be issued no later than March 31 of the year it is first effective. It shall remain valid until rescinded or modified by the commissioner. The rescission or modifications shall be issued no later than March 31 of the year they are first effective. Subsequent to that statement being issued, if a company chooses to use this alternative, the company shall file a request to do so, along with justification for its use, no later than April 30 of the year of the opinion to be filed. The request shall be deemed approved on October 1 of that year if the commissioner has not denied the request by that date.

(C) a statement that the reserves "meet the requirements of the insurance laws and regulations of the State of (state of domicile) and I have submitted the required comparison as specified by this state."

(i) If the commissioner chooses to allow this alternative, a formal written list of products (to be added to the table in clause (ii) of this paragraph) for which the required comparison shall be provided will be published. If a company chooses to use this alternative, the list in effect on July 1 of a calendar year shall apply to statements for that calendar year, and it shall remain in effect until it is revised or revoked. If no list is available, this alternative is not available.

(ii) If a company desires to use this alternative, the appointed actuary shall provide a comparison of the gross nationwide reserves held to the gross nationwide reserves that would be held under §7.18 of this title (relating to NAIC Accounting Practices and Procedures Manual). Gross nationwide reserves are the total reserves calculated for the total company in force business directly sold and assumed, indifferent to the state in which the risk resides, without reduction for reinsurance ceded. The information provided shall be at least:
Figure: 28 TAC §3.1606(f)(1)(C)(ii)

(iii) The information listed shall include all products identified by either the state of filing or any other states subscribing to this alternative.

(iv) If there is no codification standard for the type of product or risk in force or if the codification standard does not directly address the type of product or risk in force, the appointed actuary shall provide detailed disclosure of the specific method and assumptions used in determining the reserves held.

(2) The commissioner may reject an opinion based on the laws and regulations of the state of domicile and require an opinion based on the laws of this state. If a company is unable to provide the opinion within 60 days of the request or such other period of time determined by the commissioner after consultation with the company, the commissioner may contract with an independent actuary at the company's expense to prepare and file the opinion.

§3.1607. Description of Actuarial Memorandum Including an Asset Adequacy Analysis and Regulatory Asset Adequacy Issues Summary.

(a) General. Any actuarial memorandum required by the provisions of this subchapter shall be prepared in accordance with and subject to the provisions and qualifications of paragraphs (1) - (5) of this subsection.

(1) In accordance with Insurance Code Article 3.28, §2A, the appointed actuary shall prepare a memorandum to the company describing the analysis done in support of his or her opinion regarding the reserves under the opinion. The memorandum shall be made available for examination by the commissioner upon his or her request.

(2) In preparing the memorandum, the appointed actuary may rely on, and include as a part of his or her own memorandum, memoranda prepared and signed by other actuaries who are qualified within the meaning of §3.1604 of this title (relating to Definitions), with respect to the areas covered in such memoranda, and so state in their memoranda.

(3) If the commissioner requests a memorandum and no such memorandum exists or if the commissioner finds that the analysis described in the memorandum fails to meet the standards of the Actuarial Standards Board as required by §3.1605 of this title (relating to General Requirements), or the standards and requirements of this subchapter, the commissioner may designate a qualified actuary to review the opinion and prepare such supporting memorandum as is required for review. The reasonable and necessary expense of the independent review shall be paid by the company but shall be directed and controlled by the commissioner.

(4) The reviewing actuary shall have the same status as an examiner for purposes of obtaining data from the company and the work papers and documentation of the reviewing actuary shall be retained by the commissioner. The reviewing actuary shall not be an employee of a consulting firm involved with the preparation of any prior memorandum or opinion for the insurer required by this subchapter for any one of the current year or the preceding three years.

(5) In accordance with Insurance Code Article 3.28, §2A, the appointed actuary shall prepare a regulatory asset adequacy issues summary, the contents of which are specified in subsection (c) of this section. The regulatory asset adequacy issues summary will be submitted to the Actuarial Division, Financial Program, M.C. 302-3A, Texas Department of Insurance, 333 Guadalupe, P.O. Box 14904, Austin, Texas 78714-9104 no later than March 15 of the year following the year for which a statement of actuarial opinion based on asset adequacy is required.

(b) Details of the memorandum section documenting asset adequacy analysis. When an actuarial opinion under §3.1606 of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis) is provided, the memorandum shall demonstrate that the analysis has been done in accordance with the standards for asset adequacy referred to in §3.1605(d) of this title and any additional standards under this subchapter. The documentation of the assumptions used in paragraphs (1) - (2) of this subsection shall be such that an actuary reviewing the actuarial memorandum could form a conclusion as to the reasonableness of the assumptions. The memorandum shall specify:

(1) for reserves:

(A) product descriptions including market description, underwriting and other aspects of a risk profile and the specific risks the appointed actuary deems significant;

(B) source of liability in force;

(C) reserve method and basis;

(D) investment reserves;

(E) reinsurance arrangements;

(F) identification of any explicit or implied guarantees made by the general account in support of benefits provided through a separate account or under a separate account policy or contract and the methods used by the appointed actuary to provide for the guarantees in the asset adequacy analysis;

(G) documentation of assumptions to test reserves for the following:

(i) lapse rates (both base and excess);

(ii) interest crediting rate strategy;

(iii) mortality;

(iv) policyholder dividend strategy;

(v) competitor or market interest rate;

(vi) annuitization rates;

(vii) commissions and expenses; and

(viii) morbidity.

(2) For assets:

(A) portfolio descriptions, including a risk profile disclosing the quality, distribution and types of assets;

(B) investment and disinvestment assumptions;

(C) source of asset data;

(D) asset valuation bases; and

(E) documentation of assumptions made for:

(i) default costs;

(ii) bond call function;

(iii) mortgage prepayment function;

(iv) determining market value for assets sold due to disinvestment strategy; and

(v) determining yield on assets acquired through the investment strategy.

(3) For the analysis basis:

(A) methodology;

(B) rationale for inclusion or exclusion of different blocks of business and how pertinent risks were analyzed;

(C) rationale for degree of rigor in analyzing different blocks of business (include in the rationale the level of "materiality" that was used in determining how rigorously to analyze different blocks of business);

(D) criteria for determining asset adequacy (include in the criteria the precise basis for determining if assets are adequate to cover reserves under "moderately adverse conditions" or other conditions as specified in relevant actuarial standards of practice); and

(E) whether the impact of federal income taxes was considered and the method of treating reinsurance in the asset adequacy analysis;

(4) summary of material changes in methods, procedures, or assumptions from prior year's asset adequacy analysis;

(5) summary of results; and

(6) conclusions.

(c) Details of the regulatory asset adequacy issues summary.

(1) The regulatory asset adequacy issues summary shall include:

(A) descriptions of the scenarios tested (including whether those scenarios are stochastic or deterministic) and the sensitivity testing done relative to those scenarios. If negative ending surplus results under certain tests in the aggregate, the actuary should describe those tests and the amount of additional reserve as of the valuation date which, if held, would eliminate the negative aggregate surplus values. Ending surplus values shall be determined by either extending the projection period until the in force and associated assets and liabilities at the end of the projection period are immaterial or by adjusting the surplus amount at the end of the projection period by an

amount that appropriately estimates the value that can reasonably be expected to arise from the assets and liabilities remaining in force.

(B) the extent to which the appointed actuary uses assumptions in the asset adequacy analysis that are materially different than the assumptions used in the previous asset adequacy analysis.

(C) the amount of reserves and the identity of the product lines that had been subjected to asset adequacy analysis in the prior opinion but were not subject to analysis for the current opinion.

(D) comments on any interim results that may be of significant concern to the appointed actuary.

(E) the methods used by the actuary to recognize the impact of reinsurance on the company's cash flows, including both assets and liabilities, under each of the scenarios tested.

(F) whether the actuary has been satisfied that all options whether explicit or embedded, in any asset or liability (including but not limited to those affecting cash flows embedded in fixed income securities) and equity-like features in any investments have been appropriately considered in the asset adequacy analysis.

(2) The regulatory asset adequacy issues summary shall contain the name of the company for which the regulatory asset adequacy issues summary is being supplied and shall be signed and dated by the appointed actuary rendering the actuarial opinion.

(3) The regulatory asset adequacy issues summary will be used to examine the company's financial condition and ability to meet its liabilities. It will be considered information obtained during the course of an examination under Insurance Code Article 1.15 and treated as confidential.

(d) Conformity to standards of practice. The memorandum shall include a statement with wording substantially similar to that of this subsection as follows: Actuarial methods, considerations and analyses used in the preparation of this memorandum conform to the appropriate Standards of Practice as promulgated by the Actuarial Standards Board, which standards form the basis for this memorandum.

(e) Use of assets supporting the IMR and the AVR. An appropriate allocation of assets in the amount of the IMR, whether positive or negative, shall be used in any asset adequacy analysis. Analysis of risks regarding asset default may include an appropriate allocation of assets supporting the AVR; these AVR assets may not be applied for any other risks with respect to reserve adequacy. Analysis of these and other risks may include assets supporting other mandatory or voluntary reserves available to the extent not used for risk analysis and reserve support. The amount of the assets used for the AVR shall be disclosed in the table of reserves and liabilities of the opinion and in the memorandum. The method used for selecting particular assets or allocated portions of assets shall be disclosed in the memorandum.

(f) Documentation retention. The appointed actuary shall retain on file, for at least seven years, sufficient documentation so that it will be possible to determine the procedures followed, the analyses performed, the bases for assumptions and the results obtained.

§3.1608. Asset Adequacy Analysis Exemption.

(a) Companies that do business only in Texas and no other state are not required to perform the asset adequacy analysis required by §3.1605 of this title (relating to General Requirements) unless required by the commissioner pursuant to §3.1603 of this title (relating to Commissioner Discretion).

(b) Companies exempted under subsection (a) of this section shall submit with the annual statement an actuarial opinion pursuant to this subchapter but not based on an asset adequacy analysis.

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

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407068
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 39. PUBLIC NOTICE

SUBCHAPTER I. PUBLIC NOTICE OF SOLID WASTE APPLICATIONS

30 TAC §39.510

The Texas Commission on Environmental Quality (commission) proposes new §39.510.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

This rulemaking is based on instructions given at the commission agenda on December 3, 2003. The proposed rule is based on a petition for rulemaking from the Environmental Law and Justice Center on behalf of the Coalition Against Ruffino Trash Transfer Station. The petition was filed on October 17, 2003. This rulemaking would require notification to the public by municipal solid waste (MSW) permittees when a facility has not accepted waste within two years of the issuance of its permit or the permitted MSW facility has stopped accepting waste for two consecutive years.

A corresponding rulemaking published in this issue of the *Texas Register* includes changes to 30 TAC Chapter 305, Consolidated Permits.

SECTION DISCUSSION

Proposed new §39.510, Notice Requirements for Inactive Municipal Solid Waste Permit, adds provisions regarding the contents and types of public notice for permitted MSW facilities that have not accepted waste within two years of permit issuance or have stopped accepting waste for two consecutive years. The proposed rule would require that notification to the public be overseen by the executive director and that the notification to the public indicate when the permitted facility expects to begin operations. Mailed notice and newspaper notice would be required on an annual basis following permit issuance when a facility has not initiated operations. Additionally, at the permittee's expense, a sign or signs would be required to be placed at the site of the permitted facility declaring that the permit has been issued and stating the manner in which the commission and permittee may be contacted for further information. The new requirements

would be applicable to MSW facility permits issued after the effective date of this rule and to MSW facility permits issued before the effective date of this rule. The proposed rule would apply to all MSW permitted facilities including landfills, composting facilities, transfer stations, and all other processing facilities. The proposed rule would not apply to registered MSW facilities.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Grants Management Section, determined that for the first five-year period the proposed new rule is in effect, no significant fiscal implications are anticipated for the agency. Those units of local government that own permitted, inoperative MSW facilities may experience increased costs due to the public notification requirements, though these costs are not expected to be significant.

The proposed rule would require that permitted MSW facilities provide notification to the public to indicate when the facility expects to begin operations if it has not begun operations within two years of permit issuance or has stopped accepting waste for at least two years. Public notice would be required on an annual basis. In addition, the proposed rule would allow for the revocation of issued MSW permits if an affected permittee has not provided the periodic notification required by this rule, has not accepted waste within seven years of permit issuance, or has ceased accepting waste for seven consecutive years. There are no new costs associated with the proposed authority to revoke issued MSW permits because it does not exceed the authority the commission has under Chapter 305. The proposed rule would apply to all MSW permitted facilities including landfills, composting facilities, transfer stations, and all other processing facilities. The proposed rule would not apply to registered MSW facilities.

The proposed rule would require permitted MSW facilities that have been in an inactive state for two years or more to provide public notice in the form of written notice, mailed notice, and newspaper notice as to when the facility expects to begin operations. In addition, the proposed rule would require that sign(s) be posted at the facility declaring that a permit has been issued. The sign(s) would also provide other information including contact information and when the facility expects to begin operations.

Approximately 12 MSW facilities are permitted but not operating and may be affected by the proposed rule. The number of facilities is variable and will change as a result of the issuance of new permits and the commencement of operations at permitted facilities. Of the 12 facilities, an estimated six are owned or operated by local governments.

Costs are expected for facilities to provide public notification (including written notice, mailed notice, and newspaper notice) and to provide signs. The largest of these costs is expected to involve providing newspaper notice. This cost could be between $400 and $1,200 depending upon the circulation size of the newspaper.

Affected facilities will have to post at least one sign, and possibly as many as three, along any property line paralleling a public highway, street, or road. Signs may cost up to $1,000 each.

Mailed notice must be provided to: landowners within 500 feet of the facility property line; the mayor and health authorities of the city or town in which territorial limits or extraterritorial jurisdiction the facility is located or in which waste will be managed; the county judge and health authorities of the county in which the facility is located or in which waste will be managed; and the council of governments in which the facility is located or in which waste will be managed. The facility must also file an affidavit certifying compliance with the notice requirements. It is not known what the mailing costs and the cost of filing an affidavit would be, but costs may be as high as $800, depending upon the number of mailed notices required.

It is estimated that the costs for affected facilities to comply with the proposed rule would be, at the most, $5,000 per year per facility, beginning in fiscal year 2007. The cost for approximately six facilities could be as high as $30,000 per year.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed new rule is in effect, the public benefit anticipated from the changes in the proposed rule will be the opportunity for the public to be notified as to when a permitted MSW facility will be operational. Advance notice to the public would reduce the likelihood of a surprise to the public when a facility begins operations years after permit issuance or begins operations years after operations have ceased.

Fiscal implications are anticipated for owners or operators of permitted MSW facilities that have not begun operations within a two-year period or permitted facilities that have stopped accepting waste for at least two years, though these costs are not expected to be significant.

The proposed rule would apply to all MSW permitted facilities including landfills, composting facilities, transfer stations, and all other processing facilities. The proposed rule would not apply to registered MSW facilities. There are an estimated six individually owned facilities statewide that may be impacted by the proposed rule. It is estimated that the costs for affected facilities to comply with the proposed rule would be, at the most, $5,000 per year per facility, beginning in fiscal year 2007. The cost for approximately six facilities could be as high as $30,000 per year.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are likely or anticipated for MSW facilities that are small or micro-businesses. Small or micro-businesses that own or operate MSW facilities, which are permitted but are not operational within two years of the permit issuance or are permitted and stop operating for at least two years, will experience the same costs as those facilities that are large businesses. The commission estimates that few, if any, small or micro-businesses will be affected by the proposed rule since most of the owners and operators of the privately owned facilities are large 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 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 analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225, because it does not meet the criteria for a "major environmental rule" as defined in that statute. 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 purpose of this rulemaking is to require public notice for permitted MSW facilities that have not yet begun accepting waste or have stopped accepting waste. The affected regulated community is current and future permittees who may have a permitted MSW facility that has not begun accepting waste or has stopped accepting waste. The proposed rule does not create any burdensome new requirements; therefore, it is not anticipated that the proposed rule will 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 commission concludes that this proposed rulemaking does not meet the definition of a major environmental rule.

Furthermore, even if the proposed rulemaking did meet the definition of a major environmental rule, the proposed rule is not subject to Texas Government Code, §2001.0225, because it does not meet any of the four applicable requirements specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, 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.

In this case, the proposed new §39.510 does not meet any of these requirements. First, there are no applicable federal standards that this rule would address. Second, the proposed rule does not exceed an express requirement of state law, because there is no express requirement of state law related to the required public notice for permitted MSW facilities that have not yet begun operations or have stopped accepting waste. Third, the proposed rule would not exceed the commission's obligations to implement its federally approved Subtitle D permit program. Fourth, the commission does not propose this rule under the general powers of the agency but rather under the authority of Texas Health and Safety Code, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste. This rule is also proposed under the authority of Texas Health and Safety Code, §361.011 and §361.024, which provide the commission the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act. Therefore, the commission does not propose the rule solely under the commission's general powers. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The purpose of this rulemaking is to provide notice to the public regarding permitted MSW facilities that have not yet begun accepting waste or have stopped accepting waste. Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property because the rule does not affect real property.

The proposed rule does not create any new requirements or impose burdens on private real property. Providing greater public notice will benefit the program, the regulated community, the environment, and the general public. The rule does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation, because it does not create more stringent requirements. Therefore, this rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies. The commission invites public comment regarding the consistency of the proposed rulemaking with the CMP.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on January 11, 2005, at 10:00 a.m. in Building F, Room 2210, 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. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2004-036-305-WS. Comments must be received by 5:00 p.m., January 17, 2005. Copies of the proposed rule can be obtained from the commission's website at *http://www.tnrcc.state.tx.us/oprd/rules/propadop.html*. For further information, please contact Clifton Wise, Policy and Regulations Division, at (512) 239-2263.

STATUTORY AUTHORITY

The new section is proposed under Texas Water Code, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties; Texas Health and Safety Code, §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; §361.024, which provides the commission with rulemaking authority; and §361.061, which authorizes the

commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste.

The proposed new section implements Texas Health and Safety Code, §361.024 and §361.061.

§39.510. Notice Requirements for Inactive Municipal Solid Waste Permit.

(a) This section applies to the owners or operators of inactive permitted municipal solid waste (MSW) facilities, which are those facilities that have not accepted waste within two years of permit issuance or have ceased accepting waste for at least two consecutive years. This section applies to facilities permitted before or after the effective date of this rule.

(1) Within two years of the date of permit issuance, the date of ceasing to accept waste, or the effective date of this rule, whichever is later, the permittee of an inactive MSW facility shall notify the executive director in writing that the facility is inactive and that the permittee intends to operate the facility in the future. In the event that the permittee does not intend to operate the facility, the permittee should begin voluntary permit revocation procedures.

(2) Within two years of the date of permit issuance, the date of ceasing to accept waste, or the effective date of this rule, whichever is later, the permittee of an inactive permitted MSW facility shall publish notice of intent to operate the facility, at least once, in a newspaper of the largest circulation that is published in the county in which the facility is located or proposed to be located. If a newspaper is not published in the county, then the permittee shall publish notice in a newspaper of general circulation in the county in which the facility is located or proposed to be located, and such notice may be satisfied by one publication if the publishing newspaper meets the circulation requirements. Thereafter, notice must be published annually in accordance with this paragraph, until the facility begins accepting waste or voluntary permit revocation is requested.

(3) Within two years of the date of permit issuance, the date of ceasing to accept waste, or the effective date of this rule, whichever is later, the permittee of an inactive permitted MSW facility shall mail notice of intent to operate the facility to:

(A) landowners within 500 feet of the facility property line;

(B) the mayor and health authorities of the city or town in which territorial limits or extraterritorial jurisdiction the facility is located or proposed to be located;

(C) the county judge and health authorities of the county in which the facility is located or proposed to be located; and

(D) the council of governments that serves or covers the area or county in which the facility is located or proposed to be located. Thereafter, notice must be sent annually in accordance with this paragraph, until the facility begins accepting waste.

(4) The permittee shall file an affidavit with the executive director certifying facts that constitute compliance with the notice requirements of paragraphs (2) and (3) of this subsection within 30 days of the last publication of the published notice required by paragraph (2). The permitee shall also file a copy of the published notice required by paragraph (2) with the executive director that shows the date of publication and the name of the newspaper within ten business days after its publication. The deadline to file a copy of the published notice that shows the date of publication and the name of the newspaper is ten business days after the last date of publication. The deadline to file the affidavit is 30 calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with the public notice requirements of paragraphs (2) and (3) creates a rebuttable presumption of compliance with the requirement to publish notice.

(5) The text of the newspaper notice and the mailed notice must include:

(A) the name and address of the agency and the telephone number of an agency contact from whom interested persons may obtain further information;

(B) the name, address, and telephone number of the permittee and a contact person from whom interested persons may obtain further information and, if different, the location of the facility or activity to be regulated by the permit;

(C) a brief description of the activity authorized by the permit;

(D) the permit number and permit issuance date; and

(E) a statement indicating that the permitted facility may begin construction or operation at a future time, and when the facility is expected to begin construction and operation.

(b) Within six months of the date of permit issuance, the date of ceasing to accept waste, or the effective date of this rule, whichever is later, the permittee of an inactive permitted MSW facility shall provide signs specifying the facility's status. At the permittee's expense, a sign or signs must be placed at the site of the permitted facility declaring that the permit has been issued and stating the manner in which the commission and permittee may be contacted for further information. Such signs must be provided by the permittee and must substantially meet the following requirements. Signs must:

(1) consist of dark lettering on a white background and must be no smaller than four feet by four feet with letters at least three inches in height and block printed capital lettering;

(2) be headed by the words "AUTHORIZED MUNICIPAL SOLID WASTE DISPOSAL FACILITY";

(3) include the words "PERMIT NO.," the number of the permit, and the type of permit;

(4) include the words "for further information contact";

(5) include the words "Texas Commission on Environmental Quality" and the address and telephone number of the appropriate commission regional office;

(6) include the name of the permittee, and the address of the appropriate responsible official;

(7) include the telephone number of the permittee;

(8) include the expected start-up date for beginning operation; and

(9) remain in place and legible until the facility is opened. The permittee shall provide a verification to the executive director that the sign posting was conducted according to the requirements of this section.

(c) Each sign placed at the site must be located within ten feet of every property line paralleling a public highway, street, or road. Signs must be visible from the street and spaced at not more than 1,500-foot intervals. A minimum of one sign, but no more than three signs, shall be required along any property line paralleling a public highway, street, or road. This section's sign requirements do not apply

to properties under the same ownership that are noncontiguous or separated by intervening public highway, street, or road, unless the property is part of the permitted facility.

(d) The executive director may approve variances from the requirements of subsections (b) and (c) of this section if the permittee has demonstrated that it is not practical to comply with the specific requirements of this subsection and alternative sign posting plans proposed by the applicant are at least as effective in providing notice to the public. Approval from the executive director under this subsection must be received before posting alternative signs for purposes of satisfying the requirements of this section.

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

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407111
Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 239-0348

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CHAPTER 305. CONSOLIDATED PERMITS SUBCHAPTER F. PERMIT CHARACTERISTICS AND CONDITIONS

30 TAC §305.130, §305.131

The Texas Commission on Environmental Quality (commission) proposes new §305.130 and §305.131.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

This rulemaking is based on instructions given at the commission agenda on December 3, 2003. The proposed rules are based on a petition for rulemaking from the Environmental Law and Justice Center on behalf of the Coalition Against Ruffino Trash Transfer Station. The petition was filed on October 17, 2003. This rulemaking would require notification to the public by municipal solid waste (MSW) permittees of the existence of an inactive MSW facility when a facility has not accepted waste within two years of the issuance of its permit or the permitted MSW facility has stopped accepting waste for two consecutive years.

A corresponding rulemaking published in this issue of the *Texas Register* includes changes to 30 TAC Chapter 39, Public Notice.

SECTION BY SECTION DISCUSSION

Proposed new §305.130, Notice of Inactive Municipal Solid Waste Permit, adds provisions requiring public notice as described in proposed new 30 TAC §39.510 for permitted MSW facilities that have not accepted waste within two years of permit issuance or have stopped accepting waste for two consecutive years. The proposed rule would require that notification to the public be overseen by the executive director and that the notification to the public indicate when the permitted facility expects to begin operations. Notice would then be required on an annual basis until the facility starts accepting waste. The new requirements would be applicable to MSW facility permits issued after the effective date of the proposed rule and to MSW facility permits issued before the effective date of this rule. The proposed rule would apply to all MSW permitted facilities including landfills, composting facilities, transfer stations, and all other processing facilities. The proposed rule would not apply to registered MSW facilities.

Proposed new §305.131, Revocation of Inactive Municipal Solid Waste Permit, provides requirements allowing an MSW permit to be revoked at the discretion of the commission under the procedures found in 30 TAC §305.68 if the permittee has failed to provide notice to the public as required by §305.130; has not accepted waste within seven years of permit issuance; or has ceased accepting waste for seven consecutive years.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Grants Management Section, determined that for the first five-year period the proposed new rules are in effect, no significant fiscal implications are anticipated for the agency. Those units of local government that own permitted, inoperative MSW facilities may experience increased costs due to the public notification requirements, though these costs are not expected to be significant.

The proposed rules would require that permitted MSW facilities provide notification to the public to indicate when the facility expects to begin operations if it has not begun operations within two years of permit issuance or has stopped accepting waste for at least two years. Public notice would be required on an annual basis. The requirements would be applicable to current MSW facility permits six months after the effective date of the proposed rules. In addition, the proposed rules would allow for the revocation of issued MSW permits if an affected permittee has not provided the periodic notification required by these rules, has not accepted waste within seven years of permit issuance, or has ceased accepting waste for seven consecutive years. The proposed rules would apply to all MSW permitted facilities including landfills, composting facilities, transfer stations, and all other processing facilities. The proposed rules would not apply to registered MSW facilities.

The proposed rules would require permitted MSW facilities that have been in an inactive state for two years or more to provide public notice in the form of written notice, mailed notice, and newspaper notice as to when the facility expects to begin operations.

Approximately 12 MSW facilities are permitted but not operating and may be affected by the proposed rules. The number of facilities is variable and will change as a result of the issuance of new permits and the commencement of operations at permitted facilities. Of the 12 facilities, an estimated six are owned or operated by local governments.

Costs are expected for facilities to provide public notification (including written notice, mailed notice, and newspaper notice) and to provide signs. The largest of these costs is expected to involve providing newspaper notice. This cost could be between $400 and $1,200 depending upon the circulation size of the newspaper.

Affected facilities will have to post at least one sign, and possibly as many as three, along any property line paralleling a public highway, street, or road. Signs may cost up to $1,000 each.

Mailed notice must be provided to: landowners within 500 feet of the facility property line; the mayor and health authorities of

the city or town in which territorial limits or extraterritorial jurisdiction the facility is located or in which waste will be managed; the county judge and health authorities of the county in which the facility is located or in which waste will be managed; and the council of governments in which the facility is located or in which waste will be managed. The facility must also file an affidavit certifying compliance with the notice requirements. It is not known what the mailing costs and the cost of filing an affidavit would be, but costs may be as high as $800, depending upon the number of mailed notices required.

It is estimated that the costs for affected facilities to comply with the proposed rules would be, at the most, $5,000 per year per facility, beginning in fiscal year 2007. The cost for approximately six facilities could be as high as $30,000 per year.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes in the proposed rules will be the opportunity for the public to be notified as to when a permitted MSW facility will be operational. Advance notice to the public would reduce the likelihood of a surprise to the public when a facility begins operations years after permit issuance or begins operations years after operations have ceased.

Fiscal implications are anticipated for owners or operators of permitted MSW facilities that have not begun operations within a two-year period or permitted facilities that have stopped accepting waste for at least two years, though these costs are not expected to be significant.

The proposed rules would apply to all MSW permitted facilities including landfills, composting facilities, transfer stations, and all other processing facilities. The proposed rules would not apply to registered MSW facilities. There are an estimated six individually owned facilities statewide that may be impacted by the proposed rules. It is estimated that the costs for affected facilities to comply with the proposed rules would be, at the most, $5,000 per year per facility, beginning in fiscal year 2007. The total cost for approximately six facilities could be as high as $30,000 per year.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for MSW facilities that are small or micro- businesses. Small or micro-businesses that own or operate MSW facilities, which are permitted but are not operational within two years of the permit issuance or are permitted and stop operating for at least two years, will experience the same costs as those facilities that are large businesses. The commission estimates that few, if any, small or micro-businesses will be affected by the proposed rules since most of the owners and operators of the privately owned facilities are large 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

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225, because it does not meet the criteria for a "major environmental rule" as defined in that statute. 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 purpose of this rulemaking is to require public notice for permitted MSW facilities that have not yet begun accepting waste or have stopped accepting waste. The affected regulated community is current and future permittees who have a permitted MSW facility that has not begun accepting waste or has stopped accepting waste. The proposed rules do not create any burdensome new requirements; therefore, it is not anticipated that the proposed rules will 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 commission concludes that this proposed rulemaking does not meet the definition of a major environmental rule.

Furthermore, even if the proposed rulemaking did meet the definition of a major environmental rule, the proposed rules are not subject to Texas Government Code, §2001.0225, because they do not meet any of the four applicable requirements specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, 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.

In this case, the proposed new §305.130 and §305.131 do not meet any of these requirements. First, there are no applicable federal standards that these rules would address. Second, the proposed rules do not exceed an express requirement of state law, because there is no express requirement of state law related to the required public notice for permitted MSW facilities that have not yet begun operations or have stopped accepting waste. Third, the proposed rules would not exceed the commission's obligations to implement its federally approved Subtitle D permit program. Fourth, the commission does not propose these rules under the general powers of the agency but rather under the authority of Texas Health and Safety Code, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste. These rules are also proposed under the authority of Texas Health and Safety Code, §361.011 and §361.024, which provide the commission the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act. Therefore, the commission does not propose the rules solely under the commission's general powers. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether the proposed rules constitute

a taking under Texas Government Code, Chapter 2007. The purpose of this rulemaking is to provide notice to the public regarding permitted MSW facilities that are inactive because they have not accepted waste within two years of the issuance of the permit or they have ceased accepting waste for two consecutive years. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property because the rules do not affect real property.

The proposed rules do not create any new requirements or impose burdens on private real property, because the commission already has the authority to revoke permits. Providing greater public notice will benefit the program, the regulated community, the environment, and the general public. The rules do not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation, because they do not create more stringent requirements. Therefore, this rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The proposed rulemaking is identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program. Therefore, the goals and policies of the Texas Coastal Management Program (CMP) must be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies. The commission invites public comment regarding the consistency of the proposed rulemaking with the CMP.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on January 11, 2005, at 10:00 a.m. in Building F, Room 2210, 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. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2004-036-305-WS. Comments must be received by 5:00 p.m., January 17, 2005. Copies of the proposed rules can be obtained from the commission's website at *http://www.tnrcc.state.tx.us/oprd/rules/propadop.html*. For further information, please contact Clifton Wise, Policy and Regulations Division, at (512) 239-2263.

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties; and Texas Health and Safety Code, §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste; §361.024, which provides the commission with rulemaking authority; and §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste.

The proposed new sections implement Texas Health and Safety Code, §361.024 and §361.061.

§305.130. Notice of Inactive Municipal Solid Waste Permit.

(a) The owner or operator of a permitted municipal solid waste (MSW) facility that has not accepted waste within two years of permit issuance or that has ceased accepting waste for two consecutive years shall provide notice to the public as specified in §39.510 of this title (relating to Notice Requirements for Inactive Municipal Solid Waste Permit) of the following:

(1) the permitted facility may begin construction or operation at a future time; and

(2) the date that the facility is expected to begin construction and operations.

(b) The public notifications in subsection (a)(1) and (2) of this section are required on an annual basis following the second anniversary date of permit issuance, date the facility ceased accepting waste, or the effective date of this section, whichever is later, until waste acceptance begins or resumes.

(c) The notice requirements of this section are applicable to MSW permits issued:

(1) on or after the effective date of this section; and

(2) before the effective date of this section.

§305.131. Revocation of Inactive Municipal Solid Waste Permit.

A municipal solid waste permit may be revoked at the discretion of the commission under the procedures found in §305.68 of this title (relating to Action and Notice on Petition for Revocation or Suspension) if the commission finds any of the following. The permittee has:

(1) failed to provide notice to the public as required by §305.130 of this title (relating to Notice of Inactive Municipal Solid Waste Permit);

(2) not accepted waste within seven years of permit issuance; or

(3) ceased accepting waste for seven consecutive years.

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

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407110
Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512 239-0348

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 55. LAW ENFORCEMENT
SUBCHAPTER E. PERMITS FOR AERIAL MANAGEMENT OF WILDLIFE AND EXOTIC SPECIES

31 TAC §§55.141 - 55.153

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

The Texas Parks and Wildlife Department proposes the repeal of §§55.141 - 55.153, concerning Permits for Aerial Management of Wildlife and Exotic Species. The repeals are a result of the department's review process under the provisions of Government Code, §2001.039, which requires each state agency to perform a review of all regulations not less than every four years and to either readopt, amend, or repeal each rule as necessary and appropriate. As a result of the review, the department is relocating the aerial management rules to Chapter 65, concerning Wildlife. A proposal to that effect appears elsewhere in this issue. The effect of the repeals is nonsubstantive.

Robert Macdonald, regulations coordinator, has determined that for each of the first five years that the proposed repeals are in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the repeals as proposed.

Mr. Macdonald also has determined that for each of the first five years the repeals as proposed are in effect, the public benefit expected as a result of the proposed repeals will be rules that are organized in a more topical manner so as to be easier to access.

There will be no adverse economic cost for small businesses, microbusinesses, or persons required to comply with the repeals as proposed, as the repeals do not alter the current cost of compliance with any regulation.

The department has determined that the repeals will not affect local economies; accordingly, no local employment impact statement has been prepared.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules) does not apply to the proposed repeals.

The department has determined that Government Code, Chapter 2007 (Governmental Action Affecting Private Property Rights), does not apply to the proposed repeals.

Comments on the proposed repeals may be submitted to Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775; e-mail: robert.macdonald@tpwd.state.tx.us.

The repeals are proposed under Parks and Wildlife Code, §43.109, which authorizes the commission to make regulations governing management of wildlife or exotic animals by the use of aircraft.

The proposed repeals affect Parks and Wildlife Code, Chapter 43.

§55.141. Applicability.
§55.142. Definitions.
§55.143. General Rules.
§55.144. Application for Permit.
§55.145. Issuance of Permit.
§55.146. Period of Validity of Permit.
§55.147. Amendment of Permit.
§55.148. Renewal of Permit.
§55.149. Permit Not Transferable.
§55.150. Permit Fee.
§55.151. Landowner Authorization.
§55.152. Reports.
§55.153. Penalty.

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

Filed with the Office of the Secretary of State on December 6, 2004.

TRD-200407138
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 389-4775

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CHAPTER 59. PARKS
SUBCHAPTER B. LOCAL PARK PLANNING ASSISTANCE

31 TAC §59.10

The Texas Parks and Wildlife Department proposes an amendment to §59.10, concerning eligibility requirements for local park planning assistance. The amendment is necessary as a result of the department's review process under the provisions of Government Code, §2001.039, which requires each state agency to perform a review of all regulations not less than every four years and to either readopt, amend, or repeal each rule as necessary and appropriate. As a result of the review, the department has determined that the population thresholds in the current rule should be consistent with those stipulated in the department's small community grant rules. Additionally, the wording of the current rule has been erroneously interpreted to infer that a community of less than 20,000 in population is ineligible if it is located in a county of greater than 20,000 in population, which is not the case. The proposed amendment therefore contains clarifying language to dispel potential confusion.

Robert Macdonald, regulations coordinator, has determined that for each of the first five years that the proposed rule is in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the rule as proposed.

Mr. Macdonald also has determined that for each of the first five years the rule as proposed is in effect, the public benefit expected

as a result of the proposed rule will be more accurate rules that are clearer and easier to understand.

There will be no adverse economic cost for small businesses, microbusinesses, or persons required to comply with the rule as proposed, as the rule does not alter the current cost of compliance with any regulation.

The department has determined that the rule will not affect local economies; accordingly, no local employment impact statement has been prepared.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules) does not apply to the proposed rule.

The department has determined that Government Code, Chapter 2007 (Governmental Action Affecting Private Property Rights), does not apply to the proposed rule.

Comments on the proposed rule may be submitted to Jim Temple, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 912-7130; e-mail: jim.temple@tpwd.state.tx.us.

The amendment is proposed under Parks and Wildlife Code, §24.005, which requires the commission to adopt rules and regulations for grant assistance.

The proposed amendment affects Parks and Wildlife Code, Chapter 24.

§59.10. Eligibility.

Cities and counties in Texas are eligible for park planning assistance. Within this limitation, the following restrictions apply, based on the latest federal census or state population estimate at the time the request is submitted:

(1) Incorporated local governments of a population of 20,000 or less [~~Cities must not have a population exceeding 17,500 inhabitants~~].

(2) Counties of a population of 20,000 or less [~~Counties must not have a population exceeding 28,000 inhabitants~~].

(3) Any county may request assistance for an unincorporated community with a population of 20,000 or less that is within that county's jurisdiction, regardless of the county population.

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

Filed with the Office of the Secretary of State on December 6, 2004.

TRD-200407137
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 389-4775

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CHAPTER 65. WILDLIFE

SUBCHAPTER A. STATEWIDE HUNTING AND FISHING PROCLAMATION

DIVISION 3. SEASONS AND BAG LIMITS--FISHING PROVISIONS

31 TAC §65.74

The Texas Parks and Wildlife Department proposes new §65.74, concerning Freeze Event Closures. The amendment is necessary to address concerns about the vulnerability of fish during freeze events. Freeze events can kill fish in the shallow waters of bay systems and surviving fish are easily located in the remaining deep water areas. The proposed new rule would temporarily prohibit fishing in affected areas to minimize further loss of fish during a freeze event, ensuring maximum survival of fish after the event to minimize the impact on fish populations and the ecosystem. As a result of protection during a freeze event, game fish stocks will be able to recover more quickly and overall fishing opportunity will be enhanced.

Robin Riechers has determined that for each of the first five years that the proposed rule is in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the proposed rule.

Robin Riechers also has determined that for each of the first five years the rule as proposed is in effect, the public benefit expected as a result of the proposed rule will be the further protection of fishery resources in the event of a freeze. This protection ensures maximum survival of spawning stock biomass in freeze-affected areas, which will minimize the overall effect of a freeze event upon the fishery.

There will be no direct costs for persons required to comply with the rule as proposed. The indirect costs will be the loss of a fishing opportunity during a freeze event. For commercial finfish license holders, the estimated amount of indirect cost (revenue deferred) is estimated at a maximum of $105 per license per day of closure.

If a freeze occurs and areas are temporarily closed to fishing in any period within the five years following the adoption of the rule, Texas coastal areas (counties of Cameron, Willacy, Kenedy, Kleberg, Nueces, San Patricio, Aransas, Refugio, Calhoun, Jackson, Victoria, Matagorda, Brazoria, Galveston, Harris, Chambers, Liberty, Jefferson, Orange) may be affected. During the closure, commercial fishing will be prohibited, accordingly, local commercial fishing businesses may defer revenue until the closure ends. In the long run, however, a brief closure in the event of a freeze will assist local commercial fishing businesses by speeding the recovery of fish species from the effects of the freeze.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules) does not apply to the proposed rule.

The proposed rule may have a temporary adverse effect on small and microbusinesses, specifically, commercial finfishing. There are approximately 440 active commercial finfish licenses in Texas. The primary species caught under these licenses are southern flounder and black drum. The proposed rule should have no effect on commercial floundering, since the primary floundering method is gigging in shallow water. If the area closed contains shallow water areas as well as the deep water areas where fish congregate during freeze conditions, it is unlikely that the shallow areas will be fished heavily during these freeze conditions. Black drum are typically caught on trotlines, so the proposed rule could potentially affect commercial black drum fishing. The overall economic effect of the rule should

be positive in the long term, because the rule would allow the stock to recover more quickly after the population has suffered losses due to a freeze. In the short term, in the event of a freeze, commercial black drum trotline fishing would be prohibited in affected deeper water areas until temperatures warm sufficiently for the fish to disperse. It is expected that closures under this rule would be infrequent. The last time a coastal freeze occurred that might have required closures was 1994. There were two freezes in 1989. The freeze of 1983 is well remembered on the coast, since it caused the bays to ice over and made fishing physically impossible. The duration of the 1983 freeze was the longest in the past 21 years, about seven calendar days. (McEachron, et al, 1994). Thus, freezes are rare and brief events on the coast, and the closures would apply to limited areas. Accordingly, the effects on commercial fishing should be minor.

In 2000, the value of the black drum catch was $2.3 million, or about $9200 per fishing day (trotlines are not allowed on weekends). Thus, if a coastwide closure of all fishable areas for five fishing days were necessary, the total deferred revenue can be estimated at about $46,000. Per commercial fishing license, the deferred revenue would be about $525 over this five-day period. Of course, some areas will likely remain fishable except in the most severe freeze, so it is probable that commercial finfishermen will be able to select alternative fishing sites to the temporary closed areas and still earn revenue during the closed time period. It is infeasible to reduce the effects of the rule on small and microbusinesses. To TPWD's knowledge, all commercial finfishing is done by small or microbusinesses. If commercial fishing were allowed in the closed areas, the long-term health of fish stocks could be negatively affected. Thus, this rule must apply uniformly. There are no reporting or design requirements under this rule.

A larger business will have a proportionately higher cost of compliance per $100 of sales because it will defer more revenue in the closed period.

The department has determined that Government Code, Chapter 2007 (Governmental Action Affecting Private Property Rights), does not apply to the proposed rule.

Comments on the proposal may be submitted to Jerry L. Cooke, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4492; e-mail: jerry.cooke@tpwd.state.tx.us.

The new rule is proposed under the authority of Parks and Wildlife Code, Chapter 61, which provides the commission with authority to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life and the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life.

The proposed new rule affects Parks and Wildlife Code, Chapter 61.

§65.74. Freeze Events.

(a) Affected areas shall be temporarily closed to fishing when a freeze occurs. An affected area is a place where fishing during a freeze of sufficient severity risks depletion of one or more game fish species.

(b) The Executive Director shall provide appropriate notice to the public that a freeze has occurred and fishing in the affected area or areas is prohibited. The Executive Director shall provide appropriate public notice as to when fishing in the affected area or areas is allowed to resume.

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

Filed with the Office of the Secretary of State on December 6, 2004.

TRD-200407136
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 389-4775

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SUBCHAPTER F. PERMITS FOR AERIAL MANAGEMENT OF WILDLIFE AND EXOTIC SPECIES

31 TAC §§65.150 - 65.162

The Texas Parks and Wildlife Department proposes new §§65.150 - 65.162, concerning Permits for Aerial Management of Wildlife and Exotic Species. The new sections are a result of the department's review process under the provisions of Government Code, §2001.039, which requires each state agency to perform a review of all regulations not less than every four years and to either readopt, amend, or repeal each rule as necessary and appropriate. As a result of the review, the department is relocating the aerial management rules from Chapter 55, concerning Law Enforcement, to Chapter 65, concerning Wildlife. A proposal to repeal Chapter 55, Subchapter E, appears elsewhere in this issue.

The following changes have been made to the current rule language.

Proposed new §65.151 (current §55.142), concerning Definitions, has been modified by eliminating the definitions at paragraphs (2), (6), (7), (9), (11), and (16), which are defined in Parks and Wildlife Code, §43.103 and are therefore unnecessary in rule; by removing the portion of current paragraph (7) that creates an exception for aoudad sheep and elk, because aoudad sheep and elk are by legislative action no longer game animals in the state; and by modifying paragraph (13) to eliminate a reference to the Law Enforcement Division, because operational administration of the aerial management program is being transferred to the Wildlife Division.

Proposed new §65.152 (current §55.143), concerning General Rules, is modified by inserting the word 'harass' to utilize a term specifically defined by statute and by removing the term 'proclamation' from subsection (d) and replacing it with the phrase 'rule of the commission,' which is more precise.

Proposed new §65.162 (current §55.150), concerning Permit Fee, is modified by removing reference to the fee amount for the permit and stipulating that the permit fee is nonrefundable. The department in a previous rulemaking consolidated all fee amounts in 31 TAC Chapter 53.

Robert Macdonald, regulations coordinator, has determined that for each of the first five years that the proposed new rules are in

effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the new rules as proposed.

Mr. Macdonald also has determined that for each of the first five years the new rules as proposed are in effect, the public benefit expected as a result of the proposed rules will be rules that are organized in a more topical manner so as to be easier to access.

There will be no adverse economic cost for small businesses, microbusinesses, or persons required to comply with the rules as proposed, as the rules do not alter the current cost of compliance with any regulation.

The department has determined that the rules will not affect local economies; accordingly, no local employment impact statement has been prepared.

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 Government Code, Chapter 2007 (Governmental Action Affecting Private Property Rights), does not apply to the proposed rules.

Comments on the proposed rules may be submitted to Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775; e-mail: robert.macdonald@tpwd.state.tx.us.

The new rules are proposed under Parks and Wildlife Code, §43.109, which authorizes the commission to make regulations governing management of wildlife or exotic animals by the use of aircraft.

The proposed new rules affect Parks and Wildlife Code, Chapter 43.

§65.150. Applicability.
These rules apply to all the counties in Texas.

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

(1) Aerial Management Permit--A permit issued by the department to count, photograph, relocate, capture, or hunt wildlife or exotic animals by the use of aircraft.

(2) Applicant--An individual, partnership, or corporation who files an application for a permit to manage wildlife or exotic animals by use of aircraft.

(3) Convicted--A judgment of guilty, plea of guilty or nolo contendere, or placed on probation or deferred adjudication.

(4) Department--The Texas Parks and Wildlife Department or a specifically authorized employee of the department.

(5) Gunner--An individual who uses a firearm, tranquilizer gun, or net gun to capture, take, shoot, or attempts to capture, take, or shoot wildlife or exotic animals from an aircraft.

(6) Landowner's authorization--Signed consent from the landowner or the landowner's authorized agent to manage a specified number of wildlife or exotic animals from an aircraft on certain property.

(7) Observer--Any person other than the pilot or gunner who is on board an aircraft while wildlife or exotic animals are being counted, photographed, relocated, captured, or hunted.

(8) On file--Approved and on file at the Austin headquarters of the department.

(9) Permit--An aerial management permit.

(10) Pilot--An individual who pilots an aircraft to count, photograph, relocate, capture, or hunt wildlife or exotic animals.

§65.152. General Rules.

(a) A person who holds a permit under the authority of Parks and Wildlife Code, Chapter 43, Subchapter G, is authorized to engage in the management of wildlife and exotic animals by the use of aircraft only on land named in the landowner's authorization. The permit shall be carried in aircraft when performing management by the use of aircraft.

(b) A pilot of an aircraft used for the management of wildlife or exotic animals must maintain a daily flight log and report. The daily flight log must be current and available for inspection by game wardens at reasonable times. Each permit holder and pilot shall comply with all Federal Aviation regulations for the specific type of aircraft listed on their permit.

(c) A person commits an offense if:

(1) the person hunts, shoots, shoots at, kills, or attempts to kill from an aircraft any wildlife or exotic animals other than wildlife or exotic animals authorized by the permit and landowner's authorization;

(2) the person intentionally harasses, disturbs, hazes, or buzzes any wildlife or exotic animals by the use of an aircraft other than wildlife or exotic animals authorized in a permit and landowner's authorization;

(3) the person acts as a gunner, observer, or pilot during a flight related to management of wildlife or exotic animals from an aircraft, and has within one year immediately preceding the flight been convicted of a Class A Parks and Wildlife Code misdemeanor or Parks and Wildlife Code felony relating to the management of wildlife or exotic animals by the use of aircraft;

(4) the person pilots an aircraft to manage wildlife or exotic animals without a valid pilot's license as required by the Federal Aviation Administration;

(5) the person pays, barters, or exchanges anything of value to participate as a gunner or observer;

(6) the person acting as a gunner or pilot under an aerial management permit takes or attempts to take any wildlife or exotic animals for any purpose other than is necessary for the protection of lands, water, wildlife, livestock, domesticated animals, human life, or crops, except that any wildlife or exotic animals, once lawfully taken pursuant to this subchapter may be sold if their sale is not otherwise prohibited;

(7) the person acting as a gunner or pilot hunts, takes, kills, manages or attempts to hunt, take, kill or manage wildlife or exotic animals during the hours between 1/2-hour after sunset and 1/2-hour before sunrise;

(8) the person operates an aircraft for the management of wildlife or exotic animals and is not named as an authorized pilot in a permit;

(9) the person takes, captures, or kills more wildlife or exotic animals on properties than are specified in the landowner's authorization; or

(10) the person uses a permit for the purpose of sport hunting.

(d) These rules do not exempt any person from the requirement for other licenses or permits required by statute or rule of the commission.

§65.153. Application for Permit.

An applicant for a permit shall complete and place on file an application on a form prescribed by the department. The application shall contain the description, including make, model, color, and registration number of each aircraft to be used. The name of each individual pilot will be shown exactly as it appears on their state driver's license, personal identification certificate issued by the Department of Public Safety, or the FAA license, along with a current address and date of birth of the applicant (date of birth not applicable if corporation), and the name, address, hunting license number, and date of birth of each pilot.

§65.154. Issuance of Permit.

(a) A permit may be issued in the name of an individual, partnership, or corporation for named pilots to count, photograph, relocate, capture, or hunt wildlife or exotic animals by the use of aircraft.

(b) Upon the filing of a properly executed application, the department may issue a permit if:

(1) the applicant, or any pilot named in the application, has not within one year immediately preceding the date of the application been convicted of any Class A Parks and Wildlife Code misdemeanor or Parks and Wildlife Code felony relating to the management of wildlife or exotic animals by the use of aircraft;

(2) the applicant has not knowingly failed to disclose any material information required, or has not knowingly made any false statement regarding any material fact in connection with the application;

(3) the applicant will use the permit only for the purpose of protecting or aiding in the administration or protection of land, water, wildlife, livestock, domesticated animals, human life, or crops;

(4) the permit requested, in the judgment of the issuing official, will aid in the management of wildlife and exotic animals and will not have a deleterious effect on indigenous species.

(c) The permit shall include the following information:

(1) the name and address of the individual applicant, partnership or corporation;

(2) the authorized pilot's name, address, date of birth, and Federal Aviation Administration Certificate number;

(3) the authorized aircraft; and

(4) the issue and expiration date of the permit.

§65.155. Period of Validity of Permit.

A permit is valid for a period of one year from the date of issuance unless sooner terminated or revoked.

§65.156. Amendment of Permit.

(a) When a permittee desires to have his permit amended, that person must file an amended application on the form provided by the department. An application for amendment is subject to the same issuance criteria as the original application for permit. In emergency situations, permit amendments and new landowner's authorizations may be expedited by presenting completed forms to the game warden in the county where the management of wildlife or exotic animals is to be performed.

(b) A game warden in the county where the land is located may approve the landowner's authorization and cause the form to be delivered to the department office in Austin. In emergency situations, the landowner's authorization form will be considered on file when approved by the game warden.

(c) In situations involving only counting and photographing, the landowner's authorization for management of wildlife or exotic animals is considered on file when signed by both the permittee and landowner or landowner's agent and placed in the mail to the department office in Austin prior to flight.

§65.157. Renewal of Permit.

A permittee requesting a renewal of a permit must file a properly executed application on a form prescribed by the department, together with the required fee, at least ten days prior to the expiration of the current permit.

§65.158. Permit Not Transferable.

A permit is not transferable or assignable.

§65.159. Permit Fee.

The permit fee specified in §53.15 of this title (relating to Miscellaneous Fisheries and Wildlife Licenses and Permits) must accompany an application for the permit which is refundable should the permit application be denied. The department may exempt governmental entities from the permit fee.

§65.160. Landowner Authorization.

(a) Prior to managing wildlife or exotic animals, a permit holder must place on file a landowner's authorization form for each individual ownership on which wildlife or exotic animals are to be managed. The landowner's authorization form shall include:

(1) the name, address, and phone number of the landowner;

(2) the name, address, and phone number of the authorized landowner's agent, if applicable;

(3) the name and permit number of the permittee;

(4) the farm or ranch name and specific location of the property;

(5) the specific kind and number of wildlife or exotic animals to be managed by use of aircraft and the reason why these animals should be managed; and

(6) a trap and transplant permit number issued by the Department's Wildlife Division must be shown, if game animals or game birds are captured by the use of aircraft.

(b) A landowner's authorization for the management of wildlife or exotic animals shall be valid for the life of the permit unless the permit expires without renewal, is suspended or revoked; or, if the landowner's authorization specifies a certain time period, then the landowner's authorization will be valid for that specified time.

(c) A landowner's authorization for hunting shall be approved only for depredating animals and exotic animals.

(d) A landowner's authorization will not be approved for non-indigenous wild animals except as authorized by the department when a specific wild animal(s) has escaped from captivity.

(e) A single landowner's authorization form may be submitted by a group of landowners or by an association on behalf of such landowners. The landowner's authorization form shall have attached a list of participating landowner names, ranch names, addresses, and acreage for each participating landowner. The landowner's authorization may be signed by one authorized agent who represents the group of landowners or an association.

§65.161. Reports.

(a) The holder of a permit shall file with the department within 30 days following the end of each calendar quarter or on termination of the permit, whichever occurs first, a daily flight log and report, on a form prescribed by the department, showing:

(1) name, signature, and permit number of the permit holder;

(2) number and description of the wildlife or exotic animals managed under the permit;

(3) the landowner's authorization control number issued by the department;

(4) the dates of authorized flights taken;

(5) the time of day an authorized flight is completed;

(6) type of management by use of aircraft performed;

(7) the name and signature of pilot(s); and

(8) the name, address, and hunting license number of the gunner(s).

(b) Information required on the daily flight log and report shall be entered daily immediately upon completion of an authorized flight. Stopping to refuel does not constitute completion of a flight.

(c) The holder of a permit shall be required to file with the department a negative daily flight log and report, if there are no management flights for the calendar quarter.

§65.162. Penalty.

The penalties for violations of these rules are prescribed by the Parks and Wildlife Code, §43.111.

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

Filed with the Office of the Secretary of State on December 6, 2004.

TRD-200407135
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 389-4775

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PART 17. TEXAS STATE SOIL AND WATER CONSERVATION BOARD

CHAPTER 518. GENERAL PROCEDURES

SUBCHAPTER B. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

31 TAC §518.5

The Texas State Soil and Water Conservation Board (State Board) proposes new §518.5, concerning agency requirements to implement a policy of using historically underutilized businesses (HUB's). The new rule adopts by reference the rules of the Texas Building and Procurement Commission in 1 TAC §§111.11 - 111.28, as amended, concerning HUB Certification Program.

Kenny Zajicek, Fiscal Officer, Texas State Soil and Water Conservation Board, has determined that for the first five year period there will be no fiscal implications for state or local government as a result of administering this new rule as the agency is already implementing or carrying out the requirements of the state's HUB Policy.

Mr. Zajicek has also determined that for the first five year period these rules are in effect, the public benefit anticipated as a result of administering this rule will be a continuation of promoting full and equal business opportunities for all businesses in Texas.

There is no anticipated cost to small businesses or individuals resulting from this new rule.

Comments on the proposed new rule may be submitted in writing to Rex Isom, Executive Director, Texas State Soil and Water Conservation Board, P.O. Box 658, Temple, Texas 76503, (254) 773-2250, ext. 231.

The new rule is proposed under the Agriculture Code, Title 7, Chapter 201, §201.020, which authorizes the Texas State Soil and Water Conservation Board to adopt rules that are necessary for the performance of its functions under the Agriculture Code.

No other statutes, articles, or codes are affected by this proposal.

§518.5. Historically Underutilized Business Program.

The board adopts by reference the rules of the Texas Building and Procurement Commission in 1 Texas Administrative Code §§111.11 - 111.28, as amended, concerning Historically Underutilized Business Certification Program. Copies of the Texas Building and Procurement Commission rules, as amended, are filed at the agency headquarters, located at 311 North 5th Street, Temple, Texas.

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

Filed with the Office of the Secretary of State on December 6, 2004.

TRD-200407134
Mel Davis
Special Projects Coordinator
Texas State Soil and Water Conservation Board
Earliest possible date of adoption: January 16, 2005
For further information, please call: (254) 773-2250

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 29. PRACTICE AND PROCEDURE

37 TAC §§29.11, 29.24, 29.27, 29.29

The Texas Department of Public Safety proposes amendments to §§29.11, 29.24, 29.27, and 29.29, concerning Practice and Procedure.

The amendment to §29.11 is necessary to make the department's rule on the deadline for answers to pleadings in cases transferred to the State Office of Administrative Hearings (SOAH) consistent with discovery deadlines.

An amendment to §29.24 is necessary to clarify that Requests for Disclosure, authorized by the Texas Rules of Civil Procedure and SOAH rules are also authorized under Department Discovery Rules.

A second amendment to §29.24 is necessary to make the department discovery deadline rule for cases referred to SOAH consistent with SOAH discovery deadline rule.

A third amendment to §29.24 is necessary to make the department rules on filing discovery with SOAH consistent with SOAH rules on filing discovery.

The amendment to §29.27 is necessary to streamline the process of issuing a final order of the director when a party fails to appear at a contested case hearing scheduled at SOAH.

The amendment to §29.29 is necessary to clarify that partial payments received against an order assessing an administrative penalty as well as costs and fees will be applied first to the costs and fees before being applied to the administrative penalty.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra also has determined that for each year of the first five-year period the amendments are in effect the public benefit anticipated as a result of enforcing the amended rules will be to clarify and streamline contested case procedures in motor carrier enforcement cases and collection of the administrative penalties, as well as collection of costs and fees. There is no adverse economic impact anticipated for individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Wayne Mueller, Texas Department of Public Safety, Office of General Counsel, P.O. Box 4087, Austin, Texas 78773-0140, (512) 424-2890.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work.

Texas Government Code, §411.004(3) is affected by this proposal.

§29.11. Entry of Appearance; Continuance.

(a) The respondent shall enter an appearance within 20 [~~30~~] days of the date on which the notice of hearing is provided to the respondent.

(b) - (c) (No change.)

(d) The failure by the respondent [~~of a party~~] to timely enter an appearance as provided in this section shall entitle the petitioner to motion the administrative court to abate the proceeding and to informally dispose of the case by default [~~a continuance if so requested~~].

(e) The notice of hearing shall include the following language in capital letters in at least 10-point boldface type: "YOUR FAILURE TO ENTER AN APPEARANCE BY FILING A WRITTEN ANSWER OR RESPONSE TO THE ALLEGATIONS CONTAINED IN THIS NOTICE WITHIN 20 [~~30~~] DAYS OF THE DATE THIS NOTICE WAS MAILED OR PERSONALLY DELIVERED TO YOU SHALL ENTITLE THE DEPARTMENT TO MOTION THE STATE OFFICE OF ADMINISTRATIVE HEARINGS TO ABATE THE CASE AND TO INFORMALLY DISPOSE OF THIS CASE BY DEFAULT. THE ALLEGATIONS AGAINST YOU AS STATED IN THE STATEMENT OF CHARGES WILL BE DEEMED ADMITTED AND AN ORDER ENFORCING THE RECOMMENDED SUSPENSION WILL BE ENTERED BY THE DIRECTOR OF THE DEPARTMENT [~~RESCHEDULE THE HEARING OF THIS CASE UNTIL A LATER DATE AS SET BY THE ADMINISTRATIVE LAW JUDGE. ANY COSTS INCURRED IN RESCHEDULING THE HEARING MAY BE ASSESSED AGAINST YOU~~]."

§29.24. Discovery--General.

(a) The scope of discovery in contested case proceedings under this chapter is governed by APT. Unless otherwise ordered by the Administrative Law Judge, requests for disclosure, [~~Responses to~~] requests for admission, written interrogatories, and requests for production that are served: [~~with the initial notice of hearing shall be due 30 days from the date notice is received by respondent.~~]

(1) prior to the time SOAH acquires jurisdiction shall be due 30 days from the date notice is received by respondent, or

(2) at or after the time SOAH acquires jurisdiction shall be due 20 days from the date notice is received by the respondent.

(b) Any time after SOAH acquires jurisdiction, a party may deliver or have delivered to any other party a written request for admissions of facts and genuineness of documents. Requests for admission and responses to Requests for admission shall be filed with SOAH only when they become the subject of discovery disputes, or along with evidentiary exhibits if they will be used as to prove admitted or deemed admitted facts [~~at the time they are mailed or personally delivered to the receiving party~~].

(c) - (d) (No change.)

§29.27. Failure To Attend Hearing; Informal Disposition [~~Default Judgment~~].

(a) If a respondent fails to appear in person or by authorized representative on the day and time set for hearing in the contested case, regardless of whether an appearance has been entered, the administrative law judge must [~~shall~~] enter an order abating the proceedings so that the department may informally dispose of the case by default [~~a default judgment in the matter adverse to the respondent~~].

(b) For purposes of this chapter, informal disposition means the removal of the matter as a contested case before the State Office of Administrative Hearings, hearing officer, or other administrative entity with jurisdiction over the case. The department will then find the respondent in default, the allegations charged will be deemed admitted, and the department will enter an order enforcing the denial, suspension, revocation, or administrative penalty that was recommended in the case [~~section, default judgment means the issuance of a proposal for decision against the respondent in which the factual allegations against the respondent in the notice of hearing are deemed admitted as true, without any requirement for additional proof to be submitted by the petitioner~~].

[~~(c) Any default judgment granted under this section will be entered on the basis of the factual allegations contained in the notice of hearing, and upon the proof of proper notice to the defaulting party opponent.~~]

(c) [~~(d)~~] After the granting of a motion for abatement [~~default judgment~~], a motion by the respondent to reopen the record may be granted if the respondent establishes that the failure to attend the hearing was neither intentional nor the result of conscious indifference.

(1) A motion to reopen the record must be filed with the judge within five (5) days of the date of the hearing. The judge shall only grant the motion to reopen the record upon a showing of good cause for the respondent's failure to attend the hearing.

(2) A motion to reopen the record is not a motion for rehearing and is not to be considered a motion for rehearing. The filing of a motion to reopen has no effect on either the statutory time periods for the filing of a motion for rehearing or on the time period for ruling on a motion for rehearing.

§29.29. Proof of Attorney's Fees, Costs, and Expenses of the Department.

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

(c) Collection. Once assessment of costs of the department have been approved by order of the director, any payments which do not cover the administrative penalty and assessed costs in full shall be applied to payment of the costs until they are paid in full, then to the outstanding balance of the administrative penalty.

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

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407103
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 424-2135

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PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 152. CORRECTIONAL INSTITUTIONS DIVISION

SUBCHAPTER D. OTHER RULES

37 TAC §152.71

The Texas Board of Criminal Justice proposes new §152.71, concerning Acceptance of Gifts and Grants Related to Buildings for Religious and Programmatic Purposes. The purpose of the new rule is to clarify procedures and language relating to gifts and grants.

Brad Livingston, Chief Financial Officer for TDCJ, has determined that for the first five years the rule will be in effect, enforcing or administering the rule does not have foreseeable implications related to costs or revenues for state or local government.

Mr. Livingston has also determined that for the first five years the rule will be in effect the anticipated public benefit as a result of enforcing the rule will be to enhance public safety. There will be no economic impact on persons required to comply with the rule. There will be no effect on small and micro-businesses.

Comments should be directed to Carl Reynolds, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Carl.Reynolds@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The new rule is proposed under Texas Government Code, §492.013(f), and §501.009.

Cross Reference to Statutes: Texas Government Code, §492.013(f), and §501.009.

§152.71. Acceptance of Gifts and Grants Related to Buildings for Religious and Programmatic Purposes.

(a) Policy. The Texas Board of Criminal Justice (TBCJ) is empowered to accept gifts and grants on behalf of the Texas Department of Criminal Justice (TDCJ) from any public or private source, for use in maintaining and improving correctional programs and services. The TBCJ also specifically and earnestly encourages the involvement of volunteers and volunteer organizations for the purpose of providing reintegration of offenders through secular and spiritual programs. Correctional facilities of the TDCJ typically need additional space or amenities in existing space to provide religious services and programs. The TBCJ and the TDCJ shall actively encourage the donation of buildings and enhancements for buildings that are related to the provision of religious and secular programs.

(b) Procedures.

(1) The TDCJ shall set up a special account for the purpose of accepting funds to provide for buildings or enhancements related to the provision of religious and secular programs. The TBCJ respects the right of contributors of funds to designate a specific project at a specific TDCJ unit for which the donated funds will be used.

(2) Subject to available State funding and approval of the Executive Director of the TDCJ, the TDCJ Facilities Division may design and build, and shall maintain the various buildings on TDCJ property for which funds have been donated. The TDCJ Facilities Division is authorized to quote a dollar amount needed to construct the building or enhancement. Alternatively, the TDCJ Executive Director may authorize the donor or the donor's designee to design and construct the donated buildings, at the donor's cost, after a determination that the donor or the donor's designee is qualified to design and construct the donated buildings in accordance with the TDCJ Administrative Plan for Capital Improvements by Donor Groups. All design and/or construction activities by the donor or donor's designee shall be coordinated through the TDCJ Facilities Division.

(3) The TDCJ shall be the owner of the donated or enhanced building and shall be responsible for the operation, control, and maintenance of the building, which shall be used for religious and other correctional programs and services. The naming of buildings obtained under this rule is subject to §155.21 of this title (relating to the Naming of TDCJ Owned Facilities).

(4) Buildings that serve as chapels provided or enhanced by donations under this policy shall provide a place for all offenders to practice their religion guaranteed by the First Amendment to the United States Constitution, in accordance with TDCJ policy and procedures on religious beliefs and practices of offenders (currently embodied in Administrative Directive - 07.30, "Procedures for Religious Programming"), as well as to participate in programs with religious and other volunteers, the TDCJ Chaplaincy staff, and other programmatic personnel.

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

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407130

Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 463-0422

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PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 405. CHARGES FOR PUBLIC RECORDS

The Texas Commission on Fire Protection (TCFP) proposes amendments to §§405.1, 405.3, 405.5, 405.7, 405.11, and 405.15, and the repeal of §405.17, concerning general, definitions, charges for providing copies of public information, access to information where copies are not requested, estimates and waivers of public information charges, the TCFP charge schedule and billing form, in Chapter 405, entitled Charges for Public Records.

The Texas Building and Procurement Commission's (TPBC) rules (1 TAC §§111.61 - 111.71) require state agencies to adopt the TBPC charge schedule for copies of public information. These proposed amendments bring TCFP into compliance with recent changes made to the TBPC charge schedule. The proposed amendments also update obsolete terminology, add TBPC language not previously incorporated, and reword for clarity. The proposed repeal of §405.17, entitled Billing Form, removes from rule format an agency standard form and adds that billing form to the agency's set of standard forms, which are internally produced.

Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendments and repeal are in effect there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed amendments and repeal are in effect, the public benefit anticipated as a result of enforcing the amendments and repeal will be greater clarity regarding TCFP charges and procedures for obtaining copies of public information. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendments and repeal.

Comments on the proposal may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

37 TAC §§405.1, 405.3, 405.5, 405.7, 405.11, 405.15

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties.

Cross reference to statute: Texas Government Code, §419.008.

§405.1. General Provisions Regarding Charges for Public Records.

(a) State agencies, including the Texas Commission on Fire Protection, are subject to the Texas Public Information Act [~~(the "Act")~~], codified at Texas Government Code, Chapter 552. The Act gives the public the right to request access to government information. The Texas Building and Procurement [~~General Services~~] Commission has adopted rules for use by each state agency in determining charges for public records. When a request for public records is made for more than 50 pages of readily available information, the Commission is authorized to establish charges up to the full cost to the Commission of providing the copies.

(b) The Texas Commission on Fire Protection has considered and conformed its rules to the Texas Building and Procurement [~~General Services~~] Commission's rules in 1 TAC [~~Title 1, Texas Administrative Code,~~] Chapter 111, for charges for public records. These rules may also be used to determine what the Commission may charge another state agency for public information. [~~The adoption of these rules by the Commission promotes uniformity throughout state government for providing public information.~~]

(c) Utilization of standard charges, as determined by the Texas Building and Procurement Commission, enhances the public's understanding of how costs for public information have been calculated. The charges for public information may not be excessive and should be reasonable and not effectively bar access to information.

(d) (No change.)

§405.3. Definitions.

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

(1) Actual cost--The sum of all direct costs plus a proportional share of overhead or indirect costs. Actual cost should be determined in accordance with rules adopted by the Texas Building and Procurement Commission. [~~Commission--The Texas Commission on Fire Protection.~~]

(2) Commission--The Texas Commission on Fire Protection. [~~Actual cost--The sum of all direct costs plus a proportional share of overhead or indirect costs. Actual cost should be determined in accordance with rules adopted by the General Services Commission.~~]

(3) Nonstandard copy--A copy of public information that is made available to a requestor in any format other than a standard-size paper copy. Diskettes, magnetic tapes, and CD-ROM[~~, and nonstandard-size paper copies~~] are examples of nonstandard copies. Paper copies larger than 8 1/2 by 14 inches (legal size) are also considered nonstandard copies.

(4) (No change.)

(5) Standard paper copy--A printed impression on one side of a piece of paper that measures up to 8 1/2 by 14 inches. Each side of a piece of paper on which an impression is made is counted as a single copy [~~single-copy~~]. A piece of paper that is printed on both sides is counted as two copies.

§405.5. Charges for Providing Copies of Public Information.

(a) Basis for charges. The charges stated in this section to recover costs associated with providing public information are based on estimated average costs to state agencies.

(b) Copy charge.

(1) Standard-size paper copy--The charge for standard-size paper copies reproduced by means of an office machine copier or a computer printer is $.10 per page or part of a page. Each side that has recorded information is considered a page.

(2) Nonstandard copy--The charges for nonstandard copies are:

(A) - (B) (No change.)

(C) Oversize Paper copy (e.g.: 11 inches by 17 inches, greenbar, bluebar, not including maps and photographs using specialty paper - see 1 TAC §111.69)--$.50/each;

(D) Rewritable CD (CD-RW)--$1.00/each [~~CD-ROM--$1.25/each~~]; [~~and~~]

(E) Non-rewritable CD (CD-R)--$1.00/each; [~~Other-actual cost.~~]

(F) Magnetic tape--actual cost;

(G) Data cartridge--actual cost;

(H) Tape cartridge--actual cost;

(I) Digital video disc (DVD)--$3.00;

(J) JAZ drive--actual cost;

(K) VHS video cassette--$2.50;

(L) Specialty paper (e.g., Mylar, blueprint, blueline, map, photographic)--actual cost; and

(M) other electronic media--actual cost.

(3) The charges in this section [~~subsection~~] are to recover the cost of materials onto which information is copied and do not reflect any additional charges that may be associated with a particular request.

(c) Personnel charge.

(1) The charge for personnel costs incurred by the Commission in processing a request for public information is $15 per hour, including fringe benefits. The personnel charge includes the actual time spent to take requests, locate and compile documents, and reproduce requested information. Where applicable, the personnel charge is prorated to cover the cost for personnel time spent [~~to take requests, locate documents, and reproduce requested information~~].

(2) A personnel charge may not be billed in connection with complying with requests that are for 50 or fewer pages of readily available information.

(3) Personnel time may not be recovered for any time spent by an attorney, legal assistant, or any other person who reviews the requested information:

(A) (No change.)

(B) to research or prepare a request for a ruling by the Attorney General's Office pursuant to Texas Government Code, §552.301 (the Public Information Act) [~~of the Public Information Act~~].

(d) Overhead charge.

(1) In response to a request for information that is not readily available or for in excess of 50 pages of readily available information, the Commission may include in the charges direct and indirect costs, in addition to the personnel charge. This overhead charge would cover such costs as depreciation of capital assets, rent, maintenance and repair, utilities and administrative overhead. If the Commission chooses to recover such costs, a charge may be made in accordance with the methodology described in paragraph (3) of this subsection. [~~Although an exact calculation of costs will vary from agency to agency, the use of a standard charge will avoid complication in calculating such costs and will provide uniformity for charges made statewide.~~]

(2) (No change.)

(3) The overhead charge may be computed at 20% of any charge made to cover personnel costs associated with a particular request. This is the standard methodology as set out in the Texas Building and Procurement Commission rules (1 TAC §111.63), which state that the use of a standard charge will avoid complication in calculating such costs and will provide uniformity for charges made statewide.

(e) (No change.)

(f) Computer resource charge.

(1) (No change.)

(2) These computer resource charges are not intended to substitute for cost recovery methodologies or charges made [~~by agencies~~] for purposes other than responding to open records requests.

(3) The charges in this subsection are averages based on a survey of state agencies with a broad range of computer capabilities. The Commission has determined that the category of computer type which most closely fits its existing system is a personal computer or LAN and has set its charge accordingly at $1.00 per clock hour in accordance with Texas Building and Procurement [~~General Services~~] Commission rules.

(4) (No change.)

(g) Programming time. If a particular request requires the services of a programmer to enter data in order to execute an existing program or to create a new program so that the requested information may be accessed and copied, the Commission may charge for the programmer's time. The average hourly salary of a programmer for the State of Texas is currently $28.50 [~~$26~~] an hour, including fringe benefits, which is the charge to be used in these rules. Any charge for programming should be prorated. Only programming services should be charged at this hourly rate. Any personnel time spent in performing services other than programming should be charged at the rate for personnel as described in subsection (c)(1) of this section.

(h) - (k) (No change.)

(l) Updating of Charges. The Commission shall reevaluate and update these charges as necessary.

§405.7. Access to Information Where Copies Are Not Requested.

(a) Access to information in standard form. The Commission may not charge for making available for inspection information maintained in standard form, with the following exceptions: [~~. If, however, information is located at a remote document storage center and the Commission will incur a retrieval charge in order to make the information available, the Commission may charge the requesting party the actual cost of retrieval.~~]

(1) if the information is located at a remote document storage center and the Commission will incur a retrieval charge in order to make the information available, the Commission may charge the requesting party the actual cost of retrieval; or

(2) if the information requested takes more than five hours to prepare for inspection; and

(A) is older than five years; or

(B) completely fills, or when assembled will completely fill, six or more archival boxes.

(b) (No change.)

§405.11. Estimates and Waivers of Public Information Charges.

(a) In accordance with 1 TAC [~~Title 1, Texas Administrative Code,~~] Chapter 111, the Commission will provide to the party requesting copies of public information [~~with~~] an itemized statement of estimated charges if charges for copies of public information or if charges for making public information available for inspection will exceed $40. The itemized statement will contain the following information: [~~Where a particular request will involve considerable time and resources to~~

process, the Commission staff will advise the requesting party of what may be involved and an estimate of date of completion. All efforts will be made to process requests as efficiently as possible so that requested information will be provided at the lowest possible charge. When the Commission charges for public information, full disclosure will be made to the requesting party as to how the charges were calculated.]

(1) the itemized charges, including any allowable charges for personnel time, overhead, copies, etc; and

(2) whether a less costly or no-cost way of viewing the information is available.

(b) The requestor must respond to the itemized statement in writing by mail, in person, by facsimile or e-mail within 10 business days after the date the statement is sent, or the request will be considered to have been automatically withdrawn by the requestor. The written response must contain one of the following statements:

(1) that the requestor will accept the estimated changes; or

(2) that the requestor is modifying the request in response to the itemized statement; or

(3) that the requestor has sent to the Texas Building and Procurement Commission a complaint alleging that the requestor has been overcharged for being provided with a copy of the public information.

(c) If the Commission cannot produce the requested public information and/or duplication within 10 business days after the date the written response from the requestor has been received, the Commission will certify to that fact in writing and set a date and hour within a reasonable time, as to when the information will be available.

(d) [(b)] The Commission will furnish public records without charge or at a reduced charge if it determines that a waiver or reduction is in the public interest because providing the copy of the information primarily benefits the general public.

(e) [(c)] If the estimated charges are $100 or more, the Commission may require a bond for the entire estimated amount or a deposit not to exceed 50 percent of the entire estimated charges.

(f) Where a particular request will involve considerable time and resources to process, the Commission staff will advise the requesting party of what may be involved and an estimated date of completion. All efforts will be made to process requests as efficiently as possible so that requested information will be provided at the lowest possible charge. When the Commission charges for public information, full disclosure will be made to the requesting party as to how the charges were calculated.

§405.15. The Texas Commission on Fire Protection Charge Schedule.

The following are [is a summary of] the charges for copies of public information according to the type of service rendered. No sales tax shall be applied to copies of public information. [: Service Rendered--Charge.]

(1) (No change.)

(2) Nonstandard [Nonstandard-size] copy.[:]

(A) Diskette--$1.00 each.[;]

(B) Audio cassette--$1.00 each.[;]

(C) Oversize Paper copy--$.50 each. [;]

(D) Rewritable CD (CD-RW) [CD-ROM]-- $1.00 [$1.25] each. [; and]

(E) Non-rewritable CD (CD-R) [Other]-- $1.00 each [Actual cost].

(F) Magnetic tape--Actual cost.

(G) Data cartridge--Actual cost.

(H) Tape cartridge--Actual cost.

(I) Digital video disc (DVD)--$3.00.

(J) JAZ drive--Actual cost.

(K) VHS video cassette--$2.50.

(L) Specialty paper (e.g., Mylar, blueprint, blueline, map, photographic)--Actual cost.

(M) other electronic media--Actual cost.

(3) Personnel charge.[:]

(A) Programming Personnel--$28.50 [$26] per hour. [;]

(B) (No change.)

(4) - (5) (No change.)

(6) Computer resource charge, PC or LAN--$1.00 per clock hour.

(7) Computer resource charge, Midsize computer--$1.50 per CPU minute.

(8) Computer resource charge, Client/Server--$2.20 per clock hour.

(9) [(7)] Miscellaneous supplies--Actual cost.

(10) [(8)] Postage and shipping--Actual cost.

(11) [(9)] Fax charge.[:]

(A) Local [local]--$.10 per page. [;]

(B) Long [long] distance, same area code--$.50 per page.[;]

(C) Long [long] distance, different area code--$1.00 per page.

(12) Outsourced/Contracted Services--Actual cost (may not include development costs).

(13) [(10)] Other costs--Actual cost.

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

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407071
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 239-4921

37 TAC §405.17

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the

Texas Commission on Fire Protection or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties.

Cross reference to statute: Texas Government Code, §419.008.

§405.17. Billing Form.

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

Filed with the Office of the Secretary of State on December 1, 2004.

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Gary L. Warren, Sr.
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Texas Commission on Fire Protection
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For further information, please call: (512) 239-4921

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CHAPTER 421. STANDARDS FOR CERTIFICATION

37 TAC §421.3

The Texas Commission on Fire Protection (TCFP) proposes an amendment to §421.3, concerning minimum standards set by the TCFP, in Chapter 421, entitled Standards for Certification. The proposed amendment adds position descriptions for Fire Officer I and Fire Officer II positions, which had not previously existed in §421.3.

Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendment is in effect there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be greater clarity regarding the position descriptions for the Fire Officer positions. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendment.

Comments on the proposal may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

The amendment is proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.032, which provides the TCFP with the authority to prescribe the means of presenting evidence of the fulfillment of the qualifications for appointment as fire protection personnel.

Cross reference to statute: Texas Government Code, §419.008 and §419.032.

§421.3. Minimum Standards Set by the Commission.

(a) (No change.)

(b) Functional position descriptions.

(1) - (7) (No change.)

(8) Fire Officer I personnel. The following general position description for Fire Officer I personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the Fire Officer I operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to the qualifications for basic structural fire protection personnel: supervise personnel, assign tasks at emergency operations, direct personnel during training activities, recommend action for member-related problems, coordinate assigned tasks and projects, deal with inquiries and concerns from members of the community, implement policies, perform routine administrative functions, perform preliminary fire investigation, secure an incident scene and preserve evidence, develop pre-incident plans, supervisory emergency operations, develop and implement action plans, deploy assigned resources, ensure a safe work environment for personnel, conduct initial accident investigation, and document an incident.

(B) Competency. A Fire Officer I must demonstrate competency in handling emergencies and supervising personnel utilizing skills in accordance with the objectives in Chapter 9 of the commission's Certification Curriculum Manual.

(9) Fire Officer II personnel. The following general position description for Fire Officer II personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the Fire Officer II operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to the qualifications for Fire Officer I personnel and Fire Instructor I personnel: motivate members for maximum job performance, evaluate job performance, deliver life safety and fire prevention education programs, prepare budget requests, news releases, and policy changes, conduct pre-incident planning, fire inspections, and fire investigations, supervise multi-unit emergency operations, identify unsafe work environments or behaviors, review injury, accident, and exposure reports.

(B) Competency. A Fire Officer II must demonstrate competency in supervising personnel and coordinating multi-unit emergency operations utilizing skills in accordance with the objectives in Chapter 9 of the commission's Certification Curriculum Manual.

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

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407073
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
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For further information, please call: (512) 239-4921

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CHAPTER 423. FIRE SUPPRESSION

The Texas Commission on Fire Protection (TCFP) proposes amendments to §423.13 and §423.211, concerning International Fire Service Accreditation Congress (IFSAC) seals, in Chapter 423, entitled Fire Suppression. The amendments are proposed in conjunction with proposed amendments to §§429.211, 431.13, 431.211, 433.7, 451.7, 451.207, 453.5, and 453.7, also published in this issue of the *Texas Register*.

This group of proposed amendments makes the procedures for obtaining an IFSAC seal consistent across disciplines; corrects the effective date of a change in qualifying requirements for individuals seeking an IFSAC seal; changes the term "First Responder" to the more commonly used term "Hazardous Materials Technician;" and makes minor grammatical changes for clarity.

Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendments are in effect there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be more standardization across the different disciplines and greater clarity regarding requirements for obtaining an IFSAC seal. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendments.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

SUBCHAPTER A. MINIMUM STANDARDS FOR STRUCTURE FIRE PROTECTION PERSONNEL CERTIFICATION

37 TAC §423.13

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as basic and advanced fire protection personnel.

Cross reference to statute: Texas Government Code, §419.008 and §419.022(a)(5).

§423.13. International Fire Service Accreditation Congress (IFSAC) Seal.

(a) Individuals holding a current [~~who hold~~] commission Structure Fire Protection Personnel certification received [~~Certification~~] prior to March 10 [~~1~~], 2003, may be granted International Fire Service Accreditation Congress (IFSAC) seals for Hazardous Materials [~~First Responder~~] Awareness, Hazardous Materials [~~First Responder~~] Operations, Fire Fighter I, and Fire Fighter II by making application to the commission for the IFSAC seals and paying applicable fees.

(b) Individuals completing a commission-approved basic fire suppression program, documenting the medical requirements outlined in subsection (d) of this section, and passing [~~who pass~~] the applicable state examination prior to March 10 [~~1~~], 2003, may be granted IFSAC seals for Hazardous Materials [~~First Responder~~] Awareness, Hazardous Materials [~~First Responder~~] Operations, Fire Fighter I, and Fire Fighter II by making application to the commission for the IFSAC seals and[~~,~~] paying applicable fees[~~, and documenting the medical requirements outlined in subsection (d) of this section~~].

(c) Individuals completing a commission-approved basic fire suppression program, meeting any other NFPA requirement, and passing [~~who pass~~] the applicable examination(s) based on the basic fire suppression curriculum [~~section of a state examination~~] on or after March 10 [~~1~~], 2003, may be granted IFSAC seal(s) for Hazardous Materials [~~First Responder~~] Awareness, Hazardous Materials [~~First Responder~~] Operations, Fire Fighter I, and/or Fire Fighter II by making application to the commission for the IFSAC seal(s) and[~~,~~] paying applicable fees [~~fee(s)~~], [~~and meeting any other NFPA requirements,~~] provided they meet the following provisions.

(1) To receive the IFSAC Hazardous Materials [~~First Responder~~] Awareness seal, the individual must:

(A) - (B) (No change.)

(2) To receive the IFSAC Hazardous Materials [~~First Responder~~] Operations seal, the individual must:

(A) (No change.)

(B) document possession of an IFSAC Hazardous Materials [~~First Responder~~] Awareness seal [~~or a passing score on the corresponding section of a commission examination~~]; and

(C) pass the Hazardous Materials [~~First Responder~~] Operations section of a commission examination.

(3) To receive the IFSAC Fire Fighter I seal, the individual must:

(A) - (B) (No change.)

(C) document possession of an IFSAC Hazardous Materials [~~First Responder~~] Awareness seal [~~or a passing score on the corresponding section of a commission examination~~]; and

(D) (No change.)

(4) To receive the IFSAC Fire Fighter II seal, the individual must:

(A) (No change.)

(B) document possession of an IFSAC Hazardous Materials [~~First Responder~~] Operations seal [~~or a passing score on the corresponding section of a commission examination~~];

(C) document possession of an IFSAC Fire Fighter I seal [~~or a passing score on the corresponding section of a commission examination and provide medical documentation as outlined in subsection (d) of this section~~]; and

(D) (No change.)

(d) (No change.)

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

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TRD-200407076

Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
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For further information, please call: (512) 239-4921

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SUBCHAPTER B. MINIMUM STANDARDS FOR AIRCRAFT RESCUE FIRE FIGHTING PERSONNEL

37 TAC §423.211

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as basic and advanced fire protection personnel.

Cross reference to statute: Texas Government Code, §419.008 and §419.022(a)(5).

§423.211. International Fire Service Accreditation Congress (IFSAC) Seal.

(a) Individuals holding acurrent commission Aircraft Rescue Fire Fighting Personnel certification received [~~Certification~~] prior to March 10 [~~1~~], 2003, may be granted an International Fire Service Accreditation Congress (IFSAC) seal as an Airport Fire Fighter by making application to the commission for the IFSAC seal and paying applicable fees.

(b) Individuals completing a commission-approved [~~commission approved~~] basic aircraft rescue fire suppression program, documenting an IFSAC seal [~~accreditation~~] for Fire Fighter II, and passing the applicable state examination may be granted an IFSAC seal as an [~~for~~] Airport Fire Fighter by making application to the commission for the IFSAC seal and paying applicable fees.

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

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Texas Commission on Fire Protection
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CHAPTER 427. TRAINING FACILITY CERTIFICATION

The Texas Commission on Fire Protection (TCFP) proposes amendments to §427.15 and §427.205, concerning testing procedures, in Chapter 427, entitled Training Facility Certification. The proposed amendments clarify that certified training facilities and academies must provide students all the materials required to meet the competencies of the curriculum.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendments are in effect there will be no significant fiscal impact on state or local governments. Mr. Soteriou has also determined that for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be greater assurance that the best-trained individuals are protecting the safety of the general population due to a more efficient and effective training and testing process. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendments.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

SUBCHAPTER A. ON-SITE CERTIFIED TRAINING PROVIDER

37 TAC §427.15

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; Texas Government Code, §419.022(a)(5), which gives the TCFP the authority to establish minimum educational standards for appointment as basic and advanced fire protection personnel; and Texas Government Code, §419.028(3), which provides the TCFP with the authority to set conditions under which training facilities operate.

Cross reference to statute: Texas Government Code, §§419.008, 419.022(a)(5), and 419.028(3).

§427.15. Testing Procedures.

(a) Training programs that are intended to satisfy the requirements for fire protection personnel certification must meet the objectives and competencies in the specific curriculums.

(b) [~~(a)~~] A system for evaluating the effectiveness of the instruction, and the comprehension of the trainee is required.

(c) [~~(b)~~] If performance skills are part of the applicable curriculum, performance testing shall be done and records kept in accordance with §427.13 of this subchapter. This will ensure that each trainee has demonstrated an ability to competently and carefully perform, individually and as a member of a team, all tasks and operations associated with the training.

(d) [~~(c)~~] Performance testing should be utilized to the maximum extent practical. The performance skills contained in the applicable curriculum shall be utilized to satisfy performance skills requirements. Each trainee shall be prepared to demonstrate any performance skill before a commission representative as may be required in Chapter 439 of this title (relating to Examinations for Certification).

(e) [~~(d)~~] Periodic written tests shall be administered at the ratio of one test per 50 hours of required training, or portion thereof. In addition to periodic tests, a comprehensive final test must be administered. A passing score shall be 70%. If a course is taught in phases, one comprehensive final test shall be administered at the completion of all phases.

(f) [~~(e)~~] Periodic and final tests shall be in addition to the commission examination required in Chapter 439 of this title (relating to Examinations for Certification).

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

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Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
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For further information, please call: (512) 239-4921

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SUBCHAPTER B. DISTANCE TRAINING PROVIDER

37 TAC §427.205

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; Texas Government Code, §419.022(a)(5), which gives the TCFP the authority to establish minimum educational standards for appointment as basic and advanced fire protection personnel; and Texas Government Code, §419.028(3), which provides the TCFP with the authority to set conditions under which training facilities operate.

Cross reference to statute: Texas Government Code, §§419.008, 419.022(a)(5), and 419.028(3).

§427.205. Testing Procedures.

(a) Training programs that are intended to satisfy the requirements for fire protection personnel certification must meet the objectives and competencies in the specific curriculums.

(b) [~~(a)~~] A system for evaluating the effectiveness of the instruction and the comprehension of the trainee is required.

(c) [~~(b)~~] If performance skills are part of the applicable curriculum, performance testing shall be done and records kept in accordance with §427.203 of this subchapter. This will ensure that each trainee has demonstrated an ability to perform competently and safely, individually or as a member of a team, all tasks and operations associated with the training.

(d) [~~(c)~~] Performance testing should be used to the maximum extent practical. The performance skills contained in the applicable curriculum shall be used to satisfy performance skill requirements. Each trainee shall be prepared to demonstrate any performance skill before a commission representative as may be required in Chapter 439 of this title (relating to Examinations for Certification).

(e) [~~(d)~~] Periodic written tests shall be administered at the ratio of one test per 50 hours of required training, or portion thereof. In addition to periodic tests, a comprehensive final test must be administered. A passing score shall be 70%. If a course is taught in phases, one comprehensive final test shall be administered at the completion of all phases.

(f) [~~(e)~~] Periodic and final tests shall be in addition to the commission examination required in Chapter 439 of this title (relating to Examinations for Certification).

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

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CHAPTER 429. MINIMUM STANDARDS FOR FIRE INSPECTORS

SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE INSPECTOR CERTIFICATION

37 TAC §429.211

The Texas Commission on Fire Protection (TCFP) proposes an amendment to §429.211, concerning International Fire Service Accreditation Congress (IFSAC) seals (new track), in Chapter 429, entitled Minimum Standards for Fire Inspectors. The amendment is proposed in conjunction with proposed amendments to §§423.13, 423.211, 431.13, 431.211, 433.7, 451.7, 451.207, 453.5, and 453.7, also published in this issue of the *Texas Register*.

This group of proposed amendments makes the procedures for obtaining an IFSAC seal consistent across disciplines; corrects the effective date of a change in qualifying requirements for individuals seeking an IFSAC seal; changes the term "First Responder" to the more commonly used term "Hazardous Materials Technician;" and makes minor grammatical changes for clarity.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendment is in effect there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be more standardization across the different disciplines and greater clarity regarding requirements for obtaining an IFSAC seal. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendment.

Comments on the proposal may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

The amendment is proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as basic and advanced fire protection personnel.

Cross reference to statute: Texas Government Code, §419.008 and §419.022(a)(5).

§429.211. International Fire Service Accreditation Congress (IFSAC) Seal--New Track.

(a) - (d) (No change.)

(e) Individuals who pass the applicable section of the state examination on or after January 1, 2005, may be granted IFSAC seal(s) [~~IFSAC(s)~~] for Inspector I, Inspector II, and/or Plans Examiner I by making application to the commission for the IFSAC seal(s) and paying the applicable fees [~~fee(s)~~], provided they meet the following provisions:

(1) To receive the IFSAC Inspector I seal, the individual must:

(A) complete [~~Complete~~] the Inspector I section of a commission-approved course; and

(B) pass [~~Pass~~] the Inspector I section of a commission examination.

(2) To receive the IFSAC Inspector II seal, the individual must:

(A) complete[~~Complete~~] the Inspector II section of a commission-approved course;

(B) document[~~Document~~] possession of an IFSAC Inspector I seal or a passing score on the corresponding section of a commission examination; and

(C) pass [~~Pass~~] the Inspector II section of a commission examination.

(3) To receive the IFSAC Plans Examiner I seal, the individual must:

(A) complete [~~Complete~~] the Plans Examiner I section of a commission-approved course; and

(B) pass[~~Pass~~] the Plans Examiner I section of a commission examination.

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

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CHAPTER 431. FIRE INVESTIGATION

The Texas Commission on Fire Protection (TCFP) proposes amendments to §§431.13, 431.203, and 431.211, concerning International Fire Service Accreditation Congress (IFSAC) seals and minimum standards for Fire Investigator certification, in Chapter 431, entitled Fire Investigation. The amendments to §431.13 and §431.211 are proposed in conjunction with proposed amendments to §§423.13, 423.211, 429.211, 433.7, 451.7, 451.207, 453.5, and 453.7, also published in this issue of the *Texas Register*. The amendment to §431.203 is proposed separately.

The proposed amendments to §431.13 and §431.211 make the procedures for obtaining an IFSAC seal consistent across disciplines; correct the effective date of a change in qualifying requirements for individuals seeking an IFSAC seal; change the term "First Responder" to the more commonly used term "Hazardous Materials Technician;" and make minor grammatical changes for clarity. The proposed amendment to §431.203 deletes subsection (e), which has become obsolete now that new higher levels of certification for Fire Investigator have been recently adopted.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendments are in effect there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be more standardization across the different disciplines and greater clarity regarding requirements for obtaining an IFSAC seal. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendments.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

SUBCHAPTER A. MINIMUM STANDARDS FOR ARSON INVESTIGATOR CERTIFICATION

37 TAC §431.13

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as basic and advanced fire protection personnel.

Cross reference to statute: Texas Government Code, §419.008 and §419.022(a)(5).

§431.13. International Fire Service Accreditation Congress (IFSAC) Seal [~~Certification~~].

(a) Individuals holding a [~~or who are eligible to hold~~] current commission Arson Investigator certification may be granted an International Fire Service Accreditation Congress (IFSAC) seal [~~Certification~~] as a Fire Investigator by making application to the commission for the IFSAC seal and paying applicable fees.

(b) Individuals completing a commission-approved [~~commission approved~~] basic fire investigator program and passing the applicable state examination may be granted an IFSAC seal [~~Certification~~] as a Fire Investigator by making application to the commission for the IFSAC seal and paying applicable fees.

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

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SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE INVESTIGATOR CERTIFICATION

37 TAC §431.203, §431.211

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as basic and advanced fire protection personnel.

Cross reference to statute: Texas Government Code, §419.008 and §419.022(a)(5).

§431.203. Minimum Standards for Fire Investigator Certification.

(a) - (d) (No change.)

[(e) ~~There are no higher levels of certification for the Fire Investigator.~~]

§431.211. International Fire Service Accreditation Congress (IFSAC) Seal [~~Seals~~]--Fire Investigator.

(a) Individuals holding a current commission Fire Investigator certification may be granted an International Fire Service Accreditation Congress (IFSAC) seal [~~Seal~~] as a Fire Investigator by making application to the commission for the IFSAC seal and paying applicable fees.

(b) Individuals completing a commission-approved [~~commission approved~~] basic fire investigator program and passing the applicable state examination may be granted an IFSAC seal [~~Seal~~] as a Fire Investigator by making application to the commission for the IFSAC seal and paying applicable fees.

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

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CHAPTER 433. MINIMUM STANDARDS FOR DRIVER/OPERATOR-PUMPER

37 TAC §433.7

The Texas Commission on Fire Protection (TCFP) proposes an amendment to §433.7, concerning International Fire Service Accreditation Congress (IFSAC), in Chapter 433, entitled minimum standards for Driver/Operator-Pumper. The amendment is proposed in conjunction with proposed amendments to §§423.13, 423.211, 429.211, 431.13, 431.211, 433.7, 451.7, 451.207, 453.5, and 453.7, also published in this issue of the *Texas Register*.

This group of proposed amendments makes the procedures for obtaining an IFSAC seal consistent across disciplines; corrects the effective date of a change in qualifying requirements for individuals seeking an IFSAC seal; changes the term "First Responder" to the more commonly used term "Hazardous Materials Technician;" and makes minor grammatical changes for clarity.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendment is in effect there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be more standardization across the different disciplines and greater clarity regarding requirements for obtaining an IFSAC seal. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendment.

Comments on the proposal may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

The amendment is proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as basic and advanced fire protection personnel.

Cross reference to statute: Texas Government Code, §419.008 and §419.022(a)(5).

§433.7. International Fire Service Accreditation Congress (IFSAC) Seal.

(a) Individuals holding a current commission Driver/Operator-Pumper certification [~~Certification~~] received prior to March 10 [~~1~~], 2003, may be granted an International Fire Service Accreditation Congress (IFSAC) seal as a Driver/Operator-Pumper by making application to the commission for the IFSAC seal and paying the applicable fees.

(b) Individuals completing a commission-approved [~~commission approved~~] driver/operator-pumper program; documenting, as a minimum, an IFSAC seal [~~accreditation~~] for Fire Fighter I; [~~as a minimum;~~] and passing the applicable state examination may be granted an IFSAC seal as a [~~for~~] Driver/Operator-Pumper by making application to the commission for the IFSAC seal and paying applicable fees.

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

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CHAPTER 435. FIRE FIGHTER SAFETY

37 TAC §435.11

The Texas Commission on Fire Protection (TCFP) proposes an amendment to §435.11, concerning incident management systems (IMS), in Chapter 435, entitled Fire Fighter Safety. The proposed amendment adds a new subsection (d), which recommends that departments follow the National Incident Management System (NIMS) when developing their incident management systems.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendment is in effect there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be more standardization with the National Incident Management System by regulated fire department incident management systems across the state. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendment.

Comments on the proposal may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

The amendment is proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.044, which provides the TCFP with the authority to establish minimum standards for regulated fire department incident management systems.

Cross reference to statute: Texas Government Code, §419.008 and §419.044.

§435.11. Incident Management System (IMS).

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

(d) The Commission recommends departments follow the National Incident Management System (NIMS) when developing their incident management system.

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

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CHAPTER 437. FEES

37 TAC §437.5, §437.15

The Texas Commission on Fire Protection (TCFP) proposes amendments to §437.5 and §437.15, concerning renewal fees, in Chapter 437, entitled Fees. The proposed amendments add the word "non-refundable" to the sections of the rules that deal with renewal fees, late fees charged in connection with renewal fees, and fees for IFSAC seals issued by the TCFP.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendments are in effect there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be a reduction in staff workload due to the elimination of processing and mailing out refunds for these fees, resulting in an increase in staff output in other areas. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendments.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.026, which provides the TCFP with the authority to set and collect fees for certifications and certification renewals.

Cross reference to statute: Texas Government Code, §419.008 and §419.026.

§437.5. Renewal Fees.

(a) A $20 non-refundable [~~The~~] annual renewal fee shall be [~~$20 and shall be~~] assessed for each certified individual and certified training facility. If an individual or certified training facility holds more than one certificate, the commission may collect only one $20 renewal fee which will renew all certificates held by the individual or certified training facility.

(b) - (l) (No change.)

(m) All certification renewal fees received from one to 30 days after the renewal date posted on the renewal notice will cause the individual or entity responsible for payment to be assessed a non-refundable$10 late fee in addition to the renewal fee for each individual for which a renewal fee was due.

(n) All certification renewal fees received more than 30 days after the renewal date posted on the renewal notice will cause the individual or entity responsible for payment to be assessed a non-refundable $20 late fee in addition to the renewal fee for each individual for which a renewal fee was due.

(o) In addition to any non-refundable late fee(s) assessed for certification renewal, the commission may hold an informal conference to determine, if any, further action(s) are to be taken.

(p) (No change.)

§437.15. International Fire Service Accreditation Congress (IFSAC) Seal Fees.

A non-refundable $5.00 fee shall be charged for each IFSAC seal issued by the commission.

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

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CHAPTER 439. EXAMINATIONS FOR CERTIFICATION

SUBCHAPTER A. EXAMINATIONS FOR ON-SITE DELIVERY TRAINING

37 TAC §439.5

The Texas Commission on Fire Protection (TCFP) proposes an amendment to §439.5, concerning testing procedures, in Chapter 439, entitled Examinations for Certification. The proposed amendment revises subsection (c) in order to address a situation in which an individual passes the state certification examination but fails to pass the International Fire Service Accreditation Congress (IFSAC) portion of that test. The amendment extends to two years the time in which an individual may retest on an IFSAC portion.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendment is in effect there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be a more equitable procedure for addressing the situation previously described in this preamble. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendment

Comments on the proposal may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

The amendment is proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as basic and advanced fire protection personnel.

Cross reference to statute: Texas Government Code, §419.008 and §419.022(a)(5).

§439.5. Procedures.

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

(c) An individual who fails to pass a commission written examination for state certification [~~or section thereof~~] will be given one additional opportunity to pass the examination or section thereof. This opportunity must be exercised within 180 days after the date of the first failure. An individual who passes the applicable state certification examination but fails to pass a section thereof for IFSAC seal(s) will be given one additional opportunity to pass the examination or section thereof. This opportunity must be exercised within two years after the date of the first attempt. An examinee who fails to pass the examination within the required time may not sit for the same examination again until the examinee has re-qualified by repeating the curriculum applicable to that examination.

(d) - (t) (No change.)

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

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CHAPTER 451. FIRE OFFICER

The Texas Commission on Fire Protection (TCFP) proposes amendments to §451.7 and §451.207, concerning International Fire Service Accreditation Congress (IFSAC) seals, in Chapter 423, entitled Fire Suppression. The amendments are proposed in conjunction with proposed amendments to §§423.13, 423.211, 429.211, 431.13, 431.211, 433.7, 453.5, and 453.7, also published in this issue of the *Texas Register*.

This group of proposed amendments makes the procedures for obtaining an IFSAC seal consistent across disciplines; corrects the effective date of a change in qualifying requirements for individuals seeking an IFSAC seal; changes the term "First Responder" to the more commonly used term "Hazardous Materials Technician;" and makes minor grammatical changes for clarity.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendments are in effect there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be more standardization across the different disciplines and greater clarity regarding requirements for obtaining an IFSAC seal. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendments.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

SUBCHAPTER A. MINIMUM STANDARDS FOR FIRE OFFICER I

37 TAC §451.7

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as basic and advanced fire protection personnel.

Cross reference to statute: Texas Government Code, §419.008 and §419.022(a)(5).

§451.7. International Fire Service Accreditation Congress (IFSAC) Seal.

(a) Individuals holding a current commission Fire Officer I certification receivedprior to March 10 [~~1~~], 2003, may be granted an International Fire Service Accreditation Congress (IFSAC) seal as a Fire Officer I by making application to the commission for the IFSAC seal and paying applicable fees.

(b) Individuals completing a commission-approved Fire Officer I program, documenting an IFSAC seal for Fire Fighter II, and passing the applicable state examination may be granted an IFSAC seal as a [~~for~~] Fire Officer I by making application to the commission for the IFSAC seal and paying applicable fees.[~~:~~]

[~~(1) completing a commission approved Fire Officer I program;~~]

[~~(2) passing the applicable state examination;~~]

[~~(3) documenting IFSAC accreditatino for Fire Fighter II; and~~]

[~~(4) making application to the commission.~~]

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

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SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE OFFICER II

37 TAC §451.207

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as basic and advanced fire protection personnel.

Cross reference to statute: Texas Government Code, §419.008 and §419.022(a)(5).

§451.207. International Fire Service Accreditation Congress (IFSAC) Seal.

(a) Individuals holding a current commission Fire Officer II certification received prior to March 10 [~~1~~], 2003, may be granted an International Fire Service Accreditation Congress (IFSAC) seal as a Fire Officer II by making application to the commission for the IFSAC seal and paying applicable fees.

(b) Individuals completing a commission-approved Fire Officer II program; documenting IFSAC seals for Fire Fighter II and Fire Officer I; holding, as a minimum, intermediate fire service instructor certification, intermediate fire education specialist certification or associate instructor certification through the commission, or documenting an IFSAC seal as an Instructor I; and passing the applicable state examination may be granted an IFSAC seal as a Fire Officer II by making application to the commission for the IFSAC seal and paying applicable fees.[~~:~~]

[~~(1) completing a commission approved Fire Officer II program;~~]

[~~(2) passing the applicable state examination;~~]

[~~(3) documenting IFSAC accreditation for Fire Fighter II and Fire Officer I;~~]

[~~(4) holding, as a minimum, intermediate fire service instructor certification; intermediate fire education specialist certification or associate instructor certification through the commission, or documenting IFSAC accreditation as an Instructor I; and~~]

[~~(5) making application to the commission for the IFSAC seal and paying applicable fees.~~]

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

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CHAPTER 453. MINIMUM STANDARDS FOR HAZARDOUS MATERIALS TECHNICIAN

37 TAC §453.5, §453.7

The Texas Commission on Fire Protection (TCFP) proposes amendments to §453.5 and §453.7, concerning International Fire Service Accreditation Congress (IFSAC) seals, in Chapter 453, entitled Minimum Standards for Hazardous Material Technician. The amendments are proposed in conjunction with proposed amendments to §§423.13, 423.211, 429.211, 431.13,

431.211, 433.7, 451.7, and 451.207, also published in this issue of the *Texas Register*.

This group of proposed amendments makes the procedures for obtaining an IFSAC seal consistent across disciplines; corrects the effective date of a change in qualifying requirements for individuals seeking an IFSAC seal; changes the term "First Responder" to the more commonly used term "Hazardous Materials Technician;" and makes minor grammatical changes for clarity.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendments are in effect there will be no significant fiscal impact on state or local governments. Mr. Soteriou has also determined that for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be more standardization across the different disciplines and greater clarity regarding requirements for obtaining an IFSAC seal. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendments.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022(a)(5), which provides the TCFP with the authority to establish minimum educational standards for appointment as basic and advanced fire protection personnel.

Cross reference to statute: Texas Government Code, §419.008 and §419.022(a)(5).

§453.5. Examination Requirements.

(a) The written examination requirements of Chapter 439 of this title (relating to Examinations for Certification) must be met in order to receive Hazardous Materials Technician certification. [~~A hazardous materials technician is defined as an individual who performs emergency response to an occurrence which results in, or is likely to result in, an uncontrolled release of a hazardous substance where there is a potential safety or health hazard (i.e. fire, explosion, or chemical exposure). A hazardous materials technician responds to such occurrences and is expected to perform work to handle and control (stop, confine, orextinguish) actual or potential leaks or spills. The hazardous materials technician assumes a more aggressive role than a first responder at the operations level in that the hazardous materials technician will approach the point of release. The hazardous materials technician is expected to use specialized chemical protective clothing (CPC) and specialized control equipment.~~]

(b) (No change.)

§453.7. International Fire Service Accreditation Congress (IFSAC) Seal.

(a) Individuals holding a current commission Hazardous Materials Technician certification [~~Certification~~] received prior to March 10 [~~1~~], 2003, may be granted an International Fire Service Accreditation Congress (IFSAC) seal as a Hazardous Materials Technician by making application to the commission for the IFSAC seal and paying applicable fees.

(b) Individuals completing a commission-approved [~~commission approved~~] hazardous materials technician program, documenting anIFSAC seal [~~accreditation~~] for Hazardous Materials [~~First Responder~~] Awareness and Hazardous Materials [~~First Responder~~] Operations, and passing the applicable state examination may be granted an IFSAC seal as a [~~for~~] Hazardous Materials Technician by making application to the commission for the IFSAC seal and paying applicable fees.

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

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407087
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 239-4921

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 813. FOOD STAMP EMPLOYMENT AND TRAINING

The Commission proposes the repeal of the following section of Chapter 813 relating to Food Stamp Employment and Training:

Subchapter B. Access to Employment and Training Activities and Support Services, §813.13

The Commission proposes the following new sections to Chapter 813 relating to Food Stamp Employment and Training:

Subchapter B. Access to Employment and Training Activities and Support Services, §813.13 and §813.14

Subchapter D. Allowable Activities, §813.33

The Commission proposes amendments to the following sections of Chapter 813:

Subchapter A. General Provisions, §§813.1-813.3

Subchapter B. Access to Employment and Training Activities and Support Services, §813.11 and §813.12

Subchapter D. Allowable Activities, §813.31 and §813.32

Subchapter E. Support Services for Participants, §813.41

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART V. FINAL RULES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed Chapter 813 rule changes is, in part, to improve FSE&T service delivery, based on available funding, by expanding services statewide.

Additionally, the proposed rule changes:

(1) establish monthly eligibility verification requirements for all FSE&T participants;

(2) require Local Workforce Development Boards (Boards) to coordinate with the Texas Health and Human Services Commission (HHSC) to provide consistent and streamlined FSE&T services;

(3) establish FSE&T good cause procedures that mirror Choices good cause procedures set forth in 40 TAC Chapter 811; and

(4) allow Boards the flexibility, based on available funding, to provide post-employment services for food stamp recipients who become employed.

HHSC determines food stamp eligibility and who will be certified as a food stamp household member, in accordance with federal regulations.

As part of the food stamp certification process, HHSC also determines whether a food stamp household member will be registered for work and required to participate in FSE&T services or will be exempt from FSE&T participation. HHSC classifies food stamp household members as either:

(1) Mandatory work registrants-individuals who are required to register for work, that include:

* Able-Bodied Adults Without Dependents (ABAWDs) between 18 and 50 years of age; and

* Food stamp household members who are 16 to 59 years of age, may have dependents, and are not exempt; or

(2) Exempt recipients-individuals who are not required to register for work because they meet federal exemption criteria. Federal exemptions include, but are not limited to, a parent or other household member responsible for the care of a dependent child under six; an individual physically or mentally unfit for employment; a regular participant in a drug addiction or alcoholic treatment and rehabilitation program; or an individual who is employed or self-employed at least 30 hours per week.

Currently, Commission rule classifies food stamp household members who are 16 to 59 years of age, may have dependents, and are not exempt, as FSE&T General Population. The Commission proposes to expand the definition of FSE&T General Population to include exempt recipients.

In Federal Fiscal Year 2004 (FFY'04), Boards were allowed to provide FSE&T services only to mandatory work registrants (i.e., ABAWDs and the FSE&T General Population) in "active" FSE&T counties. In the remaining FSE&T counties, Boards were not allowed to provide FSE&T services. The proposed rules, through the creation of full-service counties (referred to as active counties in current rule) and minimum-service counties, give Boards the flexibility to provide FSE&T services in counties where the services previously were not available. FSE&T services will be provided through Texas Workforce Centers, including satellite offices, in full-service counties and minimum-service counties, based on available funding.

Full-Service Counties

Mandatory work registrants who reside in full-service counties are required to participate in FSE&T services, if outreached. Exempt recipients who reside in full-service counties may voluntarily participate in FSE&T services. Full-service counties are those in which:

(1) ABAWDs, who are not working at least 20 hours per week, are outreached and receive FSE&T services;

(2) the FSE&T General Population receives FSE&T services based on available funding;

(3) mandatory work registrants shall be sanctioned (i.e., food stamp benefits are denied) for failure to cooperate with FSE&T requirements; and

(4) exempt recipients who voluntarily participate in FSE&T services shall not be sanctioned for failure to cooperate with FSE&T requirements.

Minimum-Service Counties

Mandatory work registrants and exempt recipients who reside in minimum-service counties are not required to participate in FSE&T services; however, they may voluntarily participate. Minimum-service counties are those in which:

(1) food stamp recipients (i.e., mandatory or exempt) may volunteer to participate in FSE&T services;

(2) Boards may provide services to food stamp recipients based on available funds;

(3) outreach is not conducted; and

(4) food stamp recipients (i.e., mandatory or exempt) who voluntarily participate in FSE&T services shall not be sanctioned for failure to cooperate with FSE&T program requirements.

The Commission also proposes amendments throughout Chapter 813 to:

(1) reflect the name change from the Texas Department of Human Services (DHS) to the Texas Health and Human Services Commission (HHSC) as required by House Bill 2292, enacted by the 78th Texas Legislature, Regular Session;

(2) change all references from E&T to FSE&T to align with other Commission policy; and

(3) improve clarity.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS

§813.1. Purpose

The Commission proposes modifying §813.1 by making technical amendments and adding language stating that the rules may be cited as the FSE&T rules.

§813.2. Definitions

The Commission proposes amending §813.2 by clarifying or correcting existing terms and adding definitions for exempt recipient, full-service counties, HHSC, minimum-service counties, and volunteer.

Section 813.2(1) clarifies the definition of ABAWD by stating that an ABAWD is a food stamp household member determined by HHSC to be a mandatory work registrant. Section 813.2(1)(D) is amended to add the phrase "at least 20 hours per week," in accordance with federal regulations, and corrects the current rule cite of 75 CFR §273.24 to 7 U.S.C. §2015(o)(2)(A)-(B).

Section 813.2(2) is added to define an exempt recipient as a General Population individual who is not required to participate in FSE&T services.

Section 813.2(5) is added to define full-service counties (referred to as active counties in §813.11(c) of current rule) as counties in which Boards must ensure that: ABAWDs who are not working at least 20 hours per week are outreached and receive FSE&T services; the FSE&T General Population receives FSE&T services, based on available funding; mandatory recipients are sanctioned for failure to cooperate with FSE&T requirements; and exempt recipients who voluntarily participate with FSE&T requirements are not sanctioned for failure to cooperate.

Section 813.2(6) is amended to clarify the definition of General Population.

The Commission proposes removing current §813.2(7), the definition of non-public assistance food stamp recipients, which is no longer relevant in this chapter.

The Commission proposes adding new §813.2(7) to define HHSC.

Section 813.2(8) is amended to clarify the definition of mandatory work registrant.

Section 813.2(9) is added to define minimum-service counties as counties in which food stamp recipients (i.e., mandatory or exempt) may volunteer to participate in FSE&T services; Boards may provide services to mandatory or exempt recipients, based on available funding, but are not required to do so; outreach is not conducted; and food stamp recipients (i.e., mandatory and exempt) who voluntarily participate in FSE&T services are not sanctioned for failure to cooperate.

The definition of nonprofit organization is unchanged, but renumbered as §813.2(10), in order to be listed in alphabetical order.

Section 813.2(11) is added to define volunteer as an individual who is not required to participate, but who voluntarily participates, in FSE&T services, and includes exempt recipients in full-service counties and exempt recipients and mandatory work registrants in minimum-service counties.

§813.3. General Board Responsibilities

The Commission proposes adding §813.3(a)(1) to require that Boards verify food stamp eligibility for mandatory work registrants and exempt recipients who voluntarily participate in FSE&T services before providing access to services in order to ensure that only food stamp recipients receive FSE&T-funded services. Currently, Texas Workforce Center staff is required to verify food stamp eligibility on a monthly basis for ABAWDs only and is not required to conduct such monthly verification for FSE&T General Population participants. Allowing General Population participants to continue receiving services without verifying eligibility can result in disallowed costs being incurred for providing services to an ineligible population. Therefore, the Commission proposes to require verification of any participant's eligibility for food stamp benefits during the month in which FSE&T services are provided. Section 813.3(a)(2) is added to require that Boards ensure that mandatory work registrants, and exempt recipients who volunteer, participate in approved FSE&T activities. These activities must meet the needs of employers and prepare the participants for unsubsidized employment.

The reference in §813.3(b) to Texas Government Code Section 2308.251 et seq. is corrected to reference Texas Government Code Sections 2308.301-2308.3165.

Proposed §813.3(d) is added to require that Boards coordinate with HHSC regarding referrals, good cause, sanction procedures, and fair hearings or appeals, on a regular and ongoing basis, as determined by the Boards. For example, Boards may coordinate with HHSC on special circumstances or service delivery models that HHSC hearing officers must be aware of for appeal determinations; the appeals process and the transfer of client information, including documentation and justification of a sanction request; the process for HHSC to take action on sanction requests submitted by the Boards; or the process for Board submission of reconsiderations and the HHSC process for changing the mandatory work code to exempt status.

SUBCHAPTER B. ACCESS TO EMPLOYMENT AND TRAINING ACTIVITIES AND SUPPORT SERVICES

§813.11. Board Responsibilities Regarding Access to FSE&T Activities and Support Services

In §813.11(b)(4), the Commission proposes deleting the word "family" from the term "family employment plan" because it is incorrect.

Section 813.11(b)(5) removes the term "mandatory work registrant" because Boards are required to monitor program requirements and activities for all food stamp recipients, including exempt recipients who voluntarily participate.

The Commission proposes amending §813.11(c) to delete the obsolete reference to "active Food Stamp E&T" counties and replace it with the term "full-service FSE&T" counties.

The Commission also proposes amending §813.11 by adding subsections (e)-(g) to specify Board requirements for ensuring that employment and training activities comply with the Fair Labor Standards Act (FLSA), information located in current rule under §813.12, Participant Responsibilities. Other proposed amendments to §813.11(e)-(g) remove references to "temporary cash assistance" because temporary cash assistance is not used to determine the number of hours of participation under FLSA.

§813.12. Participant Responsibilities

The Commission proposes amending §813.12 by including exempt recipients who voluntarily participate in FSE&T services. Section §813.12(2) is amended to change the reference to §813.13 to new §813.14. Additionally, §813.12(5) is amended by replacing the term "component activity" with the word "activity" to better align with Choices terminology in 40 TAC Chapter 811. The Commission further proposes amending §813.12 by removing §813.12(b)-(d) regarding Board compliance with FLSA, which is incorrectly placed in current rule under Participant Responsibilities. The Commission proposes redesignating it as §813.11(e)-(g) under Board Responsibilities Regarding Access to FSE&T Activities and Support Services.

§813.13. Good Cause for Mandatory Work Registrants and Exempt Recipients Who Voluntarily Participate in FSE&T Services

The Commission proposes the repeal of current §813.13 and proposes new §813.13 to establish good cause procedures for FSE&T participants. Federal regulations give states authority to determine and grant good cause when a food stamp recipient fails or refuses to comply with Food Stamp Program work requirements. Likewise, Temporary Assistance for Needy Families (TANF) regulations give states the authority to grant good cause when a TANF recipient fails or refuses to comply with TANF/Choices work requirements. Currently, FSE&T participants receive individual exemptions (i.e., long-term circumstances that prevent participation in FSE&T) or temporary exemptions (i.e., temporary circumstances that

prevent participation for up to 60 days). In order to provide consistency and support integration of workforce services, the Commission proposes the implementation of a good cause system for FSE&T mandatory work registrants who are unable to participate in FSE&T services because of circumstances that preclude participation. The proposed FSE&T good cause requirements are closely aligned with the current Choices good cause procedures in 40 TAC Chapter 811, and will eliminate temporary and individual exemptions.

§813.14. Special Provisions Regarding Sanctions for Noncooperation

The Commission proposes adding new §813.14, Special Provisions Regarding Sanctions for Noncooperation, to better align with Choices in 40 TAC Chapter 811.

SUBCHAPTER D. ALLOWABLE ACTIVITIES

§813.31. Activities for Mandatory Work Registrants and Exempt Recipients Who Voluntarily Participate in FSE&T Services

The Commission proposes amending §813.31 by adding exempt recipients who voluntarily participate in FSE&T services.

The Commission further proposes amending §813.31(1)(B)(i) by changing the redundant term "ABAWD mandatory work registrant" to "ABAWD," and by changing the word "may" to "shall" in §813.31(1)(B)(i) and (ii). Additionally, to better align with Choices terminology in 40 TAC Chapter 811, the term "component activity" is changed to "activity" in §813.31(1)(B)(i).

The Commission also proposes removing current §813.31(1)(B)(iii) regarding Project Reintegration of Offenders (Project RIO) because Project RIO services no longer use FSE&T funds as a method of finance. However, Project RIO participants are still eligible to be co-enrolled in FSE&T, and if so, must meet all applicable FSE&T requirements.

In renumbered §813.31(1)(B)(iii), the term "components" is changed to "activities."

Section 813.31(2)(B) is modified by deleting the word "family" from the term "family employment plan" because it is incorrect.

Section 813.31(3)(D) is modified to change the obsolete reference to "proprietary school" to "career school or college," in accordance with Senate Bills 280 and 1343, 78th Texas Legislature, Regular Session.

Proposed §813.31(4) adds a reference to 7 U.S.C. §2015(d)(4)(B)(iv), which delineates work experience.

Proposed §813.31(6) references the term "FSE&T state plan of operations" to provide consistent terminology throughout the chapter.

§813.32. FSE&T Activities for ABAWDs

The Commission proposes technical amendments to §813.32(a) to improve clarity. Section 813.32(b) clarifies that ABAWDs who become employed at least 20 hours per week have fulfilled their work requirement under 7 U.S.C. §2015(o)(2)(A) and are no longer required to participate in FSE&T services. Additionally, subsection (b) adds the requirement that Boards shall ensure that HHSC is notified when an ABAWD obtains employment.

§813.33. Post-Employment Services

The Commission proposes new §813.33 to add post-employment services for which mandatory and exempt food stamp recipients may volunteer to receive. In FFY'04 and prior years, post-employment services were not offered to mandatory work registrants or exempt food stamp recipients who became employed. In many instances, mandatory work registrants who became employed continued to receive food stamp benefits because they did not earn enough wages to be self-sufficient. In an effort to promote continued skills enhancement and career ladder progression for all food stamp recipients who become employed, Boards, based on available funding, will be allowed to offer post-employment services.

SUBCHAPTER E. SUPPORT SERVICES FOR PARTICIPANTS

§813.41. Provision of FSE&T Support Services

The Commission proposes amending §813.41 to include exempt recipients who voluntarily participate in FSE&T services. Current §813.41(b)(1) and (2) is renumbered as proposed §813.41(a)(1)(A) and (B) and details the provision of support services for mandatory work registrants. Proposed new §813.41(a)(2)(A) and (B) details the provision of support services for exempt recipients who voluntarily participate in FSE&T services. Current §813.41(c) is renumbered as §813.41(b) and is amended to add exempt recipients who voluntarily participate in FSE&T services. The Commission further proposes in §813.41(b) that Boards shall ensure that costs to provide the transportation services are reasonable and necessary for participation in FSE&T activities and paid for based on methods and amounts determined by each Board.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules. The proposed rules expand the availability of FSE&T however, the rules do not mandate the provision of additional FSE&T services in minimum-service counties, or the provision of post-employment services. Boards merely have increased flexibility to provide FSE&T services, based on available funding. Because the FSE&T allocation will not change based on these rules, there is no net increase in fiscal impact.

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to persons required to comply with the rules.

Mr. Townsend has also determined that there is no anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering these rules because they are not regulated by this rule.

Mark Hughes, Director of Labor Market Information, has determined that there is no significant negative impact upon employment conditions in this state as a result of the proposed rules. Mr. Hughes does not expect any significant impact upon overall

employment conditions in the state as a result of the proposed rules.

Luis M. Macias, Director of Workforce Development Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be to provide activities and services in a more flexible manner to meet the needs of individuals receiving FSE&T services to enable these individuals to become self-sufficient and independent of public assistance and to provide a skilled workforce for employers. Additionally, the public will benefit from the continued integration of FSE&T activities and services with the Texas workforce system.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, the Commission sought the involvement of each of Texas' 28 Boards and the Texas Association of Workforce Boards, in addition to discussing the proposed changes at five regional workshops.

The Commission provided the concept brief to each of these groups for consideration and review. During the rulemaking process, the Commission considered all information gathered in order to develop a rule that provides clear and concise direction to all parties involved.

Comments on the proposal may be submitted to TWC Rules Comments, Policy and Development, 101 East 15th Street, Room 440T, Austin, Texas 78778; fax 512-463-7379; or e-mailed to TWCRulesComments@twc.state.tx.us. The Commission must receive comments no later than 30 days from the date this proposal is published in the *Texas Register*.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§813.1 - 813.3

The amendments are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed amendments will affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Human Resources Code, Chapter 33, regarding nutrition assistance.

§813.1. Purpose.

The purpose of Food Stamp Employment and Training (FSE&T)[~~(E&T)~~] activities and support services is to assist [~~non-public assistance~~] food stamp recipients who are not receiving Temporary Assistance for Needy Families in entering employment through participation in allowable job search, training, education, or workfare activities that[~~which~~] promote self-sufficiency. These rules may be cited as the FSE&T rules.

§813.2. Definitions.

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

(1) ABAWD--a [~~non-exempt~~] food stamp household member who is determined by the Texas Health and Human Services Commission to be a mandatory work registrant and is:

(A) classified as an able-bodied adult;

(B) at least 18[~~eighteen (18)~~] but less than 50[~~fifty (50)~~] years of age;

(C) without dependents; and

(D) subject to a limitation on the receipt of food stamp[~~Food Stamp~~] benefits for three months out of 36[~~thirty-six~~] months if the person does not work at least 20 hours per week or participate in employment and training activities as specified in 7 U.S.C. §2015(o)(2)(A)-(B).[~~75 CFR, §273.24.~~]

(2) Exempt recipient--an individual who is part of the General Population and is not required to participate in FSE&T services, as set forth in 7 U.S.C. §2015(d)(2).

(3) [~~(2)~~] FSE&T[~~E&T~~] activities--[~~the~~] Food Stamp Employment and Training activities as specified in §813.31 of this chapter.[~~§§800.31 and 813.32.~~]

(4) [~~(3)~~] FSE&T[~~E&T~~] support services--[~~the~~] Food Stamp Employment and Training support services as specified in §813.41 of this chapter.

(5) Full-service counties--counties in which Boards ensure that:

(A) ABAWDs, who are not working at least 20 hours per week, are outreached and receive FSE&T services;

(B) the FSE&T General Population receives FSE&T services based on available funding;

(C) mandatory work registrants shall be sanctioned (i.e., food stamp benefits are denied) for failure to cooperate with FSE&T requirements; and

(D) exempt recipients who voluntarily participate in FSE&T services shall not be sanctioned for failure to cooperate with FSE&T requirements.

(6) [~~(4)~~] General Population--a mandatory or exempt[~~non-exempt~~] food stamp household member who is:

(A) at least 16[~~sixteen (16)~~] but less than 60[~~sixty (60)~~] years of age; and

(B) not classified as an ABAWD.

(7) HHSC--the Texas Health and Human Services Commission

(8) [~~(5)~~] Mandatory work registrant--a [~~non-exempt~~] food stamp household member who is required to register for FSE&T[~~employment~~] services, and is[~~either~~]:

(A) [~~a person~~] classified as General Population; or

(B) an ABAWD.

(9) Minimum-service counties--counties in which:

(A) food stamp recipients (i.e., mandatory or exempt) may volunteer to participate in FSE&T services;

(B) Boards may provide services to food stamp recipients based on available funds;

(C) outreach is not conducted; and

(D) food stamp recipients (i.e., mandatory or exempt) who voluntarily participate in FSE&T services shall not be sanctioned for failure to cooperate with FSE&T program requirements.

(10) Nonprofit organization--any corporation, trust, association, cooperative, or other organization that is operated primarily for scientific, educational service, charitable, or similar purpose in the public interest; is not organized primarily for profit; and uses its net proceeds to maintain, improve, or expand its operations.

[(6) Non-public assistance food stamp recipients--a classification by the Department of Human Services for a food stamp household in which all or some of its members do not receive Temporary Assistance for Needy Families (TANF) or Refugee Cash Assistance.]

[(7) Nonprofit organization--any corporation, trust, association, cooperative, or other organization that is operated primarily for scientific, educational service, charitable, or similar purpose in the public interest; is not organized primarily for-profit; and uses its net proceeds to maintain, improve, or expand its operations.]

(11) Volunteer--an individual who is not required to participate, but who voluntarily participates, in FSE&T services, including:

(A) exempt recipients in full-service counties; and

(B) exempt recipients and mandatory work registrants in minimum-service counties.

(12) [(8)] Workfare--a work-based activity that consists of [, which is] placement of an ABAWD with a public or private nonprofit entity in an unpaid job assignment for the number of hours per month equal to an ABAWD's monthly household food stamp [monthly] allotment amount divided by the federal minimum wage.

§813.3. General Board Responsibilities.

(a) Role of Boards. A Board shall:

(1) ensure that food stamp eligibility is verified monthly before providing FSE&T services for mandatory work registrants and exempt recipients who voluntarily participate in FSE&T services; and

(2) ensure that mandatory work registrants, and exempt recipients who volunteer, participate in allowable FSE&T activities. The allowable activities shall meet the needs of employers and prepare the mandatory work registrants and exempt recipients who voluntarily participate in FSE&T services for unsubsidized employment.

[(a) Role of Boards. A Board shall ensure that mandatory work registrants participate in approved E&T activities. The approved activities should meet the needs of local employers and prepare the mandatory work registrants for unsubsidized employment.]

(b) Board Planning. A Board shall develop, amend, and modify its integrated workforce training and services plan to incorporate and coordinate the design and management of the delivery of FSE&T [E&T] activities and support services with the delivery of other workforce employment, training, and educational services identified in Texas Government Code Sections 2308.301-2308.3165 [Section 2308.251 et seq.,] as well as other training and services included in the One-Stop Service Delivery Network as set forth in Chapter 801 of this title (relating to Local Workforce Development Boards).

(c) Board Management. Pursuant to this chapter, and Chapter[Chapters] 801 [and 813] of this title (relating to Local Workforce Development Boards), a Board shall coordinate workforce training and services for its[the Board's] local workforce development area and shall incorporate and coordinate the management and strategy for FSE&T[E&T] activities and support services into the comprehensive One-Stop Service Delivery Network provided to help low-income families as they move toward self-sufficiency.

(d) Coordination with HHSC. Boards shall coordinate with HHSC on a regular and ongoing basis, as determined by the Boards, regarding referrals, good cause, sanction procedures, and fair hearings or appeals.

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

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407128
Donna Garrett
Deputy Director for Policy and Development
Texas Workforce Commission
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 475-0829

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SUBCHAPTER B. ACCESS TO EMPLOYMENT AND TRAINING ACTIVITIES AND SUPPORT SERVICES

40 TAC §§813.11 - 813.14

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules will affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Human Resources Code, Chapter 33, regarding nutrition assistance.

§813.11. Board Responsibilities Regarding Access to FSE&T[E&T] Activities and Support Services.

(a) A Board shall ensure that allowable FSE&T activities and support services, as set forth in Subchapters D and E, respectively, of this chapter, are provided as specified in the annual state plan of operations[operation] approved by the United States Department of Agriculture, to individuals who are:

(1) classified as the General Population; or[and]

(2) ABAWDs.

(b) A Board shall ensure that the monitoring of FSE&T[program] requirements and participant activities is ongoing and frequent, as determined appropriate by the Board, and consists of :[the following:]

(1) tracking and reporting FSE&T[component activities] participation hours;

(2) tracking and reporting support services hours;

(3) determining and arranging for any intervention needed to assist the individual in complying with FSE&T[the E&T] service requirements;

(4) ensuring progress toward achieving the goals and objectives in the [family] employment plan; and

(5) monitoring all other [mandatory work registrant] requirements.

(c) A Board shall ensure that all ABAWDs in full-service FSE&T[active Food Stamp E&T] counties are provided with an offer of a work activity within 10 calendar days from the date of referral from HHSC[the Department of Human Services].

(d) A Board shall ensure that HHSC is notified[notification is made] in a timely manner[, to the Department of Human Services] if a mandatory work registrant fails to comply with participant responsibilities,[Participant Responsibilities] as set forth in §813.12 of this subchapter.

(e) A Board shall ensure that employment and training activities are conducted in compliance with the Fair Labor Standards Act (FLSA) (29 U.S.C. §201 et seq.) as follows:

(1) the amount of time per week that a mandatory work registrant or exempt recipient who voluntarily participates in FSE&T services may be required to participate in activities that are not exempt from minimum wage and overtime under the FLSA shall be determined by the food stamp benefits amount being divided by the minimum wage, so that the amount paid to the mandatory work registrant or exempt recipient who voluntarily participates in FSE&T services would be equal to or more than the amount required for payment of wages, including minimum wage and overtime; and

(2) if a Board provides activities that meet all the following criteria set forth in this paragraph, the activity is considered "training" under FLSA and minimum wage and overtime are not required:

(A) The training is similar to that given in a vocational school.

(B) The training is for the benefit of the trainees.

(C) Trainees do not displace currently employed workers.

(D) Employers derive no immediate advantage from trainees' activities.

(E) Trainees are not entitled to a job after training is completed.

(F) Employers and trainees understand that trainees are not paid.

(f) A Board shall ensure that placement in work-based services does not result in the displacement of currently employed workers or impair existing contracts for services or collective bargaining agreements.

(g) A Board may, through local policies and procedures, require the use of the Eligible Training Provider Certification System and Individual Training Accounts as described in Chapter 841 of this title (relating to Workforce Investment Act) to provide services for individuals participating in FSE&T and which are funded by FSE&T.

§813.12. Participant Responsibilities.

[~~(a)~~] Mandatory[~~E&T mandatory~~] work registrants and exempt recipients who voluntarily participate in FSE&T services shall:

(1) attend scheduled appointments;

(2) participate in assigned FSE&T[~~E&T~~] activities for at least a minimum weekly average of 30[~~thirty~~] hours, within the restrictions set forth[~~outlined~~] in §813.14 [~~§813.13~~] of this subchapter;

(3) report to an employer to whom they are referred;

(4) accept a job offer; and

(5) report [~~component~~] activity hours, including hours of employment.

[~~(b) A Board shall ensure that employment and training activities are conducted in compliance with the Fair Labor Standards Act (FLSA) as follows:~~]

[~~(1) the amount of time per week that a mandatory work registrant may be required to participate in activities that are not exempt from minimum wage and overtime under the FLSA shall be determined by the temporary cash assistance and food stamp benefits amount being divided by the minimum wage so that the amount paid to the mandatory work registrant would be equal to or more than the amount required for payment of wages, including minimum wage and overtime; and~~]

[~~(2) if a Board provides activities that meet all the following criteria set forth in this paragraph, the activity is considered "training" under the FLSA and minimum wage and overtime is not required:~~]

[~~(A) the training is similar to that given in a vocational school;~~]

[~~(B) the training is for the benefit of the trainees;~~]

[~~(C) trainees do not displace currently employed workers;~~]

[~~(D) employers derive no immediate advantage from trainees' activities;~~]

[~~(E) trainees are not entitled to a job after training is completed; and~~]

[~~(F) employers and trainees understand that trainee is not paid.~~]

[~~(c) A Board shall ensure that placement in work-based services does not result in the displacement of currently employed workers or impair existing contracts for services or collective bargaining agreements.~~]

[~~(d) A Board may, through local policies and procedures, require the use of the Eligible Training Provider Certification System (ETPS) and Individual Training Account (ITA) systems as described in 40 T.A.C. Chapter 841 to provide for E&T services for individuals participating in E&T services and paid for with Food Stamp E&T funds.~~]

§813.13. Good Cause for Mandatory Work Registrants and Exempt Recipients Who Voluntarily Participate in FSE&T Services.

(a) Good cause applies only to mandatory work registrants and exempt recipients who voluntarily participate in FSE&T services. A Board shall ensure that good cause is determined as provided in this chapter.

(b) A Board shall ensure that a good cause determination:

(1) is based on individual and family circumstances;

(2) is based on face-to-face or telephone contact;

(3) covers a temporary period when mandatory work registrants or exempt recipients who voluntarily participate in FSE&T services may be unable to attend scheduled appointments or participate in ongoing work activities; and

(4) is made at the time the change in circumstances is made known to the Board's service provider.

(c) For purposes of this chapter, the following reasons constitute good cause:

(1) temporary illness or incapacitation;

(2) court appearance;

(3) caring for a physically or mentally disabled household member who requires the recipient's presence in the home;

(4) no available transportation and the distance prohibits walking; or no available job within reasonable commuting distance, as defined by the Board;

(5) distance from the home of the mandatory work registrant, or exempt recipient who voluntarily participates in FSE&T services, to the Texas Workforce Center or employment service provider

requires commuting time of more than two hours a day (not including taking a child to and from a child care facility), and the distance prohibits walking and there is no available transportation;

(6) farmworkers who are away from their permanent residence or home base, who travel to work in an agriculture or related industry during part of the year, and are under contract or similar agreement with an employer to begin work within 30 days of the date the individual notified the Board of his or her seasonal farmwork assignment;

(7) an inability to obtain needed child care, as defined by the Board and based on the following reasons:

(A) informal child care by a relative or child care provided under other arrangements is unavailable or unsuitable, and based on, where applicable, Board policy regarding child care. Informal child care may also be determined unsuitable by the parent;

(B) eligible formal child care providers are unavailable, as defined in Chapter 809 of this title (relating to Child Care and Development);

(C) affordable formal child care arrangements within maximum rates established by the Board are unavailable; and

(D) formal or informal child care within a reasonable distance from home or the work site is unavailable;

(8) an absence of other support services necessary for participation;

(9) receipt of a job referral that results in an offer below the federal minimum wage, except when a lower wage is permissible under federal minimum wage law;

(10) an individual or family crisis or a family circumstance that may preclude participation, including substance abuse and mental health and disability-related issues, provided the mandatory work registrant or exempt recipient who voluntarily participates in FSE&T services, engages in problem resolution through appropriate referrals for counseling and support services; or

(11) an individual is a victim of family violence.

(d) A Board shall ensure that good cause:

(1) is reevaluated at least on a monthly basis;

(2) is extended if the circumstances giving rise to the good cause exception are not resolved after available resources to remedy the situation have been considered; and

(3) based on the existence of family violence, does not exceed a total of 12 consecutive months per occurrence.

§813.14. Special Provisions Regarding Sanctions for Noncooperation.

General population mandatory work registrants who are scheduled to participate more than 120 hours per month may not be sanctioned for noncooperation after 120 hours have been reached, as described in the Food Stamp Act, 7 U.S.C. §2015(d)(4)(F)(ii). The 120 hours include hours in all FSE&T activities, including any hours worked for paid or unpaid compensation.

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

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407126
Donna Garrett
Deputy Director for Policy and Development
Texas Workforce Commission
Earliest possible date of adoption: January 16, 2005
For further information, please call: (512) 475-0829

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40 TAC §813.13

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The rules will affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Human Resources Code, Chapter 33, regarding nutrition assistance.

§813.13. Special Provisions Regarding Penalties for Noncompliance.

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

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Deputy Director for Policy and Development
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SUBCHAPTER D. ALLOWABLE ACTIVITIES

40 TAC §§813.31 - 813.33

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The rules will affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Human Resources Code, Chapter 33, regarding nutrition assistance.

§813.31. Activities for [~~Any~~ ~~E&T~~] Mandatory Work Registrants and Exempt Recipients Who Voluntarily Participate in FSE&T Services.

The following activities may be provided for [~~any~~]FSE&T[~~E&T~~] mandatory work registrants and exempt recipients who voluntarily participate in FSE&T services[~~, which include both General Population and ABAWDs~~], subject to the limitations specified in §813.32 of this subchapter:

(1) job search services that shall:

(A) incorporate job readiness, job search training, directed job search, and group job search, and may include the following:

(i) job skills assessment;

(ii) counseling;

(iii) job search skills training;

(iv) information on available jobs;

(v) occupational exploration, including information on local emerging and demand occupations;

(vi) interviewing skills and practice interviews;

(vii) assistance with applications and resumes;

(viii) job fairs;

(ix) life skills; or

(x) guidance and motivation for development of positive work behaviors necessary for the labor market; and

(B) limit[~~are limited in~~] the number of weeks a mandatory work registrant or exempt recipient who voluntarily participates in FSE&T services can spend as follows:

(i) ABAWDs shall [~~ABAWD mandatory work registrants may~~] not be enrolled for more than four [4] weeks, and the job search activity shall [~~must~~] be provided in conjunction with the workfare activity [~~component~~], as described in §813.32(4)(D) of this subchapter.[~~;~~]

(ii) General Population mandatory work registrants and exempt recipients who voluntarily participate in FSE&T services shall [~~may~~] not be enrolled:

(I) for more than four [4] weeks of consecutive activity under paragraph (1) of this subsection [~~job search services~~];

(II) for more than six [~~6~~] weeks of total activity in a federal fiscal year.

[(iii) ~~Project Re-Integration of Offenders (Project RIO) participants are exempt from the job search limitations outlined in §813.31(1)(B)(i)-(ii): and~~]

(iii) [~~(iv)~~]Job search, when offered as part of other FSE&T[~~E&T~~] program activities[~~components~~], is allowed for more time than the limitations set forth[~~outlined~~] in clauses (1)(B)(i) and (ii) of this subsection if the job search activities comprise less than half of the required time spent in other activities[~~components.~~]

(2) vocational training that shall:

(A) relate to the types of jobs available in the labor market;

(B) be consistent with employment goals identified in the [~~family~~] employment plan, when possible; and

(C) be provided only if there is an expectation that employment will be secured upon completion of the training.

(3) nonvocational[~~non-vocational~~] education that shall increase employability, such as:

(A) enrollment and satisfactory attendance in:

(i) a secondary school; or

(ii) a course of study leading to a high school diploma or a certificate of general equivalence;

(B) basic skills and literacy;

(C) English proficiency; or

(D) postsecondary education, leading to a degree or certificate awarded by a training facility, career school or college,[~~proprietary school,~~] or other educational institution that prepares individuals for employment in current and emerging occupations that do not require baccalaureate or advanced degrees;

(4) work experience, as authorized by 7 U.S.C. §2015(d)(4)(B)(iv) and[~~defined~~] by the Workforce Investment Act in 20 CFR §663.200(b),[~~, Part 652 et al.,~~] for mandatory work registrants who need assistance in becoming accustomed to basic work skills, that[~~and~~] shall:

(A) occur in the workplace for a limited period of time;

(B) be made in either the private for-profit, the nonprofit, or the public sectors; and

(C) be paid or unpaid;

(5) unsubsidized employment; or

(6) other activities approved in the current FSE&T state plan of operations.[~~Food Stamp Employment and Training State Plan.~~]

§813.32. FSE&T[~~E&T~~] Activities for ABAWDs.

(a) Boards shall ensure that FSE&T[~~E&T~~] activities for ABAWDs are limited to participating in the following:

(1) services or activities under the Trade Act of 1974, as amended by the Trade Act of 2002;[~~, services or activities;~~]

(2) activities under the Workforce Investment Act [~~activities~~] (29 U.S.C. §2801, et seq.);[~~*et seq.);*~~]

(3) education and training, which may include:

(A) vocational training as described in §813.31(2)[~~§813.31(a)(2)~~] of this subchapter;[~~,~~] or

(B) nonvocational[~~non-vocational~~] education as described in §813.31(3)[~~§813.31(a)(3)~~] of this subchapter; and

(4) workfare activities that shall:

(A) be designed to improve the employability of ABAWDs through actual employment experience or training, or both;

(B) be unpaid job assignments based in the public or private nonprofit sectors;

(C) have hourly requirements based on the ABAWD's monthly household food stamp allotment divided by the number of ABAWDs in the food stamp household, as provided by HHSC[~~the Department of Human Services~~] and then divided by the federal minimum wage; and

(D) include a four-week job search period prior to placement in a workfare activity.

(b) Boards shall ensure that ABAWDs who are referred to a TexasWorkforce Center [~~as a mandatory work registrant~~] and subsequently become engaged in unsubsidized employment for at least 20 hours per week are not required to continue participation in FSE&T services because they have fulfilled their work requirement[~~are exempt from E&T services~~], as described in 7 U.S.C. §2015(o)(2)(A). In addition, Boards shall ensure that HHSC is notified when ABAWDs obtain employment.[~~7 CFR §273.24, and must be referred to the Department of Human Services.~~]

§813.33. Post-Employment Services.

(a) Mandatory and exempt food stamp recipients may volunteer to receive post-employment services through participation in an FSE&T activity, which may include:

(1) Job Search. Individuals may volunteer to participate in activities that will increase their employability and assist them in obtaining better jobs to progress up a career ladder. Such activities include job skills assessments, job-finding clubs, training in techniques for employability, and educational programs to expand job search abilities or employability;

(2) Education. Individuals may volunteer to participate in programs or activities to improve basic skills or improve employability, which include a direct link between the education and job readiness of the individual; and

(3) Training. Individuals may volunteer to participate in post-employment training services that will increase their skills.

(b) Boards may provide post-employment support services to food stamp recipients (mandatory and exempt recipients who voluntarily participate in FSE&T services), if the support services are reasonable, necessary, and directly related to participation in FSE&T activities described in subsection (a) of this section. Support services may include those specified in §813.41 of this chapter.

(c) Boards shall ensure that post-employment services are monitored, and that ongoing contact is established at least monthly with the individual receiving post-employment services.

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

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Donna Garrett
Deputy Director for Policy and Development
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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SUBCHAPTER E. SUPPORT SERVICES FOR PARTICIPANTS

40 TAC §813.41

The amendments are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed amendments will affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Human Resources Code, Chapter 33, regarding nutrition assistance.

§813.41. Provision of FSE&T[E&T] Support Services.

(a) Boards shall ensure that FSE&T [E&T] support services are provided to [an E&T] mandatory work registrants and exempt recipients who voluntarily participate in FSE&T services, [registrant] if the support services are reasonable, necessary, and directly related to participation in FSE&T[E&T] activities, as follows:[.]

(1) Mandatory Work Registrants. Boards shall ensure that if the monthly expenses directly related to participation by a mandatory work registrant exceed available funds, the mandatory work registrant is:

(A) exempted from further participation in an assigned FSE&T activity; or

(B) reassigned to an FSE&T activity that will not require the provision of support services.

(2) Exempt Recipients Who Voluntarily Participate in FSE&T Services. Boards shall ensure that if the monthly expenses directly related to participation for an exempt recipient who voluntarily participates in FSE&T services exceed available funds, the exempt recipient is:

(A) informed that assigned activities will be discontinued; or

(B) reassigned to an FSE&T activity that will not require the provision of support services.

[(b) Boards shall ensure that if a mandatory work registrant's monthly expenses directly related to participation exceed available funds, the mandatory work registrant is either:]

[(1) exempted from further participation in an assigned E&T activity; or]

[(2) reassigned to an E&T activity that will not require the provision of support services.]

(b) [(c)]Support services include payment or reimbursement for:

(1) child care services [that are] governed by [rules contained in] Chapter 809 of this title;

(2) transportation services that may be provided for participating mandatory work registrants and exempt recipients who voluntarily participate in FSE&T services, if alternative transportation resources are not available to the participants. Boards shall ensure that[if the] costs to provide the transportation services are:

(A) reasonable and necessary for participation in FSE&T[E&T] activities; and

(B) paid for based on the methods and amounts determined by each Board to be consistent with state policy that requires use of the most economical means of transportation to meet the FSE&T[E&T] participant's needs; and

(3) work, training, or education-related items:

(A) including, but not limited to, costs for uniforms, personal safety items, or other necessary equipment, and books or training manuals provided; and

(B) excluding the cost of meals away from home.

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

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Donna Garrett
Deputy Director for Policy and Development
Texas Workforce Commission
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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 73. ELECTRICIANS

16 TAC §73.26

The Texas Department of Licensing and Regulation has withdrawn new §73.26 which was adopted on an emergency basis in the September 24, 2004, issue of the *Texas Register* (29 TexReg 9081).

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407088
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: December 1, 2004
For further information, please call: (512) 463-7348

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ADOPTED RULES

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

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 18. ORGANIC STANDARDS AND CERTIFICATION

SUBCHAPTER F. ADMINISTRATIVE

DIVISION 5. MISCELLANEOUS PROVISIONS

4 TAC §18.702

The Texas Department of Agriculture (the department) adopts amendments to Chapter 18, Organics Standards and Certification, Subchapter F, §18.702(b)(1), without changes to the proposed text, as published in the October 29, 2004 issue of the *Texas Register* (29 TexReg 9951). The amendments to §18.702(b)(1) are adopted to change the due date for the annual certification update from December 31 of each year to March 1 of each year for organic land and livestock producers. The amendments also remove the due date for handlers (processors, distributors and retailers) from §18.702(b)(1) because the due date for handlers is established in §18.702(b)(2). The amendments also better align the annual update due date for organic land and livestock producers with the National Organic Program regulations, which require the department to conduct inspections of organic land and livestock producers within six months of the annual update deadline. Additionally, the amendments will allow organic land and livestock producers adequate time to provide to the department with the most current certification information on crop and livestock production, as required to update an existing certification.

One written comment was received generally in favor of the proposal. The department received no comments in opposition to the proposal.

The amendments to §18.702 are adopted under the Texas Agriculture Code (the code),§12.016 which provides the department with the authority to adopt rules necessary for the execution of applicable laws relating to agriculture; and the code §18.002, which provides the department with the authority to adopt rules as necessary for the enforcement and administration of the department's Organic Standards Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 1, 2004.

TRD-200407048

Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
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Proposal publication date: October 29, 2004
For further information, please call: (512) 463-4075

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 73. ELECTRICIANS

16 TAC §73.10

The Texas Department of Licensing and Regulation ("Department") adopts an amendment to 16 Texas Administrative Code, §73.10, concerning work involved in the manufacture of electrical equipment as it relates to the electricians program as published in the September 17, 2004, issue of the *Texas Register* (29 TexReg 8984), without changes, and will not be republished.

New paragraph (19) is added to clarify the meaning of the phrase "work involved in the manufacture of electrical equipment." The phrase is an exemption in the Electrical Safety and Licensing Act adopted by the 78th Legislature and published as Occupations Code Chapter 1305. Section 1304.003(7) reads "work involved in the manufacture of electrical equipment." The statutory language provides an exemption for work to manufacture electrical equipment, but it does not address where such work may be performed, nor does it address the scope or timing of a manufacturing process.

Electrical equipment manufacturers produce a tremendous range of products from simple switches designed for low power uses, to exceedingly complicated and large power control devices that are electronically monitored and controlled. Many of the products require persons with special or specific training to install and maintain. An individual with a master electrician's license, without the specific training, does not have the knowledge needed to safely work on such products, and in addition to injuring himself, even fatally, could cause massive property loss and damage from fire and explosion, along with significant risk of injury to other persons in the vicinity of the work.

The practice in the industry has been that electricians, who do not have special training, do not work on such equipment, though they are called when the wiring providing electrical power to a product or system must be moved, disconnected, reconnected, etc. Given the practice of the industries, both manufacturers and electricians would suffer a significant and detrimental change

in the manner in which manufacturers and electricians conduct their business should the statute be read to mean that work to manufacture electrical equipment could only be performed on premises controlled by a manufacturer.

The Commission is of the opinion that the legislature intended that implementation of the statute should not cause unreasonable disruption to businesses affected by the requirement that all persons performing electrical work be licensed. The intent is evidenced by the long list of exceptions, including the one under consideration here, that indicate the legislature's desire that businesses that are related to, but not part of the electrical industry, not be adversely affected by the statute. The intent of this rule is to avoid causing disruption to the businesses that manufacture electrical equipment, and to avoid imposing on persons licensed by the Department a burden they are not prepared to bear. This rule accomplishes that goal by allowing manufacturers' employees, and in some cases authorized representatives, to work on the manufacturer's equipment or the type of equipment it manufacturers, without having an electrical license and without having to perform the work, through and on behalf of, a licensed electrical contractor. The rule language was developed and approved by the Electrical Safety and Licensing Advisory Board, a body made up of industry representatives and public members.

The Department drafted and distributed the proposed rule to persons internal and external to the agency. There were seven written comments filed in response to publication of the rule. There was also one letter sent in response to the rule publication asking a question about application of the rule but no position about adoption of the rule was taken.

Two commenters were entirely in support of the rule, and as manufacturers of electrical equipment expressed their appreciation that the department has considered this rule amendment. One commenter said, "The proposed rule correctly preserves this business process, and in so doing preserves the ability of the entire industry to respond with appropriate personnel to meet the service needs of commercial, industrial, governmental, and power generation sites throughout the State of Texas." Both commenters also indicated that when electrical work outside of their equipment is required, an electrical contractor will be called to perform that work. No change to the rule was proposed by either commenter.

The comments objecting to all or part of the rule will be addressed one by one. One commenter said that the rule should require companies allowed to send unlicensed employees or representatives to work on their equipment should have an electrical engineer or a master electrician on staff. The commenter stated that in his experience motor starters and VFD's, and other equipment are installed in a manner not in compliance with the National Electric Code (NEC). The Commission makes no change to the rule in response to this comment. Having either engineers or master electricians on staff should be left to the manufacturer to decide if the rule is intended to maintain status quo, to the extent possible.

Another commenter objected to the rule, stating that his company along with every one of its employees had applied for a license under the Act. The commenter then asked a number of questions about the application of the rule, which will be answered in a response directly to the commenter. The commenter then mentioned that some states have created specialty type licenses. The commenter expressed concern that anyone owning a pick-up truck and a few hand tools can call themselves a manufacturer and work without a license. The commenter then expressed hope that laws can be written to close loopholes that get bigger every day.

Only the Legislature may enact legislation to close loopholes or to establish specialty licenses. The Commission is not authorized, in any way beyond the scope of Chapter 1305 Occupations Code, to control individuals or companies that choose to manufacture equipment. The Commission can, under authority granted to it by the Electrical Safety and Licensing Act, require persons who perform electrical work to have an appropriate license. Even though the commenter made no specific request for changes or deletion of the rule, it appears that enactment of legislation and deletion of the rule is the remedy sought. The Commission makes no changes to the rule as it maintains the status quo.

Another commenter objected to the rule in its entirety although the commenter suggested that the reference in the rule to off site repairs, coordination, and a few others not specified should be changed to electrical work. The proposed rule language was developed by the Electrical Safety and Licensing Advisory Board to limit the kinds of things manufacturers may work on. Saying such persons can perform all electrical work would indeed be opening the door to unlicensed activity in violation of the Act. The Commission does not believe the proposed change is in the public interest and no change is made. To the extent the commenter suggests deletion of the rule; the Commission makes no change, as doing so would not maintain the status quo for the two industries.

Another commenter, although supporting the intent of the rule, asked for clarity and specific language for the power systems industry. The commenter also stated a desire that emergency and standby power workers be required to have a specialty license. The clarity the commenter seeks is in defining the responsibilities of the servicing contractor for the systems it manufactures. The Commission believes that the rule as proposed provides the clarity the commenter seeks. It provides a laundry list of what a manufacturer's employees or representatives may do, and it address where the listed work may be done. The Commission does not believe that naming the emergency power systems manufacturers specifically would extend any benefit not already covered by the rule. Inclusion of one specific industry would only serve to cause concern among those industries not named in the rule. The Commission makes no change in response to the comment.

The final commenter proposed that the Commission add language referencing §1305.002(g) of the Act to make it clear that manufacturers of electric signs are not included in the exemptions for manufacturers of electrical equipment.

The Commission understands the commenter's concern that a reading of the rule alone may lead one to conclude that manufacture of electric signs is exempt. The rule, as with all rules, must be read in context with the entire statute it is addressing. In this case, §1305.001(9) of the Act establishes that sign contracting, which requires a license, includes manufacture of electric sign wiring or conductors. A rule cannot alter the statute, and the Commission does not intend that this rule attempt to do so. Further, the Commission believes that the rule is sufficiently clear in that it addresses only work involved in the manufacture of electrical equipment, and does not address electric sign manufacture that is separately provided for in the statute. The Commission makes no changes to the rule.

The amendment is adopted under Texas Occupations Code, Chapter 1305, which establishes a program to regulate electricians and Texas Occupations Code, Chapter 51, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 1305 and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 2, 2004.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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Proposal publication date: September 17, 2004
For further information, please call: (512) 463-7348

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER D. DUAL CREDIT PARTNERSHIPS BETWEEN SECONDARY SCHOOLS AND TEXAS PUBLIC COLLEGES

19 TAC §4.85

The Texas Higher Education Coordinating Board adopts amendments to §4.85, concerning the public education and higher education commissioners' funding agreement for dual credit courses, without changes to the proposed text as published in the September 17, 2004, issue of the *Texas Register* (29 TexReg 8984).

Specifically, these amendments provide for the waiver of all or part of tuition and fees for dual credit students by public institutions of higher education.

The following comment was received regarding the amendments:

Comments: One comment was received supporting the amendments.

Response: The staff agrees with the comment.

The amendments are adopted under the Texas Education Code, §§29.182, 29.184, 61.027, 61.076(J), 130.001(b)(3) and (4), 130.008, 130.090, and 135.06(d), which gives the Coordinating Board the authority to regulate dual credit partnerships between public two-year associate degree-granting institutions and public universities with secondary schools.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 29, 2004.

TRD-200407030
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Effective date: December 19, 2004
Proposal publication date: September 17, 2004
For further information, please call: (512) 427-6114

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TITLE 22. EXAMINING BOARDS

PART 10. TEXAS FUNERAL SERVICE COMMISSION

CHAPTER 201. LICENSING AND ENFORCEMENT--PRACTICE AND PROCEDURE

22 TAC §201.16

The Texas Funeral Service Commission (commission) adopts amended §201.16 (concerning Memorandum of Understanding with the Texas Department of Health). Notice of the proposed amendment was published in the June 25, 2004, issue of the *Texas Register* (29 TexReg 6022). The amended section is adopted without changes to the proposed text and will not be republished. The adopted amendments to §201.16 recognize changes in the Commission's enforcement authority made by House Bill 1538, 78th Legislature (Regular Session).

The amended section delineates certain responsibilities of the commission and the Texas Department of Health (Department). The amendment also clarifies that the commission has enforcement authority for violations of certain Department rules.

The commission received no comments.

No other statutes, articles, or codes are affected by the new sections.

Amended §201.16 is adopted under the authority of the Texas Occupations Code, §651.152 which authorizes the commission to issue such rules and regulations as may be necessary to administer Chapter 651. The amended section is also adopted under Texas Occupations Code, §651.160. The commission interprets §651.160 as requiring it to adopt a memorandum of understanding the Department outlining the responsibilities of each agency for the enforcement of Health and Safety Code chapters 193 and 361.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 2, 2004.

TRD-200407098
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Effective date: December 22, 2004
Proposal publication date: June 25, 2004
For further information, please call: (512) 936-2466

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 6. HIGHLY-REACTIVE VOLATILE ORGANIC COMPOUND EMISSIONS CAP AND TRADE PROGRAM

30 TAC §§101.390 - 101.394, 101.396, 101.399 - 101.401, 101.403

The Texas Commission on Environmental Quality (commission) adopts new §§101.390 - 101.394, 101.396, 101.399 - 101.401, and 101.403. These new sections are being adopted in Subchapter H, Emissions Banking and Trading, new Division 6, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program. Sections 101.390 - 101.394 and §§101.399 - 101.401 are adopted *with changes* to the proposed text as published in the July 9, 2004, issue of the *Texas Register* (29 TexReg 6522). Section 101.396 and §101.403 are adopted *without changes* to the proposed text and will not be republished.

The new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The Houston/Galveston/Brazoria (HGB) ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act Amendments of 1990 (as codified in 42 United States Code (USC), §§7401 *et seq*.), and therefore, is required to attain the national ambient air quality standard (NAAQS) one-hour ozone standard of 0.12 parts per million (125 parts per billion) by November 15, 2007. The HGB area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, and the commission has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. The most relevant HGB SIP revisions to date are the December 2000 one-hour ozone standard attainment demonstration, the September 2001 follow-up revision, and the December 2002 nitrogen oxides (NO_x)/highly-reactive volatile organic compound (HRVOC) revision.

This process has proven to be challenging due to the magnitude of reductions needed for attainment. The emission reduction requirements included as part of the December 2000 SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGB area, in partnership with the commission, to address ozone. These coalitions include local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as EPA and the commission, who have worked diligently to identify and quantify control strategy measures for the HGB area attainment demonstration.

December 2000

The December 2000 SIP revision contained rules and photochemical modeling analyses in support of the HGB area ozone attainment demonstration. The majority of the emissions reductions identified in this revision were from a 90% reduction in point source NO_x. The modeling analysis also indicated a shortfall in necessary NO_x emission reductions, such that an additional 91 tons per day (tpd) of NO_x reductions were necessary for an approvable attainment demonstration. In addition, the revision contained post-1999 rate-of-progress (ROP) plans for the milestone years 2002 and 2005 and for the attainment year 2007, and transportation conformity motor vehicle emissions budgets (MVEB) for NO_x and volatile organic compound (VOC) emissions. The SIP also contained enforceable commitments to implement further measures in support of the HGB area attainment demonstration, as well as a commitment to perform and submit a midcourse review.

September 2001

The September 2001 SIP revision for the HGB area included the following elements: 1) corrections to the ROP table/budget for the years 2002, 2005, and 2007 due to a mathematical inconsistency; 2) incorporation of a change to the idling restriction control strategy to clarify that the operator of a rented or leased vehicle is responsible for compliance with the requirements in situations where the operator of a leased or rented vehicle is not employed by the owner of the vehicle (the commission committed to making this change when the rule was adopted in December 2000); 3) incorporation of revisions to the clean diesel fuel rules to provide greater flexibility for compliance with the requirements of the rule while preserving the emission reductions necessary to demonstrate attainment in the HGB area; 4) incorporation of a stationary diesel engine rule that was developed as a result of the state's analysis of EPA's reasonably available control measures; 5) incorporation of revisions to the point source NO_x rules; 6) incorporation of revisions to the emissions cap and trade rules; 7) removal of the construction equipment operating restriction and the accelerated purchase requirement for Tier 2/3 heavy-duty equipment; 8) replacement of these rules with the Texas Emission Reduction Plan program; 9) layout of the midcourse review process that details how the state will fulfill the commitment to obtain the additional emission reductions necessary to demonstrate attainment of the one-hour ozone standard in the HGB area; and 10) replacement of 2007 ROP MVEBs to be consistent with the attainment MVEBs.

As was discussed in the December 2000 revision, the modeling resulted in a 141 parts per billion peak ozone level that correlated to a shortfall calculation of 91 tpd NO_x equivalent emissions. An additional five tpd were added to the shortfall, because the state could not take credit for the NO_x reductions associated with the diesel pull-ahead strategy. The excess emissions from this strategy were not included in the original emissions inventory. The gap control measures adopted in December 2000, along with the

stationary diesel engine rules included in the September 2001 revision, resulted in NO_x reductions of 40 tpd, which left a total remaining shortfall of 56 tpd. The state committed to address this shortfall through the midcourse review process.

December 2002

In January 2001, the Business Coalition for Clean Air--Appeal Group (BCCA-AG) and several regulated companies challenged the December 2000 HGB SIP and some of the associated rules. Specifically, the BCCA-AG challenged the 90% NO_x reduction requirement from stationary sources in the HGB area. In May 2001, the parties agreed to a stay in the case, and the Honorable Margaret Cooper, Travis County District Court Judge, signed a consent order, effective June 8, 2001, requiring the commission to perform an independent, thorough analysis of the causes of rapid ozone formation events and identify potential mitigating measures not yet identified in the HGB area attainment demonstration, according to the milestones and procedures in Exhibit C (Scientific Evaluation) of the order.

In compliance with the consent order, the commission conducted a scientific evaluation based in large part on aircraft data collected by the Texas 2000 Air Quality Study (TexAQS). The TexAQS, a comprehensive research project conducted in August and September 2000 involving more than 40 research organizations and over 200 scientists, studied ground-level ozone air pollution in the HGB area and east Texas regions.

To address findings from TexAQS and to fulfill obligations in the consent order, the commission adopted a SIP revision in December 2002 that focused on replacing the most stringent 10% industrial NO_x reductions with VOC controls. In light of the TexAQS study, the commission conducted further modeling analysis of ambient VOC data. The photochemical grid modeling results and analysis indicated that the HGB area can achieve the same air quality benefits with industrial VOC emission reductions, combined with 80% industrial NO_x emissions reductions, as would be realized with a 90% industrial NO_x emission reduction. An analysis of automated gas chromatograph data revealed that four compounds were frequently responsible for high reactivity days: ethylene, propylene, 1,3-butadiene, and butenes. As such, these compounds were selected as the best candidates for HRVOC emission controls.

The commission adopted revisions to the industrial source control requirements, one of the control strategies within the existing federally approved SIP. The December 2002 revision contained new rules to reduce HRVOC emissions from four key industrial sources: fugitives, flares, process vents, and cooling towers. The adopted rules target HRVOCs while maintaining the integrity of the SIP. Analysis showed that limiting emissions of ethylene, propylene, 1,3-butadiene, and butenes in conjunction with an 80% reduction in NO_x is equivalent in terms of air quality benefit to that resulting from a 90% point source NO_x reduction requirement. As such, the HRVOC rules are performance-based and emphasize monitoring, recordkeeping, reporting, and enforcement, rather than establishing individual unit emission rates.

The technical support documentation accompanying the 2002 SIP revision describes modeling and ambient data analyses which demonstrate that reduction in emissions of HRVOCs can replace the last 10% of industrial NO_x controls.

Current SIP Revision

The commission committed in 2000 to perform a midcourse review to ensure attainment of the one-hour ozone standard. The midcourse review process provides the opportunity to update emissions inventory data, use current modeling tools, such as MOBILE6, and enhance the photochemical grid modeling. The data gathered from the TexAQS continues to improve photochemical modeling of the HGB area. The collection of these technical improvements give a more comprehensive understanding of the ozone challenge in the HGB area that is necessary to develop an attainment plan. In the early part of 2003, the commission was preparing to move forward with the midcourse review; however, during the same time period EPA announced its plans to begin implementation of the eight-hour ozone standard. The EPA published proposed rules for implementation of the eight-hour ozone standard in the June 2, 2003, issue of the *Federal Register* (68 FR 32802). In the same time frame, EPA also formalized its intentions to designate areas for the eight-hour ozone standard by April 15, 2004, meaning states would need to reassess their efforts and control strategies to address this new standard by 2007. Recognizing that existing one-hour nonattainment areas would soon be subject to the eight-hour ozone standard, and in an effort to efficiently manage the state's limited resources, the commission decided to develop an approach that addresses the outstanding obligations under the one-hour ozone standard while beginning to analyze eight-hour ozone issues.

The commission's one-hour ozone SIP commitments include: 1) completing a one-hour ozone midcourse review; 2) performing modeling; 3) adopting measures sufficient to fill the NO_x shortfall; 4) adopting measures sufficient to demonstrate attainment; and 5) revising the MVEB using MOBILE6.

Results from the TexAQS and recent photochemical modeling suggest that ozone formation in the HGB area stems from a combination of two different types of emissions. The first is the daily routine emissions of a large industrial base located in an urban core with on-road and non-road emissions typical of a city of four million people. These emissions can be thought of as the base of emissions that could be expected at any given time in the HGB area. The second type of emissions can be characterized as the fluctuations that occur daily, even hourly, in the HGB area resulting from sudden sharp increases in short-term HRVOC releases. While these emission fluctuations can occur in any industrial area, the dense concentration of chemical and refinery sites makes this a particular concern in the HGB area.

Ozone forms rapidly when these variable emissions occur in the immediate presence of NO_x, under the right atmospheric conditions. The design value in the HGB area is driven by a combination of these two types of emissions. To address ozone formation in the HGB area, a dual strategy is needed to reduce the base of emissions existing continuously in the HGB area as well as restrictions on a short-term basis to address short-term variations. To address the "base" emissions, control strategies are needed that resemble those used by other metropolitan areas with a combination of a large urban population and a significant industrial base. These strategies include vehicle inspection and maintenance, cleaner fuels, cleaner technology for construction equipment, industrial-based controls for routine emissions of NO_x and VOCs, and a long-term cap on HRVOCs. To address the short-term variable emissions, a restriction of the maximum hourly rate of HRVOCs is necessary. This restriction would apply to both unauthorized emissions as well as permitted emissions that may fluctuate on an hourly basis.

To achieve the necessary HRVOC reductions, the commission developed a dual approach: address variable short-term emissions through a not-to-exceed hourly emission limit and address steady-state and routine emissions through an annual cap. The annual HRVOC cap and fugitive emission rules will reduce the overall reactivity in the airshed by removing the compounds that are most prevalent and most likely to react rapidly enough to cause one-hour ozone exceedances.

The annual HRVOC cap in Harris County will be reduced from the existing HRVOC cap in response to the attainment demonstration modeling. The annual HRVOC cap in the seven-county surrounding area is equivalent to the total emissions limits established in the December 2002 SIP revision, but represented on an annual basis instead of a 24-hour rolling average. Based on information provided, the commission determined that enforceable limits on HRVOC emissions within the seven surrounding counties may be sufficient without the need for an additional cap and trade system for those counties. Therefore, the commission has provided an exemption form the short-term and annual caps for sites in those seven counties. The executive director will continue to evaluate the necessity to require additional short-term and annual limitations on those sites subject to 30 TAC Chapter 115, Subchapter H, Divisions 1 and 2, that are located within the seven-county surrounding area. If the evaluation reveals that the total amount of enforceable HRVOC emissions is at a level that is inconsistent with the attainment demonstration of the NAAQS for the one-hour ozone by the attainment date, the commission may revoke the exemption and require compliance with this division by January 1, 2007, or within 180 days after notification, whichever is later.

The annual cap emissions will be distributed and enforced through an HRVOC emissions cap and trade program through Chapter 101, Subchapter H, Division 6. This program establishes a mandatory annual HRVOC emission cap on all sites located in the HGB area that have the potential to emit more than ten tons per year (tpy) of HRVOC and that are subject to the HRVOC control requirements of Chapter 115, Subchapter H, Division 1, Vent Gas Control, or Division 2, Cooling Tower Heat Exchange Systems. The cap shall be enforced through the allocation, trading, and banking of allowances. An allowance is the equivalent of one ton of HRVOC emissions. This HRVOC cap is established at a level demonstrated as necessary to allow the HGB area to attain the one-hour ozone standard along with a 5% reduction to safeguard against potential emissions variations. The cap will initially be implemented on January 1, 2007. These adopted sections also require all sites with new or modified HRVOC sources in the HGB area to obtain unused allowances from other sites already participating under the cap for any increased HRVOC emissions. For sites that have the potential to emit ten tpy or less of HRVOC from sources subject to the HRVOC control requirements of Chapter 115, Subchapter H, Divisions 1 or 2, the total, aggregate HRVOC emissions from those sources will be limited to ten tpy. Sites exempt from the HRVOC emissions cap and trade program will be extended an opportunity to opt-in, receive an HRVOC allocation, and thereby not be restricted to the ten tpy limit.

The HGB SIP no longer relies primarily on NO_x-based strategies. A combination of point source HRVOC controls and NO_x reductions is the most effective means of reducing ozone in the HGB area. Under this revision, there is no longer a NO_x shortfall in the HGB SIP. The commission also evaluated a number of the existing control strategies that were put in place in the December 2000 revision. The photochemical modeling shows that some of these strategies are no longer necessary to attain the one-hour ozone standard. This SIP revision includes the repeal of the commercial lawn and garden equipment restrictions, the repeal of the heavy-duty vehicle idling restrictions, and the removal of the motor vehicle inspection and maintenance program requirements from Chambers, Liberty, and Waller Counties. In addition, this SIP revision includes revisions to the environmental speed limit strategy. In September 2002, the commission revised the existing speed limit strategy to suspend the 55 mile per hour (mph) speed limit until May 1, 2005, and, where posted speeds were 65 mph or higher before May 1, 2002, to increase speed limits to five mph below what was posted. The 78th Legislature, 2003, removed the commission's authority to determine speed limits for environmental purposes; therefore, this SIP removes the reinstatement of the 55 mph speed limit on May 1, 2005, and maintains the currently posted speed limits at five mph below the posted limit before May 1, 2002. Also, as part of this SIP revision, the commission is adopting new statewide portable fuel container rules. Historically, the commission has expressed a preference to implement technology-based strategies over behavior-altering strategies, and these adopted changes embody that philosophy.

Through this revision, the commission is fulfilling its outstanding one-hour ozone SIP obligations and beginning to plan for the upcoming eight-hour ozone standard. This SIP demonstrates attainment of the one-hour ozone standard in the HGB area in 2007 and provides a preliminary analysis of the HGB area in terms of the eight-hour ozone standard in 2007 and 2010. EPA's proposed eight-hour implementation rules provide flexibility to the states in transitioning from the one-hour to the eight-hour ozone standard, and the commission believes the steps taken in this proposal and the technical work performed to date will be invaluable through the transition period. Upon EPA's finalization of the eight-hour implementation and the transportation conformity rules, the commission expects to begin developing eight-hour ozone SIPs.

The commission continues to analyze the rules for implementation of the eight-hour ozone standard adopted by EPA on April 15, 2004. This additional analysis of the impact of the adopted rules on attainment of the eight-hour standard may indicate a need for new or more stringent control measures and could result in the modification of the HRVOC emissions caps established under these adopted rules.

SECTION BY SECTION DISCUSSION

Section 101.390, Definitions

The adopted new §101.390 contains the definitions to be used with the new HRVOC emissions cap and trade program. The definition of "Allowance" is the authorization to emit one ton of HRVOC, expressed in tenths of a ton, during a control period. The definition of "Authorized account representative" is the responsible person who is authorized in writing, to transfer and otherwise manage allowances. "Banked allowance" is defined as an allowance that is not used to reconcile emissions in the designated year of allocation, but is carried forward for up to one year and noted in the compliance or broker account as banked. The definition of "Broker" is a person that is not required to participate in the requirements of this division that opens an account under this division for the purpose of banking and trading allowances. "Broker account" is defined as the account where allowances held by a broker are recorded. Allowances held in a broker account may not be used to satisfy compliance requirements for this division. "Compliance account" is defined as the

account where allowances held by a site are recorded for the purposes of meeting the requirements of this division. Sources not under common ownership or control may have separate compliance accounts. "Level of activity" is defined as the amount of HRVOCs in pounds produced as an intermediate, by-product, or final product or used by a process unit during a given period of time, but excluding any recycled HRVOCs internal to the process unit. This definition is intended to allow each process unit at a site to choose either the HRVOC production or HRVOC use, but not both, as the representative level of activity. Based on revisions to the proposed allocation methodology, petroleum refineries will not be allocated an HRVOC allowance independent of other industry sectors. This revision removes the necessity for a specific definition of "Petroleum refinery," therefore, the proposed definition was deleted. Based on comment, the proposed definition of "Process unit" was removed from the adopted rule as it is a predefined term in 30 TAC §115.10.

The new division refers to the following predefined definitions: "Cooling tower heat exchange system" as defined in 30 TAC §115.760; "Flare" as defined in 30 TAC §101.1; "Houston/Galveston/Brazoria ozone nonattainment area" as defined in §115.10; "HRVOC" as defined in §115.10; "Site" as defined by 30 TAC §122.10; and "Vent" as defined in §101.1. In response to comment, the commission has added a reference to the definition of "Potential to emit" as defined in 30 TAC §116.12 and "Process unit" as defined in §115.10.

Section 101.391, Applicability

The adopted new §101.391 states that the requirements of Division 6 apply to each site located in the HGB area that is subject to the HRVOC requirements of Chapter 115, Subchapter H, Division 1 or 2 and the types of facilities covered. Based on comment, the commission has removed the word "all" from the proposed language to indicate that vent gas streams, flares, and cooling tower heat exchange systems that are exempt from the control requirements of Chapter 115, Subchapter H, Division 1 or 2 will not be subject to this division. The adopted new §101.391 also states that any site that elects to opt-in to this division under §101.392(b) shall always be subject to the program.

Section 101.392, Exemptions

The adopted new §101.392 exempts from this division any site meeting the applicability requirements of §101.391 with the potential to emit ten tpy or less of HRVOC from all covered facilities at the site. For the purpose of determining exemption status, the site's potential to emit HRVOC from all covered facilities is compared to the ten tpy exemption level for each year of operation beginning with calendar year 2000. If at any time the site's potential to emit exceeds the ten tpy exemption level, the site shall be subject to the HRVOC emissions cap and trade program. In response to comment, a reference to the definition of "Potential to emit" found in §116.12 was added to the adopted rule. Once subject to the HRVOC cap and trade program, a site shall always be subject to the program. Sites exempt from this division, based on a potential to emit HRVOCs of ten tpy or less, are extended an opportunity to opt-in to the HRVOC emissions cap and trade program. Notification of a site's election to opt-in to the requirements of this division is required in writing to the executive director no later than April 30, 2005. Sites that do not elect to opt-in to the HRVOC cap and trade program will be limited to a potential to emit of no more than ten tpy of HRVOC. Any site that at a later date triggers HRVOC emissions cap and trade program applicability by increasing its potential to emit HRVOC above ten tpy will not receive an allocation and will be required to purchase all allowances needed to comply from the open market.

Based on comments and modeling analysis, new §101.392 provides an exemption from this division to those sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties. Sites located in those counties, otherwise subject to this division, must enforceably limit HRVOC emissions from covered facilities. Modeling studies have demonstrated that the proposed HRVOC limits on sites located in the seven counties surrounding Harris County are not necessary for the HGB area to attain the one-hour ozone standard. Further, the magnitude of HRVOC emissions from the seven surrounding counties affecting peak ozone concentrations by one part per billion is significantly larger than 1,200 pounds per hour. Affected industries in the seven-county area have indicated to the commission that representations for HRVOC emissions within their respective air permits are well below the values likely to be put in place through the HRVOC annual cap. The commission is exempting sites in the seven surrounding counties based on the presumption that the enforceable limitations from these sites are less than the area cap for the seven surrounding counties. In order to ensure that this presumption is accurate, each site with a potential to emit more than ten tpy of HRVOC must establish enforceable limits on HRVOC emissions from vent gas streams, flares, and cooling tower heat exchangers subject to the control requirements of Chapter 115, Subchapter H at levels represented in the most recent applications to the executive director for authorization under 30 TAC Chapter 116. Establishing enforceable limits on HRVOC emissions on an emission point basis can be accomplished through submittal of a PI-8 Form (Special Certification Form for Exemptions and Standard Permits) or any other form provided by the executive director to certify federally enforceable emission limits. In addition, enforceable limits on HRVOC emissions can be set by altering or amending authorizations under Chapter 116 to have an HRVOC emissions limit expressed in the maximum allowable emission rate table. The executive director will review the total amount of HRVOC emissions established through these enforceable limits for sites in the seven counties surrounding Harris County and present those findings to the commission for its determination on the appropriateness of the cap and trade program for those counties. If the evaluation reveals that the total amount of enforceable HRVOC emissions is at a level that is inconsistent with the attainment demonstration for the NAAQS for one-hour ozone by the attainment date, the commission may revoke the exemption and require compliance with this division by January 1, 2007, or within 180 days after notification, whichever is later.

Section 101.393, General Provisions

The adopted new §101.393 states that allowances may only be used to meet the requirements of Division 6 and cannot be used to meet or exceed the limitations of any annual emission limitation established under Chapter 116, Subchapter B, any applicable rule or law, or for netting purposes to avoid the applicability of federal and state new source review (NSR) requirements. In response to comments, the new section sets the initial control period as January 1, 2007, through December 31, 2007, with each control period thereafter beginning on January 1 and ending on December 31. The new section requires each site subject to this division to hold a quantity of allowances in its compliance account equal to or greater than its total HRVOC emissions from all covered facilities during the previous control period. The new section states that allowances may be simultaneously used

to satisfy offset requirements for new or modified sources subject to federal nonattainment NSR requirements as provided in Chapter 116, Subchapter B, Division 7, but not for netting requirements. The new section states that all allowances will be allocated, transferred, deducted, or used in tenths of tons and that one compliance account shall be used for each site. The new section states that an allowance does not constitute a security or a property right. The commission will maintain a registry of the allowances in each compliance and broker account. The registry will not contain proprietary information. Requests for information identified as proprietary when submitted to the agency shall be subject to the procedures set out in the Texas Public Information Act.

Section 101.394, Allocation of Allowances

The adopted new §101.394 describes how allowances will be allocated to each site subject to this division. The executive director will allocate allowances under this division on January 1, 2007. For sites subject to this division that are located in Harris County, allowances will be allocated for emissions of the following HRVOCs: 1,3-butadiene; all isomers of butene (e.g., isobutene (2-methylpropene or isobutylene), alpha-butylene (ethylethylene), and beta-butylene (dimethylethylene, including both cis- and trans-isomers)); ethylene; and propylene. Allowances will be allocated in the aggregate, not specifically identified for each HRVOC species. Sites within Harris County not eligible to receive an allocation under §101.394(c) will receive an allocation based on a percentage of the site's baseline level of activity relative to the total baseline level of activity for all sites within Harris County. This percentage will then be applied to the tons of HRVOC available for distribution to those sites within Harris County. The amount of HRVOC allowances available for distribution is calculated from the tons of HRVOC emissions determined to be sustainable in Harris County through the attainment demonstration modeling minus 5% as a compliance buffer and the 10% set aside for sites that do not produce or use HRVOC. If the commission implements the cap and trade program for sites subject to this division that are located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, allowances will be allocated for emissions of the following HRVOCs: ethylene and propylene. Allowances will be allocated in the aggregate, not specifically identified for each HRVOC species. Sites within Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties that are not eligible to receive an allocation under §101.394(c) will receive an allocation based on a percentage of the site's baseline level of activity relative to the total baseline level of activity for all sites within those counties. This percentage will then be applied to the tons of HRVOC available for distribution to those sites within Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties. The amount of HRVOC allowances available for distribution is calculated in the same manner as described for Harris County. In response to comments, the commission has revised the level of activity baseline period from the proposal. The level of activity baseline for each process unit at a site will be calculated as the level of activity for any 12 consecutive months chosen from the period of calendar years 2000 - 2004. For a site, the total level of activity shall be determined by summing the levels of activity for all process units located at the site that produce one or more HRVOCs as an intermediate, by-product, or final product or that use one or more HRVOCs as a raw material or intermediate to produce a product. In determining the level of activity for each site, the commission does not intend for HRVOC production or use for a single process unit to be counted more than once. For example, process units that use one or more HRVOCs as a feed, but also produce one or more different HRVOCs as a product or by-product, should count either HRVOC use or production, but not both, in determining level of activity. Each process unit may choose a 12 consecutive month baseline level of activity that best represents its operational characteristics. In defining process units at a site, a single process unit should consist of all process equipment and operations necessary to achieve the overall objective of the process. For example, a two million pound per year ethylene plant consisting of pyrolysis, compression, refrigeration, and separation would be defined as one process unit with a level of activity of two million pounds of HRVOC. New sites or sites that become subject to this division at a later date by increasing HRVOC emissions above the exemption level will be required to obtain allowances from other sites already participating in the cap and trade program.

Sites subject to this division that do not include process units that produce or use an HRVOC will receive an allocation based on HRVOC throughput or storage capacity for any 12 consecutive months chosen from the period of calendar years 2000 - 2004. Examples of facilities that do not produce or use HRVOCs include storage facilities, loading/unloading facilities, or pipelines. Up to 10% of the total HRVOC emissions for Harris County will be equitably allocated to those sites within Harris County subject to this division but that do not include process units that produce or use an HRVOC. Likewise, up to 10% of the total HRVOC emissions for Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties will be equitably allocated to sites in those counties meeting the same qualifications. In order to be allocated allowances from this set-aside, owners or operators of sites subject to this division that do not include process units that produce or use an HRVOC are required to apply to the executive director no later than January 30, 2005. Allowances up to the full 10% not allocated to sites meeting the previously mentioned criteria will be distributed proportionately to those sites producing or using an HRVOC.

In response to comments, the commission has deleted proposed rule language under §101.394(d) to allocate allowances to those process units that are a part of a petroleum refinery independent of other industry sectors. The commission contends that equal treatment of all process units that produce and use HRVOC will result in the most equitable basis for establishing HRVOC allocations.

In response to comments, the commission has added new language under §101.394(d) to provide a minimum allocation of 5.0 tons for those sites subject to this division or that elect to opt-in to the requirements of this division. The addition of a minimum allocation level will provide small sites a level of assurance regarding the allocation they will receive and an incentive for exempt sites to opt-in to the cap and trade program. The total amount of allowances allocated based on the minimum 5.0 ton provision and the corresponding level of activity from those sites receiving a minimum of 5.0 tons shall be subtracted from the allocation equation prior to calculating the allocations for the remaining sites.

The section states that if a site emits more HRVOC than what was held in the compliance account on March 1 following a control period, then the allocation for the next control period will be reduced by an amount equal to the emissions exceeding the compliance account plus an additional 10%. For example, an

emissions exceedance of ten tons would result in a penalty reduction of 11 tons for the next control period. If a compliance account does not have sufficient allowances to accommodate the penalty reduction, it is the responsibility of the owner or operator to purchase or transfer additional allowances within 30 days of issuance of a notice of deficiency from the executive director. Based on comments received, the initial control period has been revised, therefore, allowances will be deposited initially by January 1, 2007, and subsequently by January 1 of each control period. The annual allocation of allowances may be adjusted to reflect any new or existing SIP requirements. Allowances may be added or subtracted from a site's compliance account in accordance with the annual reporting requirements in §101.400. The commission has deleted proposed §101.394(i) that allowed sites to request consideration for extenuating circumstances. To allow sites to best represent typical operation and avoid time periods of low HRVOC production and use activity that may constitute an extenuating circumstance, the commission chose to revise the level of activity baseline requirements. Due to the initial control period beginning January 1, 2007, the commission has deleted proposed subsection (j) that required a 25% reduction in the allocation for the first control period. Sites will receive 100% of their initial allocation for the first control period.

Section 101.396, Allowance Deductions

The adopted new §101.396 describes the deduction of allowances from compliance accounts. On March 31 of the year following each control period, allowances will be deducted from the site's compliance account equivalent to the total HRVOC emissions from all covered facilities at the site. The amount of HRVOC emissions is required to be based on the monitoring and testing protocols established in 30 TAC §115.725 and §115.764, as appropriate for each process unit at the site. The section states that annual HRVOC emissions from covered facilities will be calculated for each hour of the year and summed to determine the total annual HRVOC emissions. Emissions events subject to the requirements of 30 TAC §101.201 and emissions from scheduled maintenance, startup, or shutdown activities subject to the requirements of 30 TAC §101.211 will be required to be included in the total annual HRVOC emissions for each control period. However, the hourly emissions for emission events or emissions from scheduled maintenance, startup, or shutdown activities to be included in the summation cannot exceed the short-term limit of 30 TAC §115.722(c) and §115.761(c). This section also includes a provision for missing data. Should the monitoring and testing data required by this section be nonexistent or unavailable, a site may determine its HRVOC emissions using the following methods and in the following order: continuous monitoring data; periodic monitoring data; testing data; data from manufacturers; and engineering calculations. Sources using continuous monitors to measure emissions may substitute the last valid data point from the monitor for the missing data. A justification is required for sites using one of these alternate methods for determining HRVOC emissions due to missing monitoring and testing data. The section states that the executive director shall deduct allowances for compliance with a control period beginning with the most recently allocated allowances prior to deducting banked allowances.

Section 101.399, Allowance Banking and Trading

The adopted new §101.399 describes how allowances may be traded and banked. Allowances may generally be banked for future use or traded during the control period for which they are allocated or the following control period. Any allowance not used for compliance may be banked or traded for use in the following control period. The section states that allowances that have not expired or been used are available for trade at any time after they have been allocated. Trade requests involving allowances allocated for the current control period or excess allowances from the previous control period shall be made through the submittal of a completed Form ECT-2, Application for Transfer of Allowances. Persons receiving an annual allocation of HRVOC allowances may permanently transfer ownership of the current and future allowances to be allocated to that site through the submittal of a completed Form ECT-4, Application for Permanent Transfer of Allowance Ownership. Trades involving the transfer of allowances scheduled to be allocated for a future control period may be conducted through the submittal of a completed Form ECT-5, Application for Transfer of Individual Future Year Allowances. With the exception of transfers between sites under common ownership or control, the account representative shall report the price paid per allowance for all transfer transactions. All trades will be completed through the executive director and are considered final when the executive director issues a letter to buyer and seller reflecting the transaction. Allowances initially allocated to sites located in Harris County are restricted from use at sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties. Allowances initially allocated to sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties are restricted from use in Harris County. Only authorized account representatives are permitted to trade allowances. The section states that allowances subject to an approved transaction will be deposited into the purchaser's broker or compliance account within 30 days of receipt of a completed transfer application.

In response to comments, the commission has added new §101.399(h) to provide sites subject to this division the opportunity to convert VOC emission reduction credits (ERCs) that have been certified in accordance with the requirements of Division 1, Emission Credit Banking and Trading, of this subchapter to a yearly allocation of HRVOC allowances equivalent to no more than 5% of the site's initial HRVOC allocation. VOC ERCs qualifying for conversion must be generated from a reduction at a site located in the HGB area. The qualifying ERC must be generated from a reduction strategy implemented after December 31, 2004, to reduce a VOC specie other than those defined as an HRVOC in §115.10. VOC reductions from the installation of controls required as best available control technology under an NSR permit shall not qualify for conversion to HRVOC allowances. In addition to the emission credit requirements of Division 1 of this subchapter, a qualifying ERC must be quantifiable, real, surplus, enforceable, and permanent as required under 30 TAC §101.302 at the time the ERC is converted. The baseline emissions to which the reduction is compared shall consist of the average actual emissions for any two consecutive calendar years preceding the emission reduction strategy and that include or follow the most recent year of emission inventory used in the SIP. The emissions inventory year used in the current SIP for the HGB area is from calendar year 2000. Therefore, based on the current SIP, a VOC reduction that qualifies for conversion under subsection (h) could choose a baseline period consisting of any two consecutive calendar years from 2000 to the date the emission reduction strategy was implemented. In addition, the ERC must not have expired and the owner of the ERC must have prior approval from the executive director to convert the credit to an HRVOC allocation. The quantification methodologies used

for the certification of VOC ERCs that qualify for conversion to HRVOC allowances shall be performed using the monitoring and testing methods required under §115.725 or §115.764 and the owner/operator of the source making the reduction shall comply with the recordkeeping and reporting requirements under 30 TAC §115.726 and §115.766.

The conversion of qualifying VOC ERCs shall be calculated based on a ratio of reactivity between the maximum incremental reactivity (MIR) for the speciated VOCs reduced and the MIR for HRVOC. The MIR values to be used in this conversion calculation shall be those maintained within the table titled *MIR Values for Compounds* under California Code of Regulations, Title 17, Chapter 1, §94700, as amended. From this list, the MIR for propylene of 11.57 grams of ozone per gram of VOC was chosen as the standard MIR for HRVOCs based on the prevalence of propylene in the HGB area airshed. In calculating the tons of HRVOC allowances converted from a reduction in other VOCs, the reactivity for each speciated VOC is multiplied by the actual emissions reduced, in tpy, of each speciated VOC and then divided by 11.57. If the VOC specie reduced is not a listed compound under California Code of Regulations, Title 17, Chapter 1, §94700, the generator may provide the MIR factor along with the appropriate scientific reference or use the MIR of butane as a surrogate.

For sites that are eligible to receive an HRVOC allocation under §101.394, the total amount of HRVOC allowances the site may receive from converting VOC ERCs shall not exceed a quantity of allowances equivalent to 5% of the site's initial allocation. For example, if a site was initially allocated 100 tons of HRVOC allowances, that site would be eligible to receive no more than five tons of additional HRVOC allowances from converting qualified VOC ERCs. In addition to the 5% limit, each site subject to this division that has submitted an application for a permit under Chapter 116 to construct a new covered facility or modify an existing covered facility may generate an HRVOC allocation equivalent to the associated HRVOC emissions increases by converting qualified VOC ERCs. Only those sites that have emissions increases from new or modified covered facilities not in operation prior to January 2, 2004, and that were authorized under a Chapter 116 permit that has been deemed administratively complete by the executive director within one year of the effective date of this rule shall be eligible to receive an HRVOC allocation from the conversion of VOC ERCs. The commission trusts that the conversion of reductions from other VOCs to HRVOC allocations will allow those sites with new or modified covered facilities the opportunity to receive allowances for those HRVOC emission increases while providing additional reductions to the HGB area benefitting the attainment of the one-hour ozone standard.

Section 101.400, Reporting

The adopted new §101.400 states that sites shall submit a completed Form ECT-1H, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Annual Compliance Report, to the executive director no later than March 31 following each control period detailing the amount of actual HRVOC emissions for the preceding control period. The annual compliance report must include the total amount of HRVOC emissions from each covered facility at the site, the methods used in determining the HRVOC emissions, and a summary of all final trades. The adopted section also provides the executive director authority to suspend trades involving the transfer of allowances for future control periods from any site that has not submitted an ECT-1H form. For example, if after March 31, 2007, site A has not submitted an ECT-1H form for the 2006 control period but has submitted an application for transfer of 2003 allowances to site B, the trade may be withheld pending the submittal of site A's Highly-Reactive Volatile Organic Compounds Emissions Cap and Trade Annual Compliance Report and verification of compliance for 2006.

Section 101.401, Level of Activity Certification

The adopted new §101.401 states that all sites subject to this division shall submit a completed Form ECT-3H, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Level of Activity Certification Form, certifying their baseline level of activity no later than April 30, 2005. The ECT-3H form shall include the level of activity for the 12 consecutive month period chosen from calendar years 2000 - 2004 for all covered facilities at the site. The ECT-3H form must include information and documentation in support of the adopted level of activity baseline such as production, purchase, or usage records; process flow diagrams; process descriptions; and material balance calculations. This information will be used to calculate each site's allocation. In response to comments the adopted section allows an owner or operator to mark any portion of the ECT-3H form and the supporting documentation as confidential under Texas Health and Safety Code, §382.041.

For the commission to retain the exemption in §101.392, affected industries in the seven counties surrounding Harris County must establish enforceable limits on hourly and annual emissions of HRVOC from vent gas streams, flares, and cooling tower heat exchangers subject to the control requirements of Chapter 115, Subchapter H at levels represented in the most recent authorizations under Chapter 116. Information pertaining to the levels of HRVOC emissions represented in authorizations for sites within Harris County will be necessary to more accurately evaluate the HGB area for the eight-hour ozone attainment demonstration. Therefore, new subsection (e) was added to the rule requiring all sites in the HGB area with a potential to emit more than ten tpy of HRVOC to submit, in addition to Form ECT-3H, enforceable documentation of the maximum allowable emission rates for HRVOC emissions from covered facilities at that site.

Section 101.403, Program Audits and Reports

The adopted new §101.403 requires the executive director to perform an audit of the HRVOC emissions cap and trade program within three years of the effective date of this division and every three years thereafter. The audit will evaluate the impact of the program on the SIP, availability and cost of allowances, compliance by participants, necessity for additional trading restrictions, and any other elements chosen by the executive director. Additionally, no later than June 30 following each control period, the executive director shall prepare and make available a report for the previous control period. This report will detail the number of allowances allocated to each compliance account, total number of allowances allocated under this division, total amount of HRVOC allowances deducted from each compliance account based on actual HRVOC emissions, and a summary of all trades for the control period.

FINAL 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 rulemaking action meets 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The adopted rulemaking to Chapter 101 and revisions to the SIP affects owners and operators of sources emitting HRVOC subject to Chapter 115, Subchapter H, Divisions 1 and 2. In this rulemaking, the commission is establishing a cap and trade program to implement the annual HRVOC cap under Chapter 115, Subchapter H being adopted in concurrent rulemaking. All sites subject to the cap and trade program are required to hold a quantity of allowances in its compliance account by March 1 equal to or greater than the total HRVOC emissions emitted during the previous control period. The HRVOC cap will reduce the overall reactivity in the airshed by removing compounds that are most prevalent and most likely to react rapidly enough to cause one-hour ozone exceedances. The rules are intended to protect the environment and reduce risks to human health and safety from environmental exposure and may have adverse effects on owners and operators of certain sources. Many of these sources are owned or operated, petrochemical plants, refineries, and other industrial, commercial, or institutional groups, and each group could be considered a sector of the economy. This determination is based on the analysis provided in the proposed preamble, including the discussion in the PUBLIC BENEFITS AND COSTS section of the proposal.

This rulemaking does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. 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 rulemaking implements requirements of 42 USC, §7410, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the NAAQS in each air quality control region of the state. While 42 USC, §7410, does not require specific programs, methods, or reductions to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the FCAA does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 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 to attain 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. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of adopted regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. 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 proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC, §7410 does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis 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. Because 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 Legislative Budget Board, the commission contends that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC, §7410. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe one-hour ozone nonattainment areas such as the HGB area. The adopted rules, which will reduce ambient HRVOC and ozone in the HGB area, will be submitted to the EPA as one of several measures in the federally approved SIP. As discussed earlier in this preamble, the banking and trading program in the adopted rules are necessary to address some of the elevated ozone levels observed in the HGB area; this program will result in reductions in ozone formation in the HGB area and help bring the HGB area into compliance with the air quality standards established under federal law as NAAQS for ozone. Through its

2004 revision to the HGB SIP, the commission is fulfilling its outstanding one-hour ozone SIP obligations and beginning to plan for the upcoming eight-hour standard. This rulemaking is part of the HGB SIP revision which demonstrates attainment of the one-hour ozone standard in the HGB area in 2007, and provides preliminary analysis of the HGB area in terms of the eight-hour standard in 2007 and 2010.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. The commission presumes 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); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *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).

As discussed, this rulemaking action implements requirements of 42 USC, §7410. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is it adopted solely under the general powers of the agency. Finally, this rulemaking action 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 Texas Clean Air Act), and Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.011, 382.012, 382.014, 382.016, 382.017, 382.021, and 382.034. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rulemaking does not meet any of the four applicability requirements.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043. The specific purpose of this rulemaking is to reduce and permanently cap HRVOC emissions to a level that would allow the HGB area to attain the NAAQS for ozone. Promulgation and enforcement of the rules will not burden private real property. The adopted rules 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. Additionally, the credits and allowances created under these rules are not property rights. Consequently, this rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this rulemaking action, because it is reasonably taken to fulfill an obligation mandated by federal law. The emission limitations and control requirements within this rulemaking action were developed to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS. Attainment of the one-hour ozone standard will require reductions of HRVOC emissions, as well as substantial reductions in NO_x emissions. Any VOC reductions resulting from the current rulemaking are no greater than what scientific research indicates is necessary to achieve the desired ozone levels. However, this rulemaking is only one step among many necessary for attaining the one-hour ozone standard.

In addition, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the adopted rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety. This action is taken in response to the HGB area exceeding the federal ozone NAAQS. This exceedance adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by reducing ozone levels in the HGB area. Consequently, the rules meet the exception in Texas Government Code, §2007.003(b)(13). This rulemaking action therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). For these reasons, the adopted rules do not constitute a takings 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 the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 30 TAC §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 Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this 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(l)). No new sources of air contaminants will be authorized and the adopted rules will maintain the same level of, or reduce the level of emissions as the existing rules. 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 §501.14(q)). This rulemaking action complies with 40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Because Chapter 101 contains applicable requirements under 30 TAC Chapter 122, Federal Operating Permits, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 101 requirements for each emission unit at their sites affected by the revisions to Chapter 101.

PUBLIC COMMENT

The commission conducted public hearings on the proposed rules on August 2, 2004, in Houston; August 3, 2004, in Beaumont; and August 5, 2004, in Austin. During the public comment period, which closed on August 9, 2004, the commission received comments from ATOFINA Chemicals, Inc. and American Acryl, L.P. (ATOFINA-American); ATOFINA Petrochemicals, Inc. (ATOFINA-Petrochemicals); Bracewell and Patterson, L.L.P., on behalf of Basell USA, Inc. (Basell); BASF Corporation (BASF); Baker Botts, L.L.P., on behalf of the BCCA-AG; Chevron Phillips Chemical Company (Chevron-Phillips); Dow Chemical Company (Dow); Environmental Defense; EPA; Electric Reliability Council of Texas, Inc. (ERCOT); Galveston-Houston Association for Smog Prevention (GHASP); Harris County Public Health and Environmental Services (HCPHES); the Honorable Bill White, Mayor, City of Houston and the Honorable Robert Eckels, County Judge, Harris County (Houston/Harris County); Baker Botts, L.L.P., on behalf of the Mid-course Coalition (MCC); Sierra Club--Houston Regional Group (Sierra Club); SUNOCO Chemicals (SUNOCO); Texas Chemical Council (TCC); Valero Energy Corporation (Valero); and four individuals.

RESPONSE TO COMMENTS

TCC requested that the commission clarify §101.391, Applicability, to indicate that the HRVOC rule applies to HRVOC process units, petroleum refinery process units, and sites that transport or store HRVOCs. TCC also suggested that the commission remove the word "all" from the phrase "Covered facilities include all vent gas streams, flares, or cooling tower heat exchange systems that emit highly-reactive volatile organic compounds" to avoid confusion that exempt streams are included in HRVOC provisions.

The commission has revised the rule, based on this comment, to remove the word "all" from the rule language under §101.391. Should a vent gas stream, flare, or cooling tower at a site be exempt from the control requirements of Chapter 115, Subchapter H, Division 1 or 2 by meeting an exemption under §115.727 or §115.767, that vent gas stream, flare, or cooling tower would not be subject to the HRVOC emissions cap and trade program. Exempted process units that are not subject to the HRVOC emissions cap and trade program should not be counted in establishing the baseline level of activity for allocation of HRVOC allowances and would not be required to count emissions toward compliance with the annual cap.

BCCA-AG, MCC, and Valero commented that the vent gas and cooling tower heat exchange system rules apply to certain accounts in the HGB area airshed. The proposed HRVOC cap and trade program applies to sites and the terms "account" and "site" are similar but not identical. MCC requested that the commission substitute the term "site" for "account" in the vent gas and cooling tower heat exchange system rules. MCC also stated that the term "account" is used in the proposed HRVOC emissions cap and trade program rules when referring to compliance and broker accounts, adding to the confusion. TCC also stated that the rule is confusing because "site" and "account" are used interchangeably.

The rules have not been revised based on this comment. The adopted rule applies to a "Site" as defined in §122.10. Based on comments, Chapter 115, Subchapter H, Divisions 1 and 2 have been revised to apply to a "Site" as defined in §122.10. The term "account" is only used in the adopted rule when referring to a compliance account or broker account where allowances are recorded.

The proposed HRVOC emissions cap and trade program rules exempt sites that have the potential to emit less than ten tpy. BCCA-AG, MCC, and Valero recommended that the commission clarify the applicability of the HRVOC emissions cap and trade program rules to sites in the HGB area subject to the vent gas or cooling tower heat exchange system rules by including in §101.390 the definition of "Potential to emit" as found in §116.12(15). The definition should not include nonroutine emissions that cannot be planned or predicted.

The commission has revised the rule, based on this comment, to reference the definition of "Potential to emit" as defined in §116.12.

Chevron-Phillips and Dow commented that the studies indicate that a cap and trade program in the seven counties surrounding Harris County will have little effect on the entire HGB area's ability to meet the one-hour or eight-hour ozone standards. Based on these studies, Chevron-Phillips and Dow contended that the short-term and annual caps in the seven surrounding counties are not warranted. Chevron-Phillips and Dow requested that the commission delay any action on a cap and trade program for the seven counties surrounding Harris County until such time that the science predicts that a cap and trade program would be an effective measure to enable attainment of the ozone standards.

The commission has reviewed the studies referenced by the commenter and has provided an exemption from the requirements of this division for sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties. Sites located in those counties, otherwise subject to this division, must explicitly demonstrate that enforceable limits on HRVOC emissions from covered facilities are below a level that is consistent with the attainment demonstration of the NAAQS for one-hour ozone by the attainment date. Affected industries in the seven counties surrounding Harris County have indicated to the commission that representations for HRVOC emissions within their respective air permits are well below the values likely to be put in place through the annual HRVOC cap. For the commission to consider retaining this exemption, each site with a potential to emit more than ten tpy of HRVOC must establish enforceable limits on HRVOC emissions from vent gas streams, flares, and cooling tower heat exchangers subject to the control requirements of Chapter 115, Subchapter H at levels represented in the most recent authorizations under Chapter 116. Establishing enforceable limits on HRVOC emissions on an emission point basis can be accomplished through submittal of a PI-8 Form or any other form provided by the executive director to certify federally enforceable emission limits. In addition, enforceable limits on HRVOC emissions can be established by altering or amending authorizations under Chapter 116 to have an HRVOC emissions limit expressed in the maximum allowable emission rate table.

The necessary enforceable documentation is required to be submitted along with the site's Form ECT-3H no later than April 30, 2005. The executive director will then evaluate the total amount of HRVOC emissions established through these enforceable limits for sites in the seven counties surrounding Harris County to determine the appropriateness of the cap and trade program for those counties. If the evaluation reveals that the total amount of enforceable HRVOC emissions is at a level that is inconsistent with the attainment demonstration of the NAAQS for one-hour ozone by the attainment date, the commission may revoke the exemption and require compliance with this division by January 1, 2007, or within 180 days after notification, whichever is later.

BCCA-AG, Dow, MCC, TCC, and Valero commented that the definition of "Level of activity" in §101.390(7) should be modified to recognize that some process units not only produce but also use HRVOC. The proposed definition would result in an allowance allocation based on just production or use of HRVOC. Dual function process units would be under allocated. Dow also urged that the commission consider large, complex sites that produce, use, and store HRVOC. These sites should receive a portion of the allowances set aside for storage sites. TCC requested the ability to provide input on the requirements of the level of activity form in §101.401(c). TCC requested that the commission provide a correction method for companies that discover incorrect data on production or use of HRVOC.

The definition of "Level of activity" in §101.390 has not been revised based on this comment. A single process unit that both produces and uses HRVOC should count only HRVOC production or use activity, not both, toward a site's total level of activity.

The commission chose to segregate sites that did not operate process units that produce or use HRVOCs to allow those sites to use another basis for determining their HRVOC allocations. Complex sites that may store HRVOCs in addition to producing or using HRVOCs will have a level of activity from the production and/or use of the HRVOCs being stored. Thus these complex sites would have a production and/or use level of activity that corresponds to the storage of HRVOCs.

The commission has not revised the rule to provide a method for correcting incorrect level of activity data. Based on the allocation methodology, any change in level of activity at a site due to the correction of incorrect HRVOC production and use data will have a direct impact on the quantity of allowances available to all other sites in the same area. The commission will evaluate changes to the control strategies for the HGB area needed to meet the eight-hour ozone standard. These changes may include reallocation of allowances, possibly using actual monitored data, which would provide an opportunity to correct errors from previous level of activity certifications.

The commission would welcome input from the regulated industries subject to the HRVOC emissions cap and trade program on what data will be useful and necessary to establish a level of activity baseline for each site. Further, the commission trusts that this cooperative effort will be necessary to quickly and efficiently determine the allowance allocation under the HRVOC emissions cap and trade program.

BCCA-AG, Chevron-Phillips, MCC, TCC, and Valero commented that the proposed rules do not allow any time to plan for the use of HRVOC emissions cap and trade program allowances because the first control period begins the day after the initial allocation. They stated that HRVOC emissions cap and trade program sites must have 24 months between initial allocation and the first control period for the following reasons.

The HRVOC emissions cap and trade program applies to vents, flares, and cooling towers at numerous sites and under widely varying conditions. Sites require an adequate amount of time to analyze and implement control strategies.

HRVOC emissions in the HGB area may be significantly underestimated and the monitoring and testing methods in §115.764 should be implemented by December 31, 2005, in order to reveal HRVOC emissions that are different than those estimated using earlier techniques. This possibility must be considered in the HRVOC emissions cap and trade program rules and time should be allowed for sites to adjust their compliance plans.

The mass emissions cap and trade program for NO_x did not require any reductions during its initial control period thus allowing a period for the planned implementation of control strategies. The HRVOC emissions cap and trade program requires immediate reductions during the initial control period. MCC stated that a reasonable period of time between allocation and the first control period would be consistent with the mass emissions cap and trade program.

A delay of the initial control period to April - December 2007 is consistent with EPA requirements as stated in the preamble to the adoption of the eight-hour ozone standard, which requires that controls be implemented by the beginning of the ozone season immediately preceding the area's attainment date.

MCC recommended a workshop or pilot program to disseminate level of activity information to help ease the short-term burden on the commission and regulated industries caused by a 24-month delay between allocation and initial control period.

The commission disagrees with the commenters' interpretation of the rules. The adopted rules provide for allowances to be deposited into compliance accounts on March 31, 2006, not for the notification of a site's allocation by that date. It is the intent of the commission to process the level of activity certifications and calculate the allocations for all sites subject to the HRVOC emissions cap and trade program in a manner that is considerate of the regulated industry's need to implement control strategies. The commission is willing to commit to notifying each site subject to the HRVOC emissions cap and trade program of its projected allocation no later than September 1, 2005.

Because the HRVOC emissions inventory is based on estimates rather than monitoring data, the commission is not adopting an allocation methodology dependent on HRVOC emissions from each site subject to the HRVOC emissions cap and trade program. Instead, the allocation methodology distributes, based on HRVOC production and use, the tons of HRVOC emissions that the HGB area airshed can sustain while demonstrating attainment of the one-hour ozone standard.

The commission has revised the rule to delay the initial control period to January 1, 2007. This delay should allow regulated industries additional time to determine actual HRVOC emissions based on the monitoring and testing methods required under Chapter 115 and to adjust their compliance strategies should that data differ from earlier emissions estimates.

While the HRVOC emissions cap and trade program rules would provide for the initial allocations to be based on the overall required HRVOC reductions, the HRVOC control requirements were adopted in November 2003. Regulated industries have had since that time to formulate control strategies that at a

minimum would attain compliance with the site-wide caps adopted under the 2003 SIP revision.

The commission agrees that workshops or stakeholder meetings to determine the level of activity information needed would help to quickly and efficiently determine the HRVOC allocations and will work with affected industries in such a manner.

Dow and ATOFINA-American also expressed concern about the uncertainty of final caps coupled with a short time to comply and urged the commission to issue initial allocations as soon as practicable in 2005. Dow recommended that the first control period run from April 1, 2006, to December 31, 2006, with a 100% allowance allocation, or establish the first control period from January to December 2007. BASF and Chevron-Phillips requested that the initial control period be delayed for one year.

The commission intends to process the level of activity certifications and calculate the allocations for all sites subject to the HRVOC emissions cap and trade program in a manner that is considerate of the regulated industry's need to implement control strategies. Staff is willing to commit to notifying each site subject to the HRVOC emissions cap and trade program of its projected allocation no later than September 1, 2005. In addition, the commission has revised the rule to delay the initial control period to January 1, 2007. This delay should allow regulated industries time to adjust their compliance strategies should the monitoring and testing methods required under Chapter 115 reveal greater emissions than earlier emissions estimates.

ATOFINA-American, BCCA-AG, Dow, MCC, TCC, and Valero commented that emissions from emission events and emissions from scheduled maintenance startup and shutdown should not count against a site's allowances. Emission events and many scheduled maintenance startup and shutdown activities are unanticipated and should not be counted with routine and predictable emissions when deducting allowances. Counting unanticipated emissions against a site's allowances could cause a rapid exhaustion of allowances leading to the possibility of a site shutdown and a potential loss of a significant portion of national refining capacity. They stated that the HRVOC emissions cap and trade program is designed to lower levels of HRVOC emissions over the program area and is not suitable for use in addressing short-term emissions in the manner of the uniform hourly limit. TCC suggested revising §101.396(b) to state that emissions "in compliance" with §101.211 be included in the accounting for the annual site-wide HRVOC cap. An individual supported the emission event inclusion.

Under a cap and trade program, all emissions from capped sources should be counted for compliance. However, the commission has recognized the possibility that emission events could cause rapid exhaustion of a site's annual allowances requiring such a site to depend on market availability of allowances for compliance or lead to formal enforcement for violating the annual cap. Based on this recognition, the adopted rules do not require that emissions exceeding the short-term limit be counted against the annual cap, thus providing the opportunity for a site to still meet the annual limit while exceeding the short-term limit. The commission has determined that emissions above the short-term, not-to-exceed limit should not count against the cap because those emissions are arguably not a part of the base of emissions that comprise the long-term part of the two part strategy.

BCCA-AG, MCC, and Valero commented that counting nonroutine emissions against a site's allocation results in a double penalty for the site because the site remains liable for potential enforcement under Chapter 101 emission event rules. HRVOC emissions cap and trade program sites will also be subject to hourly limits, which exposes them to more potential enforcement. BCCA-AG, MCC, and Valero also stated that counting unplanned emissions against allowances causes the HRVOC rules to work at cross purposes because the increased fugitive monitoring required under 30 TAC §§115.780 - 115.789 would require more frequent shutdowns and more venting and flaring associated with those shutdowns.

The rules have not been revised based on this comment. The commission acknowledges that sites with nonroutine emissions are subject to the requirements relating to emission events under Chapter 101 and an hourly limit under Chapter 115. The adopted rules do not require sites to count emissions above the short-term limit in calculating annual emissions for compliance with the cap and trade program. This provision was created to reduce the likelihood of a site with an emission event from also exceeding its annual cap limit.

The proposed language in §§115.780 - 115.789 has been revised to specify that the calculation of emissions from non-repairable leaking components for comparison to emissions that would be generated by a shutdown to repair the leaking components is to be determined on a daily basis. The proposed requirement would have made the comparison on a cumulative basis from the time the component was determined to be leaking until the next scheduled process shutdown. The adopted requirements also specify a *de minimis* level of 500 pounds to trigger a shutdown.

BCCA-AG, Dow, MCC, TCC, and Valero requested that the commission allocate allowances on a process-unit basis and then aggregate all the units for a site's total allocations. They stated that this type of allocation will allow process units located at hybrid sites to receive more equitable allocations. Without this provision, for example, refining units located at a chemical plant would be treated differently than refining units at a dedicated petroleum refinery. TCC suggested a revision to the definition of "Petroleum refinery" to accomplish this and that refinery not be split out as a separate category for HRVOC allocations.

The rule has been revised based on this comment. The commission does not have sufficient data on actual HRVOC emissions attributable to specific types of process units to support an allocation on a process-unit basis. The proposed allocation methodology has been revised based on additional comments to treat all process units that produce or use HRVOC equally. Sites that strictly store or handle HRVOC and do not have any HRVOC production or use activity will continue to be treated independent of those sites that have HRVOC production or use activity and will receive allowances from a 10% set-aside. The commission will evaluate under its analysis of the eight-hour ozone standard whether it would be appropriate to reallocate allowances based on actual monitored HRVOC data. That potential reallocation could result in a different methodology of allocating emissions if sufficient data is available to warrant an alternative approach.

SUNOCO and ATOFINA-Petrochemical requested that the commission provide a detailed justification for establishing a separate emissions cap for refineries and chemical plants. They also requested an explanation of how the proposed rules would credit facilities, in terms of HRVOC allocations, for early installation and operation of emission control equipment prior to the proposed 2000 - 2004 certification period. The proposal does not seem

to consider facilities that may have already installed controls in excess of those required.

The rules have been revised to remove the specific emissions cap for petroleum refineries. The allocation methodology in the adopted rules treats all sites with HRVOC production or use activity equally.

Allocations are not based on actual HRVOC emissions due to a lack of accurate emissions data. Since the allocation methodology is based on HRVOC production/use, a site that installs and operates emissions control equipment prior to the required compliance date should benefit.

BCCA-AG, MCC, and Valero requested that the commission clarify what percentage of total HRVOC allowances may have already been set aside for sites that do not use or produce HRVOC but simply store them. They requested that the commission confirm that the allocation for storage sites will only increase the figures for HRVOC production and use sites. TCC requested that the commission provide a basis for the 10% figure of total allocations that will be set aside for dedicated storage sites.

The adopted rules allow for the distribution of up to 10% of the total cap for Harris County and up to 10% of the total cap for the other seven counties to be allocated to sites that do not produce or use HRVOCs. If the full 10% that was set aside is not allocated to the sites that do not produce or use HRVOCs, then the remaining allowances not allocated will be distributed under §101.394(a) and (d). The area caps listed in §101.394(a) and (d) do not include the 10% set aside for sites that do not produce or use HRVOC. Therefore, should the full 10% not be allocated to those sites without HRVOC production and use, the area caps listed in §101.394(a) and (d) will increase.

ATOFINA-American supported the set-aside allocations for storage facilities but stated that the commission was silent on how unused allowances at these facilities could be used. ATOFINA-American commented that the surplus allocations should be eligible for trade or purchase.

The commission appreciates the support. Once the allocations for all sites have been determined and placed into each site's compliance account, any excess allowance not needed for compliance may be traded in accordance with §101.399. This would include allowances allocated under §101.394(c) for those sites that do not produce or use HRVOCs.

Basell requested that the commission provide an explanation of the selection of a five-year period to determine level of activity. Basell also stated that the level of activity was a poor substitute for accurate emission inventory data. Without a more certain emission inventory, a regulatory cap could be implemented that would shut down permitted facilities. Basell stated that the focus on HRVOC emissions appears to be based solely on modeling of an August 2000 event and questioned the need for large cuts in HRVOC emissions. TCC asked how the commission would reconcile significant shifts in the HRVOC emission inventory with production and use information.

The commission has revised the rule to allow each site to choose any 12 consecutive months during the period of 2000 - 2004 as the representative baseline period for each process unit subject to the HRVOC control requirements under Chapter 115, Subchapter H, Divisions 1 or 2. A 12 consecutive month baseline period will allow sites to choose a baseline level of activity for each process unit that results in the least amount of impact on the site's allocation due to unplanned shutdowns, process unit turnarounds, or economic conditions.

The modeling is based on the emissions adjustment, not the other way around as implied by the commenter. The commenter is referred to several peer-reviewed scientific papers, which conclude that HRVOC emissions in the HGB area are severely under-reported in the inventory (*Chemical and Meteorological Characteristics Associated with Rapid Increases of Ozone in Houston, Texas*, Berkowitz et al., 2004; *Modeling the Effects of VOC and NO_x Emission Sources on Ozone Formation in Houston During the TexAQS 2000 Field Campaign*, Jiang et al., 2004; *Chemical Characterization of Ozone Formation in the Houston-Galveston Area: a Chemical Transport Model Study*, Lei et al., 2004; *Effect of Petrochemical Industrial Emissions of Reactive Alkenes and NO_x on Tropospheric Ozone Formation in Houston, Texas*, Ryerson et al., 2003; *Signatures of Terminal Alkene Oxidation in Airborne Formaldehyde Measurements During TexAQS 2000*, Wert et al., 2003--see the revised Houston/Galveston/Brazoria One-Hour Ozone Mid-Course Review SIP for references). The commission contends that addressing HRVOC emissions are a necessary part of the attainment strategy for the HGB area. Future control strategy modeling of HRVOC emissions establishes an emission rate at which the one-hour standard can be attained. The area-wide cap has been set at this level. The HRVOC emission inventory will be significantly improved with the additional monitoring requirements of Chapter 115. Several studies have indicated that the HRVOC emission inventory is not consistent with ambient concentration measurements, thus the commission contends that drawing conclusions about the current HRVOC emission inventory without further actual monitoring would be difficult. The commission contends that in general, emissions are proportional to the amount of product handled. In cases where emissions of HRVOC may be lower for one facility handling the same amount of HRVOC as another facility, this reduction can be attributed to better control strategies and environmental management systems. As a part of the development of a one-hour attainment demonstration, the commission may consider reallocating the allowances to be based on actual emissions data as it becomes available.

ATOFINA-American, Basell, BASF, BCCA-AG, Chevron-Phillips, Dow, MCC, TCC, and Valero requested that the commission allow the use of any 12 consecutive months during the period 2000 - 2004 to establish a level of activity instead of the five-year period itself. This will take into account any shutdowns that may have occurred during the five-year period and prevent an artificially low level of allocation. Dow stated that this method would eliminate the need for the extenuating circumstances language in §101.394(i).

The rule has been revised based on this comment. The adopted rule allows each site to choose any 12 consecutive months from the period of 2000 - 2004 as the representative baseline period for each process unit subject to this division.

Basell stated that allowance allocations should be based on permitted emission levels. This allocation would then be based on normal operations and better reflect the production capacity that formed the basis for the capital investment in the facility. Air permits could serve as a base for this allocation method.

The commission has not revised the rule based on this comment. The allocation of allowances based on the allowable limits set forth in an air permit was an option discussed during meetings with stakeholders. However, the option was problematic

because most permits do not explicitly state allowable limits for speciated VOCs. In addition, permit limits are often based on maximum operation and not normal operation. The goal of basing the allowance allocations on actual HRVOC production and use, in the absence of accurate emissions data, was to relate the allocations to data representative of actual operation.

BCCA-AG, MCC, and Valero requested that the commission clarify the intent of §101.394(e) by adding language that the owner of an account must purchase or transfer allowances to cover any deficiency in an account that has been penalized for overdrawing allowances in the previous control period.

The adopted language under §101.394(e) is intended to specify that those sites that engage in trading activities that could result in a site's compliance account being void of allowances for a given year, have the responsibility of purchasing or transferring allowances to cover any penalty assessed for noncompliance for the previous control period. For example, a site is allocated 10.0 tons of HRVOC allowances on a yearly basis. In 2007, the site emits 15.0 tons and transfers 6.0 tons of 2008 allowances through submittal of an individual future year trade application. A penalty of 5.5 tons (the 5.0 tons exceeding the site's allowance possession plus 10%) would be assessed on the 2008 allocation. However, the site's compliance account for 2008 contains only 4.0 tons of allowances (10.0 tons allocated--6.0 tons transferred) due to the transfer transaction and does not hold a sufficient number of allowances to allow full assessment of the 5.5 ton penalty for noncompliance in 2007. Under the adopted rule the site would be responsible for acquiring, on the open market, the additional 1.5 tons of allowances to cover the full penalty amount.

BCCA-AG, MCC, and Valero requested that the commission clarify in the preamble the effect of an overdrawn account on the next year's allocation. They expressed the belief that the penalty for an overdrawn account (the amount overdrawn plus 10% subtracted from the next year's allowances) is applied for only the year immediately after the overdrawn year and does not affect subsequent years.

The commenters are correct. A penalty for noncompliance with a given control period is only assessed on the allocation for the next control period. If a site does not possess sufficient allowances to cover its actual emissions in 2007, a penalty consisting of the amount exceeding the compliance account balance plus an additional 10% would be assessed on the 2008 allocation. If the site then possessed sufficient allowances to cover its actual emissions in 2008, no further allowance penalties would be assessed on that site in 2009. This does not preclude formal enforcement action or penalties resulting from enforcement action.

BCCA-AG, MCC, and Valero objected to language in §101.394(g), which appears to give the executive director the authority to adjust the number of HRVOC allowances based on new SIP requirements. They argued that allowance allocation formulas are established by rule and any change in those allocation procedures should go through a rule change and be approved by the commission. This language, they contended, would allow the executive director to change the HRVOC emissions cap and trade program without amendment to the rules that support it. They also commented that any reminder stating that allocations under the HRVOC emissions cap and trade program are subject to change by the commission only be included in the adoption preamble. ATOFINA-American requested that the rules allow the executive director to expand the pool of allocations at least every five years to accommodate industrial growth.

The commission agrees that it is highly unlikely that the allocation of allowances would be changed absent a rulemaking. However, there may be unforeseen circumstances that could necessitate the executive director to change allowance allocations. Additionally, in the commission's continuing evaluation of control strategies for the HGB area's eight-hour ozone attainment demonstration a reallocation of allowances, possibly using actual monitored data, may be necessary. Any future reallocation would necessitate a rule change and a revision to the SIP, allowing for public participation and comment.

BCCA-AG, MCC, TCC, and Valero requested that the commission not restrict the HRVOC emissions cap and trade program to existing process units but include a mechanism that would allocate allowances to new or modified process units that have an administratively complete application or have qualified for a permit by rule 60 days after the effective date of the HRVOC emissions cap and trade program. They stated that a precedent exists in the mass emissions cap and trade program that allows allocation to units under construction. They also stated that a portion of the 10% set-aside allowances for storage facilities could be allocated to future projects.

The rule has been revised based on these comments to provide sites subject to the HRVOC emissions cap and trade program the opportunity to convert VOC emission reduction credits to a yearly HRVOC allocation at a ratio based on reactivity. This provision could be used by sites to create additional HRVOC allowances for increases in HRVOC emissions from new or modified covered facilities. The commission chose not to rely on the allocation of allowances remaining from the 10% set-aside due to uncertainty in the number of allowances that would be available to future qualified projects.

Basell, BCCA-AG, MCC, TCC, and Valero commented that extenuating circumstances (i.e., power outages, fire, acts of God) that lead to a forced level of low activity should not be limited to noneconomic factors. They commented that severe economic-related conditions should also be included and that the executive director should have discretion to grant a case-by-case baseline determination.

The rules have not been revised based on these comments. Based on the allocation methodology, any change in level of activity at a site will have a direct impact on the quantity of allowances available to all other sites in the same area. Therefore, it is imperative that the setting of each site's allocation be based on actual HRVOC production and use for that site. The commission contends that the opportunity for each site to choose a 12 consecutive month baseline period for each process unit subject to this division, from the period of 2000 - 2004, will allow sites to establish a level of activity baseline resulting in the least amount of impact on the site's allocation due to forced levels of low activity. The commission is sensitive to economic fluctuations that attribute to varying emission levels and contends that almost all sites under the HRVOC emissions cap and trade program could make an argument for consideration of extenuating circumstances based on economic-related conditions.

Basell commented that the commission should allow alternate allocation methods in the case of extraordinary circumstances. Those methods are: 1) allocate allowances based on permitted operations; 2) allow a site to use one year before or after the 2000 - 2004 period; 3) select a maximum activity year during

2000 - 2004; or 4) allow sites to use VOC credits if it is demonstrated that the credits include HRVOCs. Basell, Dow, and TCC also commented that the commission should provide a method to appeal allocation amounts to the executive director.

The allocation of allowances based on permit limits is not feasible as most NSR permits do not contain allowable limits for specific VOCs. Further, the establishment of the annual HRVOC caps must be based on actual data and not maximum operating data as used in permits. The commission contends that the revised baseline provision will allow sites to establish a level of activity baseline resulting in the best possible level of activity levels for the site and, therefore, sites should not need the added benefit of an extenuating circumstance provision. The commission has also revised the rule to allow sites to convert emission reductions in other VOCs to a yearly allocation of allowances, providing sites an option to increase their allocation should they feel it insufficient. Revisions to allocations based on appeal would have a direct impact on all other sites subject to the cap and trade program creating problems with each site's ability to accurately develop reduction strategies for compliance.

BCCA-AG, MCC, and Valero stated that the proposed wording of §101.401(d) seems to limit the protection of confidential information to only that information concerning the production or use of HRVOC and requested that the wording be changed to eliminate any potential conflict or misunderstanding over the limitations of the protection of confidential material. The confidentiality provisions of the Texas Clean Air Act cannot be waived or restricted by rule. TCC requested that information of specific HRVOC use remain confidential and that only total HRVOC use/production be made public.

The rule has been changed in response to these comments. The commenters have correctly pointed out that the confidentiality provisions of the Texas Clean Air Act cannot be waived or restricted by rule. The provisions of §101.401(d) reiterate that portions of the level of activity certification form, as well as supporting documentation, may be marked as confidential. To minimize potential misunderstandings, the phrase "relating to production and use of highly-reactive volatile organic compounds" has been removed. A governmental body does not have authority to promulgate a rule purporting to make certain information confidential unless it is statutorily authorized to do so.

BCCA-AG, EPA, MCC, and Valero commented that the SECTION BY SECTION DISCUSSION of the preamble refers to an allowance as the authorization to emit 0.1 ton of HRVOC during a control period and that this description conflicts with the definition of allowance in §101.390(1).

The commission has revised the preamble based on this comment to specify that an allowance is the authorization to emit one ton of HRVOC during a control period and expressed to the tenth of a ton.

BCCA-AG, MCC, and Valero commented that the definition section of the proposal should use the existing definitions in rules where possible. They noted the following existing definitions that could be referenced in the HRVOC rules: "Cooling tower heat exchange system" as defined in §115.760(b); "Flare" as defined in §101.1(33); "Houston/Galveston ozone nonattainment area" as defined in §115.10(18); "Highly-reactive volatile organic compounds" as defined in §115.10(17); "Site" as defined in §122.10(27); and "Vent" as defined in 30 TAC §101.1(109).

The commission has revised the rule based on this comment. The adopted rule contains references to existing definitions of the terms "Highly-reactive volatile organic compounds," "Houston/Galveston/Brazoria ozone nonattainment area," "Process unit," and "Site." In addition, the adopted rules apply to those sites that are subject to Chapter 115, Subchapter H, Division 1 or 2. These rules contain a definition or reference to a definition of the terms "Cooling tower heat exchange systems," "Flare," and "Vent."

TCC requested that the commission add a definition for "HRVOC process unit" that would include production, use, and storage. TCC recommended additional definition for "production," "use," and "process" patterned after EPA publication "Toxic Chemical Release Inventory Reporting Forms and Instructions: Revised 2002 Version," March 2003. TCC also suggested that definitions used in multiple rules should be placed in a common location.

The rule has not been revised based on this comment. The adopted rule does not use the term "HRVOC process unit." Chapter 101 contains the state's general air quality rules where terms used in multiple rules are defined. Terms not specifically defined under rule have meanings commonly ascribed to them in the field of air pollution control. The commission contends that the use of the terms "production," "use," or "process" within the adopted rule does not warrant a specific definition.

TCC commented that a cooling tower heat exchange system will need a minimum allocation of five tpy, regardless of level of activity, to cover emissions from the cooling water system.

The commission has revised the rule based on this comment to provide a minimum allocation of 5.0 tons for sites subject to the HRVOC emissions cap and trade program or exempt sites electing to opt-in to the HRVOC emissions cap and trade program. This revision should address situations where a small site, with relatively little HRVOC production or use activity, receives services, such as cooling water, from a second site. In addition, this revision provides an incentive for exempt sites to opt-in to the cap and trade program. The total amount of allowances allocated based on the minimum 5.0 ton allocations and the corresponding level of activity from those sites receiving a minimum of 5.0 tons will be subtracted from the allocation equation prior to calculating the allocations for the remaining sites.

TCC requested that the commission clarify if sources operating during the baseline determination period but that are now shut down, may count the emissions from the shut down source toward estimates of production and use.

Level of activity from covered facilities operating at any time during the calender year 2000 - 2004 period but that are now shut down may be counted towards the total HRVOC level of activity for the site. For example, a process unit in operation during calender years 2000 and 2001 is shut down on April 30, 2001. The owner/operator may choose a baseline period for that process unit of April 1, 2000 - March 31, 2001, in order to count the level of activity contribution of that process unit in calculating the base level of activity for the site.

TCC commented that the commission should allow trades out of Harris County into surrounding counties if those counties are subject to a cap.

The rule has not been revised based on this comment. The commission has provided an exemption for sites located in the seven counties surrounding Harris County. Therefore, it would not be appropriate to allow trades of HRVOC allowances out of Harris County.

TCC supported rule provisions that make future year allowance transfers to be final rather than conditional.

The commission appreciates the commenter's support.

TCC requested that the commission provide the basis for HRVOC allocations to Harris County, surrounding counties, petroleum refineries, and "set-asides."

For Harris County, the annual HRVOC cap was reduced from the HRVOC cap in the December 2002 SIP revision in order to support the attainment demonstration modeling. The total annual cap for Harris County equates to 3,633.1 tons of HRVOC. The annual HRVOC cap for the seven-county surrounding area is equivalent to the total emissions limits established in the December 2002 SIP revision, but represented on an annual basis instead of a 24-hour rolling average. The total annual HRVOC cap for the seven-county surrounding area equates to 5,135.5 tons of HRVOC. The commission then reduced the respective caps by 5% as a compliance margin to address uncertainty in geographical emission shifts under a cap and trade program. Additionally, 10% from each annual HRVOC cap was then set aside for allocation to sites that did not produce or use HRVOCs. For Harris County the amount to be distributed to sites that produce and use HRVOC after reducing the cap for the 5% compliance margin and the 10% set aside is 3,106.3 tons. For the seven-county surrounding area the amount to be distributed to sites that produce and use HRVOC after the 5% and 10% reductions is 4,390.8 tons. The area caps listed in §101.394(a) and (d) are based on these quantities of HRVOC emissions.

Based on comment, the commission has chosen not to allocate to refineries independent of other industries and has elected to treat all process units that produce and use HRVOC equally.

ERCOT expressed concern that proposed rules could inhibit the ability to provide electric power in the event of emergency conditions on the electric grid.

The adopted rules would create a cap and trade program providing a mechanism of compliance for sites that are subject to the HRVOC control requirements under Chapter 115, Subchapter H, Division 1 or 2. These rules address HRVOC emissions from process vents, flares, and cooling towers heat exchange systems. The commission contends that these adopted rules will have no impact on those sites that provide electric power in the HGB area.

EPA requested documentation of the emission levels used in the SIP attainment demonstration and how these levels relate to the cap established for the HRVOC cap. EPA also expressed concern over the determination of level of activity for individual sources and suggested using emission levels included in the attainment model as backups if there is a delay in establishing a cap.

The annual HRVOC cap in Harris County has been reduced from the HRVOC cap in the December 2002 SIP revision in order to support the attainment demonstration modeling. If the commission implements the cap and trade program for the seven-county surrounding area, the cap will be equivalent to the total emissions limits established in the December 2002 SIP revision, but represented on an annual basis instead of a 24-hour rolling average. The commission further reduced the respective caps by 5% as a compliance margin to address uncertainty caused by daily fluctuations in emission rates and differences between how the emissions were modeled for the attainment demonstration and how actual emissions may occur with trading in place.

Additionally, 10% from each annual HRVOC cap was then set aside for allocation to sites that did not produce or use HRVOCs. The area caps listed in §101.394(a) and (d) are based on these quantities of HRVOC emissions determined through current modeling to be sustainable in these areas while demonstrating attainment of the one-hour ozone standard. The commission appreciates EPA's concern over the determination of level of activity for individual sources but does not anticipate any delays in establishing the HRVOC allocations.

EPA requested an analysis demonstrating how the attainment demonstration will be preserved under the HRVOC cap and trade program.

The HRVOC cap and trade program is part of a two part approach to address variable short-term emissions through a not-to-exceed limit and steady-state and routine emissions through an annual cap. The established HRVOC caps are based on the amount of HRVOC emissions determined through current modeling to be sustainable in the HGB area while demonstrating attainment of the one-hour ozone standard. As an additional measure, the annual caps have been reduced by 5% to address uncertainty in the geographic redistribution of emissions between the attainment demonstration model and how actual emissions are likely to occur under the cap and trade program. Total HRVOC emissions from sites subject to the HRVOC cap and trade program would be limited to the annual limits of the cap, thus addressing the steady-state emissions from the area.

The annual HRVOC cap in the seven-county surrounding area is equivalent to the total emissions limits established in the December 2002 SIP revision, but represented on an annual basis instead of a 24-hour rolling average. Based on information provided, the commission determined that enforceable limits on HRVOC emissions within the seven surrounding counties may be sufficient without the need for an additional cap and trade system for those counties. The executive director will continue to evaluate the necessity to require additional short-term and annual limitations on those sites subject to Chapter 115, Subchapter H, Divisions 1 and 2, that are located within the seven-county surrounding area. If the evaluation reveals that the total amount of enforceable HRVOC emissions is at a level that is inconsistent with the attainment demonstration of the NAAQS for one-hour ozone by the attainment date, the commission may revoke the exemption and require compliance with this division by January 1, 2007, or within 180 days after notification, whichever is later.

EPA stated that §101.396(b) appears to exempt emissions above a short-term limit from the HRVOC annual cap. EPA policy for emission caps is that all emissions must be included.

The commenter is correct in that allowances equivalent to emissions from emission events or scheduled maintenance, startup, or shutdown activities that exceed the short-term limits of §115.722(c) or §115.761(c) shall not be deducted for the purposes of the annual cap. However, rule language under §101.396(b) does not exempt HRVOC emissions above the short-term limit from being reported annually by each site or from the requirements of §101.201 or §101.211. Emission events in excess of the short-term limit are unauthorized and subject to formal enforcement action under the commission's rules governing emission events and scheduled maintenance, startup, and shutdown emissions. Under those rules, sources must prove that no ozone exceedance occurred in order to qualify for limited enforcement protection. However, the commission has recognized the possibility that emission events could cause rapid exhaustion of a site's annual allowances, requiring such

sites to depend on market availability of allowances for compliance or lead to formal enforcement for violating the annual cap. Based on this recognition, the adopted rules do not require that emissions exceeding the short-term limit be counted against the annual cap, thus providing the opportunity for a site to still meet the annual limit while exceeding the short-term limit. The commission has determined that emissions above the short-term, not-to-exceed limit should not count against the cap because those emissions are arguably not a part of the base of emissions that comprise the long-term part of the two part strategy. The commission considers it necessary to allow sites the opportunity to comply with the annual limit under the HRVOC emissions cap and trade program in light of unexpected emission events that will exceed the short-term limit.

EPA commented that it is unclear how brokers and broker accounts will function in the HRVOC emissions cap and trade program and requested an explanation.

The term "broker" is used to identify a person or entity that is not required to demonstrate compliance with the HRVOC emissions cap and trade program, yet participates in the banking and trading of allowances. Brokers typically facilitate trades between buyers and sellers. A broker account would be used for recording the allowances held by a broker. Broker accounts would not be subject to allowance deduction due to demonstrating compliance with the HRVOC emissions cap and trade program.

EPA requested that the commission indicate that if reductions for a facility are to be used as NSR offsets, then the allowances associated with the reduction must be permanently retired. This is a feature of the mass emissions cap and trade program and EPA requested a similar assurance for the HRVOC emissions cap and trade program.

The adopted rule does not contain any provisions to allow sources subject to the HRVOC emissions cap and trade program the opportunity to bank reductions that result in unused allowances as ERCs. The adopted rule does provide for new sources under the HRVOC emissions cap and trade program that trigger nonattainment NSR the opportunity to use HRVOC allowances to satisfy the correlating one-to-one portion of the required offset ratio. For example, a new 100-ton source of HRVOC would be required to offset the emissions increase at a ratio of 1.3 to one, yielding a required offset of 130 tons. The source could satisfy the one-to-one portion of the required offset by possessing 100 tons of HRVOC allowances. The remaining 30 tons of the offset would then be offset through traditional credits. Since the HRVOC cap is finite, the transfer of allowances from an existing source to a new source assumes a permanent reduction under the cap.

EPA commented that the HRVOC emissions cap and trade program proposal should address concerns described in the Economic Incentive Programs (EIP) Guidance, §16.8, that are applicable to sources with Title V permits and that the proposal should include an analysis to determine the probability of emission spiking resulting from banked emissions. EPA also commented that the proposal should include an uncertainty analysis addressing trades between the seven HGB nonattainment counties. EPA also requested that the commission address the HRVOC cap and its seeming mismatch with the cap associated with attainment of the ozone standards (eight-hour or one-hour).

Within Texas' Title V program all applicable requirements must be specifically cited in the conditions for each permit. Therefore, Title V permits for sources that are subject to the HRVOC emissions cap and trade program will contain language referencing the requirements of the HRVOC emissions cap and trade program and its applicability in complying with the HRVOC control requirements under Chapter 115, Subchapter H.

In order to address the concerns raised regarding uncertainty caused by daily fluctuations in emission rates and differences between how the emissions were modeled for the attainment demonstrations, and how actual emissions may occur with trading in place, the commission has reduced the overall HRVOC cap by 5%. An additional safeguard to any potential emissions variability due to trading is also included in the adopted rules by limiting the banking of excess HRVOC allowances to one year. The commission also reserves the right to discontinue trading, in whole or in part, and to adjust the deposit of allowances for any control period as corrective measures to any issues identified as negative to attainment of the ozone standard. Finally, the commission will continue to study the impacts of HRVOC emissions on the HGB area airshed and may choose to reallocate allowances based on actual monitored HRVOC emissions from the first three to four years of program operation when addressing the eight-hour ozone standard.

EPA commented that §101.394(b) could be interpreted to allow changes in level of activity from year to year and the redetermination of allowances.

The rule has been revised to specify that the level of activity for a site will be determined by summing the levels of activity for all process units located at the site that produce one or more HRVOCs as an intermediate, a by-product, or a final product or that use one or more HRVOCs as a raw material or an intermediate to produce a product during the 12 consecutive months chosen from the 2000 - 2004 time period. The commission does not intend to recalculate allocations on a year-by-year basis. However, the commission may consider the reallocation of allowances based on actual HRVOC emissions data monitored in the first three to four years of the program when addressing eight-hour ozone.

EPA commented that §101.396 allows sites to determine HRVOC emissions without EPA approval of the protocol. EPA requested confirmation that this section could be applied only for temporary outages in the monitoring system.

The commission confirms that the emission quantification methods listed in §101.396(c) are only applicable in the event of temporary outages of the monitoring required under §115.725 and §115.764.

EPA requested information on the tracking system for the HRVOC emissions cap and trade program and an explanation of the term "AC" in the allocation formulas.

The commission maintains a comprehensive database system that currently contains all contact information, baseline data, allowance transaction history, and actual emissions data for the mass emissions cap and trade program. The system contains a compliance account for each regulated entity and a broker account for all participating brokers. Each account provides detail on the facilities located at the site that are subject to the program, the amount of allowances allocated to each facility at the site, the number of allowances purchased or sold in a given year, the actual emissions for the site for a given year, the number of vintage allowances carried forward from the previous year, any penalties incurred for noncompliance, and overall account balance for a given year. The information in the database relating

to each account is used to regularly update the mass emissions cap and trade program allowance registry on the commission's Web site. The commission intends to expand this system to provide the same data storage and allowance tracking capabilities for the HRVOC emissions cap and trade program.

The term "AC" in the allocation formulas under §101.394(a) and (d) stands for "area cap" and represents the number of tons of HRVOC emissions that will be allocated for that industrial sector.

EPA requested an explanation of how the HRVOC emissions cap and trade program will provide safeguards against excessive emissions in communities of concern because one of the traded VOCs (1,3 butadiene) is a hazardous air pollutant.

The HRVOC emissions cap and trade program is intended to act as a compliance mechanism for the HRVOC reduction requirements under Chapter 115, Subchapter H and does not supersede the requirements contained in a facility's permit authorization. Under Texas' NSR program, facilities are required to pass a health impacts analysis to ensure the allowable limit set for an air pollutant is at a level demonstrated as safe for public health. In cases where a specific air pollutant, such as 1,3-butadiene, has demonstrated the potential for localized health impacts, the maximum allowable emission rate table in the permit will list a short-term and annual allowable limit for that specific pollutant based on the results of the health impacts analysis. The HRVOC emissions cap and trade program in no way provides any exception to these limits.

EPA commented that the proposal does not adequately address defining program violations, identification of violators, availability of emission data to citizens, citizen lawsuits, enforceability of emission reductions, and collection of penalties. EPA also stated that compliance records should be retained for five years.

If an account does not contain sufficient allowances by March 1 to cover the actual HRVOC emissions, then there has been a violation of the HRVOC emissions cap and trade program. Emissions data gathered by the HRVOC emissions cap and trade program is available to the public. The adopted rules provide for the automatic subtraction of the amount exceeded plus an additional 10% of the site's exceedance from the subsequent year's allocation. Additionally, violations of the HRVOC emissions cap and trade program are subject to the normal enforcement actions of the commission for violating rules and regulations, which can result in administrative penalties up to $10,000 per violation per day. The commission's penalty policy is not contained in each rule but is a separate policy implemented by the enforcement branch of the commission. Penalties are not generally detailed in the rule so that enforcement staff have the flexibility to make case-by-case determinations. Collection of penalties is also covered in separate policies and rules. Citizen suits are provided for in separate rules and statutes. Specifically, they are provided for under federal law for anything included in a SIP. All sites that are also required to have a Title V permit must retain compliance records for five years.

EPA commented that the HRVOC emissions cap and trade program should require a designated company representative responsible for a source's emissions and allowances.

The commission has not revised the rules based on this comment. The adopted rules do require each site to designate an authorized account representative who is responsible for authorizing the transfer of allowances. The majority of the facilities that will participate in the HRVOC emissions cap and trade program are also required to have a Title V permit. The restrictions under the HRVOC emissions cap and trade program are applicable requirements under Title V. Therefore, participants in the HRVOC emissions cap and trade program are required under the Title V program to certify on a regular basis their compliance with the HRVOC emissions cap and trade program requirements.

EPA questioned how program audit results in §101.403(a) will be made available to the public and cited applicable guidance in EIP §6.5. EPA also stated that §101.400 does not require that compliance reports disclose violations and potential health and environmental effects to the EPA and the public as discussed in EIP guidance.

The commission intends to provide program audit results through the commission's Web site. The commission continues to believe that posting information on the internet is a superior form of public notice based on widespread internet access, including at public libraries; length of availability for public viewing; and breadth of circulation. In addition, the commission will provide the audit results in hard copy form to anyone requesting a copy. Any violations resulting from failure to comply with the HRVOC emissions cap and trade program or the short-term limit will be referred to the commission's Enforcement Division for formal enforcement action. Any notice of violation resulting from such referral would be included in the site's compliance history. All information relating to an enforcement action or a site's compliance history is available by request to the public. Compliance history information is available on the commission's Web site. In addition, participation in the HRVOC emissions cap and trade program does not preclude compliance with a source's permit limits, which are evaluated for health impacts.

EPA stated that the commission should commit to a program evaluation at least every three years and should consider a more frequent evaluation if stakeholders raise concerns about the program.

The commission has not revised the rule based on this comment. The adopted rule language under §101.403, Program Audits and Reports, requires that a complete audit of the HRVOC cap and trade program be conducted three years following the effective date of the rule and every three years thereafter. The audit will evaluate the impacts of the program on the state's ozone attainment demonstration, availability and cost of allowances, any related compliance issues, and any environmental issues related to the trading of allowances. The audit is required to be submitted to the EPA and made available to the public within six months of its initiation.

EPA requested confirmation that the HRVOC emissions cap and trade program does not give exemptions from reasonably available control technology (RACT).

The commission confirms that the HRVOC emissions cap and trade program does not exempt sources subject to RACT from installing and operating control technology required by RACT.

EPA stated that the opt-in procedures were not clear. EPA asked whether new sources less that ten tpy had to purchase allowances and for clarification that sources greater than ten tpy were required to purchase allowances. EPA asked if existing sources under ten tpy would fit in the existing cap or would the cap be expanded to accommodate the source.

Sites that have a potential to emit of ten tpy or less of HRVOC from all covered facilities will have an opportunity to opt-in to the HRVOC emissions cap and trade program. Those sites that choose to opt-in to the program will receive an allocation under

the existing cap based on their historical level of activity or will receive a minimum five tons of HRVOC allowances. Any site electing not to opt-in will be limited to a potential to emit not to exceed ten tpy of HRVOC. An exempt site that at a later date triggers HRVOC emissions cap and trade program applicability by increasing its potential to emit above ten tpy of HRVOC will not receive an allocation and will be required to acquire allowances to cover actual HRVOC emissions from the open market.

New sites with a potential to emit of ten tpy or less of HRVOC from all covered facilities will be exempt from the HRVOC emissions cap and trade program and not required to possess allowances for their actual emissions. These exempt sites will still be subject to the control requirements under Chapter 115, Subchapter H, including the short-term limit, but will not be subject to the annual cap within the HRVOC emissions cap and trade program. Any new site with a potential to emit greater than ten tpy of HRVOC from all covered facilities would be subject to the HRVOC emissions cap and trade program, would not receive an allowance allocation, and would need to acquire, from the open market, allowances to cover HRVOC emissions from all covered facilities at the site.

EPA stated that the commission will need to provide safeguards against demand shifting.

Under the adopted rules, the HRVOC emissions cap and trade program will apply to all sites that operate process units subject to the HRVOC control requirements under Chapter 115, Subchapter H, Division 1 or 2 and that collectively have the potential to emit more than ten tpy of HRVOC. Sites that have a collective potential to emit of ten tpy or less from covered facilities will be exempt from the HRVOC emissions cap and trade program but are still subject to the HRVOC control requirements under Chapter 115, including the short-term limit. The commission has conducted an analysis of the contribution from these exempt sites to the attainment demonstration and found that the potential emissions from these sites if operating at a full ten tons would add less than 0.4 parts per billion. Further, the commission contends that it is highly unlikely that all sources exempt from the HRVOC emissions cap and trade program will increase emissions to ten tpy.

EPA asked if sources could opt-in after 2005 and if shutdowns could generate allowances. Dow also questioned whether a future site could opt-in to the program in 2007 or later and requested that §101.392 be clarified on this point. TCC also suggested clarification and that new sources be allowed to opt-in after 2005 within 60 days of commencing operation. ATOFINA-American stated that the commission should allow an opt-in at any time after April 2005.

Sites that have a potential to emit of ten tpy or less of HRVOC from all covered facilities must notify the commission of their decision to opt-in to the HRVOC emissions cap and trade program no later than April 30, 2005. Those sites that choose to opt-in to the program will receive an allocation based on their historical level of activity or a minimum allocation of five tons. Based on the methodology in the adopted rule for determining a site's allocation, there will be no additional opportunity for sites to opt-in to the program at a future date.

Newly constructed sites triggering HRVOC emissions cap and trade program applicability that begin operation after the baseline period will not receive an allocation and must acquire allowances to cover their actual emissions from the open market. Any new covered facility at a site already subject to the HRVOC emissions cap and trade program based on potential to emit or at a site that has elected to opt-in to the HRVOC emissions cap and trade program will automatically be subject to the HRVOC emissions cap and trade program and be required to possess allowances equivalent to its actual emissions. For sites that have a potential to emit of ten tpy or less from all covered facilities and do not elect to opt-in to the HRVOC emissions cap and trade program by April 30, 2005, but trigger HRVOC emissions cap and trade program applicability due to the future addition of covered facilities resulting in the increase of the site's potential to emit above ten tpy, no allowances will be given for either the existing or newly added facilities.

Each site's allocation of HRVOC allowances will be determined by the level of activity from all covered facilities at the site in operation during the chosen baseline period. Should a covered facility that contributed to the baseline level of activity for the site be shut down at a future date, no reduction in allowances will be required of the site for the shutdown.

TCC stated that new sources opting-in to the program must purchase all of their allowances instead of receiving an initial allocation. Existing sources receive an initial allocation and need only purchase allowances for growth.

A site with the potential to emit more than ten tpy of HRVOC that begins operation of a new process unit subject to Chapter 115, Subchapter H, Division 1 or 2 after the baseline period will not receive allowances based on the level of activity contribution of the new process unit and will have to acquire allowances from the open market to cover any actual HRVOC emissions from the new process unit. Any new site with the potential to emit more than ten tpy of HRVOC from process units subject to Chapter 115, Subchapter H, Division 1 or 2 will automatically be subject to the HRVOC emissions cap and trade program, will not receive an allowance allocation, and must acquire allowances from the open market to cover the actual HRVOC emissions from covered facilities at the site. Any site exempt from the HRVOC emissions cap and trade program based on potential to emit that elects not to opt-in to the HRVOC emissions cap and trade program by April 30, 2005, but at a later date triggers HRVOC emissions cap and trade program applicability, will not receive an allowance allocation, and must acquire allowances to cover the actual HRVOC emissions from all covered facilities at the site.

Houston/Harris County, HCPHES, and GHASP commented that the HRVOC cap and trade program should be implemented only after the HRVOC inventory is validated or significantly improved in order to structure the cap program considering the distribution of HRVOC around Harris County. HCPHES stated that this could mean dividing the county into smaller trading areas with individual caps. Houston/Harris County, HCPHES, GHASP, and Environmental Defense also urged that the mass emissions cap and trade program be reviewed to prevent a trading concentration of NO_x into Harris County. GHASP noted that there is no restriction on trading across county lines. GHASP also commented that the audit of the NO_x cap program does not include a provision for addressing the geographic distribution of allowances and that an audit once every three years is inadequate to address problems that might occur annually.

The commission has not revised the rules based on these comments. While waiting until additional data regarding HRVOC emissions becomes available would be preferable, that data will not be available in time to allow implementation of the rules in time to meet the 2007 attainment deadline. In the absence of

additional data on HRVOC emissions, the commission considers the allocation of allowances based on actual HRVOC production and use to be a viable alternative. The potential geographic redistribution of emissions has also been addressed by reducing the overall HRVOC cap by 5%. The commission does not consider the division of Harris County into smaller trading zones necessary at this time, but will continuously monitor the effects of HRVOC trades on the county's progress toward reducing ozone exceedances.

The concepts of increasing the frequency of audits under the mass emissions cap and trade program, geographic distribution of mass emissions cap and trade program allowances, or preventing concentrations of mass emissions cap and trade allowances from being traded into Harris County is not being addressed in this rulemaking.

Sierra Club commented that the HRVOC cap and trade program should be held in abeyance until a more accurate emission inventory is available.

The commission agrees that more accurate HRVOC emissions data is needed for the HGB area, however, contends that a finite cap on HRVOC emissions is needed to achieve attainment of the one-hour ozone standard.

Sierra Club stated its opposition to emission trading programs because they result in environmental discrimination by concentrating emissions in certain communities.

The commission made no changes to the rules in response to these comments. The commission's ozone reduction strategy is regional and is intended to achieve a target level of reduced regional HRVOC and subsequently a reduction in ozone. The commission contends that this strategy will lead to public health benefits for the entire region. Under the cap and trade program, HRVOC emissions have a finite cap that is set at levels demonstrated to attain the one-hour standard for ozone. The commission contends that emissions banking and trading programs, such as the HRVOC emissions cap and trade program, are flexible and environmentally sound programs that reward good pollution control practices. The commission acknowledges that, under these programs, some sources will purchase allowances for more emissions rather than install additional controls or upgrade equipment, but these sources are still controlled to a level that is protective of human health and may not exceed permitted allowable emissions.

Environmental Defense stated that a cap and trade program for HRVOC should not be implemented until the benefits of such a program are compared with a site-by-site control strategy. GHASP added that a cap and trade program should prevent short-term variability at individual sources or areas and consider concentration of emissions at individual sites and the effect on ozone formation. GHASP stated that an HRVOC cap and trade program presents risks to attainment strategies unless there is a method to review concentration of allowances in specific geographic areas and recommended that the program not be implemented until the commission can demonstrate that it can rely on industry to effectively monitor and report HRVOC emissions. Two individuals also commented that cap and trade programs are not as effective as command and control programs. Another individual suggested that companies all contribute to an escrow fund that would be forfeited if any individual company violates applicable rules.

The commission contends that a cap and trade program is an appropriate method of implementation considering that meeting the ozone standard is a regional goal. Short-term variability has been addressed through the rules by two means, the first is the implementation of the not-to-exceed limit of 1,200 pounds per hour. The commission contends that holding individual sites to this maximum hourly rate in combination with the annual limitation will prevent exceedances of the one-hour ozone standard. To address uncertainty associated with hourly variability, the annual cap has been reduced by 5%, a value consistent with current research. Based on the mass emissions cap and trade program, which regulates NO_x emissions in the HGB area, emissions trading is not expected to result in concentrations of emissions that would jeopardize the attainment strategy. A cap and trade program, when properly implemented and enforced, is a more effective means of achieving overall emission reductions than a command and control strategy because a cap and trade encourages the most cost-effective reductions to be implemented first. Under the Texas Clean Air Act, the commission does not have the authority to require contributions to an escrow account that may be forfeited should any one person contributing to that account violate an applicable rule.

GHASP stated that an HRVOC program should be allowed to reasonably accommodate changes in production and structure of companies and to offer an alternative compliance method for companies that have unexpected emission control complications. In structuring such a trading program the commission should limit the use of banking to reduce year-to-year variations in emissions, consider the potential for geographic concentrations of emissions, and prohibit short-term trading as it is contrary to the design of the site-wide emission cap system.

The commission contends that the adopted rules establish reasonable flexibility for affected industries while limiting the potential of banked or traded emissions to negatively impact attainment of the one-hour ozone standard.

GHASP supported the idea of a limited trading system and suggested that companies be required to hold an adequate number of allowances at the beginning of each month to meet their daily emissions for the month and that each trade be approved on a case-by-case basis by the executive director with a chance for appeal to the commission. GHASP also stated that the entire trading process should be transparent and all information used for allowance allocation and the structuring of the trading system should be available to the public.

The concept of monthly true up for each compliance account would create undue burden on affected industry and agency staff. The approach adopted by the commission is a dual approach, limiting short-term emissions through a not-to-exceed hourly limit and controlling steady-state and routine emissions through an annual cap.

All transfer transactions of HRVOC allowances are required under the adopted rules to be approved by the executive director. The adopted rules also provide for the limiting or discontinuation of allowance trading. The receipt of transfer applications by the executive director will continue to be available to the public through the use of the commission's Web site (emissions banking and trading database advanced search function and HRVOC emissions cap and trade program allowance registry). Additionally, all information, not marked as confidential under Texas Health and Safety Code, §382.041, that pertains to the establishment of HRVOC allocations will be available to the public under the Texas Public Information Act.

GHASP expressed concern about the ability of the commission to administer, monitor, and enforce an additional cap and trade program with its current resources and staffing.

The commission appreciates the commenter's concerns. Resources necessary to adequately administer, monitor, and enforce the adopted rules will be allocated in a manner that ensures accomplishment of the HRVOC emissions cap and trade program.

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air. The new sections are also adopted under Texas Health and Safety Code, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits. The new sections are also adopted under 42 USC, §7410(a)(2)(A), that requires state implementation plans to include enforceable measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

§101.390. Definitions.

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

(1) Allowance--The authorization to emit one ton of highly-reactive volatile organic compounds, expressed in tenths of a ton, during a control period.

(2) Authorized account representative--The responsible person who is authorized in writing to transfer and otherwise manage allowances for the site.

(3) Banked allowance--An allowance that is not used to reconcile emissions in the designated year of allocation, but is carried forward for up to one year and noted as banked in the compliance account or broker account.

(4) Broker--A person that is not required to participate in the requirements of this division, but that opens an account under this division for the purpose of banking and trading allowances.

(5) Broker account--The account where allowances held by a broker are recorded. Allowances held in a broker account may not be used to satisfy compliance requirements for this division.

(6) Compliance account--The account in which allowances held by a site are recorded for the purposes of meeting the requirements of this division.

(7) Level of activity--The amount of highly-reactive volatile organic compounds, as defined in §115.10 of this title (relating to Definitions), in pounds produced as an intermediate, by-product, or final product or used by a process unit during a given period of time, but excluding any recycled highly-reactive volatile organic compounds internal to the process unit.

§101.391. Applicability.

This division applies to each site, as defined in §122.10 of this title (relating to General Definitions), in the Houston/Galveston/Brazoria ozone nonattainment area, as defined in §115.10 of this title (relating to Definitions), that is subject to Chapter 115, Subchapter H, Division 1 of this title (relating to Vent Gas Control) or Division 2 of this title (relating to Cooling Tower Heat Exchange Systems). Covered facilities include vent gas streams, flares, and cooling tower heat exchange systems that emit highly-reactive volatile organic compounds, as defined in §115.10 of this title (relating to Definitions), and that are located at a site subject to Chapter 115, Subchapter H of this title (relating to Highly-Reactive Volatile Organic Compounds). For the purpose of compliance with Chapter 115, Subchapter H, Division 1 or Division 2 of this title, each site that meets the applicability requirements of this section, or elects to opt-in to this division under §101.392(b) of this title (relating to Exemptions), shall always be subject to this division.

§101.392. Exemptions.

(a) Sites in the Houston/Galveston/Brazoria ozone nonattainment area that have the potential to emit, as defined in §116.12 of this title (relating to Nonattainment Review Definitions), ten tons per year or less of highly-reactive volatile organic compounds from all covered facilities at the site are exempt from the requirements of this division.

(b) Sites exempt from this division under subsection (a) of this section may elect to opt-in to the requirements of this division by notifying the executive director in writing by April 30, 2005.

(c) All sites in the Houston/Galveston/Brazoria ozone nonattainment area, excluding Harris County, are exempt from the requirements of this division except for §101.401 of this title (relating to Level of Activity Certification). The commission may revoke this exemption upon public notice of this revocation. If the exemption is revoked, sites subject to this division located in the Houston/Galveston/Brazoria ozone nonattainment area, excluding Harris County, must comply by January 1, 2007, or within 180 days of public notice, whichever is later.

§101.393. General Provisions.

(a) Allowances may be used only for the purposes described in this division and may not be used to meet or exceed the emission limitations authorized under Chapter 116, Subchapter B of this title (relating to New Source Review Permits), or any other applicable rule or law.

(b) The initial control period is January 1, 2007, through December 31, 2007. Each control period after December 31, 2007, shall begin January 1 and end December 31 of each year. No later than March 1 after each control period, a site subject to this division must hold a quantity of allowances in its compliance account that is equal to or greater than the total highly-reactive volatile organic compound emissions from the covered facilities located at the site during the control period.

(c) Allowances may not be used to satisfy netting requirements under Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review; and Prevention of Significant Deterioration Review).

(d) Allowances may be used simultaneously to satisfy the requirements of this division and the one-to-one portion of the offset requirements for new or modified covered facilities, subject to federal nonattainment new source review requirements as provided in Chapter 116, Subchapter B, Division 7 of this title (relating to Emission Reductions: Offsets).

(e) An allowance does not constitute a security or a property right.

(f) All allowances will be allocated, transferred, deducted, or used in tenths of tons. The number of allowances will be rounded down to the nearest tenth of a ton when determining excess allowances and rounded up to the nearest tenth of a ton when determining allowances used.

(g) Each site shall have only one compliance account.

(h) The commission will maintain a registry of compliance accounts and broker accounts. The registry will not contain proprietary information.

§101.394. Allocation of Allowances.

(a) On January 1, 2007, the executive director will deposit allowances into compliance accounts as follows.

(1) For sites located in Harris County that are not eligible to receive allowances under subsection (c) of this section, allowances for the emissions of one or more of the highly-reactive volatile organic compounds (HRVOC) as defined in §115.10 of this title (relating to Definitions), will be determined using the equation in the following figure.

Figure: 30 TAC §101.394(a)(1)

(2) For sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties that are not eligible to receive allowances under subsection (c) of this section, allowances for emissions of ethylene and propylene for each site will be determined using the equation in the following figure.

Figure: 30 TAC §101.394(a)(2)

(b) The level of activity of a site shall be determined by summing the levels of activity from the chosen 12 consecutive month period for each process unit, as defined in §115.10 of this title, located at the site that produce one or more HRVOCs as an intermediate, by-product, or final product or that use one or more HRVOCs as a raw material or intermediate to produce a product.

(c) The owner or operator of a site that is subject to this division, but that does not include a process unit that produces or uses an HRVOC, shall apply by January 30, 2005, to the executive director for an allocation based on HRVOC throughput or storage capacity for any 12 consecutive months during the period of 2000 through 2004.

(1) The executive director may equitably allocate up to 10% of the total HRVOC allocations for Harris County to all such sites located in Harris County;

(2) For sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, the executive director may allocate up to 10% of the total HRVOC emissions allocated for those counties to all such sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties.

(3) The executive director shall distribute all allowances not allocated under this subsection proportionally to those sites receiving allocations under subsections (a) and (b) of this section.

(d) Sites subject to the requirements of this division or electing to opt-in to the requirements of this division that receive an HRVOC allocation of less than 5.0 tons based on the allocation methodologies under subsection (a) or (c) of this section shall be eligible to receive a minimum allocation of 5.0 tons of HRVOC allowances per year.

(e) If the total actual HRVOC emissions from the covered facilities at a site during a control period exceed the amount of allowances in the compliance account for the site on March 1 following the control period, allowances for the next control period shall be reduced by an amount equal to the emissions exceeding the allowances in the compliance account plus 10% of the exceedance. This allocation reduction does not preclude the executive director from initiating an enforcement action. If a compliance account does not hold sufficient allowances to accommodate the reduction, the executive director may issue a notice of deficiency to the owner or operator. The owner or operator shall purchase or transfer allowances sufficient to accommodate the reduction within 30 days of issuance of the notice of deficiency from the executive director.

(f) Allowances will be allocated by the executive director, who will deposit allowances into each compliance account:

(1) initially, by January 1, 2007; and

(2) subsequently, by January 1 of each following year.

(g) The executive director may adjust the deposits for any control period to reflect new or existing state implementation plan requirements.

(h) The executive director may add or deduct allowances from compliance accounts based on the review of reports required under §101.400 of this title (relating to Reporting).

§101.399. Allowance Banking and Trading.

(a) Allowances allocated for a control period that are not used for compliance in that control period may be banked for use in demonstrating compliance for the next control period or transferred.

(b) Allowances that have not expired or been used may be transferred at any time during a control period, except as provided in this section.

(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-2, Application for Transfer of Allowances.

(2) The ECT-2 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.

(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.

(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.

(c) A person receiving allowances on an annual basis may permanently transfer ownership of current and future allowances to any person in accordance with the following requirements.

(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-4, Application for Permanent Transfer of Allowance Ownership.

(2) The ECT-4 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.

(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.

(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.

(d) A person may transfer allowances that are scheduled to be allocated in a future control period but have not yet been deposited into an account.

(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-5, Application for Transfer of Individual Future Year Allowances.

(2) The ECT-5 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.

(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.

(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.

(e) Allowances generated from sites located in counties other than Harris County may not be used at sites located in Harris County. Allowances generated from sites located in Harris County may not be used at sites located in counties other than Harris County.

(f) Only authorized account representatives may transfer allowances.

(g) Allowances subject to an approved transaction will be deposited into the purchaser's broker or compliance account within 30 days of receipt of a completed transfer application.

(h) Volatile organic compound emission reduction credits (ERC) certified in accordance with Division 1 of this subchapter (relating to Emission Credit Banking and Trading) may be converted to a yearly highly-reactive volatile organic compound (HRVOC) allocation.

(1) Qualified volatile organic compound (VOC) ERCs must be generated:

(A) from a reduction at a site located in the Houston/Galveston/Brazoria nonattainment area;

(B) from a reduction strategy implemented after December 31, 2004; and

(C) from a reduction in VOC species other than those defined as HRVOCs under §115.10 of this title (relating to Definitions).

(2) VOC reductions due to the installation of best available control technology do not qualify for conversion under this subsection.

(3) In addition to the requirements of Division 1 of this subchapter, a qualified VOC ERC must meet the following requirements:

(A) the ERC must be quantifiable, real, surplus, enforceable, and permanent as required in §101.302 of this title (relating to General Provisions) at the time the ERC is converted;

(B) the baseline emissions to which the VOC reduction is compared must consist of the average actual emissions for any two consecutive calendar years preceding the emission reduction strategy and that include or follow the most recent year of emission inventory used in the state implementation plan;

(C) the quantification of VOC reductions must be performed using the monitoring and testing methods required under §115.725 or §115.764 of this title (relating to Monitoring and Testing Requirements) and subject to the recordkeeping and reporting requirements under §115.726 and §115.766 of this title (relating to Recordkeeping and Reporting Requirements);

(D) the ERC must not have expired; and

(E) the owner of the ERC shall have prior approval from the executive director to convert the ERC to an HRVOC allocation.

(4) VOC ERCs must be converted to HRVOC allowances at a ratio calculated using the equation in the following figure.
Figure: 30 TAC §101.399(h)(4)

(5) For each site eligible to receive allowances under §101.394(a) or (c) of this title (relating to Allocation of Allowances), additional HRVOC allowances received from the conversion of VOC ERCs under this subsection must be limited to a quantity not to exceed more than 5% of the site's initial HRVOC allocation.

(6) In addition to paragraph (5) of this subsection, sites subject to this division may receive an HRVOC allocation from the conversion of VOC ERCs under this subsection equivalent to any HRVOC emissions increases from new or modified covered facilities not in operation prior to January 2, 2004, and that were included in an application for a permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) that was deemed administratively complete by the executive director within one year of the effective date of this rule.

§101.400. Reporting.

(a) No later than March 31 after each control period, each site shall submit a completed Form ECT-1H, Highly-Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade Annual Compliance Report, to the executive director, which shall include the following:

(1) the total amount of actual HRVOC emissions from covered facilities at the site during the preceding control period;

(2) the method or methods used to determine the actual HRVOC emissions, including, but not limited to, monitoring protocol and results, calculation methodologies, and emission factors; and

(3) a summary of all final transactions for the preceding control period.

(b) For sites failing to submit an ECT-1H form by the required deadline in subsection (a) of this section, the executive director may withhold approval of any proposed trades from that site involving allowances allocated for the control period for which the ECT-1H form is due or to be allocated in subsequent control periods.

§101.401. Level of Activity Certification.

(a) No later than April 30, 2005, the owner or operator of each site subject to this division shall submit to the executive director a completed Form ECT-3H, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Level of Activity Certification Form.

(b) For each process unit subject to this division, the owner or operator shall certify in the ECT-3H form the level of activity for the selected 12 consecutive months during the period of 2000 through 2004.

(c) The owner or operator shall attach to the ECT-3H form information and documentation necessary to support the proposed level of activity baseline.

(d) The owner or operator of the site may mark any portion of the ECT-3H form, or supporting information and documentation, as confidential under Texas Health and Safety Code, §382.041.

(e) In conjunction with submission of the ECT-3H form, the owner or operator of the site subject to this division shall provide enforceable documentation of the maximum allowable emission rate of highly-reactive volatile organic compounds from facilities located at that site.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-0348

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CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES
SUBCHAPTER J. OPERATIONAL CONTROLS FOR MOTOR VEHICLES
DIVISION 1. MOTOR VEHICLE IDLING LIMITATIONS

30 TAC §§114.500, 114.502, 114.507, 114.509

The Texas Commission on Environmental Quality (commission) adopts the repeal of §§114.500, 114.502, 114.507, and 114.509. Sections 114.500, 114.502, 114.507, and 114.509 are adopted *without changes* as published in the June 11, 2004, issue of the *Texas Register* (29 TexReg 5741).

Repealed §§114.500, 114.502, 114.507, and 114.509 and the corresponding revisions to the state implementation plan (SIP) will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED REPEALS

The Houston/Galveston/Brazoria (HGB) ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act Amendments of 1990, as codified in 42 United States Code (USC), §§7401 *et seq*., and therefore, is required to attain the national ambient air quality standard (NAAQS) one-hour standard for ozone of 0.12 parts per million (125 parts per billion (ppb)) by November 15, 2007. The HGB area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, and the commission has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. The most relevant HGB SIP revisions to date are the December 2000 one-hour ozone standard attainment demonstration, the September 2001 follow-up revision, and the December 2002 nitrogen oxides (NO_x)/highly-reactive volatile organic compound (HRVOC) revision.

This process has proven to be challenging due to the magnitude of reductions needed for attainment. The emission reduction requirements included as part of the December 2000 SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGB area, in partnership with the commission, to address ozone. These coalitions include local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as EPA and the commission, and worked diligently to identify and quantify control strategy measures for the HGB area attainment demonstration.

December 2000

The December 2000 SIP revision contained rules and photochemical modeling analyses in support of the HGB area ozone attainment demonstration. The majority of the emissions reductions identified in this revision were from a 90% reduction in point source NO_x. The modeling analysis also indicated a shortfall in necessary NO_x emission reductions, such that an additional 91 tons per day (tpd) of NO_x reductions were necessary for an approvable attainment demonstration. In addition, the revision contained post-1999 rate-of-progress (ROP) plans for the milestone years 2002 and 2005 and for the attainment year 2007, and transportation conformity motor vehicle emissions budget (MVEB) for NO_x and volatile organic compound (VOC) emissions. The SIP also contained enforceable commitments to implement further measures in support of the HGB area attainment demonstration, as well as a commitment to perform and submit a midcourse review.

September 2001

The September 2001 SIP revision for the HGB area included the following elements: 1) corrections to the ROP table/budget for the years 2002, 2005, and 2007 due to a mathematical inconsistency; 2) incorporation of a change to the idling restriction control strategy to clarify that the operator of a rented or leased vehicle is responsible for compliance with the requirements in situations where the operator of a leased or rented vehicle is not employed by the owner of the vehicle (The commission committed to making this change when the rule was adopted in December 2000.); 3) incorporation of revisions to the clean diesel fuel rules to provide greater flexibility for compliance with the requirements of the rule while preserving the emission reductions necessary to demonstrate attainment in the HGB area; 4) incorporation of a stationary diesel engine rule that was developed as a result of the state's analysis of EPA's reasonably available control measures; 5) incorporation of revisions to the point source NO_x rules; 6) incorporation of revisions to the emissions cap and trade rules; 7) the removal of the construction equipment operating restriction and the accelerated purchase requirement for Tier 2/3 heavy-duty equipment; 8) the replacement of these rules with the Texas Emission Reduction Plan (TERP) program; 9) the layout of the midcourse review process that details how the state will fulfill the commitment to obtain the additional emission reductions necessary to demonstrate attainment of the one-hour ozone standard in the HGB area; and 10) replacement of the 2007 ROP MVEBs to be consistent with the attainment MVEBs.

As was discussed in the December 2000 revision, the modeling resulted in a 141 ppb peak ozone level that correlated to a shortfall calculation of 91 tpd NO_x equivalent emissions. An additional five tpd was added to the shortfall, because the state

could not take credit for the NO_x reductions associated with the diesel pull-ahead strategy. The excess emissions from this strategy were not included in the original emissions inventory. The gap control measures adopted in December 2000, along with the stationary diesel engine rules included in the September 2001 revision, resulted in NO_x reductions of 40 tpd, which left a total remaining shortfall of 56 tpd. The state committed to address this shortfall through the midcourse review process.

December 2002

In January 2001, the Business Coalition for Clean Air--Appeal Group (BCCA-AG) and several regulated companies challenged the December 2000 HGB SIP and some of the associated rules. Specifically, the BCCA-AG challenged the 90% NO_x reduction requirement from stationary sources in the HGB area. In May 2001, the parties agreed to a stay in the case, and the Honorable Margaret Cooper, Travis County District Court Judge, signed a consent order, effective June 8, 2001, requiring the commission to perform an independent, thorough analysis of the causes of rapid ozone formation events and identify potential mitigating measures not yet identified in the HGB area attainment demonstration, according to the milestones and procedures in Exhibit C (Scientific Evaluation) of the order.

In compliance with the consent order, the commission conducted a scientific evaluation based in large part on aircraft data collected by the *Texas 2000 Air Quality Study* (TexAQS). The TexAQS, a comprehensive research project conducted in August and September 2000 involving more than 40 research organizations and over 200 scientists, studied ground-level ozone air pollution in the HGB area and East Texas regions. The study revealed that the ambient concentration of NO_x and certain VOCs (terminal olefins) were not consistent with the industrial emission estimates. Specifically, the ratio of terminal olefins to NO_x did not correlate to the ambient ratio of these VOCs to NO_x. Because of the greater certainty associated with NO_x emissions, the commission concluded that industrial emissions of terminal olefins were likely understated in earlier emissions inventories.

To address findings from TexAQS, and to fulfill obligations in the consent order, the commission adopted a SIP revision in December 2002 that focused on replacing the most stringent 10% industrial NO_x reductions with VOC controls. In light of the TexAQS study, the commission conducted further modeling analysis of ambient VOC data. The photochemical grid modeling results and analysis indicated that the HGB area can achieve the same air quality benefits with industrial VOC emission reductions, combined with 80% industrial NO_x emissions reductions, as would be realized with a 90% industrial NO_x emission reduction. An analysis of automated gas chromatograph data revealed that four compounds were frequently responsible for high reactivity days: ethylene, propylene, 1,3-butadiene, and butenes. As such, these compounds were selected as the best candidates for HRVOC emission controls.

The commission adopted revisions to the industrial source control requirements, one of the control strategies within the existing federally approved SIP. The December 2002 revision contained new rules to reduce HRVOC emissions from four key industrial sources: fugitives, flares, process vents, and cooling towers. The adopted rules target HRVOCs while maintaining the integrity of the SIP. Analysis showed that limiting emissions of ethylene, propylene, 1,3-butadiene, and butenes in conjunction with an 80% reduction in NO_x is equivalent in terms of air quality benefit to that resulting from a 90% point source NO_x reduction requirement. As such, the HRVOC rules are performance-based, emphasizing monitoring, recordkeeping, reporting, and enforcement, rather than establishing individual unit emission rates.

The technical support documentation accompanying the 2002 SIP revision describes modeling and ambient data analyses that demonstrate that reductions in HRVOC emissions can replace the last 10% of industrial NO_x controls.

Current Revision

The commission committed in 2000 to perform a midcourse review to ensure attainment of the one-hour ozone standard. The midcourse review process provides the opportunity to update emissions inventory data, to use current modeling tools, such as MOBILE6, and to enhance the photochemical grid modeling. The data gathered from the TexAQS continues to improve photochemical modeling of the HGB area. The collection of these technical improvements give a more comprehensive understanding of the ozone challenge in the HGB area that is necessary to develop an attainment plan. In the early part of 2003, the commission was preparing to move forward with the midcourse review; however, during the same time period EPA announced its plans to begin implementation of the eight-hour ozone standard. The EPA published proposed rules for implementation of the eight-hour ozone standard in the June 2, 2003, issue of the Federal Register (68 FR 32802). In the same time frame, EPA also formalized its intentions to designate areas for the eight-hour ozone standard by April 15, 2004, meaning states would need to reassess their efforts and control strategies to address this new standard by 2007. Recognizing that existing one-hour nonattainment areas would soon be subject to the eight-hour ozone standard, and in an effort to efficiently manage the state's limited resources, the commission decided to develop an approach that addresses the outstanding obligations under the one-hour ozone standard while beginning to analyze eight-hour ozone issues.

The commission's one-hour ozone SIP commitments include: 1) completing a one-hour ozone midcourse review; 2) performing modeling; 3) adopting measures sufficient to fill the NO_x shortfall; 4) adopting measures sufficient to demonstrate attainment; and 5) revising the MVEB using MOBILE6.

Results from the TexAQS and recent photochemical modeling suggest that ozone formation in the HGB area stems from a combination of two different types of emissions. The first is the daily routine emissions of a large industrial base located in an urban core with on-road and non-road emissions typical of a city of four million people. These emissions can be thought of as the base of emissions that could be expected at any given time in the HGB area. The second type of emissions can be characterized as the fluctuations that occur daily, even hourly in the HGB area resulting from sudden sharp increases in short-term HRVOC releases. While these emission fluctuations can occur in any industrial area, the dense concentration of chemical and refinery sites makes this a particular concern in the HGB area.

Ozone forms rapidly when these variable emissions occur in the immediate presence of NO_x, under the right atmospheric conditions. The design value in the HGB area is driven by a combination of these two types of emissions. To address ozone formation in the HGB area, a dual strategy is needed to reduce the base of emissions existing continuously in the HGB area, as well as restrictions on a short-term basis to address short-term variations. To address the "base" emissions, control strategies

are needed that resemble those used by other metropolitan areas with a combination of a large urban population and a significant industrial base. These strategies include motor vehicle inspection and maintenance, cleaner fuels, cleaner technology for construction equipment, industrial-based controls for routine NO_x and VOC emissions, and a long-term cap on HRVOCs. To address the short-term variable emissions, a restriction of the maximum hourly rate of HRVOCs is necessary. This restriction would apply to both unauthorized emissions, as well as to permitted emissions that may fluctuate on an hourly basis.

To achieve the necessary HRVOC reductions, the commission developed a dual approach that addresses variable short-term emissions through a not-to-exceed hourly emission limit, and that addresses steady-state and routine emissions through an annual cap. The annual HRVOC cap and fugitive emission rules will reduce the overall reactivity in the air shed by removing the compounds that are most prevalent and most likely to react rapidly enough to cause one-hour ozone exceedances. The annual HRVOC cap in Harris County will be reduced from the existing HRVOC cap to support the attainment demonstration modeling. The annual HRVOC cap in the seven-county surrounding area is equivalent to the total emissions limits established in the December 2002 SIP revision, but represented on an annual basis instead of a 24-hour rolling average. The commission will continue to evaluate the necessity to require short-term and annual reductions from those sites subject to 30 TAC Chapter 115, Subchapter H, Divisions 1 and 2, that are located within the seven-county surrounding area. If the evaluation demonstrates that reductions from these counties have little impact on attainment of the one-hour ozone standard, the short-term and annual limits for those other seven counties may no longer be required. The commission also solicited comments on possible ways to mitigate violations of the short-term emissions cap.

The annual HRVOC cap emissions would be distributed and enforced through an HRVOC emissions cap and trade program under 30 TAC Chapter 101, Subchapter H, new Division 6 (Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program) being adopted in concurrent rulemaking. This program would establish a mandatory annual HRVOC emissions cap on all sites located in the HGB area that emit or have the potential to emit more than ten tons per year of HRVOC, and that are subject to the HRVOC control requirements of Chapter 115, Subchapter H, Division 1 or Division 2. The cap would be enforced by the allocation, trading, and banking of allowances. An allowance is the equivalent of one ton of HRVOC emissions. This HRVOC cap is established at a level demonstrated as necessary to allow the HGB area to attain the one-hour ozone standard along with a 5% reduction to safeguard against potential emissions variations. The adopted cap would initially be implemented on January 1, 2007. The adopted HRVOC cap and trade program would also require all sites with new or modified HRVOC sources in the HGB area to obtain unused allowances from other sites already participating under the cap to offset any increased HRVOC emissions. For sites that have the potential to emit ten tons per year or less of HRVOCs from sources subject to the HRVOC control requirements of Chapter 115, Subchapter H, Division 1 or 2, the total aggregate HRVOC emissions from those sources would be limited to ten tons per year. Sites that are exempt from the HRVOC emissions cap and trade program would be extended an opportunity to opt-in, receive an HRVOC allocation, and thereby not be restricted to the ten tons per year limit.

The HGB area SIP no longer relies primarily on new reductions from NO_x-based strategies. A combination of point source HRVOC controls and NO_x reductions is the most effective means of reducing ozone in the HGB area. Under this revision, there is no longer a NO_x shortfall in the HGB SIP. The commission also evaluated a number of the existing control strategies that were put in place in the December 2000 revision. The photochemical modeling shows that some of these strategies are no longer necessary to attain the one-hour ozone standard. This SIP revision is repealing the commercial lawn and garden equipment restrictions and the heavy-duty vehicle idling restrictions, and removing the motor vehicle inspection and maintenance program requirements from Chambers, Liberty, and Waller Counties. In addition, this SIP includes revisions to the environmental speed limit strategy. In September 2002, the commission revised the existing speed limit strategy to suspend the 55-mile per hour (mph) speed limit until May 1, 2005, and, where posted speeds were 65 mph or higher before May 1, 2002, to increase speed limits to five mph below what was posted. The 78th Legislature, 2003, removed the commission's authority to determine speed limits for environmental purposes; therefore, this SIP removes the reinstatement of the 55 mph speed limit on May 1, 2005, and maintains the currently posted speed limits at five mph below the posted limit before May 1, 2002. Also, as part of this SIP revision, the commission is adopting new statewide portable fuel container rules. Historically, the commission has expressed a preference to implement technology-based strategies over behavior-altering strategies, and these adopted changes embody that philosophy.

Through this revision, the commission is fulfilling its outstanding one-hour ozone SIP obligations and beginning to plan for the upcoming eight-hour ozone standard. This SIP demonstrates attainment of the one-hour ozone standard in the HGB area in 2007 and provides a preliminary analysis of the HGB area in terms of the eight-hour ozone standard in 2007 and 2010. EPA's proposed eight-hour implementation rules provide flexibility to the states in transitioning from the one-hour to the eight-hour ozone standard, and the commission maintains that the steps taken in this proposal and the technical work performed to date will be invaluable through the transition period. Upon EPA's finalization of the eight-hour implementation and the transportation conformity rules, the commission expects to begin developing eight-hour ozone SIPs.

The commission originally adopted rules in §§114.500, 114.502, 114.507, and 114.509 on December 6, 2000 as a control strategy to reduce NO_x emissions in the HGB ozone nonattainment area by limiting the engine idling time of motor vehicles with a gross vehicle weight rating of greater than 14,000 pounds to five consecutive minutes while the vehicle is operating in the affected area from April 1 to October 31 each year. These idling restriction rules went into effect on April 1, 2001. The commission also adopted revisions to the HGB attainment SIP in December 2000 that contained provisions to claim the anticipated NO_x emission reductions from the implementation of the idling restriction rules.

The idling restriction rules were expected to lower NO_x emissions from both gasoline-powered and diesel-powered motor vehicles in the affected areas. Because NO_x emissions are precursors to ground-level ozone formation, reduced emissions of NO_x will result in ground-level ozone reductions. Emissions modeling performed for the original rulemaking indicated that, by 2007, the idling restriction rules would reduce NO_x emissions in the affected areas by 0.48 tpd. In addition, the idling restriction rules were estimated to reduce VOC emissions by 0.19 tpd.

The commission has reevaluated a number of the existing control strategies, including motor vehicle idling restrictions, that were put in place in the December 2000 revision. As stated previously, results from the TexAQS and recent photochemical modeling indicate that additional HRVOC reductions will be the most beneficial measure in reducing ozone in the HGB area, and that this strategy is no longer the most effective means to attain the one-hour ozone standard. Therefore, the commission is adopting the repeal of Chapter 114, Subchapter J, Division 1, concerning Motor Vehicle Idling Limitations. Historically, the commission has expressed a preference to implement technology-based strategies over behavior-altering strategies such as the idling restrictions. The repeal of these rules is consistent with that philosophy.

Additionally, this repeal will allow for funding under the TERP program for idling projects to reduce NO_x emissions. The 77th Legislature, 2001, passed Senate Bill (SB) 5 establishing the TERP program to provide financial incentives for the voluntary reduction of NO_x emissions from diesel vehicles and equipment in 38 counties, which included the HGB ozone nonattainment area counties affected by the idling restriction rules. The 78th Legislature, 2003, passed House Bill 1365 to revise the TERP program and expand the coverage area to 41 counties.

Projects for on-vehicle idle reduction technologies and truck stop electrification infrastructure may be considered by the commission for incentive grant funding through the TERP program. However, the commission is prohibited under Texas Health and Safety Code, §386.102, from using TERP funding for technology and projects that are required by federal or state regulations. Since the current idling restriction rules limit the engine idling time of motor vehicles with a gross vehicle weight rating of greater than 14,000 pounds to five consecutive minutes while the vehicle is operating in the HGB ozone nonattainment area counties, the commission cannot use TERP funds for any idle reduction projects in these areas. Therefore, the repeals will allow the commission to make TERP grant funding available for idle reduction projects within the HGB nonattainment area counties.

SECTION-BY-SECTION DISCUSSION

The adopted repeal of §§114.500, 114.502, 114.507, and 114.509 allows the commission to achieve NO_x emission reductions more effectively through the use of TERP grant funding made available for idle reduction projects within the HGB nonattainment area counties.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis 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. 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The adopted revisions to Chapter 114 and to the SIP repeal idling restrictions within the HGB nonattainment area counties. The repeals are not expected to adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The adopted repeals do not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Section 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 repeals implement requirements of 42 USC. Under 42 USC, §§7410, *et seq*., states are required to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While 42 USC, §§7410, *et seq*., does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, such as the I/M program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC 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 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §§7410, *et seq*. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §§7410, *et seq*., and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by SB 633 during the 75th Legislative Session. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (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 proposed rules from the full analysis unless the rule was a major environmental rule that exceeded a federal law. As discussed earlier in this preamble, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area

to ensure that the area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule 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. Because 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 SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and §7511(a)(d) requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as the HGB area. The adopted repeals will remove Chapter 114, Subchapter J, Division 1, which imposes idling restrictions on certain vehicles in the HGB ozone nonattainment area. Historically, the commission expressed a preference to implement technology-based strategies over behavior-altering strategies and the adopted repeals embody that philosophy. A combination of point source HRVOC controls and NO_x reductions appears to be the most effective means of reducing ozone in the HGB area. Consequently, the commission reevaluated a number of the existing control strategies, including motor vehicle idling restrictions, that were put in place in the December 2000 revision. The photochemical modeling shows that this strategy is no longer necessary to attain the one-hour ozone standard and therefore, the commission is adopting the repeal of this control strategy. Therefore, the adopted repeals are consistent with the ozone attainment demonstration SIP for the HGB area, required by 42 USC, §§7410, *et seq*.

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 (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).

As discussed earlier in this preamble, this rulemaking implements the requirements of 42 USC. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. Therefore, the adopted repeals do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor are the repeals adopted solely under the general powers of the agency. In addition, the repeals are adopted under Texas Health and Safety Code (also known as the Texas Clean Air Act), §§382.011, 382.012, 382.017, 382.019, and 382.208. The commission invited public comment on this determination; no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the adopted rulemaking action under Texas Government Code, §2007.043. The specific purpose of these revisions is to repeal idling restrictions in the HGB nonattainment counties.

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this adopted rulemaking because it is reasonably taken to fulfill an obligation mandated by federal law. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §§7410, *et seq*. and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. The motor vehicle idling restriction was submitted in the HGB December 2000 SIP revision as a control strategy to reduce NO_x in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. However, the commission adopts the repeal of the motor vehicle idling restriction because photochemical modeling shows that this strategy is no longer necessary to attain the one-hour ozone standard, and the combination of point source HRVOC controls and NO_x reductions appears to be the most effective means of reducing ozone in the HGB area. Therefore, the overall goal of this rulemaking is to meet the air quality standards established under federal law as NAAQS.

In addition, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the repeals do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and significantly advance the health and safety purpose. This action is taken in response to the HGB area exceeding the federal ozone NAAQS, which adversely affects public health, primarily through irritation of the lungs. The motor vehicle idling restriction was submitted as a control strategy in the HGB December 2000 SIP revision. A combination of point source HRVOC controls and NO_x reductions appears to be the most effective means of reducing ozone in the HGB area. Consequently, the commission reexamined this strategy and photochemical modeling shows that this strategy is no longer necessary to attain the one-hour ozone standard and therefore, the commission is adopting the repeal of Chapter 114, Subchapter J, Division 1. The action does not specifically advance the health and safety purpose by reducing ozone levels in the HGB nonattainment area. However, the repeal of this control strategy is part of a larger scheme to reduce ozone in the HGB area through the most effective means and strategies determined by the commission. Consequently, these adopted repeals meet the exemption in §2007.003(b)(13). This rulemaking therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). For these reasons, the adopted repeals do not constitute a takings under Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption is an action identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in §505.11, and therefore required that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission prepared a consistency determination for the adopted repeals under 31 TAC §505.22 and found that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking 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 CMP policy applicable to this rulemaking is the policy that commission rules comply with regulations in 40 Code of Federal Regulations, adopted in accordance with the Federal Clean Air Act, 42 USC, §§7401, *et seq*., to protect and enhance air quality in the coastal area so as to protect coastal natural resource areas and promote public health, safety, and welfare (31 TAC §501.14(q)). This rulemaking complies with 40 Code of Federal Regulations, adopted in accordance with the Federal Clean Air Act. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies. The commission invited public comment on this determination; no comments were received.

PUBLIC COMMENTS

Public hearings on this proposal were held in Houston on August 2, 2004; Beaumont on August 3, 2004; and Austin on August 5, 2004. The comment period closed on August 9, 2004. Written comments were submitted by the Sierra Club, Houston Regional Group (Sierra Club); EPA; Environmental Defense; Galveston-Houston Association for Smog Prevention (GHASP); Houston-Galveston Area Council (HGAC); Transportation Policy Council (TPC); the Honorable Bill White, Mayor, City of Houston, the Honorable Robert Eckels, County Judge, Harris County provided joint comments (Houston/Harris County); and four individuals. Sierra Club, Environmental Defense, GHASP, and four individuals opposed the repeal of the rules. HGAC, TPC, and Houston/Harris County supported the repeal of the rules. EPA neither supported nor opposed the rules but requested that the commission provide a detailed, substantive analysis of how these measures will advance attainment.

RESPONSE TO COMMENTS

HGAC, TPC, and Houston/Harris County commented that they support the repeal of the rules and that the reduction of emissions from diesel trucks during idling should be a regional priority and that reductions could be achieved through other means.

The commission appreciates support of the repeal of these rules.

One individual asked why the rules were adopted and are now being repealed.

The commission responds that it reevaluated a number of the existing control strategies, including motor vehicle idling restrictions, that were put in place in the December 2000 SIP revision. Results from the TexAQS and recent photochemical modeling indicate that additional HRVOC reductions will be the most beneficial measure in reducing ozone in the HGB area, and that the motor vehicle idling restrictions are no longer necessary to attain the one-hour ozone standard. The commission is also concerned about the effectiveness of these rules because the commission does not have enough enforcement personnel to adequately enforce the idling limitation in the HGB area, even if the rule applied only at truck stops. Local governments, on the other hand, have law enforcement personnel already patrolling the streets and areas which would be frequented by idling vehicles subject to the restriction. Local governments have the ability to determine whether they wish to dedicate the personnel and time required to enforce such a regulation. The commission has proposed locally-enforced motor vehicle idling limitation rules (§§114.510 - 114.512, 114.517) that would allow local governmental entities to enforce heavy-duty diesel idling restrictions within their jurisdictions if they sign a memorandum of agreement with the commission. Finally, for areas that choose not to adopt locally-enforced idling restrictions, the TERP program is an appropriate mechanism to help deploy technologies such as truck stop electrification for qualifying projects. No changes were made to the rules in response to this comment.

One individual commented that there should be a way for trucking companies to buy newer, cleaner diesel trucks.

The commission responds that a major initiative to reduce pollution from diesel trucks is the TERP program. The TERP program provides grants to eligible projects in affected counties to offset the incremental costs associated with the activities that reduce emissions of NO_x from high-emitting mobile diesel sources. No changes were made to the rules in response to this comment.

Environmental Defense commented that there should be a limited repeal of the rules and recommended that the commission require electrification of truck stops and retain the idling restriction at truck stops.

The commission does not agree that there should be a limited repeal of the rules and this rulemaking cannot require the electrification of truck stops because the scope of this rulemaking is limited to the repeal of the motor vehicle idling restrictions in the HGB nonattainment area. In order to change the rules in a way that would regulate new entities, the commission would have to initiate another rulemaking to satisfy the public notice and comment procedures of the Administrative Procedure Act. Thus, regulations requiring electrification would require an additional rulemaking. The commission may consider requiring electrification in a future in another rulemaking.

Idling restrictions and truck stop electrification are not required to demonstrate attainment of the one-hour ozone standard in the HGB area. The commission reevaluated a number of the existing control strategies, including motor vehicle idling restrictions, that were put in place in the December 2000 SIP revision. As a result of that reevaluation, the commission is submitting a SIP revision that demonstrates attainment without reductions from the idling limitation rule.

The commission is also concerned about the effectiveness of these rules because the commission does not have enough enforcement personnel to adequately enforce the idling limitation in the HGB area, even if the rules applied only at truck stops. Local governments, on the other hand, have law enforcement personnel already patrolling the streets and areas which would be frequented by idling vehicles subject to the restriction. Local governments have the ability to determine whether they wish to

dedicate the personnel and time required to enforce such a regulation. The commission has proposed locally-enforced motor vehicle idling limitation rules (§§114.510 - 114.512, 114.517) that would allow local governmental entities to enforce heavy-duty diesel idling restrictions within their jurisdictions if they sign a memorandum of agreement with the commission. Finally, for areas that choose not to adopt locally-enforced idling restrictions, the TERP program is an appropriate mechanism to help deploy technologies such as truck stop electrification for qualifying projects.

No changes were made to the rules in response to this comment.

Environmental Defense commented that it believes that the commission has not shown that the strategy is no longer necessary to attain the one-hour ozone standard.

The commission disagrees that the rules are necessary to attain the one-hour ozone standard. The commission reevaluated a number of the existing control strategies, including motor vehicle idling restrictions, that were put in place in the December 2000 SIP revision. The idling limitation rule effective in the HGB area was initially proposed when the SIP was focused primarily on new NO_x emission reduction strategies. The idling limitation rule was adopted in support of the December 2000 ozone attainment demonstration SIP. The majority of the emission reductions identified in the December 2000 SIP revision were from a 90% reduction in point source NO_x. The modeling analysis also indicated a shortfall in necessary NO_x emission reductions, such that an additional 91 tpd of NO_x reductions were necessary for an approvable attainment demonstration. Hence, rules such as the idling limitation were adopted. The commission soon thereafter conducted a scientific evaluation based in large part on aircraft data collected by the TexAQS. The TexAQS, a comprehensive research project conducted in August and September 2000 involving more than 40 research organizations and over 200 scientists, studied ground-level ozone air pollution in the HGB area and East Texas regions. The study revealed that the ambient concentration of NO_x and certain VOCs (terminal olefins) were not consistent with the industrial emission estimates. Specifically, the ratio of terminal olefins to NO_x did not correlate to the ambient ratio of these VOCs to NO_x. Because of the greater certainty associated with NO_x emissions, the commission concluded that industrial emissions of terminal olefins were likely understated in earlier emissions inventories.

To address findings from TexAQS, and to fulfill obligations in the consent order, the commission adopted a SIP revision in December 2002 that focused on replacing the most stringent 10% industrial NO_x reductions with VOC controls. In light of the TexAQS study, the commission conducted further modeling analysis of ambient VOC data. The photochemical grid modeling results and analysis indicated that the HGB area can achieve the same air quality benefits with industrial VOC emission reductions, combined with 80% industrial NO_x emissions reductions, as would be realized with a 90% industrial NO_x emission reduction. An analysis of automated gas chromatograph data revealed that four compounds were frequently responsible for high reactivity days: ethylene, propylene, 1,3-butadiene, and butenes. As such, these compounds were selected as the best candidates for HRVOC emission controls.

The December 2002 SIP revision contained new rules to reduce HRVOC emissions from four key industrial sources: fugitives, flares, process vents, and cooling towers. The HGB SIP no longer relies primarily on new reductions from NO_x-based strategies. A combination of point source HRVOC controls and NO_x reductions is the most effective means of reducing ozone in the HGB area and there is no longer a NO_x shortfall in the HGB SIP. Therefore, the commission is submitting a SIP that relies on HRVOC controls and NO_x reductions to achieve attainment and is no longer relying on reductions from behavior-altering strategies such as the idling limitation rule. No changes were made to the rules in response to this comment.

Environmental Defense commented that it does not believe that allowing TERP grant funding for truck stop electrification infrastructure justifies the repeal of the rules. Environmental Defense also commented that the state should invest its limited TERP funds in projects that would not otherwise occur without state funding and that public funding should be limited to loans, and/or partnerships between electric utilities and the commission. Finally, Environmental Defense commented that truck stop electrification is a commercially viable technology that generates revenues that will more than recoup the initial capital cost.

As discussed previously, the commission is repealing this idling rule because a combination of point source HRVOC controls and NO_x reductions is the most effective means of reducing ozone in the HGB nonattainment area. The idling rule is not required to demonstrate attainment of the one-hour ozone standard in the HGB area.

For local government entities that want to enforce idling limitations, the commission has proposed locally-enforced motor vehicle idling limitation rules (§§114.510 - 114.512, 114.517) that would allow local governmental entities to enforce heavy-duty diesel idling restrictions within their jurisdictions if they sign a memorandum of agreement with the commission.

Making TERP funding available for idle reduction projects could accelerate emission reductions by influencing implementation of idle reduction projects to the areas where they are needed most. TERP funds are disbursed only to those projects that meet the standards and criteria of the program. Several factors, such as cost-effectiveness and the amount of emission reductions to be achieved by the project, are taken into account before applicants are awarded TERP grant funding. Emission reductions occurring through TERP projects will have contractual enforcement mechanisms that will include reporting requirements demonstrating compliance. TERP specifically provides for funding for infrastructure projects such as truck stop electrification. The commission exercises considerable discretion in managing TERP funds and overseeing the program.

The commission recognizes that some non-TERP funded idle reduction projects are operating in the state. In those instances, business decisions were made based on the viability of idle reduction technologies in a competitive market. However, partnering with electric utilities to fund electrification infrastructure is beyond the scope of this rulemaking.

This rulemaking cannot require truck stop electrification because the scope of this rulemaking is limited to the repeal of the motor vehicle idling restrictions in the HGB nonattainment area. In order to change the rule in a way that would regulate new entities, the commission would have to initiate another rulemaking to satisfy the public notice and comment procedures of the Administrative Procedure Act. Thus, regulations requiring electrification would require an additional rulemaking. The commission may consider requiring truck stop electrification in a future rulemaking.

No changes were made to the rules in response to this comment.

Environmental Defense and GHASP commented that there should be electrification at any "commercial truck stop, travel center or public rest area with 25 or more parking spaces where commercial motor vehicles can park for more than 60 minutes" by June 1, 2006, since electrification is a "commercially viable technology" which quickly recoups capital costs. GHASP commented that those who do not comply with the rule should be ineligible for any state environmental license or permit. GHASP also commented that those who operate a public rest area should establish enforcement policies and identify suitable resources for the truck stop electrification operations.

This rulemaking cannot require truck stop electrification because the scope of this rulemaking is limited to the repeal of the motor vehicle idling restrictions in the HGB nonattainment area. In order to change the rule in a way that would regulate new entities, the commission would have to initiate another rulemaking to satisfy the public notice and comment procedures of the Administrative Procedure Act. Thus, regulations requiring electrification would require an additional rulemaking. The commission may consider requiring truck stop electrification in a future rulemaking.

The idling rule is not required to demonstrate attainment of the one-hour ozone standard in the HGB area. Therefore, additional enforcement mechanisms are not being considered at this time. The commission will consider these enforcement suggestions should a mandatory idling restriction rule be considered in the future.

No changes were made in response to this comment.

Environmental Defense and GHASP commented that the idling rule could be improved if owners of public fleets (e.g., school bus fleets, local government fleets, etc.) were asked to implement and enforce anti-idling policies. GHASP commented that the commission should identify best practices for idling for publicly owned diesel fleets and aggressively market those practices. GHASP recommended that the commission then schedule an audit to determine the program's effectiveness and require anti-idling practices and enforcement if public agencies prove to be unreasonably resistant.

The commission responds that allowing local governments to enforce an idling limitation regulation is the most logical strategy to reduce emissions from heavy-duty truck idling. Local governments have the ability to determine whether they wish to dedicate the personnel and time required to enforce such a regulation and may do so if they take part in the proposed heavy-duty diesel idling opt-in rule. That proposed rulemaking would allow local governmental entities to enforce heavy-duty diesel idling restrictions within their jurisdictions if they sign a memorandum of agreement with the commission.

Additionally, the scope of this rulemaking is limited to the repeal of the motor vehicle idling restrictions in the HGB nonattainment area. In order to change the rule in a way that would regulate new entities, the commission would have to initiate another rulemaking to satisfy the public notice and comment procedures of the Administrative Procedure Act. Thus, regulations requiring electrification would require an additional rulemaking. The commission may consider requiring electrification in the future in another rulemaking. No changes were made to the rules in response to this comment. GHASP commented that as a first step toward voluntary, grant, or regulatory programs to reduce truck idling, Texas Department of Transportation (TxDOT) should establish a "registration program" of private and public sites where more than five diesel trucks may idle at one time.

The idling rule is not required to demonstrate attainment of the one-hour ozone standard in the HGB area. Therefore, additional enforcement mechanisms are not being considered at this time. The commission will consider a truck stop registration program should a mandatory idling restriction rule be considered in the future. No changes were made to the rules in response to this comment.

Sierra Club commented that the rule was never enforced, and in fact, the commission discouraged local air pollution control programs from enforcing the rule.

The commission responds that it did not discourage local air pollution control programs from enforcing the idling limitations, but no large-scale enforcement activities have been conducted by the commission since the rule became effective. Enforcement is a major concern when it comes to regulating behavior. The time and effort necessary to consistently and effectively enforce such rules as the idling restrictions and the lawn and garden restrictions are one of the reasons why they are being repealed and replaced with strategies such as the HRVOC rules and voluntary incentive-based programs such as the TERP program. Results from the TexAQS and recent photochemical modeling indicate that additional HRVOC reductions will be the most beneficial measure in reducing ozone in the HGB area. No changes were made to the rules in response to this comment.

Sierra Club recommended that the commission determine what it would take to enforce the rule effectively and implement a pilot enforcement program.

The commission responds that it knows that local involvement is a necessary element for proper enforcement of many regulations. In repealing the Houston idling rules the commission allows the local governmental entities to decide the most appropriate approach to controlling excessive idling. The commission has expressed a preference to implement voluntary technology-based strategies over mandatory behavior-altering strategies, and the repeals embody that philosophy. The commission has a proposed "locally enforced motor vehicle idling limitations" rule (Rule Project Number 2004-072-114-AI) that will incorporate the same idling restrictions as the current Houston idling rule, but would allow the local governmental entities to decide if and how to implement it. This leaves the option for the local governmental entity to decide if other options, such as TERP-funded idling projects, will be better suited for their air quality situation. No changes were made to the rules in response to this comment.

Sierra Club questioned whether the commission approved this rule based on avoiding SIP disapproval and sanctions, and whether or not the commission ever intended to implement the rule.

The commission responds that it did approve the rule based on avoiding SIP disapproval and sanctions and that the commission has already implemented the rule. The idling limitations became effective on April 1, 2001. No changes were made to the rules in response to this comment.

EPA commented that "necessary to attain" is not the reasonably available control measures (RACM) standard; instead it is whether the rules would advance the attainment date. EPA asked that the commission provide a RACM analysis that includes "a detailed, substantive consideration of whether these measures {are} reasonable and would advance attainment."

The commission recognizes that a RACM analysis is a SIP requirement and will document SIP requirements in the accompanying one-hour attainment demonstration scheduled for the commission's consideration on December 1, 2004.

By the year 2007, the idling limits would reduce NO_x emissions in the affected area by 0.48 tpd. The commission estimates the daily cost savings benefit of this strategy to be approximately $51,900 per ton of NO_x reduced. This figure was calculated from the estimated NO_x reductions from this strategy of 0.48 tpd, the estimated reduction in fuel consumption per hour, and the current price per gallon of fuel sold in the affected area. On June 23, 2004, the commission proposed a one-hour ozone midcourse review attainment demonstration for the HGB area. The recently proposed SIP addresses emission of both NO_x and HRVOCs. The current proposal models six of ten days below 125 ppb, with the remaining four days demonstrating attainment using a weight-of-evidence analysis. Additional enhancements to the modeling since the SIP was proposed in June replicate peak ozone at or below 125 ppb on eight of ten days. The repeal of the idling restriction does not significantly impact modeled ozone concentrations.

Given the minimal emission reductions and the development of a more robust attainment demonstration, the commission maintains that the inclusion of the repeal of the motor vehicle idling restriction rules is not a reasonable measure. These factors indicate that this measure does not advance the one-hour ozone attainment date of the HGB area, and therefore, is not a RACM. No changes were made to the rules in response to this comment.

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code (TWC), §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105, concerning General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act). The repeals are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §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; and §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2004.

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Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-5017

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CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

The Texas Commission on Environmental Quality (commission) adopts the amendments to §§115.10, 115.720, 115.722, 115.725 - 115.727, 115.729, 115.760, 115.761, 115.764, 115.769, 115.780 - 115.783, and 115.786 - 115.789. The commission also adopts the repeal of §§115.766 - 115.768 and 115.785, and adopts new §115.766 and §115.767. The amendments to §§115.10, 115.720, 115.722, 115.725 - 115.727, 115.729, 115.760, 115.761, 115.764, 115.769, 115.780 - 115.783, and 115.786 - 115.789; and new 115.766 and 115.767 are adopted *with changes* to the proposed text as published in the July 9, 2004, issue of the *Texas Register* (29 TexReg 6534). Repealed §§115.766 - 115.768 and §115.785 are adopted *without changes* to the proposed text and will not be republished.

The amended, repealed, and new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The Houston/Galveston/Brazoria (HGB) ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act Amendments of 1990 (FCAA) as codified in 42 United States Code (USC), §§7401 *et seq.*, and therefore, is required to attain the national ambient air quality standard (NAAQS) one-hour standard for ozone of 0.12 parts per million (ppm) (125 parts per billion (ppb)) by November 15, 2007. The HGB area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, and the commission has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. The most relevant HGB SIP revisions to date are the December 2000 one-hour ozone standard attainment demonstration, the September 2001 follow-up revision, and the December 2002 nitrogen oxides (NO_x)/highly-reactive volatile organic compound (HRVOC) revision.

This process has proven to be challenging due to the magnitude of reductions needed for attainment. The emission reduction requirements included as part of the December 2000 SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGB area, in partnership with the commission, to address ozone. These coalitions include local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as EPA and the commission, and worked diligently to identify and quantify control strategy measures for the HGB area attainment demonstration.

December 2000

The December 2000 SIP revision contained rules and photochemical modeling analyses in support of the HGB area ozone

attainment demonstration. The majority of the emissions reductions identified in this revision were from a 90% reduction in point source NO_x. The modeling analysis also indicated a shortfall in necessary NO_x emission reductions, such that an additional 91 tons per day (tpd) of NO_x reductions were necessary for an approvable attainment demonstration. In addition, the revision contained post-1999 rate-of-progress (ROP) plans for the milestone years 2002 and 2005 and for the attainment year 2007, and transportation conformity motor vehicle emissions budgets (MVEB) for NO_x and volatile organic compound (VOC) emissions. The SIP also contained enforceable commitments to implement further measures in support of the HGB area attainment demonstration, as well as a commitment to perform and submit a midcourse review.

September 2001

The September 2001 SIP revision for the HGB area included the following elements: 1) corrections to the ROP table/budget for the years 2002, 2005, and 2007 due to a mathematical inconsistency; 2) incorporation of a change to the idling restriction control strategy to clarify that the operator of a rented or leased vehicle is responsible for compliance with the requirements in situations where the operator of a leased or rented vehicle is not employed by the owner of the vehicle (the commission committed to making this change when the rule was adopted in December 2000); 3) incorporation of revisions to the clean diesel fuel rules to provide greater flexibility for compliance with the requirements of the rule while preserving the emission reductions necessary to demonstrate attainment in the HGB area; 4) incorporation of a stationary diesel engine rule that was developed as a result of the state's analysis of EPA's reasonably available control measures; 5) incorporation of revisions to the point source NO_x rules; 6) incorporation of revisions to the emissions cap and trade rules; 7) the removal of the construction equipment operating restriction and the accelerated purchase requirement for Tier 2/3 heavy-duty equipment; 8) the replacement of these rules with the Texas Emission Reduction Plan program; 9) the layout of the midcourse review process that details how the state will fulfill the commitment to obtain the additional emission reductions necessary to demonstrate attainment of the one-hour ozone standard in the HGB area; and 10) replacement of the 2007 ROP MVEBs to be consistent with the attainment MVEBs.

As was discussed in the December 2000 revision, the modeling resulted in a 141 ppb peak ozone level that correlated to a shortfall calculation of 91 tpd NO_x equivalent emissions. An additional five tpd was added to the shortfall, because the state could not take credit for the NO_x reductions associated with the diesel pull-ahead strategy. The excess emissions from this strategy were not included in the original emissions inventory. The gap control measures adopted in December 2000, along with the stationary diesel engine rules included in the September 2001 revision, resulted in NO_x reductions of 40 tpd, which left a total remaining shortfall of 56 tpd. The state committed to address this shortfall through the midcourse review process.

December 2002

In January 2001, the Business Coalition for Clean Air - Appeal Group (BCCA-AG) and several regulated companies challenged the December 2000 HGB SIP and some of the associated rules. Specifically, the BCCA-AG challenged the 90% NO_x reduction requirement from stationary sources in the HGB area. In May 2001, the parties agreed to a stay in the case, and the Honorable Margaret Cooper, Travis County District Court Judge, signed a consent order, effective June 8, 2001, requiring the commission to perform an independent, thorough analysis of the causes of rapid ozone formation events and identify potential mitigating measures not yet identified in the HGB area attainment demonstration, according to the milestones and procedures in Exhibit C (Scientific Evaluation) of the order.

In compliance with the consent order, the commission conducted a scientific evaluation based in large part on aircraft data collected by the *Texas 2000 Air Quality Study* (TexAQS). The TexAQS, a comprehensive research project conducted in August and September 2000 involving more than 40 research organizations and over 200 scientists, studied ground-level ozone air pollution in the HGB area and East Texas regions. The study revealed that the ambient concentrations of NO_x and certain VOCs (terminal olefins) were not consistent with the industrial emissions estimates. Specifically, the ratio of terminal olefins to NO_x did not correlate to the ambient ratio of these VOCs to NO_x. Because of the greater certainty associated with NO_x emissions, the commission concluded that industrial emissions of terminal olefins were likely understated in earlier emission inventories.

To address findings from TexAQS, and to fulfill obligations in the consent order, the commission adopted a SIP revision in December 2002 that focused on replacing the most stringent 10% industrial NO_x reductions with VOC controls. In light of the TexAQS study, the commission conducted further modeling analysis of ambient VOC data. The photochemical grid modeling results and analysis indicated that the HGB area can achieve the same air quality benefits with industrial VOC emission reductions, combined with 80% industrial NO_x emissions reductions, as would be realized with a 90% industrial NO_x emission reduction. An analysis of automated gas chromatograph data revealed that four compounds were frequently responsible for high reactivity days: ethylene, propylene, 1,3-butadiene, and butenes. As such, these compounds were selected as the best candidates for HRVOC emission controls.

The commission adopted revisions to the industrial source control requirements, one of the control strategies within the existing federally approved SIP. The December 2002 revision contained new rules to reduce HRVOC emissions from four key industrial sources: fugitives, flares, process vents, and cooling towers. The adopted rules target HRVOCs while maintaining the integrity of the SIP. Analysis showed that limiting emissions of ethylene, propylene, 1,3-butadiene, and butenes in conjunction with an 80% reduction in NO_x is equivalent in terms of air quality benefit to that resulting from a 90% point source NO_x reduction requirement. As such, the HRVOC rules are performance-based, emphasizing monitoring, recordkeeping, reporting, and enforcement, rather than establishing individual unit emission rates.

The technical support documentation accompanying the 2002 SIP revision describes modeling and ambient data analyses that demonstrate that reductions in HRVOC emissions can replace the last 10% of industrial NO_x controls.

Current SIP Revision

The commission committed in 2000 to perform a midcourse review to ensure attainment of the one-hour ozone standard. The midcourse review process provides the opportunity to update emissions inventory data, to use current modeling tools, such as MOBILE6, and to enhance the photochemical grid modeling. The data gathered from the TexAQS continues to improve photochemical modeling of the HGB area. The collection of these technical improvements give a more comprehensive understanding of the ozone challenge in the HGB

area that is necessary to develop an attainment plan. In the early part of 2003, the commission was preparing to move forward with the midcourse review; however, during the same time period EPA announced its plans to begin implementation of the eight-hour ozone standard. The EPA published proposed rules for implementation of the eight-hour ozone standard in the June 2, 2003, issue of the *Federal Register* (68 FR 32802). In the same time frame, EPA also formalized its intentions to designate areas for the eight-hour ozone standard by April 15, 2004, meaning states would need to reassess their efforts and control strategies to address this new standard by 2007. Recognizing that existing one-hour nonattainment areas would soon be subject to the eight-hour ozone standard, and in an effort to efficiently manage the state's limited resources, the commission decided to develop an approach that addresses the outstanding obligations under the one-hour ozone standard while beginning to analyze eight-hour ozone issues.

The commission's one-hour ozone SIP commitments include: 1) completing a one-hour ozone midcourse review; 2) performing modeling; 3) adopting measures sufficient to fill the NO_x shortfall; 4) adopting measures sufficient to demonstrate attainment; and 5) revising the MVEB using MOBILE6.

Results from the TexAQS and recent photochemical modeling suggest that ozone formation in the HGB area stems from a combination of two different types of emissions. The first is the daily routine emissions of a large industrial base located in an urban core with on-road and non-road emissions typical of a city of four million people. These emissions can be thought of as the base of emissions that could be expected at any given time in the HGB area. The second type of emissions can be characterized as the fluctuations that occur daily, even hourly in the HGB area resulting from sudden sharp increases in short-term HRVOC releases. While these emission fluctuations can occur in any industrial area, the dense concentration of chemical and refinery sites makes this a particular concern in the HGB area.

Ozone forms rapidly when these variable emissions occur in the immediate presence of NO_x, under the right atmospheric conditions. The design value in the HGB area is driven by a combination of these two types of emissions. To address ozone formation in the HGB area, a dual strategy is needed to reduce the base of emissions existing continuously in the HGB area as well as restrictions on a short-term basis to address short-term variations. To address the "base" emissions, control strategies are needed that resemble those used by other metropolitan areas with a combination of a large urban population and a significant industrial base. These strategies include motor vehicle inspection and maintenance, cleaner fuels, cleaner technology for construction equipment, industrial-based controls for routine NO_x and VOC emissions, and a long-term cap on HRVOCs. To address the short-term variable emissions, a restriction of the maximum hourly rate of HRVOCs is necessary. This restriction would apply to both unauthorized emissions as well as to permitted emissions that may fluctuate on an hourly basis.

To achieve the necessary HRVOC reductions, the commission developed a dual approach that addresses variable short-term emissions through a not-to-exceed hourly emission limit, and that addresses steady-state and routine emissions through an annual cap. The annual HRVOC cap and fugitive emission rules will reduce the overall reactivity in the airshed by removing the compounds that are most prevalent and most likely to react rapidly enough to cause one-hour ozone exceedances. The annual HRVOC cap in Harris County will be reduced from the existing HRVOC cap in response to support the attainment demonstration modeling. The annual HRVOC cap in the seven-county surrounding area is equivalent to the total emissions limits established in the December 2002 SIP revision, but represented on an annual basis instead of a 24-hour rolling average. Based on information provided, the commission determined that enforceable limits on HRVOC emissions within the seven surrounding counties may be sufficient without the need for an additional cap and trade system for those counties. Therefore, the commission has provided an exemption from the short-term and annual caps for sites in those seven counties. The executive director will continue to evaluate the necessity to require short-term and annual reductions from those sites subject to Chapter 115, Subchapter H, Divisions 1 and 2, that are located within the seven-county surrounding area. If the evaluation reveals that the total amount of enforceable HRVOC emissions is at a level that is inconsistent with the attainment demonstration of the one-hour NAAQS for ozone by the attainment date, the commission may revoke the exemption. The commission also solicited comments on possible ways to mitigate violations of the short-term emissions cap.

The annual HRVOC cap emissions in Harris County would be distributed and enforced through an HRVOC emissions cap and trade program under 30 TAC Chapter 101, Subchapter H, new Division 6 (Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program) being adopted in concurrent rulemaking. This program would establish a mandatory annual HRVOC emissions cap on all sites located in Harris County that emit or have the potential to emit more than ten tons per year of HRVOC, and that are subject to the HRVOC control requirements of Chapter 115, Subchapter H, Division 1 or Division 2. The cap would be enforced by the allocation, trading, and banking of allowances. An allowance is the equivalent of one ton of HRVOC emissions. This HRVOC cap is established at a level demonstrated as necessary to allow the HGB area to attain the one-hour ozone standard along with a 5% reduction to safeguard against potential emissions variations. The adopted cap would initially be implemented on January 1, 2007. The adopted HRVOC cap and trade program would also require all sites with new or modified HRVOC sources in Harris County to obtain unused allowances from other sites already participating under the cap to offset any increased HRVOC emissions. For sites in Harris County that have the potential to emit ten tons per year or less of HRVOCs from sources subject to the HRVOC control requirements of Subchapter H, Division 1 or 2, the total aggregate HRVOC emissions from those sources would be limited to ten tons per year. Sites that are exempt from the HRVOC emissions cap and trade program would be extended an opportunity to opt-in, receive an HRVOC allocation, and thereby not be restricted to the ten tons per year limit.

The HGB area SIP no longer relies primarily on NO_x-based strategies. A combination of point source HRVOC controls and NO_x reductions is the most effective means of reducing ozone in the HGB area. Under this revision, there is no longer a NO_x shortfall in the HGB SIP. The commission also evaluated a number of the existing control strategies that were put in place in the December 2000 revision. The photochemical modeling shows that some of these strategies are no longer necessary to attain the one-hour ozone standard. This SIP revision is repealing the commercial lawn and garden equipment restrictions and the heavy-duty vehicle idling restrictions, and removing the motor vehicle inspection and maintenance program requirements from Chambers, Liberty, and Waller Counties. In addition, this SIP

includes revisions to the environmental speed limit strategy. In September 2002, the commission revised the existing speed limit strategy to suspend the 55-mile per hour (mph) speed limit until May 1, 2005, and, where posted speeds were 65 mph or higher before May 1, 2002, to increase speed limits to five mph below what was posted. The 78th Legislature, 2003, removed the commission's authority to determine speed limits for environmental purposes; therefore, this SIP removes the reinstatement of the 55 mph speed limit on May 1, 2005, and maintains the currently posted speed limits at five mph below the posted limit before May 1, 2002. Also, as part of this SIP revision, the commission is adopting new statewide portable fuel container rules. Historically, the commission has expressed a preference to implement technology-based strategies over behavior-altering strategies, and these adopted changes embody that philosophy.

Through this revision, the commission is fulfilling its outstanding one-hour ozone SIP obligations and beginning to plan for the upcoming eight-hour ozone standard. This SIP demonstrates attainment of the one-hour ozone standard in the HGB area in 2007 and provides a preliminary analysis of the HGB area in terms of the eight-hour ozone standard in 2007 and 2010. EPA's proposed eight-hour implementation rules provide flexibility to the states in transitioning from the one-hour to the eight-hour ozone standard, and the commission maintains that the steps taken in this proposal and the technical work performed to date will be invaluable through the transition period. Upon EPA's finalization of the eight-hour implementation and the transportation conformity rules, the commission expects to begin developing eight-hour ozone SIPs.

The commission continues to analyze the rules for implementation of the eight-hour ozone standard adopted by EPA on April 15, 2004. This additional analysis of the impact of the adopted rules on attainment of the eight-hour standard may indicate a need for new or more stringent control measures and could result in the modification of the HRVOC emissions caps established under these adopted rules. Finally, the commission is also concurrently adopting a cap and trade program in Chapter 101, Subchapter H, new Division 6 as a refinement of the annual cap proposed for HRVOC emissions.

SECTION BY SECTION DISCUSSION

General Administrative Rule Language Changes

The commission adopts amendments in numerous locations in the rule language to change the word "which" to "that" and the word "shall" to "must" to conform to the drafting rules in the *Texas Legislative Council Drafting Manual*, October 2002.

The commission adopts amendments to spell out acronyms the first time they are used in a section and to delete acronyms that are only used once in a section. The commission also adopts amendments to §§115.10, 115.720, 115.722, 115.760, 115.761, and 115.780 to change all references from the Houston/Galveston area to the HGB area to correspond to federal references to the area.

SUBCHAPTER A, DEFINITIONS

The commission adopts the amendment to §115.10, concerning Definitions. The amendment adds a new definition of "Emergency flare" to differentiate flares that only receive emissions during upset events. Unscheduled maintenance, startup, or shutdown activities from other flares are not included in the adopted definition and are handled elsewhere in the rule. The remaining definitions in §115.10 are renumbered accordingly.

The amendment to the definition of "Houston/Galveston area" adds "or Houston/Galveston/Brazoria area" because the both references are used throughout Chapter 115. The amendment to the definition of "Strippable volatile organic compound" removes the listing of test methods used to determine the concentration of strippable VOC because the test methods are not necessary to define the term and are already listed in the cooling tower rules in Division 2 of this subchapter.

SUBCHAPTER H, HIGHLY-REACTIVE VOLATILE ORGANIC COMPOUNDS

Division 1, Vent Gas Control

Section 115.720, Applicability and Definitions

The commission adopts the amendment to §115.720. The amendment to §115.720(a) adds language to specify that the applicability of this rule includes both controlled and uncontrolled vent gas streams containing HRVOC at a "site" instead of an "account." The amendment adds a new definition for "Degassing safety device" in §115.720(b) to address low-flow pilots that are typically permitted as flares, but used only at geologic storage facilities during emergency releases. In response to comments, the amendment also revised the definition for "Supplementary fuel" in §115.720(b)(2) as natural gas or fuel gas added to the gas stream to increase the net heating value. In response to comments, the amendment includes a more concise definition for "Pilot gas" in §115.720(b)(3). The remaining definitions in §115.720 are renumbered accordingly.

Section 115.722, Site-wide Cap and Control Requirements

The commission adopts the amendment to §115.722 to allow sites the flexibility of compliance with the vent gas control requirements of this division through compliance with the HRVOC emissions cap and trade program. The amendment to §115.722(a) changes the long-term site-wide cap strategy to a calendar year basis instead of the existing 24-hour rolling average basis, and states that owners or operators of a site subject to the HRVOC vent gas rules shall comply with the HRVOC emissions cap and trade program in Chapter 101, Subchapter H, Division 6. The amendment to §115.722(a) also removes the reference to the site-cap limits in the tables of the SIP.

The commission adopts §115.722(b) specifying that Harris County sites subject to this division or to Division 2, but that are exempt from the HRVOC emissions cap and trade program in accordance with 30 TAC §101.392(a) (Exemptions), are limited to ten tons of HRVOC emissions per calendar year.

The commission adopts §115.722(c) to provide a short-term, not-to-exceed limit of 1,200 pounds of HRVOC per one-hour block, for Harris County sites subject to this division. The commission evaluated the magnitude of the short-term limit, and the time period over which this short-term limit would be enforced. The commission also solicited comments regarding the appropriate level for this short-term limit, and requested any supporting data regarding alternatives to the magnitude and time period. The comments received are addressed in the RESPONSE TO COMMENTS section of this preamble. Adopted §115.722(c)(3) addresses how exceedances of the short-term limits should be calculated to determine compliance with the long-term cap. Existing §115.722(b) and (c) are relettered to §115.722(d) and (e), respectively. The amendment to

relettered §115.722(d) corrects a citation to 40 Code of Federal Regulations (CFR) §60.18 and adds two new paragraphs to specify the methods to demonstrate compliance with the minimum net heating value requirements and the maximum exit velocity requirements. The commission adopted the amendment to §115.722(d) that changes the phrase, "volatile organic compounds" to "HRVOCs." The commission did not propose to require continuous monitoring of potential visible emissions from flares.

Section 115.725, Monitoring and Testing Requirements

The commission adopts the amendment to §115.725(a) to specify that pressure relief valves (PRV) are not subject to the requirements of §115.725(a). The amendment to §115.725(a) specifies that each vent gas, at a "site" instead of an "account," that is not controlled by a flare must be tested, and specifies that HRVOC emissions are considered to be zero during non-operational periods for cyclic or batch processes. Additionally, the amendment adds requirements in §115.725(a)(1) and (2) for owners or operators to select operational parameters for uncontrolled and controlled vents, monitor those parameters, and establish operating limits based on averages during the tests required by §115.725(a). The term, "correlates to" has been changed to "affects" throughout §115.725(a) with regard to the selection of operational parameters. This amendment is made to clarify that the commission did not intend to imply that parameter monitoring will be used to predict or estimate HRVOC emission rates, or that the selected parameter or parameters must be directly proportional with emission rates or control device efficiency, as in the statistical definition of the phrase. The process parameter monitoring requirements are necessary to help assure compliance with the site-wide caps in §115.722(c). Adopted §115.725(a)(3) requires that HRVOC emissions during emissions events and scheduled startup, shutdown, and maintenance activities be determined using either testing or process knowledge and engineering calculations. This requirement is necessary due to the inclusion of emissions from emissions events and scheduled startup, shutdown, and maintenance activities in the site-wide caps in §115.722 and to better assure compliance with the HGB area attainment demonstration SIP. Adopted §115.725(a)(4) requires the owner or operator to develop, implement, and follow written monitoring plans for the operational parameters required under §115.725(a)(1) and (2). Adopted §115.725(a)(5) specifies that additional testing may be performed to update emission data after the initial HRVOC emission test has been performed, and that written notification of testing must be submitted to the Houston regional office as specified in §115.726(a)(2). Adopted §115.725(a)(6) includes the provisions previously in §115.725(c), regarding the use of testing performed prior to December 31, 2004, and expands §115.725(a)(6)(A) to add language providing additional flexibility. Adopted §115.725(a)(7) includes the language previously in §115.725(g), regarding test waivers for one-half of the vents that are identical in design and operation. Adopted §115.725(a)(7)(B) has been modified since proposal to change the requirement to submit test results from 45 days after the date of written authorization of the temporary waiver to no later than 60 days after completion of testing. Adopted §115.725(a)(7)(C) has been added since proposal to specify that for demonstrating compliance with the control requirements of §115.722(a) - (c), the HRVOC emission test results from the vent gas stream with the maximum HRVOC emission rate of those vents tested under this paragraph must be used for those vent gas streams for which a waiver of testing, temporary or permanent, has been authorized.

The commission adopts the amendment to §115.725(b) that specifies that the alternatives provided may not be applied to PRVs and that the vent gas stream must comply with the process parameter monitoring requirements of §115.725(a). The amendment to §115.725(b)(1)(B) specifies that cylinder gas audits must be performed at a minimum quarterly, after the initial cylinder gas audit. The amendment in §115.725(b)(2) specifies that process data, "sufficient to demonstrate compliance status" may be used to determine maximum potential HRVOC hourly emissions, and removes PRVs from the types of processes for which process knowledge may be used. Adopted §115.725(b)(1)(D) and (E) have been added in response to comments, which adds a provision for parameter monitoring requirements to be used in lieu of the requirements of §115.725(a)(1) or (2). Finally, the amendment to §115.725(b) includes the addition of degassing safety devices in §115.725(b)(2)(D) to the types of vent gas streams for which process knowledge may be used in lieu of testing. The proposal erroneously referred to these vent gas streams as "processes" and was therefore changed in response to comments.

The commission adopts §115.725(c) that provides monitoring requirements for PRVs. Adopted §115.725(c)(1) specifies the requirements of the PRV monitoring system. Adopted §115.725(c)(2) specifies that the owner or operator may use process knowledge to determine the HRVOC emission rates during events when the PRVs open. Adopted §115.725(c)(3) requires written monitoring plans for the PRV monitoring systems, and specifies the requirements of the plans. Finally, adopted §115.725(c)(4) specifies that the written monitoring plans must be submitted within 30 days upon written request by the executive director, and that the executive director may require additional or alternative monitoring requirements.

The commission adopts the amendment to §115.725(d) that specifies that except for subsections (e) - (k), the owner or operator shall perform continuous monitoring in accordance with the requirements of §115.725(d) to demonstrate compliance with §115.722(a) - (d). The amendment to §115.725(d)(2) revises the calibration requirements for the on-line analyzer. The amendment to §115.725(d)(2)(A)(i) specifies that for HRVOC constituents, the owner or operator must follow the procedures and requirements of 40 CFR Part 60, Appendix B, Section 10 of Performance Specification 9, except as provided for in §115.725(d)(2)(A)(i). Adopted §115.725(d)(2)(A)(ii) specifies that for constituent monitoring to determine net heating value and molecular weight, the owner or operator may elect to follow the §115.725(d)(2)(A)(i) calibration requirements or the manufacturer recommended procedures. Adopted §115.725(d)(2)(A)(ii)(I) requires that if the manufacturer recommended procedures are selected, those procedures must include, at a minimum, weekly calibration checks of the top two non-HRVOC constituents affecting molecular weight and net heating value to meet the performance criteria of Section 10.2 of Performance Specification 9. Adopted §115.725(d)(2)(A)(ii)(II) requires that manufacturer information and data be included in the quality assurance plan (QAP) for those constituents for which routine calibration is not performed. Adopted §115.725(d)(2)(A)(iii) specifies that the range of calibration standards required for calibration of the on-line analyzer may be based on the typical concentrations instead of the full potential range of concentrations. Adopted §115.725(d)(2)(A)(iii) also specifies that data must be included in the QAP to demonstrate

the accuracy of the analyzer at the maximum concentrations outside the adopted calibration range. The language in the adopted amendment to §115.725(d)(2)(A)(iii) differs from the proposed language because QAPs are no longer required to be submitted. Adopted §115.725(d)(2)(A)(iv) states that the executive director may specify calibration requirements in the approval of the QAP. Finally, proposed §115.725(d)(2)(B) that specified that the owner or operator may install an on-line calorimeter to determine net heating value instead of monitoring for individual constituents to determine net heating value is adopted as §115.725(m)(1). The adopted amendment to §115.725(d)(2)(B) was revised to specify that if the on-line analyzer required in paragraph (2) measures concentrations on a dry basis, then the results must be corrected for moisture when determining net heating value according to the requirements in 40 CFR §60.18(f)(3) or when determining mass rates using volumetric flow rates that are on a wet basis. The adopted amendment outlines the methods that may be used to determine moisture for the correction. The commission notes that a reference in 40 CFR Part 60, Appendix B, Performance Specification 9, Section 10.1 incorrectly cites Section 13.3 of Performance Specification 9 with regard to the acceptance criteria for multipoint calibration requirements. Section 13.3 requires industry to comply with a five-minute sampling frequency for the on-line analyzers. EPA confirmed that the correct citation for the precision and linearity requirements should be Section 13.2 of Performance Specification 9. Therefore, it is the commission's position that industry should comply with the multipoint calibration requirements in Section 13.2 of Performance Specification 9.

The amendment to §115.725(d)(3) specifies the calculation methodology to determine the percent measurement data availability. The amendment to §115.725(d)(4) changes the start of daily sampling from within 24 hours to within ten hours of initial on-line analyzer malfunction, and specifies that the samples collected during periods of monitor downtime shall be used to demonstrate "continuous compliance with the requirements of §115.722(a) - (d) of this title." The adopted amendment to §115.725(d)(5), (6), and (7) changes the determination of flare efficiency from a 15- minute basis for emission calculation purposes to each block hour period. The amendment to §115.725(d)(5) deletes the language specifying that compliance with the minimum net heating value requirements of §115.722(d) is based on a one-hour block average, and moves the language to §115.722(d)(1). The language in §115.725(d)(7) is renumbered to §115.725(d)(6) and revised to move language to §115.722(d)(2) specifying that compliance with the exit velocity requirements is based on a block one-hour average. Additionally, §115.725(d)(6) is renumbered to §115.725(d)(7) and revised to specify that HRVOC emission rates shall be calculated from data gathered according to paragraphs (1) - (6), and to specify that the heating value requirement is based on net heating value. Finally, in order to better organize the monitoring and testing rules, §115.725(d)(8) regarding minor modifications to the methods and alternative monitoring methods, is moved to adopted §115.725(m) and the language revised to better specify the requirements.

The commission adopts the amendment to §115.725(e) that specifies that this subsection applies to flares used solely for marine loading operations or transport loading and unloading operations. Adopted §115.725(e) does not apply to temporary portable flares used solely for scheduled startup, shutdown, or maintenance activities because these flares are addressed in the adopted §115.725(f). The commission had proposed an amendment to §115.725(e) that would have specified that this subsection only applies to flares used solely for abatement of HRVOC emissions. However, based on comments received, the commission determined that this amendment would make §115.725(e) too restrictive. Therefore, this proposed change was not included in adopted §115.725(e). The amendment also moves the recordkeeping requirements in §115.725(e)(1)(B) to §115.726(d)(5), and renumbers §115.725(e)(1)(A) - (D) to §115.725(e)(1) - (3). The amendment to §115.725(e)(1) - (3) also specifies the requirements to demonstrate compliance with the minimum net heating value requirements and the exit velocity requirements of §115.722(d), and compliance with the site-wide cap in §115.722. Section 115.725(e)(3) has been revised to specify that a destruction efficiency of 93% must be used to determine HRVOC emissions during each one-hour block period instead of each 15-minute period that a flare does not meet the minimum net heating value or exit velocity requirements. Additionally, §115.725(e)(2) has been revised to specify that exit velocity shall be calculated on a one-hour block average basis to be consistent with the time periods specified for compliance in §115.722. Based on comments received, the commission determined that the requirement to determine flare efficiency on a 15-minute basis for emission calculation purposes, while compliance with the net heating value and exit velocity requirements are on a hourly basis, is overly complicated to the data handling and recordkeeping process.

Adopted §115.725(e)(4) specifies that the owner or operator may use process knowledge to determine net heating value for demonstrating compliance with §115.722(d) for flares that receive greater than 95% of an individual HRVOC at all times. Proposed §115.725(e)(4) specified that flares that received greater than 98% of an individual HRVOC at all times could use process knowledge to determine net heating value and HRVOC emissions. The provision to use process knowledge to determine HRVOC emissions was removed from §115.725(e)(4) because §115.725(e)(3) already allows loading emission calculations for all flares that are subject to §115.725(e) and the duplicative provision in §115.725(e)(4) was unnecessary. The original intent of §115.725(e)(4) was to provide an alternative to the on-line calorimeter required by §115.725(f)(3) for flares that receive predominantly pure HRVOC. The level of HRVOC required was decreased to 95% in the adopted §115.725(e)(4) because, based on comments received, the 95% level is still sufficient to assure that minimum net heating value can be determined without requiring an on-line calorimeter.

The commission adopts the amendment that reletters §115.725(f) to §115.725(m) and specifies that minor modifications and alternatives to either test methods or monitoring methods may be approved by the executive director.

The commission adopts §115.725(f) that specifies monitoring requirements for flares used solely for abatement of emissions from scheduled and unscheduled startup, shutdown, and maintenance activities. Proposed §115.725(f) was applicable to flares used solely for scheduled startup, shutdown, and maintenance activities. However, a scheduled startup, shutdown, or maintenance activity may become an unscheduled activity if an emissions limit is exceeded during the activity, thereby becoming an emissions event. Even if the emissions event is exempted as provided in Chapter 101, Subchapter F, the owner or operator would still receive a violation for sending emissions from an unscheduled activity to a flare subject to §115.725(f) if only scheduled startup, shutdown, or maintenance activities are allowed for that subsection. Therefore, the commission revised

§115.725(f) to include both scheduled and unscheduled startup, shutdown, and maintenance activities.

Adopted §115.725(f) incorporates language removed from §115.725(e)(2), regarding temporary portable flares, and also expands the applicability to any flare type used solely for scheduled or unscheduled startup, shutdown, and maintenance activities. Based on comments received, the limits specified in adopted §115.725(f)(1) and (2) are specified in hours rather than days to better reflect how these types of flares are used. Additionally, because §115.725(f) has been expanded to include unscheduled startup, shutdown, and maintenance activities, additional time has been provided in the limits specified in §115.725(f)(1) and (2) to account for this revision. Section 115.725(f)(1) limits the total number of hours to 720 hours in 12 consecutive months for a single flare operated in HRVOC service at a site, and §115.725(f)(2) limits the total number of hours to 1,440 hours in 12 consecutive months that a site may send HRVOC to multiple flares under the provisions of §115.725(f). Both §115.725(f)(1) and (2) have been revised to specify "site" rather than "account" to be consistent with the terminology used in §115.722. Section 115.725(f)(5) has been revised to specify that a destruction efficiency of 93% must be used to determine HRVOC emissions during each one-hour block period instead of each 15-minute period that a flare does not meet the minimum net heating value or exit velocity requirements. Additionally, §115.725(e)(5) has been revised to specify that exit velocity shall be calculated on a one-hour block average basis to be consistent with the time periods specified for compliance in §115.722. Based on comments received, the commission determined that the requirement to determine flare efficiency on a 15-minute basis for emission calculation purposes while compliance with the net heating value and exit velocity requirements are on a hourly basis is overly complicated to the data handling and recordkeeping process.

Adopted §115.725(f)(6) specifies that the owner or operator may use process knowledge to determine net heating value for flares that receive greater than 95% of an individual HRVOC at all times. Proposed §115.725(f)(6) specified that flares that received greater than 98% of an individual HRVOC at all times could use process knowledge to determine net heating value and HRVOC emissions. The provision to use process knowledge to determine HRVOC emissions was removed from §115.725(f)(6) because §115.725(f)(5) already allows process knowledge for determining HRVOC emissions for all flares that are subject to §115.725(f) and the duplicative provision in §115.725(f)(6) was unnecessary. The original intent of §115.725(f)(6) was to provide an alternative to the on-line calorimeter required by §115.725(f)(3) for flares that receive predominantly pure HRVOC. Additionally, based on comments received, the level of HRVOC required was decreased to 95% in adopted §115.725(f)(6).

The commission adopts the amendment to §115.725(g), regarding test waivers for one-half of the vents that are identical in design and operation, that moves the language to §115.725(a)(7).

The commission adopts §115.725(g), that specifies monitoring requirements for emergency flares as defined in adopted §115.10(12). Proposed §115.725(g) was applicable solely to emergency flares, which were defined as in proposed §115.10(12), to include flares that only receive emissions during an emissions event, i.e., an upset event or unscheduled startup, shutdown, or maintenance activities. However, as noted previously in this preamble, a scheduled startup, shutdown, or maintenance activity may become an unscheduled activity if an emissions limit is exceeded during the activity, thereby becoming an emissions event. The commission revised adopted §115.725(f) to include both scheduled and unscheduled startup, shutdown, and maintenance activities. Therefore, in the adopted rules, the definition of an emergency flare in §115.10(12) and the provisions in §115.725(g) have been revised to only include emissions from upset events. Adopted §115.725(g)(1) and (2) provide the option of complying with the monitoring requirements of §115.725(d) or using process knowledge and engineering calculations to determine compliance with §115.722(a) - (d). Adopted §115.725(g)(2) specifies additional requirements for emergency flares for which process knowledge and engineering calculations are used. Adopted §115.725(g)(2)(A) specifies parameter monitoring for emergency flares with physical seals, such as water seals, to monitor the status of the physical seals, record the time and duration of each event when emissions are sent to the flare, and verify that the seals have been restored after an event. Adopted §115.725(g)(2)(B) specifies parameter monitoring for emergency flares without physical seals to monitor flow to the emergency flare with a flow monitor or flow indicator to determine the time and duration of each event when emissions are sent to the flare and to determine the minimum flow rate that indicates when emissions are sent to the flare. Adopted §115.725(g)(2)(C) specifies that any owner or operator electing to use process knowledge for emergency flares must develop, implement, and follow a written monitoring plan for the parameter monitoring under §115.725(g)(2)(A) or (B). Adopted §115.725(g)(2)(C)(ii) was also revised to include in the monitoring plan any actual testing performed in accordance with §115.725(g)(2)(B). Adopted §115.725(g)(2)(D) specifies that the written monitoring plans must be submitted within 30 days upon written request by the executive director. Finally, adopted §115.725(g)(2)(E) specifies the calculation methods for the actual exit velocity and the HRVOC hourly average mass emission rate from the flare, and the destruction efficiencies for various situations. Additionally, based on comments received, adopted §115.725(g)(2)(E) has been revised to specify that a destruction efficiency of 93% must be used to determine HRVOC emissions during each one-hour block period instead of each 15-minute period that a flare does not meet the minimum net heating value or exit velocity requirements, and to specify that exit velocity shall be calculated on a one-hour block average basis to be consistent with the time periods specified for compliance in §115.722.

The commission adopts §115.725(h) that specifies requirements for flares other than emergency flares that temporarily receive HRVOC emissions from activities other than scheduled and unscheduled startup, shutdown, and maintenance. The language in the adopted §115.725(h) was revised to reflect changes in §115.725(f) and (g) regarding scheduled and unscheduled startup, shutdown, and maintenance activities. Adopted §115.725(h)(1) and (2) limits the total time that HRVOC may be temporarily sent to an individual flare, or to multiple flares at a site under the provisions of §115.725(h). Based on comments received, the limits in §115.725(h)(1) and (2) are specified in hours rather than days; however, the time limits specified in §115.725(h)(1) and (2) are not increased. Adopted §115.725(h)(3) allows options to determine flow rate to the flare in lieu of monitoring in accordance with §115.725(d)(2), including process knowledge, actual measurement, or for flares that temporarily receive HRVOC emissions from flare systems that are monitored according to §115.725(d), data substitution. Based on comments received, adopted §115.725(h)(3)(C) was

revised to specify that the maximum one-hour average flow rate must be used if the owner or operator chooses to use data substitution. Adopted §115.725(h)(4) specifies options to determine net heating value and HRVOC constituents in lieu of monitoring in accordance with §115.725(d)(2), including daily sampling according to §115.725(d)(4) or, for flares that temporarily receive HRVOC emissions from flare systems that are monitored according §115.725(d), data substitution for time periods up to 72 consecutive hours. Adopted §115.727(h)(4)(B) was revised to specify that the maximum one-hour average total HRVOC and minimum one-hour average net heating value must be used for data substitution. Finally, adopted §115.725(h)(5) specifies that, if an emissions event occurs while HRVOC emissions are sent temporarily to a flare under §115.725(h), then process knowledge may be used to determine compliance with §115.722(a) - (d).

The commission adopts §115.725(i) to specify that process knowledge may be used to determine compliance with §115.722(a) - (d) for flares that are specifically designed to receive and control liquid or dual phase streams. This amendment is necessary because the monitoring provisions in §115.725 are not applicable to flares designed to control liquid streams, and the current state of monitoring technology is not sufficient to allow continuous monitoring of dual phase streams.

The commission adopts §115.725(j) to provide alternative monitoring provisions for a special category of flares that are used to control vent gases from metal alkyl production processes. Based on comments received, the commission determined that the requirements for on-line analyzers in §115.725(d)(2) may not be practicable for flares in this type of service. Adopted §115.725(j)(1) specifies that flow monitoring in accordance with §115.725(d)(1) is still required; however, the owner or operator may request alternative parameter monitoring for situations where direct flow monitoring may not be possible. Adopted §115.725(j)(2) allows the use of process knowledge and engineering calculations for determining net heating value and HRVOC concentrations.

The commission adopts §115.725(k) to allow for certain multi-purpose flares. This new subsection is adopted based on comments received to provide greater flexibility to owners or operators in the operation of flares subject to the rules. Adopted §115.725(k)(1) provides the option for an owner or operator of a multi-purpose flare to comply with the monitoring requirements in §115.725(d), and adopted §115.725(k)(2) allows the owner or operator to comply with the most stringent requirements of the applicable subsections that the flare may be subject to. Adopted §115.725(k)(2)(A) specifies that only flares subject to the monitoring requirements of §115.725(e), (f), or (g) may be considered multi-purpose flares and §115.725(k)(2)(B) specifies those requirements of §115.725(e), (f), and (g) that will apply, as applicable, to a multi-purpose flare. Adopted §115.725(k)(2)(B)(i) specifies the requirements for determining net heating value and §115.725(k)(2)(B)(ii) specifies the requirements for determining volumetric flow rate and HRVOC emissions, depending on the specific activity. Section 115.725(k)(2)(B)(iii) specifies that the time limitations in §115.725(f)(1) and (2) will apply for any activities that are scheduled or unscheduled maintenance, startup, or shutdown activity. Adopted §115.725(k)(2)(B)(iv) requires that multi-purpose flares that are emergency flares must satisfy the monitoring requirements of §115.725(g)(2)(A) - (D). Finally, adopted §115.725(k)(2)(C) clarifies that multiple clauses under §115.725(k)(2) will apply to multi-purpose flares.

Based on comments received, the commission is adopting §115.725(l) to specify that all monitoring systems required by §115.725 must be continuously operated as required at least 95% of the operating time of the applicable flare, vent gas stream, or PRV. Adopted §115.725(l)(1) - (3) specifies what is considered to be operating time for each of the source types.

The commission adopts §115.725(m), originally proposed as §115.725(j), that incorporates language previously in §115.725(f) to specify that minor modifications to either test methods or monitoring methods may be approved the executive director. Adopted §115.725(m) is also revised to specify that alternatives to monitoring may be approved by the executive director in addition to alternatives to test methods. Section 115.725(m) was further revised to include specific alternatives that do not require prior approval from the executive director. Adopted §115.725(m)(1) incorporates language moved from §115.725(d)(2)(B) that allows an owner or operator to use on-line calorimeters in lieu of monitoring constituents to determine net heating value according to §115.725(d)(2). Adopted §115.725(m)(2) allows an owner or operator the option to comply with the net heating value requirements by continuously monitoring and maintaining sufficient supplementary fuel flow to meet the minimum het heating value while assuming zero net heating value contribution from all vent gas streams sent to the flare. Finally, adopted §115.725(m)(3) is included to allow owners or operators of storage tanks with 95% or greater of an individual HRVOC to determine net heating value and HRVOC concentrations using process knowledge and engineering calculations in lieu of the on-line analyzer required in §115.725(d)(2). Flow rate monitoring according to §115.725(d)(1) is still required for sources that qualify for §115.725(m)(3).

Finally, the commission adopts §115.725(n), originally proposed as §115.725(k), to specify that when process information and engineering calculations are used to demonstrate compliance with §115.722(a) - (d), the process information and engineering calculations must be submitted within 30 days upon written request by the executive director. This addition to §115.725 is necessary to ensure the commission has adequate information to determine compliance with the site-wide caps.

Section 115.726, Recordkeeping and Reporting Requirements

Section 115.726(a) is adopted with changes to the proposed rule. The commission revised the rule regarding the submission and approval of QAPs and test plans based on comments received. Adopted §115.726(a)(1) requires written QAPs to be developed, implemented, and followed, but the QAPs are not specifically required to be approved. Proposed §115.726(a)(1)(A) - (C) regarding dates for submitting the QAPs and the executive director's approval were not adopted because those provisions are no longer applicable. Adopted §115.726(a)(1)(A) requires that records of the QAP and any revisions must be maintained on site and §115.726(a)(1)(B) requires the QAP to be submitted within 30 days upon written request by the executive director. Any modifications or alternatives to the monitoring requirements or methods specified in the rule must still be approved by the executive director. Any such requests must be specifically approved, and default approval will not occur. The amendment to §115.726(a)(1) specifies that the paragraph applies to the monitoring requirements in §115.725(d). The amendment to §115.726(a)(2) specifies that the paragraph only applies to the testing requirements in §115.725(a). As noted previously in this preamble, the commission revised the rule regarding the test plans. Adopted

§115.726(a)(2) requires written test plans to be developed, implemented, and followed. Test plans must be submitted at least 45 days prior to testing to the Houston regional office with notification of the test, but test plans are not specifically required to be approved. Proposed §115.726(a)(2)(A) - (C) regarding dates for submitting the test plans and the executive director's approval were not adopted because those provisions are no longer applicable. Section 115.726(a)(2) also specifies the minimum content of the written test notification. Adopted §115.726(a)(2)(A) and (B) requires that the notification include the date of testing and the written test plan. Adopted §115.726(a)(2)(D) is relettered to §115.726(a)(2)(C) and revised to specify that the operational parameters required in adopted §115.725(a)(1) and (2) must be included in the test notification.

The commission adopts the amendment to §115.726(b) that includes more specific recordkeeping requirements of the vent testing and monitoring conducted as required by §115.725(a) and (b). Adopted §115.726(b)(1) - (3) includes the addition of recordkeeping requirements for the process parameter monitoring and monitoring plans required under adopted §115.725(a)(1), (2), and (4). Additionally, adopted §115.726(b)(4) - (7) provides more specific recordkeeping requirements for vent gas streams monitored using a continuous emission monitoring system in accordance with §115.725(b)(1), and for vent gas streams for which alternatives to testing have been allowed under §115.726(b)(2).

The amendment reletters §115.726(c), relating to recordkeeping requirements for flares monitored in accordance with §115.725, to §115.726(d). Adopted §115.726(c) includes recordkeeping requirements for affected PRVs monitored in accordance with the new provisions in §115.725(c). The additional recordkeeping requirements include records of the date, time, duration, volumetric flow rate, and speciated and total HRVOC emissions for each pressure relief event. The recordkeeping requirements for affected PRVs include records of the parameters monitored in accordance with §115.725(c)(1), all process information, data, and calculations used to determine flow and emission data as specified in §115.725(c)(2), and the monitoring plans required under §115.725(c)(3).

The commission adopts the amendment to §115.726(d), which was relettered from §115.726(c), that specifies that the recordkeeping requirements are for flares monitored in accordance with §115.725. The amendment to §115.726(d)(4), which was renumbered from §115.726(c)(4), specifies that the records maintained for the calculated net heating values and exit velocities must be recorded on a 15-minute average basis rather than instantaneous values.

The commission adopts §115.726(d)(5) that identifies recordkeeping requirements specific to flares used solely for loading operations under §115.725(e), in addition to the general flare recordkeeping requirements in §115.726(d)(1) - (4). Section 115.726(d)(4) was revised based on comments received to specify that records must be maintained of each one-hour block average net heating value and exit velocity instead of each 15 minute average. The new language in §115.726(d)(5) incorporates recordkeeping requirements moved from §115.725(e)(1)(B) and the requirement in §115.726(d)(5)(A) requires the size of vessel being loading instead of the type of vessel. Based on comments received, §115.726(d)(5)(A) is revised to specify that records of the nominal size of the vessel must be maintained. Adopted §115.726(d)(5)(C) was revised based on comments to specify that only records of compounds loaded at concentrations greater than 1% by weight are required.

The commission adopts §115.726(d)(6) that identifies recordkeeping requirements specific to flares used solely for scheduled or unscheduled startup, shutdown, and maintenance activities under §115.725(f), in addition to the general flare recordkeeping requirements in §115.726(d)(1) - (4). Similarly, adopted §115.726(d)(7) identifies recordkeeping requirements specific to emergency flares subject to §115.725(g), in addition to the general flare recordkeeping requirements in §115.726(d)(1) - (4). Finally, adopted §115.726(d)(8) identifies recordkeeping requirements specific to flares subject to the requirements of §115.725(h) or (i), in addition to the general flare recordkeeping requirements in §115.726(d)(1) - (4). Based on comments received, §115.726(d)(6)(B), (7)(B), and (8)(B) is revised to specify that records of volumetric flow rate should be recorded in 15-minute block average periods, or portion thereof, for each flaring event. Section 115.726(d)(6)(B) is also revised to add the term "volumetric" to flow rate to be consistent with §115.726(d)(7)(B) and (8)(B).

The amendment to §115.726(d) includes §115.726(d)(9) to specify the recordkeeping requirements for flares used to control vent gases from metal alkyl processes subject to the monitoring requirements in §115.725(j). Section 115.726(d)(9)(A) specifies records for volumetric flow rate and §115.726(d)(9)(B) requires records for all process information, monitored data, and calculations used to determine net heating value and HRVOC emissions. Adopted §115.726(d)(9)(C) requires hourly records of parameter monitoring, if alternative parameter monitoring has been approved by the executive director.

Adopted §115.726(d)(10) is added to the recordkeeping requirements to specify that multi-purpose flares must maintain all applicable records required of the categories of flares for which the multi-purpose flare is in service.

The commission adopts the amendment that reletters §115.726(d), regarding records for exemptions, to §115.726(e), and specifies that the records correspond to the exemptions listed in §115.727(a) - (e). The amendment to §115.726(e)(1), which was renumbered from §115.726(d)(1), specifies that the records applied to vent gas streams that are routed to flares and that contain less than 5.0% by weight HRVOC, and to vent gas streams that are not routed to flares that do not exceed 100 ppm, by volume (ppmv) HRVOC. The amendment to §115.726(e)(3) corrects cross-references.

The commission adopts the amendment that reletters §115.726(f) to §115.726(i). Section 115.726(f) was adopted with changes based on comments received. Section 115.726(f) requires that an owner or operator claiming exemption under §115.727(e) to submit written notification no later than December 31, 2005, instead of the requirement to submit notification at least 15 days prior to permanently removing a flare from service as was in the proposed amendment.

The commission adopts the amendment that reletters §115.726(e) to §115.726(g). The amendment to §115.726(g) specifies that daily records are required to demonstrate compliance with the tons per calendar year emissions limits in §115.722(a) and (b). Furthermore, the amendment to §115.726(g)(2) includes PRVs in addition to all flares and vents subject to §115.725. Finally, the amendment deletes §115.726(g)(3), because this specific recordkeeping requirement is moved to §115.726(g)(2).

The commission adopts §115.726(h) that specifies the recordkeeping requirements to demonstrate compliance with the one-hour block emission limits in §115.722(c).

The commission adopts the amendment to §115.726(i), which is relettered from §115.726(f), to specify that records must be maintained on site.

The commission adopts §115.726(j), based on comments received, to specify recordkeeping requirements for owners or operators of affected flares, vent gas streams, or PRVs that either become exempt from the division or are reclassified as to the operational status or requirements of the division.

Section 115.727, Exemptions

The commission adopts the amendment to §115.727. Based on comments received, the amendment to §115.727(a) includes revising the term "account" to "site" to be consistent with terminology used in §115.722 and the cross-reference to the subsection in §115.722 to specify that the exemption applies to §115.722(a) - (c). The amendment to §115.727(b)(1) corrects cross-references, and §115.727(b)(2) is adopted with a change to correct a cross-reference error in the proposed language. Additionally, §115.727(b) is adopted with changes to specify that the 5% HRVOC exemption is by weight. Additionally, the amendment deletes §115.727(c) that specified that emissions from scheduled maintenance, startup, and shutdown activities in compliance with §101.211 are exempt from the requirements of §115.722(a). The amendment also deletes §115.727(d) that specified that emissions from emissions events in compliance with 30 TAC §101.201 (Emissions Event Reporting and Recordkeeping Requirements) are exempt from the requirements of §115.722(a). The removal of the exemptions in §115.727(c) and (d) is necessary to better ensure an approvable SIP and the demonstration of attainment.

The commission adopts the amendment that reletters §115.727(e) to §115.727(c) and includes the addition of language to specify that the exemptions in §115.727(c) may apply to vent gas streams that are not routed to a flare. The amendment to relettered §115.727(c)(1) - (3) corrects cross-references. Adopted §115.727(c)(2) also adds language to provide exemption for vent gas streams with low volumetric rates equal to or less than 100 dry standard cubic feet per hour. This amendment provides flexibility to exempt vent gas streams that may exceed the 100 ppmv exemption level already provided, but that have minimal HRVOC emissions due to very low volumetric flow rate. The proposed amendment to §115.727(c)(2) specified that the 5% limit for the total number of vents claimed exempt under §115.727(c)(2) is based on the long-term cap limitation in §115.722(a) or (b). Adopted §115.727(c)(2) is revised based on comments received to specify that the maximum potential HRVOC emissions from all vent gas streams claimed under the exemption must be less than 0.5 tons per year. Finally, the amendment to §115.727(c)(3)(A) adds incinerators to list of the sources for which an exemption may be claimed, and specifies that the exemption for vent gas streams resulting from the combustion of less than 5.0% HRVOC is "by weight."

The commission adopts the amendment that reletters §115.727(f) to §115.727(d) and corrects a cross-reference error based on comments received.

The commission adopts §115.727(e) to specify that any flares that will be permanently out of service by April 1, 2006, are exempt from the requirements of the division except for the notification and recordkeeping requirements of §115.726(f). The new exemption will provide relief for owners or operators with flares that will be permanently taken out of service after the December 31, 2005, compliance date to install continuous monitoring equipment, but prior to the April 1, 2006, compliance date for the site-wide caps in §115.722.

The commission adopts §115.727(f) to specify that all sites subject to this division that are located in the HGB ozone nonattainment area, excluding Harris County, are exempt from §115.722(b) and (c)(2), except as provided in §115.729(a)(3).

Section 115.729, Counties and Compliance Schedules

The commission adopts the amendment to §115.729(1) that adds a subsection (a), that now covers all three types of sources (flares, vent gas streams, and PRVs). The general compliance date remains December 31, 2005, with exceptions provided. Adopted §115.729(a)(1) establishes the compliance date of January 1, 2007, for facilities having to comply with §115.722(a) and (c)(2). Adopted §115.729(a)(2) establishes the compliance date of April 1, 2006, for facilities having to comply with §115.722(b) and (c)(1). The changes to adopted §115.729 remove the requirement to submit results of testing and monitoring to the Houston regional office and any applicable local air pollution control agency with jurisdiction, by no later than December 31, 2005. All results of testing and monitoring must be submitted upon request as specified in §115.726(i); therefore, authorized representatives of the executive director, the EPA, or an applicable local air pollution control agency with jurisdiction can request this information at any time.

The commission adopts §115.729(a)(3) that specifies that the exemption in §115.727(f) will no longer apply upon public notice of revocation by the commission. Upon revocation of §115.727(f), sites subject to this division that are located in the HGB ozone nonattainment area, excluding Harris County, must comply with §115.729(a)(1) and (2) by the dates specified in those paragraphs, or within 180 days of public notice, whichever is later.

Adopted §115.729(b) also specifies that for vent gas streams, flares, and PRVs becoming subject to the requirements of the division after December 31, 2005, testing and monitoring must be conducted as soon as practicable, but no later than 60 days after being brought into HRVOC service.

Division 2, Cooling Towers

Section 115.760, Applicability and Cooling Tower Heat Exchanger System Definitions

The commission adopts the amendment to §115.760 that includes non-substantive language changes to §115.760(a) and (b) as well as definitions for "Jacketed reactor" in §115.760(b)(2) and for "Finite volume system" in §115.760(b)(3).

Section 115.761, Site-wide Cap

The commission adopts the amendment to §115.761 that allows sites the flexibility of compliance with the cooling tower heat exchange system control requirements of this division through compliance with the HRVOC emissions cap and trade program. The amendment to §115.761(a) changes the long-term site-wide cap strategy to a calendar year basis instead of the existing 24-hour rolling average basis, and states that the owner or operator of a site subject to the HRVOC cooling tower heat exchange system rules shall comply with the HRVOC emissions cap and trade program in Chapter 101, Subchapter H, Division 6. The amendment to §115.761(a) also removes the reference to the

site-cap limits in the tables of the SIP. The amendment reletters §115.761(b) to §115.761(d). Adopted §115.761(b) specifies that Harris County sites subject to this division or to Division 1, but that are exempt from the HRVOC emissions cap and trade program in accordance with §101.392(a), are limited to ten tons of HRVOC emissions per calendar year. Adopted §115.761(c) provides a short-term, not-to-exceed limit of 1,200 pounds of HRVOC per one-hour block, for Harris County sites subject to this division. The commission continues to evaluate the magnitude of the short-term limit, and the time period over which this short-term limit would be enforced. The commission solicited comment regarding the appropriate level for this short-term limit, and requested any supporting data regarding alternatives to the magnitude and time period. The comments received are addressed in the RESPONSE TO COMMENTS section of this preamble. Adopted §115.761(c)(3) addresses how exceedances of the short-term limits should be calculated to determine compliance with the long-term cap.

Section 115.764, Monitoring and Testing Requirements

The commission adopted the amendment to §115.764 that changes the section title from "Monitoring Requirements" to "Monitoring and Testing Requirements" to reflect the inclusion of the testing requirements formerly in §115.766. Merging the testing requirements of §115.766 with the monitoring requirements of §115.764 provides more consistency with the rule structure of Subchapter H, Division 6.

The commission adopts the amendment to §115.764(a) that removes the *de minimus* exemption for 100 ppm, by weight (ppmw) of HRVOC in the process side fluid. The 100 ppmw *de minimus* exemption language is incorporated into the appropriate exemptions in §115.767, Exemptions (formerly §115.768), to better facilitate interpretation of the rule.

The amendment to §115.764(a)(2) includes the calibration requirements of the total strippable VOC monitoring system from §115.766(1). The amendment to calibration requirements of the total strippable VOC monitor in §115.764(a)(2) changes the allowable monitor drift from 3.0% to 5.0%. The proposed amendment would have removed the ten ppb, by weight (ppbw) detection limit requirement for the total strippable VOC monitor. However, based on comments received regarding the use of one-half the detection limit of the total strippable VOC monitoring, the adopted §115.764(a)(2) specifies a 25 ppbw detection limit capability for the monitor. This requirement allows the use of one-half the detection limit for calculation purposes when concentrations are below detectable levels, but still ensures the enforceability of the 50 ppbw action level specified in the rule. Finally, the amendment to §115.764(a)(2) corrects the citation to the air-stripping method in Appendix P of the *Texas Commission on Environmental Quality Sampling Procedures Manual* (January 2003).

The amendment to §115.764(a)(3) specifies the calculation methodology to determine the percent measurement data availability, provides consistency for the calculation of monitor uptime, and specifies that time needed for normal calibrations required by the rule is not counted as downtime. The amendment to §115.764(a)(4) and (5) replaces the references to §115.766 with the specific reference to the air- stripping method in Appendix P of the commission's sampling procedures manual. The adopted amendment to §115.764(a)(5) further specifies that if a sample triggers the requirement by having a concentration of total strippable VOC equal to or greater than 50 ppbw in the cooling tower water for more than a one-hour block of time, then the daily sample can be collected beginning on the next calendar day.

The amendment to §115.764(a)(6) replaces the reference to "speciation of strippable VOC in paragraphs (4) and (5)" with "speciation of strippable HRVOC in paragraphs (4) and (5)" because the requirements of §115.764(a)(4) and (5) are for the speciation of HRVOC only. Additionally, the amendment removes the requirement to comply with Section 8.2 of 40 CFR Part 60, Appendix B, Performance Specification 9. While the initial testing required under Section 8.2 of Performance Specification 9 is recommended to help establish proper setup and operation of the analyzer, the commission considers the calibration requirements specified in the amendment to §115.764(a)(6) sufficient to quality assure the data generated by the analyzer, and that it is unnecessary to specifically require Section 8.2 in the rule. Furthermore, the amendment to §115.764(a)(6) changes the frequency of the multipoint calibration check procedure in Section 10.1 of Performance Specification 9 from monthly to quarterly, because quarterly multipoint calibrations checks provide sufficient quality assurance of analyzer linearity and accuracy. The amendment to §115.764(a)(6) also includes non-substantive language revisions to better facilitate interpretation of the monitoring requirements. The adopted §115.764(a)(6) also specifies that the sampling system for the continuous on-line monitoring system must be demonstrated equivalent to the air stripping apparatus used in Appendix P for determining strippable HRVOC concentrations in the water as specified in §115.764(f). This change is necessary due to the changes in the rule regarding submission and approval of the monitoring QAPs. Finally, the amendment to §115.764(a)(6) specifies that periodic sampling during downtime of the continuous on-line analyzer will continue until the on-line analyzer is properly operating and within the required performance specifications and specifies that this requirement is for out-of-order periods of 24 hours or greater. Adopted §115.764(a)(6)(A) and (B) provide further clarification regarding data collection and sampling during out-of-order periods.

The commission adopted the amendment to §115.764(b) that removes the *de minimus* exemption for 100 ppmw of HRVOC in the process side fluid. The 100 ppmw *de minimus* exemption language is incorporated into the appropriate exemptions provided in §115.767, which was formerly in §115.768, to better facilitate interpretation of the rule. The amendment to §115.764(b)(2) replaces the reference to §115.766 with the specific reference to the air-stripping method in Appendix P of the commission's sampling procedures manual.

The amendment to §115.764(b) now applies to not only cooling tower heat exchange systems with a design capacity to circulate less than 8,000 gallons per minute (gpm) of cooling water, but also jacketed reactor cooling tower heat exchange systems defined in §115.760(b). The amendment to §115.764(b)(3) specifies that the calculation methodology to determine the percent measurement data availability to provide consistency for the calculation of monitor uptime and specify that the time required for normal calibrations as required by the rule is not counted as downtime. The amendment to §115.764(b)(4) and (5) replaces references to §115.766 with specific references to the air-stripping method in Appendix P of the commission's sampling procedures manual. The amendment to §115.764(b)(5) specifies that additional sampling to determine total strippable VOC, speciated HRVOC, and total HRVOC must continue on a daily basis, beginning on the next calendar day, until the concentration of total strippable VOC drops below 50 ppbw.

The amendment to §115.764(b)(6) removes the reference to "speciation of strippable VOC" and replaces the reference with "speciation of strippable HRVOC" because the requirements of §115.764(b)(4) and (5) are for speciation of HRVOC only. Additionally, the amendment removes the requirement to comply with Section 8.2 of 40 CFR Part 60, Appendix B, Performance Specification 9. While the initial testing required under Section 8.2 of Performance Specification 9 is recommended to help establish proper setup and operation of the analyzer, the commission considers the calibration requirements specified in the amendment to §115.764(b)(6) sufficient to quality assure the data generated by the analyzer. Furthermore, the amendment to §115.764(b)(6) changes the frequency of the multipoint calibration check procedure in Section 10.1 of 40 CFR Part 60, Appendix B, Performance Specification 9 from monthly to quarterly, because quarterly multipoint calibrations checks will provide sufficient quality assurance of analyzer linearity and accuracy. An additional amendment to §115.764(b)(6) includes non-substantive language revisions to better facilitate interpretation of the monitoring requirements. Adopted §115.764(b)(6) also specifies that the sampling system for the continuous on-line monitoring system must be demonstrated equivalent to the air stripping apparatus used in Appendix P for determining strippable HRVOC concentrations in the water as specified in §115.764(f). This change is necessary due to the changes in the rule regarding submission and approval of the monitoring QAPs. Finally, the amendment to §115.764(b)(6) specifies that periodic sampling during downtime of the continuous on-line analyzer will continue until the on-line analyzer is properly operating and within the required performance specifications and specifies that this requirement is for out-of-order periods of 24 hours or greater. Adopted §115.764(b)(6)(A) and (B) provide further clarification regarding data collection and sampling during out-of-order periods.

The commission adopted the amendment to §115.764(c) that incorporates language from the repealed testing requirements in §115.766. The amendment removes the ten ppbw minimum detection limit requirement for strippable HRVOC monitoring from §115.766(1). Removing the requirement provides more flexibility for affected owners or operators in the selection of on-line monitoring systems and laboratories for analysis of periodic samples. However, the requirements in adopted §115.766(a)(3) and (4) to use one-half the detection limit for HRVOC emission calculation purposes will encourage owners or operators to use a monitoring system or laboratory analysis with sufficient detection capability appropriate for the specific cooling tower size and the amount of site-wide caps for the site. As previously noted in this preamble, the proposed amendment would have also removed the ten ppbw detection limit requirement for the total strippable VOC monitoring. However, based on comments received, §115.764(a)(2) has been revised to specify that the continuous strippable VOC monitoring must be capable of achieving a minimum detection limit of 25 ppbw or less to allow using one-half the detection limit of the monitor for calculation purposes without adversely affecting the enforceability of the 50 ppbw action level.

The commission adopts the amendment to delete §115.764(d), regarding requirements to submit QAPs for the monitoring systems required by §115.764, and move the requirements for the QAPs to §115.766(i) in the recordkeeping and reporting requirements. Also, the amendment reletters §115.764(e) to §115.764(d) and replaces the reference to the testing requirements of §115.766 with the reference to the air-stripping method in Appendix P of the commission's sampling procedures manual.

The commission adopts the amendment that reletters §115.764(f), relating to alternatives to continuous flow monitoring, to §115.764(e), and corrects cross-references to correspond to other amendments to the division.

The commission adopts the amendment that reletters §115.764(g), relating to minor modifications and alternative monitoring, to §115.764(f), corrects cross-references, and specifies that the provisions for modifications or alternatives apply to testing as well as monitoring.

The commission adopts §115.764(g) to specify that alternative monitoring locations may be used for cooling tower heat exchanger systems. Adopted §115.764(g)(1) specifies the alternatives for cooling tower heat exchange systems in which a single cooling tower services both HRVOC and non-HRVOC process units, or that services multiple types of heat exchange systems. The amendment allows the owner or operator to monitor from locations that represent the flow and concentrations from HRVOC processes. Adopted §115.764(g)(2) specifies the alternative locations for monitoring flow rate may be used provided the location is representative to the total flow rate to the cooling tower.

The commission adopts §115.764(h) to provide owners and operators of cooling tower heat exchange systems with a finite volume of HRVOC and with the design capacity to circulate 8,000 gpm or greater of cooling water with options to be used in lieu of the requirements of §115.764(a).

Repeal of Section 115.766, Testing Requirements

The commission adopts the repeal of §115.766 to incorporate specific testing requirements of §115.766 into the appropriate subsections in §115.764 to establish more consistency with Division 2 and to better facilitate interpretation of the requirements.

Repeal of Section 115.767, Recordkeeping Requirements

The commission adopts the repeal of §115.767 to incorporate specific recordkeeping requirements of §115.767 into new §115.766, Recordkeeping and Reporting Requirements, to establish more consistency with Division 1.

Section 115.766, Recordkeeping and Reporting Requirements

The commission adopts new §115.766 that incorporates the recordkeeping and reporting requirements of §115.767. New §115.766(a)(2) corrects cross-references in existing §115.767(a)(2).

New §115.766(a)(3) removes the requirement to maintain hourly records documenting the pound per hour mass emission rate for total strippable VOC in existing §115.767(a)(3). The testing and monitoring requirements in §115.764 for total strippable VOC, when applicable, do not require determining the mass emission rate of total strippable VOC. The recordkeeping requirements for total strippable VOC concentration are addressed in new §115.766(a)(4). New §115.766(a)(3) also corrects cross-references and incorporates recordkeeping requirements for alternative monitoring provided for in §115.764(a)(6) or (b)(6). New §115.766(a)(3) requires owners or operators to use one-half the minimum detection limits for HRVOC emission calculations when concentrations are below detection.

New §115.766(a)(4) specifies recordkeeping requirements for the concentration of total strippable VOC in the cooling water for

cooling tower heat exchange systems monitored in accordance with §115.764(a)(2), (b)(2), (d), or (h). Proposed §115.766(a)(4) required owners or operators to use the full minimum detection limit for total strippable VOC when concentrations are below detection. However, based on comments received, adopted §115.766(a)(4) allows using one-half the detection limit of the monitor for calculation purposes. As previously noted in this preamble, adopted §115.764(a)(2) specifies that the total strippable VOC monitor must have a minimum detection limit of 25 ppbw or less to ensure the enforceability of the 50 ppbw action level. Removing the ten ppb detection limit requirement provides more flexibility for affected owners or operators in the selection of online monitoring systems and laboratories for analysis of periodic samples. However, the requirements to use one-half the detection limit for HRVOC emission calculation purposes will encourage owners or operators to use a monitoring system or laboratory analysis with sufficient detection capability appropriate for the specific size of cooling tower and the amount of the site-wide caps for the site.

Adopted §115.766 deletes the requirements in existing §115.767(a)(5) regarding hourly recordkeeping requirements for the 24-hour rolling average HRVOC emissions in relation to the site-wide cap. Provisions for recordkeeping to demonstrate compliance with the site-wide caps specified in §115.761 are provided in new §115.766(g) and (h). The adoption of this section also deletes the requirements in existing §115.766(a)(6) regarding recordkeeping requirements for alternative monitoring performed in accordance with §115.764(a)(6) or (b)(6). As previously noted, new §115.766(a)(3) incorporates these recordkeeping requirements.

New §115.766(a)(5) specifies that the owner or operator must maintain hourly records of the cooling water flow rate. New §115.766(a)(6) removes the term "hourly" from the existing language of §115.767(a)(4) to specify that the owner or operator must maintain records on a weekly basis and revises §115.766(a)(6) to clarify that the recordkeeping requirements for corrective actions is for periods of monitor downtime.

Adopted §115.766(a)(7) specifies the recordkeeping requirements for cooling tower heat exchange systems with finite volume systems in accordance with §115.764(h).

Adopted §115.766(b) corrects cross-references to the existing language moved from §115.767(b) and is revised to address changes made to §115.767 regarding exemptions for cooling tower heat exchange systems with intervening fluids. The new §115.767(c) has the same language as in repealed §115.767(c). New §115.766(d) includes language from repealed §115.767(d)(1) and (2) and reflects new §115.766(a) that incorporates recordkeeping requirements for testing performed in accordance with §115.764(d) and better facilitates interpretation of the recordkeeping requirements.

New §115.766(e) and (f) incorporates the language in repealed §116.767(e) and (f) and corrects cross-references. Based on comments received, adopted new §115.766(e)(1) and (f)(2) specify that if manufacturer's certified information is unavailable, then pump performance information that is generated by a qualified independent third-party organization using a code or standard of practice acceptable to the executive director may be used.

New §115.766(g) and (h) specifies recordkeeping requirements to demonstrate compliance with §115.761, and specifies recordkeeping requirements to demonstrate compliance with tons per calendar year emission limits in §115.761(a) and (b). New §115.766(h) specifies recordkeeping requirements to demonstrate compliance with pound per hour emission limits in §115.761(c).

Finally, §115.766(i) is adopted with changes to the proposed rule. The commission revised the rule regarding the submission and approval of QAPs based on comments received. Adopted §115.766(i) requires written QAPs to be developed, implemented, and followed, but the QAPs are not specifically required to be approved. Proposed §115.766(i)(1), (2), and (3) regarding dates for submitting the QAPs and the executive director's approval were not adopted because those provisions are no longer applicable. Adopted §115.766(i)(1) requires that records of the QAP and any revisions must be maintained on site and §115.766(i)(2) requires the QAP to be submitted within 30 days upon written request by the executive director. Any modifications or alternatives to the monitoring requirements or methods specified in the rule must still be approved by the executive director. Any such requests must be specifically approved, and default approval will not occur.

The amendment to move the QAP provisions to §115.766(i) also deletes the requirement that previously existed in §115.764(d)(2) to define each compound that could potentially leak through the heat exchanger. Finally, new §115.766(j) specifies that an owner or operator claiming exemption under §115.767(4) shall submit written notification no later than December 31, 2005.

Section 115.767, Exemptions

The commission adopts the repeal of §115.768 to incorporate exemptions of §115.768 into the appropriate subsections in adopted new §115.767. The move of the exemptions corrects a consistency problem with the section numbering in Division 1. New §115.767(1) and (2) specify that the exemptions apply to heat exchangers with greater than 100 ppmw HRVOC in the process side fluid. Also, the commission deletes the exemption in repealed §115.768(4), because emissions events are not exempt from §115.761 in this adoption. New §115.767(4) specifies that cooling tower heat exchange systems that will be permanently out of service by April 1, 2006, are exempt from the requirements of the division, except for the notification and recordkeeping requirements of §115.766(j). The new exemption provides relief for owners or operators with cooling tower heat exchange systems that will be permanently taken out of service after the December 31, 2005, compliance date for installation of continuous monitoring equipment, but prior to the April 1, 2006, compliance date for the site-wide caps in §115.761.

Adopted new §115.767(5) provides an exemption for cooling tower heat exchange system with an intervening cooling fluid containing less than 100 ppmw of HRVOC between the process and the cooling water.

The commission adopts new §115.767(6) to specify that all sites subject to this division that are located in the HGB ozone nonattainment area, excluding Harris County, are exempt from §115.761(b) and (c)(2), except as provided in §115.769(a)(3).

Section 115.769, Counties and Compliance Schedules

The commission adopts the amendment to §115.769 that updates cross-references and adds §115.769(b) to address the compliance date requirements for cooling tower heat exchange systems that become subject to the requirements of the division after December 31, 2005. Furthermore, §115.769 has been revised to add §115.769(a)(1) that establishes the compliance

date of January 1, 2007, for facilities having to comply with §115.761(a) and (c)(2). Adopted §115.769(a)(2) establishes the compliance date of April 1, 2006, for facilities having to comply with §115.761(b) and (c)(1).

The commission adopts §115.769(a)(3) that specifies the exemption in §115.767(6) will no longer apply upon public notice of revocation by the commission. Upon revocation of §115.767(6), sites subject to this division that are located in the HGB ozone nonattainment area, excluding Harris County, must comply with §115.769(a)(1) and (2) by the dates specified in those paragraphs, or within 180 days of public notice, whichever is later.

Division 3, Fugitive Emissions

Section 115.780, Applicability

The commission adopts the amendment to §115.780 that designates the first paragraph as subsection (a) and adds §115.780(b) to specify that emission reduction credits or discrete emission reduction credits may not be used in order to demonstrate compliance with the HRVOC fugitive emissions rules.

Section 115.781, General Monitoring and Inspection Requirements

The commission adopts the amendment to §115.781(b)(1) to correct a cross- reference specifying that the exemptions of §115.357(1) - (12) are not applicable to this division. The term "immediately" is added to §115.781(b)(7)(A), to specify that if requested by staff of the Houston regional office or any air pollution control agency having jurisdiction, the owner or operator shall provide the site's unsafe-to-monitor list within that business day. The reference to quarterly monitoring in §115.781(b)(7)(A) has been deleted to clarify that the monitoring exclusion for unsafe to monitor components is not restricted to components that are subject to quarterly monitoring. The amendment to §115.781(b)(7)(B) specifies that the "difficult-to-monitor components" terminology includes components that would require a permit for confined space entry as defined in 29 CFR §1910.146, concerning permit-required confined spaces (December 1, 1998 issue of the *Federal Register*).

The amendment to §115.781(b)(8) and (e) specifies that all PRVs in gaseous service that are not equipped with a rupture disk upstream of the relief valve with a pressure- sensing device between the rupture disk and the PRV must be monitored with a hydrocarbon gas analyzer for fugitive leaks. Section 115.781(b)(8) specifies that the body of the PRV must be monitored for fugitives on a quarterly basis. The amendment to §115.781(e) specifies that the vent from the PRV must be monitored within 24 hours following actuation if the vent is not considered to be unsafe-to-monitor or difficult-to-monitor. The purpose of this monitoring is to ensure that the relief mechanism has properly reseated. However, if the emissions from the PRV are released to a control device, the vent monitoring is not required. This requirement does not supersede any monitoring requirements found in §115.725. The requirement in §115.781(e) that the results of monitoring any PRV that has vented to the atmosphere within 24 hours after actuation be reported in accordance with §115.786 has been changed to specify that the results be recorded. Section 115.786 does not require that the results be reported.

Adopted §115.781(g) adds language regarding data collection that is similar to data collection language in 30 TAC §115.354(10) in Subchapter D. The language is being removed from §115.354(10) in concurrent rulemaking because it is more appropriately applied to components in HRVOC service. The wording of the rule has been changed to specify that the owner or operator must transfer electronic data to the database within seven days after the monitoring, so that the time frame for recording electronic data is the same as that allowed for transferring manually recorded data. The reference to the database required by §115.356 has been changed to "the paper or electronic database" because a database is not required by §115.356. The requirement in proposed §115.786(g)(1) to determine an acceptable rate of monitoring and to have a documented auditing process in place has been deleted. Determining an acceptable rate for recording data for all situations is not feasible due to the variety of factors that affect the rate of monitoring. The reference to an auditing process is duplicative of the audit requirements in §115.788. The reference in §115.786(g)(2) to recording data for audio, visual, and olfactory inspections has been deleted because these inspections are not required by the HRVOC fugitive rules. Components such as connectors that are required to be inspected in the general fugitive rules are required to be monitored instead under the HRVOC rules.

Section 115.782, Procedures and Schedule for Leak Repair and Follow-up The commission adopts the amendment to §115.782(c) to specify that components on the delay of repair (DOR) list, which would require a shutdown to correct, must be repaired at the next scheduled process unit shutdown. The amendment to §115.782(c)(1)(B)(i) requires documentation of calculations in §115.782(c)(1)(B)(i) - (iii), and renumbers clause (ii) as clause (iv). The adopted language in §115.782(c)(1)(B)(i) - (iii) is similar to language that is being removed in concurrent rulemaking from, §115.352(2)(A)(i) - (iii) in Subchapter D. The proposed language has been changed to specify that the calculation of emissions from nonrepairable leaking components for comparison to emissions that would be generated by a shutdown to repair the leaking components is to be determined on a daily basis. The proposed requirement would have made the comparison on a cumulative basis from the time the component was determined to be leaking until the next scheduled process shutdown. This comparison could trigger a shutdown that would generate VOC emissions over a one- or two-day period to eliminate emissions that have accumulated over a period of time, and could actually increase the potential for ozone formation. The adopted requirements also specify a *de minimis* level of 500 pounds to trigger a shutdown. Some facilities have successfully minimized emissions from shutdown, clearing, and restart of process units so that a nonrepairable leaking component at a low leak rate could trigger a shutdown, thus putting these units at a disadvantage over units that have not minimized shutdown related emissions to the same extent. Furthermore, §115.782(c)(1)(B)(i)(II) has been revised to delete the requirement for inspection of leaking components in heavy liquid service, because this should not apply to any of the compounds that are defined as HRVOCs. Amended §115.782(c)(1)(B)(iii) has been revised to replace the word "valve" with "component." This clause allows facilities to exclude the emissions from nonrepairable leaking components from the total daily mass emissions comparison required by §115.782(c)(1)(B)(ii) if they use extraordinary means to attempt to repair the components. This exclusion applies to nonrepairable leaking components other than valves. According to §115.782(c)(2), extraordinary efforts are required for valves that cannot be repaired by the normal methods without a process unit shutdown unless there would be a safety, mechanical, or major environmental concern as specified in §115.782(c)(2)(A)(ii) posed by using

extraordinary efforts. The adopted amendment adds to this clause a requirement that emissions from these nonrepairable leaking valves for which extraordinary efforts are not used must be included in the calculation of total daily emissions from nonrepairable leaking components.

The amendment to §115.782(c)(2)(A)(i) specifies that extraordinary efforts for nonrepairable leaking valves must be taken within 14 or 30 calendar days after the leak is found (depending on the amount of the leak detected), instead of seven or 15 days of the valve being placed on the shutdown list. The amendment does not allow any additional days nor reduce the number of days, but simply revises the language to a time frame that the owner or operator will more readily know from the information already in the databases.

Section 115.783, Equipment Standards

The commission adopts the amendment to §115.783(2) deleting the language that recovery devices, flares, and other control devices that are used to control fugitive emissions must obtain a set control efficiency. This language is deleted because the emissions from these types of sources are already being controlled or will be controlled by Subchapter B, Division 2 rules or by the adopted Subchapter H, Division 1 rules. The amendment to §115.783(3) deletes the requirement that a PRV must be equipped with a pressure sensing device. This language is deleted because the emissions from these types of sources will be controlled by adopted Subchapter H, Division 1. The amendment to §115.783 renumbers paragraphs (4) - (6) as paragraphs (3) - (5).

Repeal of §115.785, Testing Requirements

The commission adopts the repeal of §115.785 because the section established a stack testing method for sources that control fugitive emissions. These sources are controlled under adopted Subchapter H, Division 1; therefore, these additional requirements are no longer necessary in the fugitive rules.

Section 115.786, Recordkeeping Requirements

The commission adopts the amendment to §115.786(b)(3)(D) to specify that the flow through the bypass line is an estimated flow rate. The amendment to §115.786(c) specifies the exact date that specific records must be submitted to the Houston regional office and any local air pollution control agency having jurisdiction. The adopted amendment also specifies the reporting period covered by these reports. The adopted amendment also changes paragraph (4) to require records of the date of the last scheduled process unit shutdown instead of the last process unit turnaround.

The amendment to §115.786(d) and (e) specifies that the type of records used to identify exempt components is the same as the type of records listed in §115.781. Adopted §115.786(d)(1) and (2) adds similar language that is being removed from Subchapter D, §115.352(2)(F)(ix) and §115.356(3) in concurrent rulemaking. The adopted amendment to §115.786(d)(2) specifies that the records for process units with leaking components are to be updated within five business days instead of daily to allow time to perform the calculation of emissions from the nonrepairable leaking component. The amendment to §115.786 also reletters subsection (e) to subsection (f).

Section 115.787, Exemptions

The commission adopts the amendment to §115.787(a) to correct a citation from §115.786(d) and (e) to §115.786(e) and (f). The amendment to §115.787(b) also corrects a citation from §115.783(4) to §115.783(3).

The amendment to §115.787(c)(4) changes the language "plant sites covered by a single account number" to "any site as defined in 30 TAC §122.10 of this title (relating to General Definitions)." The amendment to §115.787(c)(6) and (7) replaces the phrase "which are in compliance with" with the phrase "that meet the requirements of" to avoid the incorrect interpretation that this paragraph requires direct compliance with the selected provisions of 40 CFR §63.166 or §63.169.

The amendment to §115.787(e) clarifies that if a PRV has a rupture disk located upstream of the PRV then the valve is exempt from the requirements of §115.781(b)(8) provided the PRV complies with §115.725(c) and the rupture disk is replaced no later than 30 calendar days after a failure is detected.

Amended §115.787(f) corrects a citation from §115.352(4) to §115.783(5).

Adopted §115.787(g) exempts any site with less than 100 components in HRVOC service from the third-party audit requirements of §115.788.

Section 115.788, Audit Provisions

The commission adopts the amendment to §115.788(a) that changes the time frame and number of process units for which the independent third-party audits must be conducted. The amendment changes the requirement to conduct an audit of all process units every two years to a requirement to conduct an audit of the site at least once per calendar year. It is the commission's intent that the fugitive audit program be used to identify any patterns that are indicative of failure to properly implement Test Method 21. If the number of valves sampled is truly random throughout the site this should allow the independent third-party organization to identify any potential patterns showing failure to properly implement Test Method 21, without being overly burdensome on the company. To implement this audit program properly, it is important that the pool of components to be selected from is one that contains components that are monitored on a quarterly basis, so an accurate leaker rate can be determined. Because valves are the most numerous component at a site behind connectors, and valves typically have a higher leaker rate than connectors, the commission determined that for the field survey, the component pool will consist of all the valves at the site in HRVOC service that are not exempted from quarterly monitoring by §115.787 and are not listed on either the difficult-to-monitor or the unsafe-to-monitor lists. It is also the commission's intent that the random sampling of valves must be such that each valve has an equal chance of being selected from the total number of valves being sampled.

The amendment to §115.788(a)(1) requires the independent third-party organization to verify that all applicable valves (e.g., all valves included in the random sampling) are properly tagged in accordance with §115.782(a). The amendment to §115.788(a)(1)(B) and (d)(2) removes the requirement for the audit to include a list of components that should have been monitored but were not on the list to be monitored. The reasoning for the amendment is that the existing language would have required the company conducting the audit to completely inspect the entire process unit, including, but not limited to, steam lines, water lines, and waste lines. The commission considers this requirement to be cost prohibitive for the results that would have been obtained.

The amendment to §115.788(a)(2) specifies that an independent third-party organization must perform a field survey to determine the representative percentage of leaking components at the site using a random sampling of the population of components of interest. The amendment to §115.788(a)(2)(A) also specifies that the field survey must be started after the usual monitoring service has completed its monitoring of the valve's population of interest, and that the field survey conducted by the auditing company must be completed by the end of the next monitoring period (i.e., quarterly) in which the usual monitoring service conducted its monitoring.

The amendment to §115.788(a)(2)(B) replaces the graph in Figure: 30 TAC §115.788(a)(2)(B) with Table 1. The graph used to determine field survey sample size in this section was based on a sampling strategy using binomial sampling distribution. Use of the binomial distribution is conservative in this sampling scheme. Sampling components from a limited population of components is an instance of sampling without replacement from a finite population, and because the number of leakers is generally very small in number in comparison with the total count of members of the population (hence, the population leaker rate is usually far less than 5%), the most appropriate model upon which to base the sampling is from a hypergeometric distribution. Using the hypergeometric distribution rather than the binomial distribution has the added benefit of significantly reducing the size of sample that must be taken while still permitting the establishment of error bounds on the sample average leaker rate. The adopted table is used in place of the original graph in Figure 30 TAC §115.788(a)(2)(B). Proper use of this table will result in the minimum size of sample that must be taken from the population of interest. Components sampled must be part of that same population. The table is generated by calculating sample size based on the sample number of leakers following a hypergeometric distribution, Type I error rate held at 0.05 or less, Type II error rate held to 0.20 or less, when the minimum difference between the company's claimed leaker rate and the true population leaker rate is at least 2%.

The amendment to §115.788(a)(2)(C) provides an alternative to the table provided in §115.788(a)(2)(B). In determining the required sampling size the company must follow a hypergeometric distribution, which characterizes sampling from a finite population without replacement. Determining the required sample size to test the reported leaker rate can be accomplished by using commercially-available statistical software. Establishing sample size is dependent upon three things: 1) The Type I error rate; 2) the Type II error rate; and 3) minimum difference for the statistical test. A Type I error occurs when the company reported percentage of leakers accurately reflects the true proportion of leakers, yet the test falsely indicates that the true percentage of leakers is greater than reported. A Type II error occurs when the true leaker rate is in fact greater than the reported rate, but the test fails to so indicate. The minimum difference for a statistical test is the level of the parameter of interest, in this case, the average population leaker rate, beyond which the commission would find reason to reject the null hypothesis. In this case, the statistical test null hypothesis to which these error rates apply is that the true population leaker rate is the company determined population leaker rate (based on determinations made in previous monitoring cycles) and the alternative hypothesis is that the true population leaker rate is at least two percentage points greater than the company determined population leaker rate. Therefore, the minimum difference must be at least two percentage points or more greater than the company claimed population leaker rate. The sample size must be chosen according to the following three specifications: 1) Type I error rate less than or equal to 0.05; 2) Type II error rate less than or equal to 0.20; and 3) minimum difference between the company's claimed leaker rate and the true population leaker rate is at least 2%. Adopted §115.788(a)(2)(D) specifies that the independent third-party organization must follow Test Method 21 in 40 CFR Part 60, Appendix A, while conducting the field survey.

The amendment to §115.788(a)(3) specifies that the data generated by monitoring technicians must be reviewed by the independent third-party organization. The amendment to §115.788 also consolidates the language in §115.788(a)(3)(A) and (B), and moves the language in §115.788(d)(4) to §115.788(a)(3)(A). The amendment to §115.788(a)(3)(B) requires that the independent third-party organization review the records to verify proper calibration in accordance with Test Method 21. Section 115.788(a)(3)(C) has been combined with §115.788(a)(3)(A), thereby providing guidance to the independent third-party organization when determining if the company is implementing Test Method 21 properly. The commission also deleted the term "abnormal." The amendment deletes §115.788(a)(3)(D) because the retention of field data from a datalogger is not specifically required.

The amendment to §115.788(b) makes a grammatical correction to remove the term "means" and replace it with the term "is."

The amendment to §115.788(c) removes the requirement to provide the agency written notification that the audit has been completed, because the owner or operator is already required to provide the audit results to the Houston regional office within 30 days after audit completion. However, the requirement to verbally notify the Houston region and any local air pollution control agency having jurisdiction must still be provided at least 30 days prior to the start date of the audit.

The amendment to §115.788(d) specifies that the audit report should be submitted to the Houston regional office, instead of the more general description of the Office of Compliance and Enforcement or appropriate regional office. The amendment to §115.788(d)(1) specifies that the list concerning the valves that were not tagged but should have been, is based on the requirements of §115.782(a). The amendment to §115.788(d) renumbers paragraphs (3) and (4) to paragraphs (2) and (5), and the amendment to renumbered §115.788(d)(2) specifies that the percentage of leaking valves should be identified during the field survey. The amendment also specifies that a detailed description of the sampling scheme used to ensure that a random sample of valves was selected so that each valve had an equal chance of being selected from the total number of valves being sampled must be reported. Adopted §115.788(d)(3) specifies that the company's total number of valves, number of leakers, and percentage of leaking valves must be reported. Section 115.788(d)(4) specifies that the report must include the methodology used to select the field survey sample size, and if the alternative provided in §115.788(a)(2)(C) is used, documentation must include the actual Type I and Type II error rates associated with the sample size used and a detailed description of the methodology used to calculate the sample size. Finally, the amendment to renumbered §115.788(d)(5) deletes subparagraphs (A) - (C) and references the categories specified in §115.788(a)(3)(A) and (B).

Adopted §115.788(e) requires the owner or operator to submit a corrective action plan with the audit report if the results of the audit indicate deficiencies in the implementation of Test Method

21. Subsections (e) and (f) are also relettered as subsections (f) and (g).

Finally, adopted §115.788(h) specifies that the executive director may require additional corrective actions.

Section 115.789, Counties and Compliance Schedules

The commission adopts the amendment to §115.789(2) to clarify the compliance schedule for the requirements of §115.782. The commission adopts the amendment to §115.789(3) to specify that the initial third-party audits required in §115.788 must be completed as soon as practicable, but no later than December 31, 2005. The deletion of the current §115.789(4) removes the compliance schedules for testing requirements, because the corresponding testing requirements in §115.785 are being repealed. The amendment to §115.789 renumbers paragraphs (5) and (6) to paragraphs (4) and (5).

FINAL 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 meets 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking and revisions to the SIP improve implementation of Chapter 115 by adding requirements to achieve reductions in HRVOC emissions in the HGB area. In this rulemaking, the commission developed a dual approach that addresses variable short-term emission through a not-to-exceed hourly emission limit, and that addresses steady-state and routine emissions through an annual cap. The annual HRVOC cap and fugitive emission rules will reduce the overall reactivity in the airshed by removing the compounds that are most prevalent and most likely to react rapidly enough to cause one-hour ozone exceedances. The annual HRVOC cap allowances would be distributed and enforced through an HRVOC emissions cap and trade program under Chapter 101, Subchapter H, new Division 6 being adopted in concurrent rulemaking. The rules are intended to protect the environment and reduce risks to human health and safety from environmental exposure and may have adverse effects on owners and operators of certain sources, in particular fugitives, flares, process vents, and cooling towers. Many of these sources are owned or operated by petrochemical plants, refineries, and other industrial, commercial, or institutional groups, and each group could be considered a sector of the economy. This determination is based on the analysis provided in the proposal preamble, including the discussion in the PUBLIC BENEFITS AND COSTS section of the proposal. The remaining amendments in this rulemaking are intended to update cross-references, add flexibility, and delete obsolete language. These amendments are not expected to adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking action does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. 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 rulemaking implements requirements of 42 USC, §7410, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While 42 USC, §7410 does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the FCAA does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 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 to attain 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. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (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 proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC, §7410 does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the

SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule 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 in its fiscal notes. Because 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 Legislative Budget Board, 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 SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC, §7410. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe one-hour ozone nonattainment areas such as the HGB area. As discussed earlier in this preamble, this dual approach addresses variable short-term emissions as well as steady-state and routine industrial VOC emissions to address some of the elevated ozone levels observed in the HGB area; these controls will result in reductions in ozone formation in the HGB area and help bring the HGB area into compliance with the air quality standards established under federal law as NAAQS for ozone. Compliance with these rules will reduce ambient HRVOC and ozone in the HGB area and the commission is submitting these to the EPA as one of several measures in the federally approved SIP. Through its 2004 revision to the HGB SIP, the commission is fulfilling its outstanding one- hour ozone SIP obligations and beginning to plan for the upcoming eight-hour ozone standard. This rulemaking is part of the HGB SIP revision that demonstrates attainment of the one-hour ozone standard in the HGB area in 2007, and provides preliminary analysis of the HGB area in terms of the eight-hour ozone standard in 2007 and 2010. Therefore, the adopted rulemaking is a necessary component of and consistent with the HGB area ozone attainment demonstration SIP required by 42 USC, §7410.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. The commission presumes 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); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *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).

As discussed earlier in this preamble, this rulemaking action implements requirements of 42 USC, §7410. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the rulemaking action does not exceed a standard set by federal law, does not exceed an express requirement of state law, and does not exceed a requirement of a delegation agreement. Finally, this rulemaking action 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 Texas Clean Air Act), and Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.011, 382.012, 382.014, 382.016, 382.017, 382.021, and 382.034. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rulemaking does not meet any of the four applicability requirements. The commission invited public comment on the draft RIA determination, but received none.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the rulemaking action under Texas Government Code, §2007.043. The specific purposes of this rulemaking are to achieve reductions of HRVOC emissions and ozone formation in the HGB area and help bring the HGB area into compliance with the air quality standards established under federal law as NAAQS for ozone, as well as to improve implementation of the existing Chapter 115 by updating cross-references, adding flexibility, and deleting obsolete language. These rules require certain sources located in the HGB area to install equipment to monitor emissions and achieve HRVOC emission reductions in the HGB area through a cap and trade system, and implement new recordkeeping requirements. Installation of the necessary equipment could conceivably place a burden on private, real property.

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this rulemaking action, because it is reasonably taken to fulfill an obligation mandated by federal law. The emission limitations and control requirements within this rulemaking action were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS. Attainment of the one-hour ozone standard will require reductions of HRVOC emissions, as well as substantial reductions in NO_x emissions. Any VOC reductions resulting from the current rulemaking are no greater than what scientific research indicates is necessary to achieve the desired ozone levels. However, this rulemaking is only one step among many necessary for attaining the one-hour ozone standard.

In addition, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and significantly advance the health and safety purpose. This action is taken in response to the HGB area exceeding the federal ozone NAAQS. This exceedance adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by reducing ozone

levels in the HGB area. Consequently, these rules meet the exemption in Texas Government Code, §2007.003(b)(13). This rulemaking action therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). For these reasons, the adopted rules do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking action and found that the action is identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in §505.11, and therefore will require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission determined that under 31 TAC §505.22 the rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this 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)). No new sources of air contaminants will be authorized and ozone levels will be reduced as a result of the rulemaking. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies. The commission solicited comments on the consistency of the proposed rules with the CMP during the public comment period, but received none.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

Chapter 115 is an applicable requirement under 30 TAC Chapter 122; therefore, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 115 requirements for each emission unit affected by the revisions to Chapter 115 at their sites.

PUBLIC COMMENT

Public hearings for the proposed rulemaking were held in Houston on August 2, 2004; in Beaumont on August 3, 2004; and in Austin on August 5, 2004. The comment period closed on August 9, 2004. The following persons submitted written or oral comments: Albemarle Corporation (Albemarle); Lloyd, Gosselink, Blevins, Rochelle, and Townsend, P.C., on behalf of Allied Waste Industries, Inc. (Allied); ATOFINA Chemicals, Inc. and American Acryl, L.P. (ATOFINA-American); ATOFINA Petrochemicals, Inc. (ATOFINA-Petrochemicals); Bracewell and Patterson, L.L.P., on behalf of Basell USA, Inc. (Basell); Baker Botts, L.L.P., on behalf of the BCCA-AG; BP Products North America, Inc. (BP); Celanese Chemicals (Celanese); Celanese Chemicals and Enterprise Chemicals (Celanese-Enterprise); Chevron Phillips Chemical Company, L.P. (Chevron-Phillips); Dow Chemical Company (Dow); Enterprise Products Operating, L.P. (Enterprise); Environmental Defense; EPA; ExxonMobil (ExxonMobil); ExxonMobil Pipeline Company (EMPCo); Galveston-Houston Association for Smog Prevention (GHASP); Greater Houston Partnership (Partnership); Harris County Public Health and Environmental Services (HCPHES); Intercontinental Terminals Company (ITC); Kaneka Texas Corporation (Kaneka); LBC Houston, L.P. (LBC); Baker Botts, L.L.P., on behalf of the Mid-Course Coalition (MCC); Sierra Club - Houston Regional Group (Sierra Club); SUNOCO Chemicals (SUNOCO); Texas Chemical Council (TCC); Texas Genco, L.P. (Texas Genco); Texas Oil and Gas Association (TxOGA); and Valero Energy Corporation (Valero). ATOFINA-American, Basell, BP, and Dow endorsed the comments of TCC. Basell also endorsed the comments of ATOFINA-Petrochemicals. BCCA-AG and Valero endorsed the comments of MCC. EMPCo endorsed the comments of TxOGA. Texas Genco endorsed the comments of BCCA-AG and MCC.

RESPONSE TO COMMENTS

General comments

Environmental Defense, MCC, Partnership, and Texas Genco generally supported the proposed rules. No commenter generally opposed the proposed rules. Albemarle, Allied, ATOFINA-American, ATOFINA-Petrochemicals, Basell, BCCA-AG, BP, Celanese, Celanese- Enterprise, Dow, Enterprise, Environmental Defense, EPA, EMPCo, ExxonMobil, GHASP, HCPHES, ITC, Kaneka, LBC, MCC, Sierra Club, SUNOCO, TCC, TxOGA, and Valero raised issues or suggested changes to the proposed rules.

Texas Genco expressed support for the establishment of short-term caps for HRVOC.

RESPONSE

The commission appreciates the support.

Environmental Defense recommended that additional chemicals should be designated for enhanced monitoring, including all ethyltoluenes, isoprene, all pentenes, toluene, all trimethylbenzenes, all xylenes, isobutane, n butane, isopentane, n-pentane, ethane, and propane. Additionally, for counties outside of Harris County, the Environmental Defense commented that butenes and 1,3-butadiene should be added to this list of designated chemicals. The enhanced monitoring suggested by Environmental Defense would include flow monitoring for all flares and cooling towers handling designated chemicals and sampling for speciation, or at least total VOC, at representative intervals. Environmental Defense proposed a strategy to reduce "other reactive VOCs" (OVOC). Environmental Defense suggested that for fugitives, all sources that can emit certain VOCs should be regulated under Subchapter H, Division 3 as the current four HRVOCs are regulated.

RESPONSE

The concept of regulating additional VOCs was not included in the proposal and is beyond the scope of this rulemaking. If the commission were to make the suggested changes at this time, the applicability of the rule would be greatly expanded without providing proper notice to newly affected parties. The commission intends to initiate a stakeholder process that will focus on methods to improve the emissions inventory. The commission will use this stakeholder process, in conjunction with data from other air quality studies and monitoring, to determine future actions regarding other VOCs.

GHASP recommended that the commission revise Chapter 115 to regulate OVOC. GHASP suggested that OVOCs be defined as the following chemicals or classes: including all ethyltoluenes, isoprene, all pentenes, toluene, all trimethylbenzenes, all xylenes, isobutane, n-butane, isopentane, n-pentane, ethane, propane, and, for counties outside of Harris County, butenes and 1,3-butadiene. GHASP recommended that

whether a facility is subject to these new regulations should be determined based on whether the OVOC emissions in the 2000 emissions inventory exceeded 100 tons per year ozone formation potential, for which GHASP provided a definition. The regulations suggested by GHASP would require an initial monitoring study for every vent gas stream and cooling tower inlet to gather representative flow, concentration, and speciation data. The results of this initial monitoring would be used to determine which vents and cooling towers would be expected to exceed 200 pounds per hour ozone forming potential and would require continuous monitoring of those vents and cooling towers. GHASP recommended that the continuous monitoring, recordkeeping and reporting should generally meet the same requirements of the HRVOC rules; however, specific OVOCs that never exceed 5% of the ozone forming potential could be exempted from the continuous monitoring requirements. Vents and cooling towers that did not exceed the 200 pounds per hour ozone forming potential level would be subject to less stringent flow monitoring unless a measurement indicated that the source has exceeded 200 pounds per hour ozone forming potential. GHASP suggested that similar compliance schedules and exemptions to those provided in the HRVOC rules could be used for the OVOC regulations. Finally, GHASP suggested that Chapter 115, Subchapter H, Division 3 should be expanded to include all OVOC species.

RESPONSE

The concept of regulating additional VOCs was not included in the proposal and is beyond the scope of this rulemaking. If the commission were to make the suggested changes at this time, the applicability of the rule would be greatly expanded without providing proper notice to newly affected parties. The commission plans to initiate a stakeholder process that will focus on methods to improve the emissions inventory. The commission will use this stakeholder process, in conjunction with data from other air quality studies and monitoring, to determine future actions regarding other VOCs.

EPA commented that to address uncertainties in the emissions inventory, the commission must improve inventory techniques with additional source monitoring and the use of better estimation techniques for fugitive emissions of all VOCs. EPA encouraged the commission to commit to improve source monitoring of less reactive VOCs, suggesting that less sophisticated monitoring programs without full speciation may be adequate to achieve this goal. Furthermore, EPA suggested that the commission consider requiring monitoring of less reactive VOCs, specifically on cooling towers and flares.

RESPONSE

The commission has been and will continue to strive to improve the emissions inventory. Many projects are being funded and/or sponsored by the commission to achieve this goal by researching new technologies and methods for measuring VOCs. However, there are substantial costs associated with requiring facilities to perform source monitoring for VOCs, even with limited speciation or total VOC. Monitoring for any specific VOCs such as those considered "less reactive" will by default require some speciation unless the only VOCs present at a specific source are just those which are the targeted species. Furthermore, the cost of monitoring for speciated VOCs is greatly impacted by the specific compounds that are required. HRVOC, as currently defined for the entire HGB area, are a limited group of compounds with similar properties and a narrow range of molecular weights. It is more complicated and costly to monitor for speciated VOCs with dissimilar properties from different organic compound groups or with large differences in molecular weight. The monitoring for some sources can be further complicated by the possible presence of other VOCs that, while not considered to be reactive and not of interest, interfere in the analysis of targeted compounds. Even facilities that will be performing the required monitoring for HRVOCs could be subject to substantial additional costs if required to monitor for other "less reactive" VOCs by possibly being required to install additional monitoring systems. The commission must give careful consideration to the associated costs and benefits before requiring any such monitoring. At present, there is insufficient evidence to suggest that there will be significant benefits from the suggested monitoring and additional regulation of "less reactive" VOCs to warrant the economic impact to the regulated community in the HGB area. The commission will continue to evaluate new technologies and methods of measuring VOCs, data collected from ambient monitors in the HGB area, as well as other ongoing research activities to determine if further control and monitoring of specific VOCs other than the current HRVOCs is necessary to achieve attainment. The commission plans to initiate a stakeholder process that will focus on methods to improve the emissions inventory. The commission will use this stakeholder process, in conjunction with data from other air quality studies and monitoring, to determine future actions regarding other VOCs.

Environmental Defense commented that the commission should establish stringent limits on upset emissions of the most common chemicals that contribute to ozone exceedances in Houston, not just HRVOC.

RESPONSE

The concept of regulating additional VOCs was not included in the proposal and is beyond the scope of this rulemaking. If the commission were to make the suggested changes at this time, the applicability of the rule would be greatly expanded without providing proper notice to newly affected parties.

GHASP commented that they are opposed to the change from a 24-hour site-wide cap to an annual cap. GHASP expressed a belief that a 24-hour cap would require facilities to manage the variability of their emissions. GHASP further commented that if the commission maintains the annual cap approach, it should conduct adequate modeling to determine the likely degree to which emissions will typically exceed the annual average emission rate and adjust the modeling inventory to reflect the higher emission rate that would likely occur on some ozone-conducive days.

RESPONSE

The photochemical modeling of the August - September 2000 episode coupled with a weight-of-evidence argument demonstrates attainment of the one-hour ozone standard. To achieve the necessary HRVOC reductions, the commission is adopting a two-part approach that will address variable short-term emissions through a not-to-exceed limit, and will address steady-state and routine emissions through an annual cap.

The annual HRVOC cap emissions will be distributed and enforced through an HRVOC emissions cap and trade program in Harris County under new Chapter 101, Subchapter H, Division 6. This program will establish a mandatory annual HRVOC emissions cap on all sites located in Harris County that emit or have the potential to emit more than ten tons per year of HRVOC, and that are subject to the HRVOC control requirements of Chapter 115, Subchapter H, Division 1 or Division 2. The cap will be managed by the allocation, trading, and banking of allowances.

An allowance is the equivalent of one ton of HRVOC emissions. This HRVOC cap will be established at levels demonstrated as necessary to allow the HGB area to attain the one-hour ozone standard.

GHASP supported a site-wide cap to limit hourly emissions and opposed a categorical exclusion of all emissions above the hourly cap. GHASP expressed the belief that this exclusion could result in calculated business decisions to extend emission events.

RESPONSE

The commission found no evidence to support GHASP's claim that owners and operators would purposefully make business decisions to extend emission events as defined in Chapter 101. Exceedance of the hourly cap is a violation of this rule. Furthermore, the emissions from a single emission event could potentially exceed the annual cap if owners and operators were required to calculate their long-term cap based on the entire quantity of emissions from emissions events when these events exceed the short-term cap limit of 1,200 pounds per hour. If the commission made the suggested changes, many facilities would face potential noncompliance with their annual cap in addition to noncompliance with the short- term cap. This scenario would force owners and operators to either shutdown or purchase a large amount of credits, if available, or operate in willful violation.

Enterprise supported the proposed uniform, hourly HRVOC limit to address short-term emissions.

RESPONSE

The commission appreciates the support.

GHASP commented on the need for additional enforcement strategies particular to the HRVOC rules, and objected to the decision to prevent publication of the Division 4 rules regarding enforcement of site-wide caps.

RESPONSE

The concept of additional enforcement strategies was not included in the published proposal and is beyond the scope of this rulemaking. The commission complies with the requirements of the Texas Administrative Procedure Act and applicable case law with regard to rulemaking and if the rules will be part of the SIP, the commission also complies with the applicable federal law. Specifically, the commission provides notice of the proposed rules, allows time for comment, considers the comments, and provides reasoned justification for the adopted rules. Historically, there have been changes to rules upon adoption and those changes have been made in compliance with applicable law. The commission staff does not provide drafts of rules to the public, except when there are announced stakeholder meetings, before the versions presented to the commission for consideration are filed with the Office of the Chief Clerk. The Administrative Procedure Act does not require reasoned justification for rules that the commission votes neither to propose nor adopt. The commission does not have a policy, written or unwritten, of seeking approval from any outside group for the proposal or adoption of rules.

The Sierra Club commented on the preamble statement that "the commission may significantly amend these proposed rules at adoption, repropose a portion of these rules, or propose additional rules, as appropriate." The Sierra Club asserted that the commission is disowning its own SIP by stating that it may change and remove rules that it has stated are necessary for attainment of the one-hour ozone standard by 2007. The Sierra Club urged the commission to fully implement the demonstration attainment SIP now, with no more delays.

RESPONSE

The commission disagrees with the commenter's assertion that the commission is disowning its own SIP, because the commission is fully adopting and implementing the attainment demonstration SIP. The statements made in the proposal preamble were drafted to ensure comments that may lead to changes in the proposed rules and the statements are consistent with the commission's philosophy that comments could be considered toward the development of the final adopted rules and attainment demonstration SIP.

Dow commented that it is seeking clarification that "sonic velocity" flares can be used as a control device to meet the requirements of this rule.

RESPONSE

There is no EPA determination regarding the applicability of 40 CFR §60.18 to sonic velocity flares; therefore, the commission declines to provide guidance because there is insufficient information available from EPA to determine whether the requirements of 40 CFR §60.18 are appropriate for sonic flares or what destruction efficiency should be applied to sonic flares. The commission encourages Dow to seek guidance from EPA on the 40 CFR §60.18 requirements as they pertain to sonic flares.

Miscellaneous Comments

TCC commented that the commission has developed a robust set of vent gas testing requirements and flare and cooling tower requirements that will result in measurements of HRVOC emissions from these sources and in many cases in measurements of emissions of other similar molecular weight species. Furthermore, TCC commented that the commission has developed a robust set of HRVOC fugitive emission monitoring requirements that stretch far past the requirements of EPA's maximum achievable control technology (MACT) standards and that should result in significant emission reductions of HRVOC and also other VOCs because many new emission sources are being added to the program.

RESPONSE

The commission agrees and appreciates the comment.

TCC commented that the commission is regulating the correct mixture of chemicals and that any additions of other chemicals to the HRVOC list as part of the 2004 rulemaking will result in significant scheduling and cost issues for its member companies and pointed out that these same companies are in the process of engineering and installing the required monitoring equipment for the HRVOC rules as they exist today and many are helping to fund additional ambient monitoring stations.

RESPONSE

The commission agrees that the monitoring and testing required by the HRVOC rules could cause significant scheduling issues and that the cost of monitoring could also be significant. At this time, the commission is not changing the list of HRVOC chemicals. However, the commission will need to review available control strategies to determine what controls are needed to reach attainment of the new eight-hour ozone standard. The final control strategy could require the control of additional chemicals and sources.

Celanese stated that the commission should exempt pilot plants from the HRVOC rules because the rule does not provide any allocations for pilot plant operation. A pilot plant does not produce a product, therefore, it does not meet the proposed definition for level of activity and would not receive any cap allocation. In addition, pilot plants have limited potential emissions, are typically authorized under 30 TAC §106.124 (which has an hourly limit of 6.0 pounds per hour and an annual limit of ten tons per year), and are exempted from other regulations, such as EPA's MACT and new source performance standards (NSPS). Celanese also commented that exemptions should be consistent regardless of the location and should include pilot plants, cooling water tower heat exchange systems with less than 5% HRVOC, vent gases with less than 100 ppmv HRVOC, and vent gases with flows less than 100 standard cubic feet per hour.

RESPONSE

For the purposes of these rules, the emissions authorized for pilot plants under §106.124 represent a significant amount of HRVOC emissions. Therefore, they cannot be specifically exempted from the monitoring and testing requirements or the HRVOC cap and trade rules in Chapter 101.

ExxonMobil and TxOGA requested that when periodic sampling is required that only single samples should be required instead of the multiple (five) samples described in Section 8.2.2.2 of Method 18. TCC commented that the commission should clarify that strict adherence to Method 18 is not required and that individual samples should be analyzed in triplicate (three injections) with averaged results.

RESPONSE

Where EPA Method 18 is specified for analysis of periodic samples, only the analytical requirements of Method 18 are applicable. Section 115.725(d)(4) and §115.764(c) specify the number of samples that are required to be taken when periodic sampling is required.

With regard to the proposed hourly limit in the vent gas and cooling tower heat exchange system rules, MCC requested that the commission clarify the meaning of "one- hour block period" in the preamble to the adopted rules. MCC expressed a belief that the commission intended this phrase to mean each successive 60-minute period beginning at the "top" of each hour, e.g., 6:00 a.m. to 6:59 a.m.

RESPONSE

MCC's understanding of the term "one-hour block period" is consistent with the commission's intent.

MCC generally supports the monitoring, recordkeeping, and reporting requirements for cooling towers, vent gas streams, and flares that handle HRVOCs.

RESPONSE

The commission appreciates the comment.

Definitions

§115.10

Dow requested that a definition of "product" be included in §115.10 to incorporate previous rule interpretations.

RESPONSE

The commission declines to add the definition to §115.10 at this time because it may affect other sections of Chapter 115. No changes were made in response to this comment.

Dow requested that a definition of "extraction" as it relates to natural gas processing be included in §115.10 to incorporate the commission's Rule Interpretation Memo R5- 10.001.

RESPONSE

The commission declines to add the definition to §115.10 at this time because it may affect other sections of Chapter 115. No changes were made in response to this comment.

EPA supported the proposed revision to the definition of "Strippable volatile organic compound."

RESPONSE

The commission appreciates the support.

MCC suggested that §115.10(12), the definition of "Emergency flare," be changed to "A flare that combusts HRVOC containing gas streams only as a result of an upset event or unscheduled maintenance, startup, or shutdown activity."

RESPONSE

The definition of "Emergency flare" may have applicability beyond the rules in Chapter 115, Subchapter H. The commission does not intend to limit the definition specifically to flares receiving HRVOC; therefore, the commission declines to make the suggested change.

EPA requested that the definition of "Emergency flare" be revised to add the word "unscheduled" before the words startup and shutdown. EPA expressed a belief that the intent was to establish a special provision for flares that operate only in emergency, unplanned situations, but the proposed wording could be interpreted to allow the flare to be used during planned startup or shutdown.

RESPONSE

The definition of "Emergency flare" has been revised to be a flare that only receives emissions during an upset event. This change is necessary because, the emission event rules in Chapter 101 state that "a scheduled startup, shutdown, or maintenance activity may be considered an emission event, i.e., an unscheduled startup, shutdown, or maintenance activity, if an applicable emission specification is exceeded."

Division 1

Section 115.720 issues

Dow and TCC suggested that the definition of "Pilot gas" in §115.720(b)(3) should be revised.

RESPONSE

The commission agrees to some of the suggested changes. The definition of pilot gas has been revised to include any fuel gas that does not contain greater than 5% by weight HRVOC. Furthermore, the commission did not revise the definition to include all thermal control devices. This definition is specifically used to address flares.

ExxonMobil and TxOGA commented that the definition of degassing safety devices in §115.720(b)(1) should not be limited to devices at geologic storage facilities and that the definition should be moved to §115.10. MCC and TCC commented that

the word "control" should be added before device for clarity and that the definition should be moved to §115.10.

RESPONSE

The commission intended for this definition to target geologic storage facilities that use a degassing safety device, which is a vent stack with a pilot. These degassing safety devices are often permitted as flares, and therefore, warranted acknowledgment in this rule. Furthermore, the definition was not moved to the Chapter 101 definitions or §115.10, because it was not the intention of this definition to affect any other rules in either Chapter 115 or Chapter 101, and no such changes were proposed for public comment. No changes were made in response to this comment.

Dow, ExxonMobil, MCC, and TxOGA commented that the definition of "Supplementary fuel" in §115.720(b)(2) should be changed to remove the limitation of, "to increase the net heating value to the minimum required value." ExxonMobil and TxOGA stated that natural gas or fuel added to raise the British thermal unit (Btu) level but that does not achieve the minimum required level would not be included. ExxonMobil, MCC, TCC, and TxOGA commented that the definition should be moved to §115.10 or to §101.1, because these definitions are generally applicable to all VOC controls.

RESPONSE

The commission does not intend to limit the definition of "Supplementary fuel" so that fuel only meets the definition when sufficient fuel is added to increase the net heating value to minimum required level. The commission revised the rule to clarify the definition of "Supplementary fuel." A thorough evaluation of Chapter 115 would be necessary to determine whether or not these definitions are appropriate for broader applicability. Therefore, the definition of "Supplementary fuel" has not been relocated.

MCC, ExxonMobil, and TxOGA commented that the applicability of monitoring and controls should be by individual sources, and that sources or operations at a site that do not have HRVOC emissions or that have potential emissions that meet the exemptions should clearly be exempted.

RESPONSE

The commission recognizes that some owners or operators of facilities that meet the applicability specified in §115.720 or §115.760 may have individual sources that are exempt. However, Subchapter H is based on a cap and trade system. Therefore, overall applicability must be based site-wide, not on an individual vent or flare. Specific exemptions are already provided in the rules that determine the applicability of monitoring requirements for individual sources. However, sufficient recordkeeping must be required to document the exemption of specific sources. Therefore, the commission has not made the suggested change.

TCC commented that applicability in §115.720(a) should be based on an individual flare/vent rather than the account or site.

RESPONSE

The commission recognizes that some owners or operators of facilities that meet the applicability specified in §115.720 or §115.760 may have individual sources that are exempt. Applicability must be based site-wide, not on an individual vent or flare. Specific exemptions are already provided in the rules that determine the applicability of monitoring requirements for individual sources. However, sufficient recordkeeping must be required to document the exemption of specific sources. Therefore, the commission has not made the suggested change.

TCC commented that the commission clarify that the term "vent" does not include those "vents" that are normally blind-flanged and only opened during steam purges and similar operations.

RESPONSE

It is very difficult for the commission to summarize and address all of the possible notions that the regulated community may associate with the term, "vent" in this rule. The commission disagrees with TCC that the term "vent," as it is used in this division, would not include those "vents" that are blind-flanged and only open during steam purges and similar operations. Therefore, the commission did not make the suggested change.

Section 115.722 issues

Sierra Club requested that continuous monitoring of potential visible emissions from flares be required by the vent gas rule in §115.722. Sierra Club asserted that continuous monitoring of visible flare emissions would ensure compliance with §115.722 and §111.111(a)(4) and thus help ensure that VOC emissions are kept below limits that would protect human health. The continuous compliance methods would also help investigators determine compliance more easily.

RESPONSE

There is currently no available monitoring technology that would allow long- term continuous monitoring of visible emissions from flares by any practical means. While the commission is studying technologies for directly measuring actual emissions from or the destruction/combustion efficiencies of flares, the development and application of these technologies toward this purpose is still preliminary.

TCC expressed concern that the 1,200 pounds per hour limit in §115.722(c)(1) and (2) is not technically feasible to meet during certain upset conditions associated with some hydrocarbon plants. TCC commented that the final rule needs to be adjusted so that owners and operators who use good control technology to reduce emissions associated with upsets are not penalized.

RESPONSE

The impact to the annual cap due to exceedances of the short-term 1,200 pound per hour limit has been minimized. Any hourly exceedance above 1,200 pounds per hour will be a violation of the short-term limit, but only 1,200 pounds per hour of the exceedance will be attributed toward the calculation of the long-term cap. The HRVOC cap and trade program in Chapter 101 is based on production and should allow owners and operators of sites with various levels of control to buy and sell HRVOC credits in the marketplace to alleviate any perceived inequity. Because the HRVOC allocations are based on production and use rather than actual HRVOC emissions, sites that install and operate more efficient control equipment prior to the required compliance date should benefit.

ExxonMobil, MCC, and TxOGA commented on §115.722(b) and (c) and expressed a belief that the site emission limitations should not be in multiple subchapters. ExxonMobil and TxOGA expressed a belief that the specification of default cap and short-term HRVOC emission limits should be in the Chapter 101, Subchapter H, Division 6 rules. TCC commented that the site-wide cap emission limitations should be moved to the HRVOC emission cap and trade rules because this language best fits the cap and trade provisions and would eliminate

redundant language in both the vent/flare rules and the cooling tower rules.

RESPONSE

The commission maintains that it is appropriate to reference these requirements in both Chapter 115 and in Chapter 101, because not every site is subject to the HRVOC cap and trade program in Chapter 101.

Sierra Club commented that the rules limiting emissions of HRVOC to 1,200 pounds per one-hour block period appear to require recordkeeping similar to the emission event rules, and questioned how the commission will ensure that companies record the emissions truthfully.

RESPONSE

The commission requires that records of hourly emission rates in pounds per hour be maintained for all affected sources. Companies must maintain records sufficient to demonstrate compliance with both requirements, even if the recordkeeping is similar. No changes were made in response to this comment.

Sierra Club commented that fugitive emissions should be part of the 1,200 pound limit in §115.722(c)(1) and (2) and in §115.761(b)(1) and (2).

RESPONSE

The commission adopted a control strategy for fugitive emissions that requires the repair of leaking components, as discussed in the commission's earlier rulemakings published in the January 3, 2003, and November 7, 2003, issues of the *Texas Register* (28 TexReg 113 and 28 TexReg 9847). This is distinguishable from the control strategy for other facilities with HRVOC emissions, specifically vents, cooling towers, and flares. The HRVOC cap and trade program limits emissions from these three categories of emissions and requires monitoring, but allows flexibility as to the specific control requirements. No changes were made in response to this comment.

Sierra Club commented that the limit of 1,200 pounds of HRVOC per one-hour block period in §115.722(c)(1) and (2) and in §115.761(b)(1) and (2) is not supported by the SIP appendices. Sierra Club stated that the appendices that refer to a short-term limit refer to a 1,000 pound release, and further stated that the commission did not give the source of the 1,200 pound limit. HCPHES expressed a concern that ozone exceedances will occur even after the proposed hourly cap is implemented, particularly if emissions events occur simultaneously at multiple facilities.

TCC commented that the commission has not justified a 1,200 pounds per hour limit for any site in Harris County and recommended that a higher number is appropriate or that the existing emissions events rules provide an adequate regulatory mechanism to minimize emissions. Dow expressed similar concerns and provided similar comments.

MCC commented that the hourly limit on HRVOC emissions should ensure that short- term emissions remain under EPA's level of "ozone-forming significance." MCC suggested that the commission set the HRVOC limit at or near the upper limit of the "below ozone- forming significance" range of 1,500 - 4,000 pounds per hour, arrived at by the Texas Environmental Research Consortium's Project H-13. MCC commented that the effectiveness of the suite of control strategies; the reported frequency, magnitude, and location of short- term HRVOC emissions in the HGB area; the historical frequency of ozone-conducive conditions in the HGB area; the historical frequency of ozone exceedances in the HGB area; and the analysis of Texas Environmental Research Consortium's Project H-13 results support MCC's suggestion that HRVOC emissions should controlled by a short-term limit in the range of 1,500 - 4,000 pounds of HRVOC emissions per hour. MCC commented that this limit would only rarely affect peak ozone at an ozone significance level of two ppb. MCC further cited cost and technical feasibility as issues that support the establishment of the short-term HRVOC emission limit at or near the upper end of the 1,500 - 4,000 pounds per hour range. TCC commented that the additional controls (caps) are not justified in the perimeter counties based on the scientific findings according to commission's Technical Analysis Division's modeling update on July 21, 2004, to the Photochemical Modeling Technical Committee.

RESPONSE

The 1,000 pound release cited in the Texas Environmental Research Consortium Project H-13 Draft Progress Report in Appendix I of the HGB SIP is used to provide examples of potential impacts of releases of HRVOC emissions and is not necessarily indicated as a critical control value. Furthermore, the H-13 Draft Progress Report indicates that the impact of the release would be dependent on the time of day the release occurred, the location of the emission release, and the meteorological conditions at the time. Enforcement of an emission specification that is dependent on such variable factors would be impractical, and therefore, the commission applied the limitation on a 24-hour basis without regard to time, location, or meteorological conditions. As stated earlier, the commission is adopting rules to reduce HRVOC emissions to reach attainment of the one-hour ozone standard. The photochemical modeling of the August - September 2000 episode coupled with a weight-of-evidence argument demonstrates attainment of the one-hour ozone standard. To achieve the necessary HRVOC reductions, the commission is adopting a two-part approach that addresses variable short-term emissions through a not-to-exceed limit, and steady-state and routine emissions and through an annual cap. The projected increases of one - four ppb in peak ozone concentration per 1,000 pounds per hour of HRVOC emissions would be expected at the times and locations that would be sensitive to the release and at the right meteorological conditions. The 1,500 - 4,000 pounds per hour emission limit suggested by MCC is not feasible because it would potentially jeopardize efforts to reach attainment. Although the commission is not placing limits in small geographic areas, if emissions from a concentrated area of emission sources were to emit at a level in this range in a small geographic area, conditions could be favorable for ozone formation.

The commission disagrees with Dow's comment that it will be impossible for large facilities or sites to meet the short-term limit. Several comments were received by the commission requesting that §115.782(c) be modified to establish a *de minimis* limit below which a shutdown to repair leaking components would not be required. In support of this request, Dow and TCC commented that some processes, such as pilot plants and plants that vent to a high efficiency thermal oxidizer, have minimal or no emissions from maintenance, startup, and shutdown. ExxonMobil commented that industry is continually working to reduce or eliminate shutdown related emissions. Although not all processes may be able to minimize startup and shutdown emissions to a minimal level, these comments imply that there are efforts that industry can make to reduce these emissions. The commission disagrees with Dow's comment that the 1,200 pounds per hour

limit will not define a targeted limit in context of the known scientific information from the modeling studies. Based on the best available information, the commission maintains that the 1,200 pound per hour limit is sufficiently low to reduce the likelihood that a sudden emissions increase of sufficient magnitude will occur under the right conditions to cause a one-hour ozone standard exceedance. This limit strikes a balance between the emission rate used as an example in the H-13 Draft Progress Report and a limit that could, under certain conditions be more likely to result in ozone formation.

Based on comments and modeling analysis, the commission adopts §115.727(f) and §115.767(6) to provide exemptions from the short-term and annual cap emission specifications in §115.722 and §115.761 to those sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties. Modeling studies have demonstrated that the proposed HRVOC limits on sites located in the seven counties surrounding Harris County are not necessary for the HGB area to attain the one-hour ozone standard. Further, the magnitude of HRVOC emissions from the seven surrounding counties affecting peak ozone concentrations by one part per billion is significantly larger than 1,200 pounds per hour. Affected industries in the seven-county area have indicated to the commission that representations for HRVOC emissions within their respective air permits are well below the values likely to be put in place through the HRVOC annual cap. The commission is exempting sites in the seven surrounding counties based on the presumption that the enforceable limitations from these sites are less than the area cap for the seven surrounding counties. In order to ensure that this presumption is accurate, each site with a potential to emit more than ten tpy of HRVOC must establish enforceable limits on HRVOC emissions from vent gas streams, flares, and cooling tower heat exchangers subject to the control requirements of Chapter 115, Subchapter H at levels represented in the most recent applications to the executive director for authorization under 30 TAC Chapter 116. Establishing enforceable limits on HRVOC emissions on an emission point basis can be accomplished through submittal of a PI-8 Form (Special Certification Form for Exemptions and Standard Permits) or any other form provided by the executive director to certify federally enforceable emission limits. In addition, enforceable limits on HRVOC emissions can be set by altering or amending authorizations under Chapter 116 to have an HRVOC emissions limit expressed in the maximum allowable emission rate table. The executive director will review the total amount of HRVOC emissions established through these enforceable limits for sites in the seven counties surrounding Harris County and present those findings to the commission for its determination on the appropriateness of the cap and trade program for those counties. If the evaluation reveals that the total amount of enforceable HRVOC emissions is at a level that is inconsistent with the attainment demonstration for the one-hour ozone NAAQS by the attainment date, the commission may revoke the exemption.

TCC commented that the commission has not justified a 1,200 pounds per hour hourly limit for any site in the perimeter counties and recommended that a higher number is appropriate or that the existing emissions events rules provide an adequate regulatory mechanism to minimize emissions.

BP and Chevron-Phillips stated that scientific studies completed by the commission and independent findings submitted by scientists to BP, indicate that removing the HRVOC caps in the seven surrounding counties provides only a *de minimis* increase in one-hour and eight-hour ozone concentrations. BP and Chevron-Phillips stated that short and long-term HRVOC caps should therefore only apply to Harris County, because the dedication of industry and commission resources to include the surrounding seven counties is unwarranted, the seven-county cap is ineffective in terms of environmental benefit, and the seven-county cap has no scientific basis.

Chevron-Phillips stated that work to install HRVOC analyzers on affected flare lines, cooling towers, and process vents is underway, and significant enhancements to the fugitive monitoring program are being implemented. In addition, improved and more comprehensive recordkeeping systems are also being established. Most importantly, the monitoring provisions will enable a facility to utilize actual monitoring data, rather than emission estimation factors, to determine compliance with permitted emission limits. In all permits examined through an informal industry group, the facility permit limits are significantly lower than the HRVOC cap that was previously assigned to each affected facility of the April 2004 rule proposal. Chevron-Phillips expressed a belief that the level of control afforded by the combination of monitoring and existing permit limits is adequate for the seven counties surrounding Harris County.

Dow expressed a belief that an annual emissions cap noted in §115.722(a) is not necessary for accounts that are located in the perimeter counties. Dow cited a May 2004 study prepared by the Center for Energy and Environmental Resources at the University of Texas. Dow also expressed a belief that the commission should use the combination of the monitoring and testing requirements with permitted annual emission rates to control annual emission of HRVOC in perimeter counties.

Dow recommended that the short-term limit of 1,200 pounds for HRVOC per hour in §115.722(c)(2) be eliminated or significantly raised for sources located in the seven perimeter counties. Dow stated that the 1,200 pounds per hour limit will not define a targeted limit in context of the known scientific information from the modeling studies, will make it impossible for large facilities to meet the requirement when maintenance, startup, and shutdown activities and emission events are included even if these events are controlled by the best known control technology, and will add a requirement which overlaps with the commission's other regulations and programs. However, Dow commented that should the commission opt to set a short-term emission limit for the perimeter counties, the commission should set the limit in the range of 16,500 - 33,000 pounds per hour as a release of this quantity is expected to impact maximum ozone concentrations by up to one - two ppb, by volume. Dow stated that this is consistent with the approach used to establish the proposed short-term limit for sources located in Harris County as supported by the Texas Environmental Research Consortium's Project H-13 study.

RESPONSE

The commission declines to change the hourly limit to within the range suggested by Dow for Harris County. The studies on which Dow relies to request a short-term limit of 16,500- 33,000 examined some of the sources in the Chocolate Bayou area of Brazoria County and the Texas City area of Galveston County. It would be premature to adopt a short-term limit of the magnitude suggested by the commenters until more complete data is obtained and analyzed.

However, as discussed in the response to the previous comment, the commission has exempted sites in the seven perimeter counties from both the long-term and short-term limits. Under concurrent rulemaking being adopted by the commission in §101.401, owners or operators of affected sites shall submit enforceable documentation of maximum allowable HRVOC emission rates from facilities located at those sites. If the evaluation reveals that the total amount of enforceable HRVOC emissions is at a level that is inconsistent with the attainment demonstration for the one-hour ozone NAAQS by the attainment date, the commission may revoke the exemption.

The commission acknowledges Dow's comment that the short-term limit adds a requirement that overlaps with the commission's other regulations and programs. Overlapping requirements frequently occur, particularly in the ozone nonattainment areas for sources of NO_x and VOC.

Dow suggested that the average one-hour block net heating value and exit velocity calculation in §115.722(d) should be used to determine flare efficiency for the emission rate calculation. Dow commented that using one 15-minute data point to determine the flare efficiency and the one-hour block average for the compliance demonstration increases the complexity level of the data support system and is burdensome with no actual benefit to the requirement.

RESPONSE

The commission agrees that determining flare efficiency on a 15-minute basis for emission calculation purposes while compliance with the net heating value and exit velocity requirements are on a hourly basis overly complicates the data handling and recordkeeping process. Therefore, the commission revised the rule as suggested in §115.725(d)(5) - (7).

Dow suggested that the term, "site" should not be added to §115.722(c) and that the regulated entity should be the account. Dow commented that emissions points are assigned to an account and that the site cap information will be based on emissions collected for an account. Dow argued that is it is much easier to identify and validate compliance for areas that belong to an account over areas that belong to a site because accounts have usually been previously identified through permitting or the air emissions inventory.

ExxonMobil and TxOGA expressed a belief that the term, "account" should be changed to "site" in §115.720(a) and §115.760(a). ExxonMobil and TxOGA cited inconsistencies in facilities having single or multiple account numbers. They further commented that because site-wide cap allocations are proposed to be based on information other than past inventories, any reference to applicability by account is unnecessary. ExxonMobil and TxOGA also suggested that applicability should be assigned to a site, defined as a facility or facilities with common ownership and under common control. MCC commented that the commission should modify the proposed vent gas and cooling tower heat elimination system rules to apply to "sites" rather than "accounts." MCC commented that this change would aid in consistency and clarity. MCC also commented that the reference to an "account" in §115.760(a) should be changed to the term "site" because there are considerable inconsistencies in facility account numbers. MCC also suggested that "site" be defined as a facility or facilities with a common owner and under common control. MCC commented that the reference to an "account" in §115.720(a) should be changed to the term "site" because there are considerable inconsistencies in facility account numbers. MCC also suggested that "site" be defined as a facility or facilities with a common owner and under common control. TCC commented that the commission should not penalize companies based on existing air accounting principles and that the terms "site" and "account", which are used interchangeably in this proposal, cause confusion and should be defined and reviewed for consistency between regulated entities. TCC suggests that the term "site" apply to those stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person and each have the same two-digit major group standard industrial classification code. TCC commented that the terms in §115.760(a) and §115.761(a) - (c) "site" and "account", which are used interchangeably in this proposal, cause confusion and should be defined and reviewed for consistency between regulated entities. TCC suggests that the term "site" apply to those stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person and each have the same two-digit major group standard industrial classification code.

EPA commented that §115.722 now refers to emissions from a "site" rather than from an "account" and stated that a clear definition of site seemed necessary for implementation of the rules.

RESPONSE

The commission agrees with the commenters that the interchangeable use of the terms, "site" and "account" is inconsistent. Therefore, in order to conform to the Chapter 101 HRVOC cap and trade rules, the term, "account" has been replaced with the term, "site" throughout this subchapter.

Section 115.725 issues

Sierra Club expressed support for a direct monitoring requirement that would require a continuous monitoring instrument with a ppm or pounds per hour limit for HRVOC instead of the parametric monitoring proposed in §115.725(a)(1)(A) and (2)(A) and (B). Sierra Club also questioned how the commission defines "directly correlates to" and stated that a definition for the phrase should be provided.

Dow suggested that in §115.725(a)(1), the tracking of emissions from vent gas streams should utilize the concept of maximum potential rates that are revised based on knowledge of process changes and retesting or are calculated based on parameter data, which are directly correlated to the emission rate. Dow expressed a belief that the commission should not require operating limits in §115.725(a)(2)(D) to track variation in the controlled HRVOC emission rates, but should require a set parameter level for prorating the emission rate based on the emission rate results from the performance test.

TCC offered alternatives to the proposed rule in §115.725(a)(1) and (2). TCC's first option requires that an initial test be conducted to determine the maximum hourly emission rate and then requires the owner/operator to evaluate the emission rate whenever a process change is made (similar to the approach used EPA's hazardous organic national emission standards for hazardous air pollutants rules). TCC's second option allows the use of continuous parameter monitoring that is directly related to the HRVOC emission rate and allows the owner/operator to change HRVOC emission rates throughout the year in accordance with monitoring data. TCC expressed a belief that these options are consistent with EPA rules and allow the owner/operator to select the option that best fits their situation for each vent gas stream.

ExxonMobil and TxOGA commented that the requirements in §115.725(a)(1) and(2) regarding operating parameters that correlate to emission levels is not feasible for all vents. ExxonMobil and TxOGA stated that additional testing will be necessary to determine or verify the correlation of any operational parameters to the vent stream HRVOC emissions. Furthermore, ExxonMobil, and TxOGA stated that certain parameters may not currently be monitored, so new monitoring equipment may have to be installed and that it will take at least 12 - 18 months to complete the selection, installation, and initial testing. ExxonMobil and TxOGA further commented that the levels of operating parameters at the time of testing cannot be simply used to set limits because the emissions can vary as a function of a combination of parameters. ExxonMobil and TxOGA suggested that operational parameters should be used as an option to indicate the level of emissions based on an established correlation and that the parameter may be able to be used to indicate whether or not the emissions from the testing are occurring.

RESPONSE

The rationale for requiring continuous monitoring of operational parameters is to have an on-going indicator of compliance for vent gas streams for which a one- time test for HRVOC emissions has been performed. This is necessary to assure that the processes and control devices associated with a vent gas stream are operated within the same representative operational conditions as during the HRVOC emissions test. The phrase "directly correlate to" used in the rule was not intended to imply that the parameter monitoring will be used to predict or estimate HRVOC emission rates, or that the selected parameter or parameters must be directly proportional with emission rates or control device efficiency, as in the statistical definition of the phrase (i.e., HRVOC emissions increase as the parameter value increases). Owners or operators should select an operational parameter or parameters that, if varied, will have a direct effect on the HRVOC emission rate or control device efficiency, as applicable. Process parameters that can be varied without having any effect to HRVOC emission rates or control device efficiency are unacceptable for satisfying this monitoring requirement. Examples of potential operational parameters include maximum production rate, maximum loading rate, process pressure, minimum combustion temperature, or minimum excess air. The most appropriate parameter to satisfy this monitoring requirement will depend on the specific processes that result in the HRVOC emissions from the vent gas stream and the type of control device. The approach suggested by Dow would require significant actual testing and statistical analysis, i.e., similar to the requirements for predictive emission monitoring systems, to verify that the parametric monitoring accurately reflects actual emissions because the parameters monitored may not be directly linear with HRVOC emissions. Because of the wide range of vent gas streams impacted by these requirements, it is the commission's intent to provide flexibility to industry with regard to the selection of the operational parameters. The flexibility provided in the rule should allow owners and operators to use existing parameters in most cases, so the commission does not agree with the ExxonMobil and TxOGA assertions that 12 - 18 additional months will be needed to complete the selection, installation, and initial testing of new monitoring equipment. The commission revised the rule to require owners or operators to select a parameter or parameters that directly affects the HRVOC emission rates or control device efficiency.

Dow suggested that the commission consider some alternatives to the proposed parameter monitoring requirements for vent gas streams in §115.725(a).

RESPONSE

The commission contends that there is sufficient flexibility in the vent gas stream parameter monitoring requirements to allow owners or operators to select parameters. Because the exact parameters have not been specified, the rules do not require prescriptive quality assurance procedures for the parameter monitoring. Quarterly inspection is a minimum level quality control check to ensure proper operation of the parameter monitoring that will be used to demonstrate compliance with the rules. The provisions in §115.725(m) apply to the monitoring requirements in §115.725(m), allowing owners or operators to submit a request for minor modifications or alternatives to test methods and monitoring. There is an additional provision in §115.725(a)(4) that allows the executive director to specify alternative monitoring for the required parameter monitoring. No change to the rules has been made in response to this comment.

TCC commented that the commission should clarify the intent of using the term "operating limit" in §115.725(a)(1)(A). For example, TCC questioned if it is the intent that a variation from an "operating limit" is a "deviation" under the Title V program and whether these limits represent any type of authorization. Dow commented that in §115.725(a)(2)(A) and (B), the controlled vents should not require relevant operational parameters for both the uncontrolled HRVOC vent rate and the control device efficiency. Dow further stated that the performance of the control device should be well established and enforced as they currently are under new source review (NSR) permits, Title V federal operating permits, and other state and federal regulations, but should not be a part of this rule.

RESPONSE

If parameter values are outside the established range, then such an occurrence is in violation of the rule and a deviation under the Title V program. However, for purposes of cap compliance, tested HRVOC emission rates may be used. If parameter values are outside the established range due to an emissions event, then process knowledge and engineering calculations may be used to estimate emissions. The commission does not agree that monitoring of a parameter that affects performance of the control device is unnecessary. If monitoring is required under one of the other regulatory requirements cited by the commenter, that monitoring could be used to satisfy the requirements of §115.725(a)(2)(A) and (B).

EPA supported the changes in the monitoring rules that provide a framework to establish operational limits for uncontrolled process vents and vents that are controlled by means other than a flare, but questioned how the limits would work in practice. EPA requested that the rule clarify that a vent operating within its operational limits would be assumed to emit at its maximum potential HRVOC emission rate for purposes of cap compliance.

RESPONSE

The commission understands EPA's concern and modified the rule, accordingly.

TCC commented that analyzer vents, steam system vents, and vent gas streams in §115.725(a)(1) should be excluded from parameter monitoring in cases where there is no HRVOC present,

except during emissions events, startup, shutdown, and maintenance.

RESPONSE

The adopted rules contain an exemption from vent gas streams that have a maximum potential flow rate equal to or less than 100 dry standard cubic feet per hour. Any vent above this exemption limit should be monitored. Therefore, the commission has not made the suggested change.

TCC commented that the requirements in §115.725(a)(1) and (2) and (c) for duplicative plan submittals should be deleted and that any additional monitoring plan requirements should be contained in the QAP or the test plan or subsequent modifications to those documents.

RESPONSE

The commission revised the rule regarding the submission and approval of QAPs. The revised rule requires written QAPs to be developed, implemented, and followed, but are only required to be submitted upon request by the executive director. The monitoring plans required under §115.725(a)(1) and (2) and (c) are also only required to be submitted upon request by the executive director.

ExxonMobil, MCC, and TxOGA commented that the term, "limit" should be replaced with the term "values" in §115.725(a)(1)(c) and that these 'values' should only be used to indicate that additional vent stream testing may need to be conducted. ExxonMobil and TxOGA also expressed disagreement with the implication that operating above the established operating limits would be a violation of the rule.

RESPONSE

The intent of the rule is to establish operating limits, not values, as suggested by the commenters. Therefore, no changes were made in response to this comment.

Dow commented that the monitoring plan elements required in §115.725(a)(3)(B) to include all process information and calculations used to calculate HRVOC emissions from emission events and startup, shutdown, and maintenance events would be impossible to compile until the events are known. ExxonMobil, MCC, and TxOGA made similar comments. ExxonMobil and TxOGA also commented that process information and engineering calculations for maintenance activities will vary in each case and that monitoring plans can only generally describe the process information and the engineering calculations that may be used. Dow stated that supporting documentation of the actual process information and calculations for a specific event should be required.

RESPONSE

The commission is not requiring estimated emissions in pounds per hour, rather the commission is seeking the information and the calculations that owners and operators use to calculate emissions during emissions events. No changes were made in response to this comment.

EPA commented that the procedure provided in §115.725(a)(3) for estimating emissions during emission events and scheduled startup, shutdown, and maintenance activities are intended to provide an option for calculating emissions when established operational parameters are exceeded. During these times, EPA stated that the emissions would be higher than the maximum potential emissions during normal operation. EPA commented that these occurrences would not necessarily be "emission events" because emission events are by definition unauthorized. EPA also stated that use of process knowledge and calculations would be appropriate for these instances as long as they are infrequent. EPA suggested that the use of process knowledge be limited to only 14 days per year (comparable to the allowance for temporary flares.)

RESPONSE

The commission disagrees with EPA's assumption that the emissions would necessarily be higher than the tested emission rates. If parameter values are outside the established range, then the commission would consider such an occurrence to be in violation of the rule. However, for purposes of cap compliance, tested HRVOC emission rates may be used. If parameter values are outside the established range due to an emissions event, then process knowledge and engineering calculations may be used to estimate emissions. Should a facility desire to expand their operating range, retesting would be required. With regard to EPA's comment that the use of process knowledge should be limited to only 14 days, it is not the commission's intent to allow the use of process knowledge except during emissions events.

ExxonMobil, MCC, TCC, and TxOGA expressed a belief that the specified content of the monitoring plans in §115.725(a)(4) for vent stream emissions determination using process knowledge and operating parameters is too prescriptive.

RESPONSE

The commission disagrees with this comment and contends that the criteria in the rule is reasonable. The plans require the specifications for all of the monitors, the information supporting the selection of the process parameters, actual testing or manufacturers' data documenting the control efficiency of any control device, and quarterly inspections to ensure the proper operation of continuous monitoring systems. If an owner or operator opts to use process knowledge for estimating emissions during emissions events, as allowed by §115.725(a)(3)(B), then the monitoring plans would need to include relevant process information and calculations.

ExxonMobil, MCC, and TxOGA commented that the provision in §115.725(a) that allows for vents at cyclic or batch processes to be considered as zero during non-operational periods except for startup, shutdown, and maintenance should be expanded to any periodic vent when process knowledge indicates that the vent source is not active. Dow proposed that the last sentence of §115.725(a) be revised to clarify that a vent gas stream can use zero for the emission if the vent gas stream does not operate during certain hours throughout the year regardless of whether the process is a cyclical, batch, or continuous process. TCC suggested that the following language be added to this subsection to clarify that the option may be used for continuous processes during times when they are not operating: "HRVOC emissions shall be considered as zero during non-operational periods other than startup, shutdown, or maintenance activities for vent gas streams that do not operate and emit HRVOC during some periods of a calendar year."

RESPONSE

If a vent gas stream does not operate during certain hours throughout the year and process knowledge indicates that the vent source is not active, then the commission considers the process to be cyclic, and therefore, applicable to the zero

emission provision in §115.725(a). No change was made in response to this comment.

Basell stated that polyolefins production facilities have been permitted in accordance with commission guidelines based on a potential to emit of the polyolefin solid coming from the process or extruded pellet. Basell also stated that the method to determine the potential to emit most likely overstates the emissions. Also, many facilities have groups of equipment that serve the same purpose and are used for short-term holding or movement of the polyolefins between the production unit, the extrusion unit, and the load out or packaging systems. These are all potential vents and are often grouped as one vent in a permit. Although any individual vent is not expected to exceed the 100 ppm threshold for HRVOC, the total of all transfer system vent streams based on potential to emit values, when added to other items as required in the regulation (e.g., cooling towers) does have the potential to exceed the 5% of a facilities' cap. Basell stated that due to the dilute nature of the polyolefins transfer system vent streams and the diverse nature of the points at which the VOC or HRVOC may enter the atmosphere at points in time and over the course of a year, these streams do *not* represent a significant HRVOC source, and therefore, similar to analyzer vents, should be excluded from the vent monitoring and recordkeeping requirements.

Basell suggested that if an exemption is not provided, then at a minimum, the rules should allow a facility to perform representative testing of less than 50% of the vents (i.e., test one point to represent all points downstream as a worst-case scenario, or define common points in the system and perform testing on only one of the common points to represent all system points. Basell also suggested that an alternative method would be to allow composite sampling and limit analysis to the components in question. If this testing indicates that these sources are less than 5% of the cap on an annual basis, then no further testing or monitoring would be required for HRVOC. TCC commented that an alternative to the testing requirements should be added so that the owner/operator of a polyethylene or polypropylene unit may use the VOC head-space test to determine polymer handling emissions from the extruder through loading.

RESPONSE

The rule currently has a provision for testing of half of the vents, so no rule change is necessary as suggested by Basell. Provisions for alternative methods have been provided in §115.725(m). Owners or operators may submit a request to use the proposed head-space method in accordance with that subsection; therefore, no change has been made to the rules.

ExxonMobil, MCC, and TxOGA expressed a belief that testing a vent gas stream to determine maximum potential emissions in §115.725(a)(6)(B) is rarely feasible. They further stated that although §115.725(a)(5) provides for additional testing, it does not specify when testing is required to be done. ExxonMobil and TxOGA suggest that retesting should be done whenever process knowledge indicates that the emissions may be expected to be significantly above emission during prior testing.

RESPONSE

The HRVOC rules were designed to be performance-based, emphasizing monitoring, recordkeeping, reporting, and enforcement. Obtaining actual data concerning HRVOC emissions is key to fulfilling this SIP commitment. Therefore, in general, allowing estimated emissions based simply on process knowledge would not necessarily provide the commission with necessary data in most cases to demonstrate compliance with the rule. It is the commission's position that if a source can be tested, it should be tested. The commission understands that in certain specific cases, process knowledge will provide a more accurate estimation of emissions; therefore, the commission adopted revisions to §115.725(a) in the November 7, 2003, issue of the *Texas Register* (28 TexReg 9845) to allow the use of process knowledge for specific cases. Specifically, sources may determine emissions using process knowledge if the process knowledge utilizes scientific calculations and process parameter monitoring. Types of processes which may use process knowledge in lieu of actual testing are analyzer vents, PRVs, steam vents, and streams where there is no HRVOC present, except during emissions events.

The commission contends that additional rules are not necessary to allow owners and operators to retest vents. The commission also contends that it is in the best interest of owners and operators to retest when the maximum potential has increased in order to be compliant with this rule.

Sierra Club commented that the monitoring plans required by §115.725(a)(4) should be submitted within seven days when requested instead of 30 days, because the plans should already exist and be ready for immediate submittal.

RESPONSE

The commission contends that the 30 days specified in the rule is an adequate time to supply the specified information and there is no significant benefit to providing the information within seven days instead of 30.

Dow recommended that §115.725(a)(4) be deleted and Dow suggested language to be added to §115.726(a)(2)(D) to simplify the documentation and recordkeeping for the rule.

RESPONSE

The commission declines to make Dow's suggested change. Monitoring plan content should be described with the monitoring requirements. No change was made in response to this comment.

Dow commented that the requirement in §115.725(a)(4)(D) to schedule quarterly inspections of the continuous monitoring systems is unreasonable and arbitrary. TCC commented that commission has not justified requirements for quarterly "inspections" of the continuous monitoring system. ExxonMobil and TxOGA stated that the quarterly inspection of all monitors used for emission determinations from emissions events and scheduled maintenance, startup, and shutdown activities is infeasible.

RESPONSE

The commission contends that the quarterly inspection requirements are reasonable. The rule does not require monitoring for all parameters used to determine HRVOC emissions during emissions events, but instead requires the owner or operator to select a parameter or parameters that directly affect the HRVOC emissions. Therefore, if the owner or operator selected a single parameter to monitor for a particular vent gas stream or possibly multiple vent gas streams, then the owner or operator would be required to inspect that particular monitor. There is sufficient flexibility in the vent gas stream parameter monitoring requirements to allow owners or operators to select parameters. Because the exact parameters have not been specified, the rules do not require prescriptive quality assurance procedures for the parameter monitoring. Quarterly inspection is a minimum level

quality control check to ensure proper operation of the parameter monitoring that will be used to demonstrate compliance with the rules. No change to the rules has been made in response to this comment.

ExxonMobil, MCC, and TxOGA commented that §115.725(a)(6)(C) implies that the monitoring requirements in paragraphs (1) or (2) may not be installed at the time of testing, but refers to parameter limits established during testing.

RESPONSE

If the selected parameter for monitoring was not measured or monitored during prior testing, then the owner or operator would have no basis for setting the operational limit, and therefore, would need to retest the vent. Therefore, §115.725(a)(6)(C) has been revised to specify that in order to use the prior testing data, the operational parameters selected must have been monitored with a monitoring system meeting the requirements of the rule or an equivalent monitoring system.

Dow commented that it is unclear how the maintenance records of a vent and associated process can be used to indicate that vents are similar and do not require redundant testing in §115.725(a)(7)(A)(v). Dow suggested that maintenance of the emission source should not be used as an indicator to show that the source operates in a similar manner.

RESPONSE

The commission disagrees with the comment that maintenance is not a factor when determining if similar sources can be reasonably expected to have similar emissions. Modifications made during maintenance to a process or control device may impact the emission rate of the source or the performance of a control device. If similar sources are not maintained in a similar manner, then the emissions from those sources may not be similar. Therefore, the commission retained the requirement for maintenance records when a request is submitted for a waiver of testing under §115.725(a)(7)(A). No changes have been made in response to this comment.

ExxonMobil , MCC, and TxOGA expressed a belief that the requirements in §115.725(b) to provide operational parameter monitoring, in addition to providing continuous emissions monitoring systems for direct measurement, and the requirement to use operational parameter monitoring in addition to process knowledge for specifically listed source types is unwarranted and unnecessary. EPA noted that §115.725(b) provides the option of using a continuous emission monitor for vent gas streams, and also requires that the parameter monitoring requirements of §115.725(a) be followed. EPA presumed that the parameter monitoring requirements would be used to establish a maximum potential flow rate that could be used in conjunction with the measured concentration to establish the emission rate. With the caveats discussed in the comments on §115.725(a), EPA stated that this would be an acceptable method to establish vent emissions. EPA expressed concern that §115.725(b)(1)(C) calls for the use of process knowledge instead of parameter monitoring to establish flow, and stated that the use of process knowledge for establishing flow rate is not acceptable for compliance purposes.

RESPONSE

The parameter monitoring is required as an indicator for flow, which is allowed to be determined by process knowledge under §115.725(b)(1)(C). A new §115.725(b)(1)(D) has been added in response to EPA's comments. The commission disagrees with EPA regarding the use of process knowledge in §115.725(b)(1)(C). The commission has required actual monitoring throughout Subchapter H, whenever reasonable and practicable.

Sierra Club requested that the term "cylinder gas audit" used in §115.725(b)(1)(B) and §115.726(b)(5) be defined.

RESPONSE

The definition of and procedures for a cylinder gas audit are already provided by EPA in 40 CFR Part 60, Appendix F. It is not necessary to redefine or restate what a cylinder gas audit is or how to perform such an audit in §115.725(b)(1)(B).

ExxonMobil, MCC, and TxOGA commented that in §115.725(b)(2) the items listed are vent gas streams or sources and not processes as stated in the rule. TCC commented that the word "processes" should be replaced with the term "sources" to more accurately define the listing.

RESPONSE

The commission agrees that the term "processes" is inappropriately used, and therefore, revised §115.725(b)(2) accordingly.

ExxonMobil, MCC, and TxOGA commented that process knowledge should also be allowed for vents associated with double block and bleed operations and that this source type should be added to the list in §115.725(b)(2) because these sources are small and emissions can be calculated using process knowledge and engineering calculations with good certainty. Dow suggested that air emissions from double valve and vent systems should be added to the list of equipment in §115.725(b)(2) where process knowledge can be used to estimate hourly emission data. Dow stated that all of these sources should also be exempt from the parameter monitoring required in §115.725(a)(1) and (2).

RESPONSE

There is an exemption for vents that have a flow rate less than 100 dry standard cubic feet per hour in §115.727(c)(2). It is the commission's position that vents that have a flow rate of greater than 100 dry standard cubic feet per hour should be monitored. No additional changes were made in response to this comment.

EPA supported the rules in §115.725(c) for estimating emissions from pressure relief devices.

RESPONSE

The commission appreciates the comment.

ExxonMobil, MCC, and TxOGA stated that the installation of additional monitoring may not be possible in the time provided.

RESPONSE

Sufficient flexibility is included in the PRV monitoring requirements to allow owners or operators to select parameters that are already monitored. The commission also maintains that sufficient time has been provided for owners or operators to install monitors for those PRVs that do not have current monitoring to meet the requirements of §115.725(c). Therefore, no change has been made to the rules in response to this comment.

Sierra Club expressed support for a direct monitoring requirement in §115.725(c)(1) that would require a continuous monitoring instrument with a ppm or pounds per hour limit for HRVOC.

RESPONSE

The commission appreciates the support for the monitoring of PRVs; however, the commission has not specified such an instrument for monitoring PRVs.

Sierra Club commented that the pressure relief events mentioned in §115.725(c)(2) appear to be emission events. Sierra Club questioned how the emission event rules interact with the HRVOC rules and whether there was duplication of effort.

RESPONSE

In general, the emissions from open PRVs would be considered emission events and must comply with Chapter 101, Subchapter F. However, these emissions must also be accounted for in the short-term and long-term HRVOC caps in Chapter 115, Subchapter H.

ATOFINA-Petrochemicals and Basell stated that proposed §115.725(c) does not provide an alternative method of compliance determination. ATOFINA-Petrochemicals and Basell expressed a belief that the rule should provide sufficient flexibility by providing an alternate method other than through the use of a continuous monitoring system, provided that the alternative method will generate data consistent with the requirements of §115.725(c)(1) - (4). SUNOCO commented that the rule should provide for alternative methods of compliance demonstration for PRVs other than the continuous monitoring system required under §115.725(c). Dow also suggested that the commission broaden the concepts behind the monitoring plan to allow for using one or many process parameters, visual observations, relief valve calculations, and any other process equipment information to estimate the emissions from the release. Dow suggested that this information be captured in a written PRV release procedure that focuses on the total methodology for the calculation as opposed to a monitoring plan that focuses only on monitoring devices.

RESPONSE

Flexibility has been provided in §115.725(c) to allow facilities to select parameters to monitor to satisfy the requirements of the rule. The provisions in §115.725(m) apply to the PRV monitoring requirements, allowing an owner or operator to submit a request for minor modifications or alternatives to test methods and monitoring. There is an additional provision in §115.725(c)(4) that allows the executive director to specify alternative monitoring for the required parameter monitoring. Revisions have been made to §115.725(m) to clarify that alternative monitoring methods may be requested; however, the rule has not been revised to provide for alternative demonstrations of compliance. There is sufficient flexibility in the rule to satisfy the intent of §115.725(c), which is to require monitoring of affected PRVs. Allowing alternatives that do not include monitoring would not satisfy this intent.

Dow expressed a belief that the commission should impose the monitoring requirements of §115.725(c)(1) and (2) on PRVs that contact process gas that contains 5% by weight or greater HRVOC, and on PRVs that are on lines larger than one inch. Dow stated that the potential emissions for valves contacting gas with less than 5% by weight and on lines below one inch would be very small. Dow commented that this suggested change would also make this portion of the rule consistent with the HRVOC fugitive emission requirements. TCC commented that the commission should withdraw the parameter monitoring requirements for PRVs because owners and operators are already required to report these releases, and that the proposed continuous parameter monitoring results are a trivial environmental benefit while creating hundreds of new detailed monitoring and recordkeeping requirements. ExxonMobil, MCC, and TxOGA stated that the applicability of the PRV rules in §115.725(c) should match the applicability in Subchapter H, Division 3. ExxonMobil, MCC, TCC, and TxOGA also commented that PRVs with less than 5% HRVOC, PRVs in sampling or instrumentation systems, and conservation vents or other devices on atmospheric storage tanks that are actuated by vacuum or pressure of no more than 2.5 pounds per square inch, gauge should be exempt.

RESPONSE

The commission intended that the applicability of Division 1 apply to any site with a controlled or uncontrolled vent gas stream containing HRVOC. This would apply to any PRV that has the potential to emit HRVOC. The intent of the monitoring required for PRVs in §115.725(c) is for including HRVOC emissions from PRVs when a relief event occurs, i.e., when the PRV is open. The applicability, requirements, and exemptions in Chapter 115, Subchapter H, Division 3 are intended to reduce emissions from PRVs when they are closed, but possibly leaking. The commission contends that while fugitive emissions from the PRVs specified in §115.787 may be minimal, the HRVOC emissions from actual relief events may be substantial. PRVs are allowed to use any of the applicable exemptions found in §115.727, and no additional exemptions are warranted. No changes were made in response to this comment.

Dow requested that the commission define the universe of PRVs that are subject to the new parameter monitoring requirements and that the commission consider alternatives to this requirement. ExxonMobil, MCC, and TxOGA stated that the term, "applicable" relief valve needs to be defined.

RESPONSE

The scope of the PRVs that would be subject to the requirements of Chapter 115, Subchapter H, Division 1 will be all PRVs that are not controlled by a flare and that do not meet the exemptions already provided in Division 1 for vent gas streams. Additionally, there is sufficient flexibility in the PRV monitoring requirements to allow owners or operators to select parameters. The provisions in §115.725(m) apply to the PRV monitoring requirements, allowing owners or operators to submit a request for minor modifications or alternatives to test methods and monitoring. There is an additional provision in §115.725(c)(4) that allows the executive director to specify alternative monitoring for the required parameter monitoring. Therefore, no change has been made to the rules in response to this comment.

TCC commented that the commission has not justified the need for additional supporting documentation in §115.725(c)(3)(C) and that a description of how to calculate the emissions should be sufficient.

RESPONSE

The commission disagrees with this comment. The commission contends that an owner or operator should be able to establish that the equations used are valid for the situation and that the owner or operator should have a copy of the supporting documentation available on site. Therefore, the commission has not made the suggested change.

ExxonMobil, MCC, and TxOGA commented on §115.725(d), stating that the flare performance requirements from 40 CFR §60.18 specified in this rule should only apply to flares when they receive HRVOC.

RESPONSE

The commission agrees that the flare performance requirements from 40 CFR §60.18 specified in this rule should only apply to flares when they receive HRVOC, and has therefore, revised the rule language. However, flares that are required by other state or federal regulations to meet the requirements of 40 CFR §60.18 must be in compliance with these requirements at all times when receiving or having the potential to receive emissions, regardless of whether the emissions are from HRVOCs or other VOCs. The commission cannot include a provision in this rule that exempts a facility from having to meet the requirements of 40 CFR §60.18 mandated by a permit, other state or federal rule, or by an EPA regulation.

Sierra Club objected to allowing 1.0% of the annual operating time of the flare to exceed the flare flow rate under §115.725(d)(1) and §115.764(a)(3) and (b)(3), and stated that there is no justification for allowing noncompliance for a flare.

RESPONSE

The referenced provision is not an allowance for noncompliance of a flare. Section 115.725(d)(1) states, "The executive director may approved alternative means of determining the flare flow rate for a period of time not to exceed 1.0% of the annual operating time of the flare." This provision is to allow facilities to use alternative means to determining flow rate for rare incidences of extremely high flow rates that would exceed the range of the continuous flow monitors required by §115.725(d)(1). While some flare systems may still require multiple flow monitors to satisfy the flow monitoring requirements, the commission determined that requiring an additional flow monitor solely for monitor flow rates that rarely occur (less than 1% of the time) was overly burdensome. The referenced §115.764(a)(3) and (b)(3) do not refer to flares. No changes were made in response to this comment.

ATOFINA-Petrochemicals and Basell stated that a site may decide to install and operate an alternate control device after the effective date of proposed §115.725(d) to control emissions from PRVs and process vents, and to utilize a flare historically operated as a process flare solely as an emergency flare. ATOFINA-Petrochemicals and Basell stated that in these cases, if the alternate control device can demonstrate a destruction efficiency capability that meets the requirements of 40 CFR §60.18, the site owner or operator should have the ability to reclassify the flare as only an emergency flare and discontinue use of the measurement and monitoring devices required by §115.725(d). SUNOCO commented that the owner or operator of a site should have the ability to reclassify a process flare to an emergency only flare for possible situations when alternative control devices are installed after the effective date to control emissions from process vents and PRVs. This would allow the owner or operator to discontinue the monitoring required for process flares under §115.725(d) and utilize the alternative monitoring provisions for emergency flares in §115.725(g).

RESPONSE

The commission agrees with the comments, and therefore, revised §115.726 to include provisions to ensure adequate documentation, reporting, and recordkeeping of these types of flare reclassifications and changes in monitoring.

ExxonMobil, MCC, and TxOGA commented that they support the provisions to use process knowledge and engineering calculations for flares that receive liquid or dual phase flows and that they would like to have this option under §115.725(d).

RESPONSE

The provisions to allow process knowledge and engineering calculations for special categories of flares specified in the rule are not intended to be acceptable alternatives for all flares, only for cases where the commission determined that the continuous monitoring of flares required in §115.725(d) would be impractical. No change to the rule was made based on this comment.

ITC requested that the commission provide an exemption to §115.725(d) for storage tanks controlled with dedicated flares. The exemption would exclude the need for a chromatograph and the calculation of net heating value of vent gas streams. ITC suggested that §115.725(d) be modified to allow for the use of process knowledge to determine the HRVOC concentration and the net heating value to demonstrate compliance under §115.722 (a) - (d). ITC suggested that the commission do this by using wording similar to §115.725(e)(4) or (f)(6).

To support this suggestion ITC commented that at one of its facilities it has tanks with dedicated flares that contain products that are virtually pure HRVOC, and ITC questioned whether in this case a chromatograph is necessary to speciate HRVOC. ITC commented that in this case it was willing to consider the vent stream to be 100% HRVOC when calculating the mass flow to the flare and for emissions calculations. ITC also questioned the necessity of the net heating value calculations to insure compliance with the Btu requirements of 40 CFR §60.18. ITC provided an example calculation with propylene to show that if the vent gas stream is 94% propylene that the minimum Btu requirement for efficient combustion, as required by 40 CFR §60.18, is satisfied. ITC also noted that even during emergency flow conditions the flare tip velocities will not exceed the maximum specified in 40 CFR §60.18.

RESPONSE

The commission agrees with ITC's comments and revised the rule to provide an alternative in §115.725(m)(3) for flares in dedicated service to storage tanks containing 95% of an individual HRVOC. This provision will allow the use of process knowledge and engineering calculations to determine net heating value and HRVOC concentrations in lieu of the online analyzer required under §115.725(d)(2); however, flow monitoring is required.

ExxonMobil, MCC, and TxOGA commented that an alternative to the initial calibration in §115.725(d)(1)(C) prior to installation needs to be provided for existing flow meters and provided suggested language. Dow suggested that the commission establish alternate calibration procedures for existing flow meters in §115.725(d)(1)(C). TCC commented that the commission should acknowledge in the rule that existing equipment may be used to meet the requirements.

RESPONSE

Alternatives to the initial calibrations, such as those described by the commenters, may be addressed by requesting a minor change to the monitoring requirements as allowed in §115.725(m). Because the commission cannot anticipate every possible alternative to the initial calibration requirement in the rule, the commission cannot know in advance which alternatives are acceptable and which are not. Therefore, the commission contends it is more appropriate to address these issues as site-specific modification requests. Consequently, the commission has not revised the rule as suggested.

ExxonMobil, MCC, and TxOGA commented that requiring the analytical accuracy for flare stream net heating value to be accurate within 5% is unnecessary. ExxonMobil, MCC, and TxOGA further stated that it is only necessary to determine if the net heating value is above the minimal value specified in 40 CFR §60.18 to determine compliance with §115.722(d), and to determine which flare destruction efficiency may be used.

RESPONSE

The requirement in §115.725(d)(2) is not intended to be the accuracy requirement for the overall results of those parameters. The commission revised this section of the rule adopted in the November 7, 2003, issue of the *Texas Register* (28 TexReg 9847) to no longer require a specific list of constituents the analyzer must measure to determine net heating value and molecular weight to provide greater flexibility. Owners and operators may decide on a case-by-case basis what constituents to monitor to satisfy this requirement. The 5% specified in the rule is provided as guidance to owners and operators for deciding what constituents must be measured by the analyzer. The actual overall accuracy of the measurements of net heating value and molecular weight is a combination of the uncertainties of the individual measurements of constituents and the uncertainty introduced by the selection of the constituents for monitoring. No changes were made to the rule in response to this comment.

ExxonMobil, MCC, and TxOGA commented that newer monitoring technology requires less calibration so the calibration requirements in §115.725(d)(2) should be relaxed.

RESPONSE

ExxonMobil and TxOGA have not provided specific information or data supporting the assertion that new monitoring technology requires less calibration than is specified in the rule. Therefore, the commission cannot determine whether or not relaxing the calibration requirements is warranted. Additionally, the commission does not contend that all possible monitoring systems that could be used to satisfy the rule requirements are of equal quality or have the same technological advances. The quality assurance requirements in the rule cannot be based solely on the best performing monitoring system available. It is not the commission's intent to limit the technology of monitors that could be used to satisfy the requirements of this rule. Furthermore, this rule does not mandate that owners or operators install only the most advanced and latest model monitors produced by a specific manufacturer. No changes were made in response to this comment.

Dow suggested that in §115.725(d)(2)(A)(ii)(I) the rule be modified to include cases where the flare header may not have two other non-HRVOC constituents present at significant concentrations by providing additional criteria.

RESPONSE

The suggested change is not necessary because significant flexibility has already been provided for the selection of constituents to monitor for net heating value and molecular weight as well as the calibration requirements for non-HRVOC constituents. If the flexibility provided is insufficient to address a site-specific concern, an owner or operator may submit a request to the commission for a minor modification as provided in §115.725(m).

TCC commented that if companies are already providing proof of linearity for other non- HRVOC components, the requirement to check the top two non-HRVOC components weekly should be eliminated in §115.725(d)(2)(A).

RESPONSE

The requirement to check the analyzer weekly is a quality assurance check for analyzer drift, not linearity. An initial linearity check will not serve to detect drift in the analyzer's response over time. Regular and frequent checks for analyzer drift are necessary to quality assure the data that will be used to demonstrate compliance with the rule requirements. Therefore, no change was made in response to this comment.

ExxonMobil, MCC, and TxOGA also commented on §115.725(d) that flare flow during times of high moisture content should be allowed to be corrected and stated that overestimation of the mass rates will occur when the flow rate includes high moisture and the constituent analyzer is measuring on a dry basis.

RESPONSE

The commission agrees with the commenter and revised §115.725(d)(2) to clarify that making corrections for moisture may be necessary to ensure that flow rate and concentrations are on an equal basis for proper calculation of mass rates. Methods of determining moisture for this correction have been specified in the rule. The commission also amended the rule to clarify that concentrations for determining net heating value must be on a wet basis, which is consistent with the requirements of 40 CFR §60.18(f)(3).

ExxonMobil, MCC, and TxOGA also requested clarification on the calculations in §115.725(d)(3) to continuously operate monitoring systems at least 95% of the time. Specifically, ExxonMobil, MCC, and TxOGA asked whether the normal calibration time is subtracted from the total flare operating time or from the monitor outage time.

RESPONSE

Normal calibration time would be included in the total operating hours with valid quality-assured data when determining the percent measurement data availability as specified in §115.725(d)(3), and §115.764(a)(3) and (b)(3). The percent measurement data availability is the valid quality-assured data divided by the total operating hours of the flare.

ExxonMobil, MCC, and TxOGA also commented that the on-stream requirement of 95% should exclude "special" times when flare conditions make monitoring infeasible. TCC commented that in §115.725(d)(3), the commission should allow periods of analyzer outage due to "steam-outs" associated with certain maintenance, startup, or shutdown activities and exclude these periods from calculations of 95% on-stream time. The impact of these steam-outs will cause inconsistent and incorrect readings between the gas chromatograph and the flow meter.

RESPONSE

The majority of such situations can be addressed through the installation of proper sampling conditioning systems that will allow monitoring to continue. Owners or operators may submit a specific request for modification or alternative to the monitoring requirements for those conditions that cannot be addressed by sampling conditioning systems. The commission cannot anticipate all possible situations that might interfere with monitoring to allow adding specific provisions to address these situations. The commission cannot have a provision to exclude "special" times from the requirements to monitor because the term is ambiguous and would erode the enforceability of the monitoring requirements. Therefore, the commission declines to make the suggested change.

MCC suggested that for analytical outages that last less than 24 hours, it should be able to use the average of the last good value and the first good value following the outage, and for outages that last 24 hours or more, use the results of at least one manual sample taken during that period.

RESPONSE

Section 115.725(d)(4) requires that a sample be taken daily during monitoring downtime of the on-line analyzer. This will allow more accurate information than using past sampling data. Therefore, the commission has not made the suggested change.

MCC commented that manual sampling should not be required for shorter outages, and that the length of the outage should be long enough to arrange for the necessary personnel to be scheduled.

RESPONSE

Ten hours is sufficient time to allow for scheduling the necessary personnel to collect samples. If an owner or operator is uncertain whether a particular outage of an analyzer will exceed the eight-hour limitation, they may elect to collect a sample within the eight hours after analyzer failure. If the eight-hour limitation is not exceeded then the sample would not need to be analyzed; however, if the analyzer failure does last longer than eight consecutive hours, then the requirement to start collecting samples within ten hours has already been satisfied.

ExxonMobil, MCC, and TxOGA stated that the requirement for manual sampling in §115.725(d)(4) must allow sufficient time to arrange for the necessary personnel to be scheduled. ExxonMobil, MCC, and TxOGA provided suggested changes to the requirements for manual sampling during analyzer outages. Dow proposed that the requirement to take a grab sample should commence within 24 hours after the initial on-line analyzer malfunction as originally described in §115.725(d)(4). Dow also suggested that a data substitution procedure should be allowed for these periods in the rule with details defined in the QAPs. TCC commented that the commission should accept the 24-hour average as acceptable data substitution for those periods of analyzer outage during times other than emission events, startup, shutdown, or maintenance. TCC also commented that the commission should retain the 24-hour provision for sample collection to ensure adequate time for sample collection in §115.725(d)(4). TCC also encouraged the commission to indicate in the response to comments that the modifications outlined in the table titled "Summary of Method 18 Modifications" are acceptable to the commission.

RESPONSE

The commission contends that ten hours is sufficient time to allow for scheduling the necessary personnel to collect samples. If an owner or operator is uncertain whether a particular outage of an analyzer will exceed the eight-hour limitation, they may elect to collect a sample within the eight hours after analyzer failure. If the eight-hour limitation is not exceeded, then the sample would not need to be analyzed; however, if the analyzer failure does last longer than eight consecutive hours, then the requirement to start collecting samples within ten hours has already been satisfied. Additionally, with regard to the referenced table of modifications to Method 18, all modifications to a test method or monitoring requirement are site specific and dependent on the specific situation. The commission cannot "approve" a modification to Method 18 via the response to comment process. If owners or operators wish to request a modification to a test method or monitoring requirement, a written request must be submitted and a site-specific approval must be given.

GHASP expressed concern regarding the commission's strategy for flare monitoring, specifically with the use of assumed flare destruction efficiencies. GHASP further asserted that under §115.725(d)(7), (e)(3), (f)(5), and (g)(2)(E) the commission may discourage research and application of monitoring technology to verify flare destruction efficiencies. Instead, GHASP suggested that companies should be required to present affirmative evidence such as remote sensing data that demonstrates the conditions under which the flares perform as designed.

RESPONSE

The use of remote sensing to determine flare destruction efficiency is not ready for commercial use, but the commission will continue to follow technological advances in this area and will reevaluate use of the assumed destruction efficiency in the future if reliable data indicate a need to do so. The commission disagrees that the use of the assumed destruction efficiency discourages research and application of monitoring technology to verify flare destruction efficiencies. While the current body of data on flare efficiency includes information showing lower flare efficiency under certain circumstances, much of the data shows efficiencies higher than 99%. Facilities with well-designed and maintained flares thus have incentive to support techniques to verify flare efficiency.

EPA expressed its concern that the projected flare destruction efficiency for ethylene and propylene for compliance with the cap was 99%. EPA noted that commission staff had provided information on the basis for the 99% destruction efficiency and stated that this documentation should be included in the SIP. EPA expressed remaining uncertainty that a 99% efficiency is justified.

RESPONSE

The use of a 99% destruction efficiency for ethylene and propylene in a flare meeting the requirements of 40 CFR §60.18 is based on a limited amount of data from EPA flare studies conducted in the early 1980's. The data shows that the combustion efficiency of a flare under these conditions, with some unexplained exceptions, is generally greater than 99%. The combustion efficiency is a measure of the complete combustion of hydrocarbons to carbon dioxide and water. The formation of carbon monoxide decreases the combustion efficiency. The hydrocarbon destruction efficiency is thus higher than the combustion efficiency. The information in EPA's *Compilation of Air Pollutant Emission Factors* (AP-42), Section 13.5, Industrial Flares, is based on the same flare study data. The emission factor for total hydrocarbons is 0.14 pound per million Btu. The compound burned was crude propylene with a heating value of less than 20,000 Btu per pound. On this basis, the calculated hydrocarbon (HC) emissions would be as follows:

(20,000 Btu/pound HC)(0.14 lb HC/1,000,000 Btu) = 0.003 pounds of HC emitted per pound burned

The corresponding efficiency would be (1 - 0.003) x 100 = 0.997 x 100 = 99.7%

Extrapolation of the flare test results to a wide variety of compounds must be done with caution, because some compounds are more easily destroyed by combustion than others. The test results in the study cited above are based on destruction of propylene; thus, the use of 99% destruction efficiency for propylene requires no extrapolation and can be justified based

on actual test data. Screening tests conducted in the early 1980's (EPA-600/2-85-106) showed destruction efficiencies greater than 99% for ethylene, comparable to the efficiency for propane and propylene. Thus, the use of 99% destruction efficiency for ethylene is supported by test data and requires no extrapolation.

The HRVOC rules require that heating value and exit velocity of flares be monitored continuously to confirm that the flares are operated in continuous compliance with the heating value and velocity specifications of 40 CFR §60.18. With these added assurances that the flares are operated properly, the assumption of 99% destruction efficiency for ethylene and propylene is supported at this time by the available data and EPA precedent.

The commission sponsored preliminary studies of a pilot test method, using a passive Fourier transform infrared spectrophotometer, for the determination of actual flare destruction efficiency. The technology is not ready for commercial use, but the commission will continue to follow technological advances in this area and will reevaluate use of the assumed destruction efficiency in the future if reliable data indicate a need to do so.

Sierra Club objected to the assumption of flare destruction efficiency of 99% for ethylene and 98% for propylene, and stated that flares often operate routinely at considerably lower destruction efficiencies.

RESPONSE

Studies showing the lower efficiency were focused on flaring at oilfield battery sites. The flares tested were simple pipe systems with no flare tips and very crude gas-liquid separation and liquid knock-out systems. Liquid carry-over to the flare was the main cause of the lower combustion efficiencies that were measured. By comparison, flares in industrial use in the HGB area have engineered flare tips that are designed to maintain flame stability. They also use efficient knock-out systems to prevent liquid carry-over to the flare.

Dow commented that they support the minimum flare destruction efficiency of 99% for ethylene and propylene in §115.725(d)(7). Dow suggests that a destruction efficiency of greater than 99% should be allowed in cases where the commission has issued an NSR permit authorizing emissions from the flare tip based on a 99.5% efficiency for the selected HRVOC. TCC supported the use of "generic" flare efficiencies for the specific HRVOCs and commented that a flare efficiency greater than the proposed 98% - 99% should be allowed for specific flares if the flare has received an NSR air permit, which allows the use of the higher efficiency and added that the flare efficiency for this rule should align with the same flare efficiency used in the NSR air permit.

RESPONSE

The commission appreciates the Dow comment supporting minimum flare efficiencies. However, the commission declines to increase the flare efficiencies in the rule as suggested by Dow and TCC.

Sierra Club commented that it does not support the requirement for a minimum monitoring time for monitoring systems of 95% of the operational time for the flare because it allows up to 438 hours of non-continuously monitored operation. Sierra Club suggested that the maximum allowable time for monitor downtime should be seven days (168 hours) or 1.9% of the time. GHASP also expressed concern with the allowance for up to 5% of monitoring system downtime, considering that time required for normal calibration checks is not considered downtime. GHASP expressed concern that companies might routinely operate their monitoring system close to the 5% downtime allowance to minimize emission reporting. GHASP urged the commission to consider a lower limit (such as 2%) or to require companies to maintain documentation of an actual malfunction for each downtime incident and to demonstrate that the repair was completed expeditiously.

RESPONSE

The commission does not consider a minimum monitor uptime requirement of 98% or higher as suggested by GHASP and Sierra Club to be appropriate or reasonable for the continuous monitoring systems that will be installed for compliance with this rule. The commission requires documentation of malfunction for each downtime incident and a demonstration of repair in §115.726(d)(3). No changes were made in response to these comments.

Albemarle commented that due to the limitations of monitoring technology, continuous flow monitoring systems and on-line analyzer systems as proposed in §115.725(d) will fail to provide the desired information when monitoring metal alkyl flares. Albemarle further stated that metal alkyls are extremely hazardous, pyrophoric materials. Therefore, Albemarle proposed that metal alkyl flares be defined and exempted from the continuous monitoring requirements of the rule. Albemarle suggests that requirements similar to the proposed requirements in §115.725(l) for flares specifically designed to receive and control liquid or dual phase streams may be an appropriate alternative. Finally, Albemarle commented that the recordkeeping requirements in proposed §115.726(d)(8) would be appropriate for metal alkyl flares. TCC and BP proposed a new exemption for any flare in metal alkyl service and proposed that "metal alkyl flare" means a flare that handles vent gases from metal alkyl production processes. Furthermore, TCC and BP commented that alternatives (i.e., process knowledge) to continuous monitoring and analysis should be allowed for flares in metal alkyl service.

RESPONSE

The commission agrees that the nature of metal alkyls when in significant quantities may interfere with the on-line analyzers that would be used to perform the continuous monitoring in §115.725(d)(2). The rule has been revised to include a new §115.725(j) to allow owners or operators the option of using process knowledge and engineering calculations for determining net heating value and HRVOC emissions. The commission retained the requirement to monitor flow rate according to §115.725(d)(1) because there is currently available technology that should be capable of monitoring flow in a metal alkyls flare. However, a provision has been provided in §115.725(j)(1) to allow owners or operators to submit a request for alternative parameter monitoring if the level of metal alkyls in a particular flare prevents direct monitoring of flow rate. The commission estimates that there are only five flares in the HGB area that would be considered in metal alkyls service. Therefore, while these flares may be in continuous operation, this provision for metal alkyls flares will have an insignificant impact to the attainment demonstration for the HGB ozone nonattainment area.

ExxonMobil, MCC, and TxOGA expressed a belief that in §115.725(e)(1) that calorimeters should not be mandated.

Instead, ExxonMobil, MCC, and TxOGA suggested that under §115.725(e) process knowledge should be allowed for known composition. ExxonMobil, MCC, and TxOGA expressed their belief that this would provide net heating value within 5% accuracy and provide information needed for calculation of HRVOC emissions. ExxonMobil, MCC, and TxOGA also stated that in §115.725(f)(3) that calorimeters should not be mandated. Instead, ExxonMobil, MCC, and TxOGA suggested that under §115.725(f)(6) process knowledge should be allowed for known composition.

RESPONSE

Provisions for loading flares and maintenance, shutdown, and startup flares that receive known concentrations of HRVOC has already been provided in §115.725(e)(4) and (f)(6). Other loading operations and maintenance, shutdown, and startup activities may be highly variable and process knowledge may not be sufficient to ensure the minimum net heating value requirements are met. Therefore, the commission has not made the suggested changes. However, the commission has provided a new alternative to monitoring net heating value in §115.725(m)(2) to provide greater flexibility. This provision will allow owners or operators to not monitor net heating value if they elect to add sufficient supplemental fuel to meet the minimum net heating value requirements while assuming zero net heating value contribution from the flare waste gas stream.

Enterprise suggested that the words "unloading and associated transfer" be added to §115.725(e) because the proposed language makes it appear that only marine "loading" operations are eligible for the alternate monitoring program and that unloading and associated transfer operations are not eligible. Enterprise stated that there is no sound basis for applying one program to marine loading and another to marine unloading and transfer operations.

RESPONSE

The commission's intent was to apply the program to both marine loading operations and transport vessel loading and unloading operations. Therefore, the commission amended the rule language to be consistent with the definitions of these operations in §115.10. The definitions of these operations include both loading and unloading. Equipment that is located between the marine vessel and the first storage tank or pipeline meter and that is associated with loading and unloading, such as drying, chilling, and heating, is considered part of the marine loading operation.

Enterprise suggested removing the term "HRVOC" from §115.725(e) because it appears to be redundant, and because it is unlikely that flares will ever abate "solely" HRVOCs.

RESPONSE

The commission agrees and has not included the term "HRVOC" in the adopted version of §115.725(e).

Dow, ExxonMobil, and TxOGA commented that for flares used solely for loading operations, the commission should allow, in §115.725(e)(4), the use of process knowledge to determine net heating value and HRVOC if at least 95% of the composition of the waste gas stream can be defined via process knowledge.

RESPONSE

The provision in §115.725(e)(4) is designed for flares that only receive predominantly pure HRVOC as an alternative to monitoring net heating value with an on-line calorimeter as required in §115.725(e)(1), because these flares would not be expected to have significant variation in the net heating value. The requirements of §115.725(e)(3) already allow the use of loading calculations and the composition of the material being loaded to determine HRVOC composition. The language in §115.725(e)(4) has been revised to better reflect the purpose of the provision.

Dow commented that the section for flares used solely for maintenance, startup, and shutdown activities in §115.725(f) cannot be easily applied to temporary flares in pipeline operations. Dow suggested that a new section be added to represent this type of flare activity. Dow also suggested that pipeline flares be allowed to not meet the minimum net heating value requirements for short periods of time during purging, indicating that is may not be safe or easy to supply supplemental fuel to a remote location.

RESPONSE

Sufficient flexibility has been provided in §115.725(f) or (i) to allow flares servicing pipeline operations to comply. If a facility does not believe that some portion of the approach in §115.725(f) or (i) is feasible, then it may submit a minor modification or alternative monitoring request per §115.725(m). The commission declines to make Dow's suggested change that pipeline flares be allowed to not meet the minimum net heating value requirements during purging. Pipeline flares will either be regulated under a permit or a permit by rule that have minimum net heating value requirements. An owner or operator must comply with all applicable requirements for the pipeline flares and providing such an exemption in Chapter 115, Subchapter H, Division 1, would not exempt a pipeline flare from having to meet minimum net heating value requirements specified by the applicable permit or permit by rule.

ExxonMobil, MCC, and TxOGA commented that no rationale was provided for the 14-day limit for single flares and the 28-day limit for multiple use flares within any 12-month period in §115.725(f) and (h). TCC commented that the commission should revise the 14 days to 30 days in §115.725(f) because 14 days may not provide enough time to perform required maintenance. Dow also suggested that the 14-day limit for a single flare be changed to 30 days. Dow opposed the 28-day limit for maintenance, startup, and shutdown activity flares in §115.725(f)(2), citing that large sites such as Dow Freeport with many types of plants and processes will not be able to comply with this requirement. TCC commented that the commission should consider placing a limit on only each individual flare in §115.725(f), not total flares.

RESPONSE

The rationale for the 14- and 28-day limits is to limit the use of flares that are not directly monitored. However, §115.725(f) has been revised to include unscheduled startup, shutdown, and maintenance activities into this same category of flare operation. This change is necessary because according to the emission event rules in Chapter 101, a scheduled startup, shutdown, or maintenance activity may be considered an emission event, i.e., an unscheduled startup, shutdown, or maintenance activity, if an applicable emission specification is exceeded. Therefore, additional time has been added to §115.725(f)(1) and (2) to account for the additional activities included under this provision. The site- wide time limitation in §115.725(f)(2) is necessary to prevent circumvention of the rules through the use of multiple portable flares. The requirements in §115.725(h) are designed for flares that do not normally receive HRVOC and are provided as short-term alternative if a flare normally in HRVOC service needs to be taken out-of-service for maintenance on the flare.

The commission intends for such periods of non-monitored flaring activity to be limited and has not provided additional time in §115.725(h).

ExxonMobil, MCC, TxOGA, and TCC commented the limitations should be based on hours instead of days in order to avoid using up a day with a short period of use because many flares are used on an intermittent basis. EMPCo suggested that limits for flares used for limited service, temporary service, and only for scheduled maintenance, startup, or shutdown activities be set in hours rather than days. Specifically, EMPCo suggested that temporary use of these flares be set at 336 hours for any single flare and 672 hours for all flares at a site in any 12-month period. EMPCo further commented that this suggested change would not increase potential emissions, would be more consistent with respect to the way these flares are used, and would avoid using a day's allowance for a short period of use during one day.

RESPONSE

The commission agrees with the commenters regarding specification of the limit in hours rather than days, and has revised the rule to specify that the maximum time limits for flares in temporary HRVOC service or for maintenance, startup, or shutdown activities are in hours.

TCC commented that the commission should clarify the term "operated" as used in §115.725(f), so that it means only those times when the flare is actually receiving emissions.

RESPONSE

A flare is considered operational if the valves leading to the flare are open, thus having the potential of allowing emissions to the flare.

Dow and TCC commented that any flare that receives 95% of a known constituent should not be arbitrarily limited to 98% of an individual HRVOC, as specified in §115.725(f)(6).

RESPONSE

The provision in §115.725(f)(6) is designed for flares that only receive predominantly pure HRVOCs as an alternative to monitoring net heating value with an on-line calorimeter as required in §115.725(f)(3), because these flares would not be expected to have significant variation in the net heating value. The requirements of §115.725(f)(5) already allow the use of process knowledge to determine HRVOC composition. The language in §115.725(f)(6) has been revised to better reflect the purpose of the provision. The commission agrees that the owner or operator of a flare that receives greater than 95% of an individual HRVOC should be allowed to use process knowledge to determine net heating value and emissions of HRVOC. The change does not significantly affect the accuracy of the estimated net heating value.

EPA suggested that the use of process knowledge instead of actual monitoring for emergency flares as provided for in §115.725(g) be limited to 14 days during any 12- month period. EPA commented that if an emergency flare is used more than 14 days during any 12-month period the source would be in violation and a monitoring system would have to be established.

RESPONSE

The rules limit the use of emergency flares by definition. The definition of an emergency flare has been revised to be a flare that only receives emissions during an upset event. It would be impractical and potentially unsafe to limit the use of a true emergency flare. Therefore, the commission has not placed a time limit on the use of emergency flares.

ExxonMobil, MCC, and TxOGA generally support the special provisions for emergency flares. However, ExxonMobil, MCC, and TxOGA commented that the calculation for actual exit velocity for each activity should be clarified to require calculation only when the flare flow is above the baseline established in §115.725(g)(2)(b)(ii).

RESPONSE

The suggested change is unnecessary, because §115.725(g)(2) specifies that process knowledge and engineering calculations may be used to determine compliance with the requirements of §115.722(a) - (d) during an upset event. The only time that calculation of actual exit velocity is necessary for an emergency flare is during such an event. If the baseline flow has been properly established, the only time the flow rate will exceed the baseline is during those events.

TCC and Dow commented that the requirements of §115.725(g)(2)(C) should be replaced with a description of the engineering calculations, manufacturer's information, or actual testing that the owner or operator will use to calculate the HRVOC emissions, flare tip exit velocity and net heating value during an emissions event.

RESPONSE

The majority of the suggested information is already required under §115.725(g)(2)(C), except for any actual testing data that may have been performed under §115.725(g)(2)(B), as noted by the commenter. The rule has been revised to correct this oversight.

Sierra Club expressed support for including emission events in the required monitoring under §115.725(a)(4) and §115.725(g)(2)(E) to provide more accurate estimates of emissions.

RESPONSE

The commission appreciates the comment.

GHASP asserted that flares often operate routinely at considerably lower control efficiencies, and cited a study that concluded that flare combustion efficiencies may be approximately 70% or lower. GHASP also asserted that the commission had documented major incidents with apparent flare destruction efficiency failures in the Houston region.

RESPONSE

The study cited by GHASP was focused on flaring at oil field battery sites. The flares tested were simple pipe systems with no flare tips and very crude gas-liquid separation and liquid knock-out systems. Liquid carry-over to the flare was the main cause of the lower combustion efficiencies that were measured. By comparison, flares in industrial use in the HGB area have engineered flare tips that are designed to maintain flame stability. They also use efficient knock-out systems to prevent liquid carry-over to the flare. The incident of flare destruction efficiency failure cited by GHASP involved a smoking flare, which does not meet the requirements of 40 CFR §60.18 and so would not be assumed to have a destruction efficiency of 99%.

LBC requested that a type of operation known as "blowdown" be addressed in §115.725(h) of the Subchapter H proposed regulations. LBC commented that "blowdown" is not scheduled maintenance or shutdown, as defined in §115.10, nor is it a continuous chemical manufacturing process or batch process. The commenter expressed a belief that the operation should be applicable under §115.725(h)(1) - (3) and that simple engineering process knowledge calculations could be used to account for flared emissions.

RESPONSE

The commission contends that the described operation would already qualify for the provisions in §115.725(h) if the operation is indeed not a scheduled maintenance, shutdown, or startup activity as defined in §101.1. Therefore, a change to the rule proposal is not necessary.

ExxonMobil, MCC, and TxOGA recommended changes to the flow monitoring option in §115.725(h)(3)(C) to allow the maximum one-hour average flow rate data, excluding data from scheduled startups, shutdowns, maintenance, or emissions events from the previous 30 operational days to comply with §115.722(a) - (d). ExxonMobil, MCC, and TxOGA also suggested that if the continuous composition monitoring option of §115.725(h)(4)(B) is used, the maximum one-hour average total HRVOC amount and the minimum one-hour average net heating value data from the previous 30 operational days (excluding data from scheduled startups, shutdowns, maintenance, or emissions events) should be used to comply with §115.722(a) - (d). The commenters further stated that the use of single peak values should not be required.

RESPONSE

The commission agrees with the commenters that single peak values should not be used for data substitution and revised the rules as suggested, because compliance is demonstrated on a block hour basis.

TCC commented that the commission has not defined the term "minor" in §115.725(m), formerly §115.725(j), and that requests for modifications will be unduly restricted based on use of the term.

RESPONSE

The term "minor" modification is consistent with provisions in other commission rules and EPA regulations regarding modifications to test methods and monitoring requirements. Therefore, the commission declines to make the suggested change.

Sierra Club commented that local air pollution agencies with jurisdiction, and not just the executive director, should have the right to request information about flares, flow rates, exit velocities, net heating values, and HRVOC under §115.725(n), formerly §115.725(k). Sierra Club also stated that the information should be sent within seven days instead of 30 days because the information should already be calculated and available.

RESPONSE

The local air pollution programs with jurisdiction are not currently contracted or delegated the authority to review and grant approval for monitoring methods. Therefore, the commission has not made the suggested change. With regard to Sierra Club's suggestion to change the requirement to specify that the information must be submitted within seven days of request, the 30 days specified in the rule is an adequate time to supply the specified information and there is no significant benefit to providing the information within seven days instead of 30.

ExxonMobil, MCC, and TxOGA requested that a new subsection be written to allow special case flares to meet more than one of the special conditions in §115.725(e) - (i). The commenters suggested that they should be able to use a combination of the most restrictive options of the multiple cases for which the flare would qualify. Dow expressed a belief that new rule language is necessary for a common flare approach, which may be used as an alternative to the individual type flare approaches in §115.725(f) and (g). Dow suggested combining the concepts of emergency flares and flares that receive emissions from maintenance, startup, and shutdown activities into this approach.

RESPONSE

The commission agrees with the commenters that additional flexibility is needed for some flares that serve as multi-purpose flares and revised the rule to include new §115.725(k) and §115.726(d)(10) to provide this option.

Environmental Defense suggested that the commission require video monitoring of flare stacks to help identify occasions when actual emissions exceed calculated emissions due to lower than ideal flare destruction efficiencies.

RESPONSE

There is currently no available monitoring technology or camera that would allow long-term continuous direct monitoring of emissions from flares by any practical means. The current camera technologies do not quantify or speciate emissions. While the commission is studying technologies for directly measuring actual emissions from or the destruction/combustion efficiencies of flares, the development and application of these technologies toward this purpose is still preliminary.

Environmental Defense and GHASP commented that the commission should propose for comment the use of monitoring systems or technology to measure integrated emission profiles (as opposed to process specific), suggesting that Texas Environmental Research Consortium's project H-13 might identify options that are commercially available or in development that might be used for this monitoring.

RESPONSE

There are monitoring systems being researched that might be used for such integrated emission measurements; however, these systems are either new technology or are new unproven applications of existing technology. The commission considers it premature to put any of these monitoring approaches into rule.

Section 115.726 issues

TCC commented that the date in §115.726(a)(1)(A) should be extended due to new regulatory requirements and at a minimum, the commission should agree to reduce the 180 days to respond to a QAP/or submittal to QAP deficiencies. TCC also expressed concern that approval of the QAP will be delayed if the commission's reply to response to deficiency is delayed an additional 180 days and that the commission should respond to notice of deficiency responses within 45 days of receipt. TCC expressed concern that approval of the QAP will be delayed if the commission's reply to response to deficiency is delayed an additional 180 days and that the commission should respond to notice of deficiency responses within 45 days of receipt. TCC proposed that the rule clarify that the monitoring equipment must

be installed within 60 days after approval of the QAP. TCC commented that the commission should clarify the amount of time the agency needs to reply to an operator's response to a notice of deficiency. ExxonMobil, MCC, and TxOGA commented that they want the requirements in §115.726(a)(1) and (2) for the submission of QAPs and test plans to be moved from April 30, 2005, to September 30, 2005. The commenters cited recent rule modifications as the reason that this date should be moved. The commenters also stated that the time required to review and approve plans should be reduced. SUNOCO commented that the commission will be receiving numerous QAPs required under §115.726(a) to be submitted for review and approval, and that the commission may not be able to address all of the plans. SUNOCO suggested that, rather than requiring prior review and approval of all QAPs, the commission adopt the same approach for the QAPs required under §115.726(a) as is provided for monitoring plans required under §115.725(a)(4), which specifies that the plans must be submitted within 30 days upon request by the executive director. ATOFINA-Petrochemicals and Basell suggested that instead of having to submit the QAP to the executive director in accordance with §115.726(a)(1)(C), QAPs should be made available within 30 days upon request of the executive director. ATOFINA-Petrochemicals and Basell stated that this method would reduce strain on an already busy commission staff and is similar to other written technical data required in the proposed rules.

RESPONSE

The commission agrees with the changes suggested by ATOFINA- Petrochemicals, Basell, and SUNOCO and revised the rule regarding the submission and approval of QAPs and test plans. The revised rule requires written QAPs and test plans to be developed, implemented, and followed; however, QAPs are only required to be submitted upon request by the executive director. Test plans are required to be submitted to the Houston regional office with the test notification required under §115.726(a)(2) to provide the regional office the opportunity to request a pretest meeting and observe the testing, but do not require specific approval. However, any modifications or alternatives to the monitoring requirements or methods specified in the rule must still be approved by the executive director. Any such requests must be specifically approved in written response from the commission, and default approval of requests will not occur. Owners or operators of affected facilities shall comply with all requirements of the rules until any such site-specific request has been approved. This approach to reviewing and responding to modifications and alternative requests is consistent with the other commission procedures to address such requests regarding other state rule and permit monitoring requirements. This revision to the rule requirements also addresses the TCC comments regarding the dates for submitting QAPs and test plans, responding to a notice of deficiency, and the commission's response time.

GHASP expressed concern that the commission will fail to adequately review QAPs for flares and cooling towers and test plans for vent testing, and that current permitting activity will not be adequately coordinated with implementation of the new rules. Sierra Club objected to automatic approval of the test plan, as provided under §115.726(a)(2)(C), if the commission has not approved or provided a deficiency letter within 45 days. Sierra Club stated that automatic approval would exert pressure on the commission to approve test plans that are not reviewed or are given insufficient review due to the lack of personnel or the lack of adequate training. Sierra Club suggested a longer time period of 120 days.

RESPONSE

As noted previously in this preamble, the commission revised the rule regarding the submission and approval of QAPs. The revised rule requires written QAPs to be developed, implemented, and followed, but the QAPs only required to be submitted upon request by the executive director. Any modifications or alternatives to the monitoring requirements or methods specified in the rule must still be approved by the executive director. Any such requests must be specifically approved in written response from the commission, and default approval will not occur. Owners or operators of affected facilities must comply with all requirements of the rules until any such site-specific request has been approved. This approach will allow the commission to focus staff resources on the critical aspects of the monitoring and testing, i.e., modifications or alternatives to the monitoring and testing requirements, and is consistent with the other commission procedures to address such requests regarding other commission rule and permit monitoring requirements. With regard to the GHASP comment on the coordination of the implementation of the new rules and current permitting activity, Chapter 115 is an applicable requirement under Chapter 122. Therefore, owners or operators subject to the federal operating permit program must revise their Title V operating permits to include the revised Chapter 115 requirements for each unit subject to the requirements of Chapter 115, Subchapter H.

Dow expressed a belief that the requirement in §115.726(a)(2)(B) to submit a test plan 60 days prior to making the change is impractical in certain situations because of the small process changes that may occur from time to time that cause new sources of HRVOC to be created. Dow suggested that the requirement be changed to only require test plan submittal prior to being placed in HRVOC service.

RESPONSE

The commission revised the rule regarding the submission and approval of test plans. The revised rule requires written test plans to be developed, implemented, and followed. However, the revised rule only requires the test plans to be submitted to the Houston regional office with the test notification required under §115.726(a)(2) at least 45 days prior to testing to provide the regional office the opportunity to request a pretest meeting and observe the testing. Specific approval of the test plans is not required. As noted previously in this preamble, any modifications or alternatives to the monitoring requirements or methods specified in the rule must still be approved by the executive director.

ExxonMobil, MCC, and TxOGA opposed the use of the term "all" in §115.726(a) - (d) and (h) to describe process information and suggested revising the rule to specify that only records of related process information are necessary.

RESPONSE

The commission does not consider the suggested change necessary. The recordkeeping requirements in §115.726 for process knowledge already specify process knowledge used for a specific determination or to satisfy a requirement of the rule.

ExxonMobil, MCC, TCC, and TxOGA expressed a belief that the expectation that hourly emissions would be available on a near

real-time basis is impossible. ExxonMobil, MCC, TCC, and TxOGA commented that they would like the requirements regarding maintenance of records of monitoring and emissions to more clearly specify the expectation of timeliness of the emissions calculations completion.

RESPONSE

The commission's intent is that emissions be recorded hourly. While it is not necessary to record the hourly emissions in the same hour that they were collected, the record must be made before the end of the following hour.

Dow suggested changes to §115.726(b)(2) and (c)(2) to clarify that hourly parameter monitoring records should be complete if 95% of the data is complete over the period versus the period in which compliance is being assessed.

RESPONSE

The commission agrees that a minimum data availability requirement for the parameter monitoring should be specified in the rule; however, the section in which to specify this requirement is the applicable parameter monitoring section. The commission changed §115.725 accordingly.

Dow suggested that the commission make slight revisions to the recordkeeping requirements in §115.726(c)(1) for PRV discharges. Specifically, Dow suggested that the requirement to keep a record of the volumetric flow be deleted and that the requirement to keep a record of the total HRVOC emission rate on a pounds per hour basis is sufficient.

RESPONSE

While process knowledge is allowed for determining HRVOC emissions in accordance with §115.725(c)(2), the owner or operator is required to use the flow rate determined according to §115.725(c)(1) when calculating the emissions. The intent of the PRV monitoring requirements is to allow owners or operators to use process knowledge for the purposes of estimating the HRVOC constituents in the gas stream exiting the PRV, but the volumetric flow rate must be either monitored directly or indirectly through parameter monitoring. Records of the volumetric flow rate are required to demonstrate compliance with all requirements applicable to PRVs; therefore, the commission has not made the suggested change.

ExxonMobil, MCC, and TxOGA expressed a belief that the requirements in §115.726(d)(3) to maintain all records related to corrective actions during monitor downtimes to be unnecessary. The commenters stated that this regulatory compliance issue should not be mandated in the this rule. ExxonMobil, MCC, and TxOGA commented that the requirement to maintain a high on-stream performance is sufficient to assure monitoring reliability. Moreover, ExxonMobil, MCC, and TxOGA expressed a belief that records and information related to corrective actions and delays in corrective actions should only be used voluntarily by a site as a consideration in enforcement actions related to failure to maintain the 95% on-stream performance.

RESPONSE

The commission disagrees with the commenters that records of corrective actions during monitor downtimes are unnecessary. Maintaining such records are necessary for field investigators to verify that on-line monitors are meeting the minimum 95% data availability specified in the rule and that owners or operators are making good faith efforts to properly maintain and operate monitors. Therefore, no changes to the rule have been made as a result of this comment.

TCC commented that because owners and operators are obliged to comply with an annual cap, documentation of corrective actions as required in §115.726(d)(3) is an additional, unnecessary burden.

RESPONSE

The recordkeeping of corrective actions required in §115.726(d)(3) is for corrective actions made to the continuous monitoring systems during monitor downtime, not the corrective actions an owner or operator may take to assure compliance with an annual cap. As previously noted, maintaining such records are necessary for field investigators to verify that on-line monitors are meeting the minimum 95% data availability specified in the rule and that owners or operators are making good faith efforts to properly maintain and operate monitors. Therefore, no changes to the rule have been made as a result of this comment.

BP and TCC stated that the commission should clarify that companies may test a representative group of process heaters (5% or 10%) or may use a hand-held flame- ionizing detection device in order to meet the recordkeeping provisions of existing §115.726(d)(3) and to document the contribution of process heaters towards the overall requirement that the sum of all vent gas streams claimed under the exemption must be less than 5% of the HRVOC cap. BP stated that historical stack test data indicates that total VOC emissions are much lower than AP-42 factors suggest, even with fuel HRVOC compositions above 5%. BP requested that the commission comment on the need to test each and every heater firing fuel greater than 5% HRVOCs to document compliance with the exemption.

RESPONSE

Preliminary testing or prior test data are examples of methods that could be used to determine if vent gas streams might meet the exemptions provided. The rule provides flexibility as to the methods that owners or operators may use to demonstrate vent gas streams meet this exemption and it is the requirement of the owner or operator to determine the records that are needed to show compliance with the exemption.

Sierra Club commented that §115.726(a)(1)(B) should require submittal of a QAP 60 days prior to use of the HRVOC process so that the commission would have the opportunity to review the QAP before use of the process begins. Sierra Club also objected to automatic approval of the QAP, as provided under §115.726(a)(1)(C) and §115.766(i)(3), if the commission has not approved or provided a deficiency letter within 180 days. Sierra stated that automatic approval would exert on the commission to approve QAPs that are not reviewed or given insufficient review due to the lack of personnel or the lack of adequate training. Sierra Club suggested a longer time period of 270 days.

RESPONSE

The commission revised the rule regarding the submission and approval of QAPs. The revised rule requires written QAPs to be developed, implemented, and followed, but the QAPs are only required to be submitted upon request by the executive director. Any modifications or alternatives to the monitoring requirements or methods specified in the rule must still be approved by the executive director. Any such requests must be specifically approved in written response from the commission, and default

approval will not occur. Owners or operators of affected facilities must comply with all requirements of the rules until any such site-specific request has been approved. This approach will allow the commission to adequately review and respond to modifications and alternative requests. This is more consistent with the other commission procedures to address such requests regarding other commission rule and permit monitoring requirements.

Sierra Club requested that the "root cause" of the continuous monitoring system's downtime be required under §115.726(d)(3) and §115.766(a)(6).

RESPONSE

Section 115.726(d)(3) and §115.766(a)(6) currently require that companies must maintain records that detail all corrective actions to the continuous emissions monitoring systems during any monitor downtimes and any delay in corrective action by documenting the dates, reasons, and durations of such occurrences. The commission considers maintaining records of the reasons for any monitor downtime to be sufficient to provide documentation for the cause of the monitor downtime, and has not made the suggested change.

Dow suggested that in §115.726(d)(5)(A) the recordkeeping requirements be amended to add the term, "nominal" to describe the size of the vessel being loaded. Dow commented that although the size of the loading vessel may appear to be straightforward, in some cases it may be difficult to obtain the exact size of the vessel because it is not usually owned or operated by the company that is loading the vessel.

RESPONSE

It was not the commission's intent to require the exact size of the vessel in §115.726(d)(5)(A). The nominal size of the vessel is sufficient for the necessary calculations, and the rule has been revised as suggested.

ExxonMobil, MCC, and TxOGA stated that the recordkeeping specification for special case loading flares in §115.726(d)(5) should be specific to the information necessary to calculate the loading emissions.

RESPONSE

All the information specified in §115.726(d)(5) is necessary for the calculation of HRVOC emissions. No change has been made in response to this comment.

Dow suggested that the requirement in §115.726(d)(5)(C) be amended such that the owner and operator would have to keep a record of any compound(s) present at a concentration of 1% by weight or higher in the vessel in order to avoid burdensome recordkeeping for compounds present in very low or trace levels.

RESPONSE

The commission agrees with the commenter and revised §115.726(d)(5)(C), because keeping records of trace level compounds would be burdensome and would provide little benefit for the purposes of the rules.

Dow suggested changes to §115.726(d)(7)(B) to clarify that the volumetric flow should be recorded over the course of an individual event or even once for every 15-minute block period of time or for longer events.

RESPONSE

The commission agrees with the commenter that the rule should be clarified and revised §115.726(d)(6)(B), (7)(B), and (8)(B) to indicate that the volumetric flow rate should be recorded in 15-minute block periods of time, or portion thereof for periods of operation shorter than 15 minutes.

TCC commented that there is no need to provide notice 15 days in advance as specified in §115.726(f) and that notification prior to the compliance date should be sufficient.

RESPONSE

The commission agrees with the comment and changed the requirement in §115.726(f) to specify that notification must be submitted prior to the compliance date.

Allied stated that municipal solid waste landfill HRVOC emissions are either rare or *de minimis* and that EPA recognizes this fact because the HRVOCs listed in Chapter 115 are not included in the AP-42 profile of municipal solid waste landfill gas constituents. Allied recommended that the commission revise §115.726(e)(3) to specify and appropriately minimize what is required in order for municipal solid waste landfills with vent gas streams or flares to handle municipal solid waste landfill gas to demonstrate continuous compliance with the §115.727 exemption criteria. Allied suggested that documentation of compliance with the exemption should be in the form of a written analysis demonstrating compliance based on process knowledge and engineering judgement, and that site-specific HRVOC sampling should be conducted and documented every five years.

RESPONSE

The adopted rules contain exemptions that establish *de minimis* levels for the HRVOC rules. Specifically, vent gas streams that are not routed to a flare that has the potential to emit less than 100 ppmv HRVOC at all times or has a maximum potential flow rate less than 100 standard cubic feet per hour are exempt from the division, except for recordkeeping. Flares that at no time receive a total gas stream with greater than 100 ppmv HRVOC are exempt from the division with the exception of recordkeeping. It is the requirement of the owner or operator to determine the records that are needed to show compliance with the exemption. Therefore, the commission has not made the suggested change.

TCC and Dow commented that daily records should not be specified for a calendar year compliance requirement in §115.726(g) and §115.766(g).

RESPONSE

The requirement to maintain daily records for demonstrating compliance with the annual cap is necessary to allow field investigators to ascertain the compliance status of a facility during a site inspection, which may occur at any time during the calendar year. The enforcement of the rules would be eroded if facilities were only required to calculate their annual emissions relative to the long-term cap at the end of the compliance period. Therefore, the commission declines to make the suggested change.

Sierra Club questioned whether the cooling tower requirement in §115.726(g)(1) should be placed in Subchapter H, which deals with cooling tower heat exchange systems.

RESPONSE

The rules cross-reference cooling towers, vents, flares, and PRV requirements to ensure proper accounting of all HRVOC emissions that contribute to the cap.

TCC commented that use of the term "hourly" in §115.726(h) is overly prescriptive.

RESPONSE

The commission disagrees with the comment. The short-term limit in §115.722(c) is based on a one-hour time period, therefore, the records showing compliance with this limit must be based on the same time period. Therefore, the commission has not made the suggested change.

ExxonMobil, MCC, and TxOGA commented that the requirement in §115.726(i) to maintain records on site is not always practical.

RESPONSE

The requirement to maintain records on site is necessary to ensure that field investigators performing a site inspection have adequate access to records necessary to complete the inspection. Also, the commission disagrees that maintaining records on site is not practical. Electronic records can be used to minimize storage space for recordkeeping purposes, because the commission has not specified the media that with which the records must be maintained. No change to the rule was made in response to this comment.

Environmental Defense commented that the commission should require corrective action plans triggered by a violation of the HRVOC cap to include engineering solutions such as flare gas recovery, upstream process analysis, and installation of backup equipment and power supplies in addition to environmental management solutions.

RESPONSE

The commission currently requires corrective action plans for emissions events that are determined to be excessive according to the provisions in Chapter 101, Subchapter F. The necessity, availability, and feasibility of engineering solutions will be dependent on the specific situation and site-specific conditions and it would be inappropriate to mandate engineering solutions for all cases. Additionally, the concept of additional corrective action requirements was not included in the published proposal and is beyond the scope of this rulemaking. Therefore, no change has been made to the rule.

Section 115.727 issues

EPA supported the deletion of the exemption for startup, shutdown, and emissions events from §115.727.

RESPONSE

The commission appreciates the comment.

TCC commented that the commission should change the reference from "any account" to a "process unit" for flares and stated that the exemption in §115.727(a), as written, is of very limited use.

RESPONSE

The commission revised §115.727(a) to specify "any site" rather than "any account" to be consistent with the terminology in §115.722. However, the commission intends for the exemption to be on a site-wide basis because the exemption applies to control requirements in §115.722(a) - (c) that are on a site-wide basis.

Allied stated that §115.727(a) should be revised to correctly reflect that the new site-wide cap and control requirements to which the §115.727(a) exemption applies are in §115.722(a) - (c).

RESPONSE

The commission agrees with the commenter and revised the rule language.

BP expressed a belief that process heaters with bridgewall temperatures above approximately 1,150 degrees Fahrenheit and excess oxygen levels above 3% adequately combust hydrocarbons to levels below 100 ppm, including HRVOCs in the fuel, and therefore, meet the exemption in §115.727(e)(2). BP stated that it conducted a test of several heaters with a range of fuel gas compositions and bridgewall operating temperatures typical for refinery heaters. The testing included HRVOC content in the fuel gas in excess of 20% and resulted in stack HRVOC concentrations well below 0.5 ppm, with most tests showing less than 0.1 ppm. ExxonMobil, MCC, and TxOGA stated that the exemption in §115.727(c)(3)(A) for combustion sources that have less than 5% by weight HRVOC in the fuel gas is overly restrictive. ExxonMobil, MCC, and TxOGA commented that these combustion sources have very high levels of combustion efficiency and HRVOC destruction.

RESPONSE

The adopted rules contain exemptions that establish *de minimis* levels for the HRVOC rules. Specifically, vent gas streams that are not routed to a flare that has the potential to emit less than 100 ppmv HRVOC at all times or has a maximum potential flow rate less than 100 cubic feet per hour are exempt from the division, except for recordkeeping, provided the sum total of the HRVOC emissions from all vent gas streams claimed under this exemption do not exceed the *de minimis* levels. The combination of the vent gas stream exemptions in §115.727(c)(2) with the exemption in §115.727(c)(3)(A) is not overly restrictive and provides sufficient flexibility for owners or operators to exempt sources that are truly insignificant in relation to the site-wide caps. Tests conducted on a few refinery heaters is not sufficient to warrant a blanket exemption for process heaters based on operating conditions or raising the exemption level specified in §115.727(c)(3)(A). Furthermore, the recordkeeping requirements of §115.726(e)(3) are flexible and it is the requirement of the owner or operator to determine the records that are needed to show compliance with the exemption. Therefore, the commission has not made the suggested change.

Allied, Dow, ExxonMobil, MCC, and TCC stated that the proposed change to §115.727(b)(2) that revised the reference to a monitoring and testing requirements provision from §115.726(d) and (e) to §115.725(d) is incorrect, because §115.726(d) is a recordkeeping and recording requirements provision, not a monitoring and testing requirements provision. ExxonMobil, MCC, and TxOGA also commented that the reference to continuous monitoring requirements in §115.727(b) should read §115.725(d). In addition, ExxonMobil, MCC, and TxOGA expressed a belief that the exemption in §115.727(b) from continuous monitoring for flares that at all times receive less than 5% HRVOC should apply to all flares, not just flares subject to §115.725(d).

RESPONSE

The commission agrees with the commenters and has corrected §115.727(b)(2) to reference the appropriate monitoring and testing requirements section. The commission also agrees with the commenter that the exemption should apply to all flares and has made the suggested change.

ExxonMobil, MCC, and TxOGA expressed concern that the use of exemptions in §115.727(c)(2) for vent gas streams with the potential to emit HRVOCs not routed to a flare, but that have

HRVOC concentrations less than 100 ppmv at all times or maximum potential flow rates of less than 100 dry standard cubic feet per hour, is limited to a site total (in pounds per hour) of 5% of the HRVOC cap. Because the HRVOC site cap is no longer on a pounds per hour rate, the limitation is invalid unless it applies to the short-term cap of 1,200 pounds per hour. ExxonMobil, MCC, and TxOGA suggested revising the exemption to be 5.0 pounds per hour and ten tons per year or 5% of the annual HRVOC site cap, whichever is greater.

RESPONSE

The commission agrees that the exemption level should be on the same basis as the annual cap and revised the rules. Additionally, adopted §115.727(c)(2) is revised to specify that the maximum potential HRVOC emissions from all vent gas streams claimed under the exemption must be less than 0.5 tons per year. The commission contends that the *de minimis* levels for the exemption suggested by the commenters of 5.0 pounds per hour and ten tons year are excessive and would allow a significant percentage of emissions to be exempted from some sources with small caps.

TCC and Dow commented on §115.727(c)(2) that because the HRVOC caps are being removed from the cap for replacement with a production-based cap and trade system, the owner/operator has no way to accurately determine what constitutes 5% of the HRVOC cap prior to the test plan submittal date of April 30, 2005. TCC suggested that the owner/operator be allowed to use process knowledge and engineering calculations to determine the hourly and annual HRVOC emission rates for all sources meeting this criteria because these types of sources typically have very low HRVOC emissions. Celanese stated that the commission should define the vent concentrations and flows that are exempt from the HRVOC vent rule. One of the current HRVOC vent exemptions is based on concentration (current rule) or flow (proposed rule), with the maximum exemption of 5% of the site-wide annual cap. The site-wide annual caps will not be set until almost a year after the QAP and test plans have been submitted and after the required testing has been completed; therefore, certain vents may prove to be exempt after testing and parameter monitoring development. Celanese suggested that at a minimum, streams with less than 100 ppmv of HRVOC or flows less than 100 standard cubic feet per hour should be exempted from the testing and monitoring requirements, and the use of engineering calculations should be allowed for those streams. Celanese suggested that as an alternative the maximum amount to be exempted for a site could be based on the proposed hourly cap.

RESPONSE

The commission revised §115.727(c)(2) to specify a *de minimis* of 0.5 tons per year. The revision deletes the language that specified a *de minimis* of 5% of the annual cap. Additionally, the requirements for the test plans have been revised and the requirement to submit test plans by April 30, 2005, has been removed. The test plans are only required to be submitted with the test notification at least 45 days prior to testing. Test plans are not specifically required to be approved; only modifications or alternatives to test methods or monitoring would specifically require approval. Furthermore, the rule provides flexibility regarding the methods that owners or operators may use to demonstrate that vent gas streams meet this exemption. In addition, the owner or operator is required to determine the records that are needed to show compliance with the exemption. Preliminary testing or prior test data are examples of methods that could be used to determine if vent gas streams might meet this exemption.

Allied stated that §115.727(d) incorrectly refers to a nonexistent §115.726(c)(3)(B) and that the intended citation should be §115.726(e)(3)(B).

RESPONSE

The commission agrees with the commenter and has corrected the reference in §115.727(d).

Section 115.729 issues

TCC commented that §115.729(1) and (1)(A) should be combined for clarity.

RESPONSE

The commission agrees with the comment and has revised the rule accordingly.

SUNOCO commented that the commission should revise §115.729(1)(A), which requires owners or operators of vent gas streams and PRVs that become subject to the testing and monitoring requirements of §115.725 after December 31, 2005, to complete testing and monitoring as soon as practicable, but no later than 60 days after being brought into HRVOC service. SUNOCO suggested using language similar to 40 CFR §60.8(a), that would require testing and monitoring to be completed "within 60 days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after being brought into HRVOC service." ATOFINA-Petrochemicals and Basell also recommended that the compliance schedule in §115.729(1)(A) be revised to be consistent with 40 CFR §60.8(a). ATOFINA-Petrochemicals and Basell stated that this change will provide consistency with NSPS testing and monitoring requirements and will also allow facilities to avoid testing of a source before it has reached its maximum production rate, resulting in more representative test results.

RESPONSE

While the suggested time frame would be consistent with EPA regulations in 40 CFR §60.8(a), it is not consistent with other commission rules for attainment demonstrations, such as 30 TAC Chapter 117. For example, Chapter 117 specifies 60 days after startup following installation of emissions controls. Additionally, the time to begin testing and monitoring must be minimized for sources that become subject to the rules after the compliance date, but the site in which the source is located is already subject to the site-wide caps in §115.722. Therefore, the commission has not made the suggested change. In response to other comments, however, the commission revised §115.729 such that paragraph (1)(A) is not subsection (a)(1).

ExxonMobil and TxOGA commented that they want all compliance dates extended again. They want the cap compliance date to be extended to April 1, 2007, to submit test plans and QAPs by September 30, 2005, to have approved test plans and QAPs by March 31, 2006, and they want to implement testing and monitoring by December 31, 2006. TCC proposed that testing of an individual vent gas stream should occur within 60 days of approval of the test plan. TCC also commented that the compliance dates associated with vent gas streams and PRVs should be extended as follows: submittal of test plan for vent gas streams to September 30, 2005; compliance testing for vent gas streams to July 6, 2006, or align with the beginning of the initial control period if that

date is revised to later than July 6, 2006; and parameter monitoring to July 6, 2006, or align with the beginning of the initial control period if that date is revised to later than July 6, 2006. TCC commented that the date in §115.726(a)(2)(A) should be revised to September 30, 2005, due to additional regulatory requirements.

Dow also commented that additional time should be provided to meet the monitoring requirements in §115.725. BCCA-AG supported the ongoing revisions to the HGB SIP and associated rules, but expressed strong concern that the combination of rule adoption delays, combined with the retention of early compliance dates for new HRVOC rules, will result in a program for which timely compliance is seriously jeopardized.

RESPONSE

With the exception of the cap compliance date, the commission previously extended all deadlines in Divisions 1 and 2 by one additional year. Because the HRVOC rules were originally adopted in December 2002, the commission contends that sufficient time has been afforded to owners and operators to prepare. Furthermore, the revision to the QAP and test plan provisions of the rules no longer constrains owners or operators to wait for approval of a QAP or test plan. The commission has not changed the compliance deadlines with regard to the testing and monitoring requirements; however, the commission agrees that additional time is needed to make the necessary emissions reductions to demonstrate compliance with the emissions specifications. All sites in Harris County must comply with HRVOC emissions cap and trade program by January 1, 2007. Harris County sites subject to the short-term limit in §115.722(c)(1) and Harris County sites subject to the annual emissions specification in §115.722(b) must continue to comply with the April 1, 2006, compliance date. However, the commission adopts §115.727(f) and §115.767(6) to specify that all sites subject to Divisions 1 and 2 that are located in the HGB ozone nonattainment area, excluding Harris County, are exempt from §115.722(b) and (c)(2) and §115.761(b) and (c)(2). The commission adopts §115.729(a)(3) and §115.769(a)(3) that specify the exemptions in §115.727(f) and §115.767(6) will no longer apply upon public notice of revocation by the commission. Upon revocation of these exemptions, sites subject to these divisions located in the HGB ozone nonattainment area, excluding Harris County, must comply with the compliance schedule or within 180 days of public notice, whichever is later.

Division 2

Section 115.760 issues

Dow suggested that the commission consider defining the terms non-HRVOC and HRVOC process units. Dow provided a proposed definition.

RESPONSE

The suggested change is not necessary because the rule provides a *de minimis* level of HRVOC in the exemptions that will determine what is considered to be a non-HRVOC process. No change has been made to the rule in response to this comment.

Dow suggested that the term "site" should not be added to §115.722(c) and that the regulated entity should be the account. Dow commented that emissions points are assigned to an account and that the site cap information will be based on emissions collected for an account. Dow commented that is it is much easier to identify and validate compliance for areas that belong to an account rather than areas that belong to a site, because accounts have usually been previously identified through permitting or the air emissions inventory. ExxonMobil and TxOGA expressed a belief that the term, "account" should be changed to "site" in §115.760(a). ExxonMobil and TxOGA cited inconsistencies in facilities having single or multiple account numbers. They further commented that because site-wide cap allocations are proposed to be based on information other than past inventories, any reference to applicability by account is unnecessary. ExxonMobil and TxOGA also suggested that applicability should be assigned to a site, defined as a facility or facilities with common ownership and under common control. MCC commented that the commission should modify the proposed vent gas and cooling tower heat elimination system rules to apply to "sites" rather than "accounts." MCC commented that this change would aid in consistency and clarity. MCC also commented that the reference to an "account" in §115.760(a) should be changed to the term "site" because there are considerable inconsistencies in facility account numbers. MCC also suggested that "site" be defined as a facility or facilities with a common owner and under common control. MCC commented that the reference to an "account" in §115.720(a) should be changed to the term "site" because there are considerable inconsistencies in facility account numbers. MCC also suggested that "site" be defined as a facility or facilities with a common owner and under common control. TCC commented that the commission should not penalize companies based on existing air accounting principles and that the terms "site" and "account," which are used interchangeably in this proposal, cause confusion and should be defined and reviewed for consistency between regulated entities. TCC suggested that the term "site" apply to those stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person and each have the same two-digit major group standard industrial classification code. TCC commented that the terms in §115.760(a) and §115.761(a) - (c) "site" and "account," which are used interchangeably in this proposal, cause confusion and should be defined and reviewed for consistency between regulated entities. TCC suggested that the term "site" apply to those stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person and each have the same two-digit major group standard industrial classification code. EPA commented that §115.722 now refers to emissions from a "site" rather than from an "account" and stated that a clear definition of site seemed necessary for implementation of the rules.

RESPONSE

The commission agrees with the commenters that the interchangeable use of the terms "site" and "account" is inconsistent. Therefore, in order to conform to the Chapter 101 HRVOC cap and trade rules, the term "account" has been replaced with the term "site" throughout this subchapter. The term "site" is defined in §122.10.

TCC expressed concern that the 1,200 pounds per hour limit in §115.760 is not technically feasible to meet during certain upset conditions associated with some hydrocarbon plants. TCC commented that the final rule needs to be adjusted so that owners and operators who use good control technology to reduce emissions associated with upsets are not penalized.

RESPONSE

The impact to the annual cap due to exceedances of the short-term 1,200 pounds per hour limit has been minimized. Any hourly exceedance above 1,200 pounds per hour will be a

violation of the short-term limit, but only 1,200 pounds per hour of the exceedance will be attributed toward the calculation of the long- term cap. The cap and trade program in Chapter 101 is based on production and should allow owners and operators of sites with various levels of control to buy and sell HRVOC allowances in the marketplace to alleviate any perceived inequity. Sites that install and operate more efficient control equipment prior to the required compliance date should benefit, because the HRVOC allocations are based on production and use rather than actual HRVOC emissions.

Kaneka commented that the definition of a "cooling tower heat exchange system" in §115.760(b) is overly broad and could result in unintended systems being included in this definition and required to comply with this rule. Kaneka commented that it has a batch reactor process that is cooled by circulating water from a cooling tower through a jacket on the outside of the reactor. Kaneka commented that while this system meets the definition of "cooling tower heat exchange system" in §115.760(b), the system is really a nontraditional heat exchanger because heat is exchanged, but not in the traditional manner (i.e., with a shell and tube heat exchanger). Kaneka further commented that the jacketed reactor is not expected to fail in a manner that would allow process material (in this case 1, 3-butadiene) to leak into a cooling water system. Kaneka commented that there are two possible ways to address this differing kind of system. First, Kaneka stated that the definition could be changed to "traditional cooling tower heat exchange system" so that an exemption could be added to §115.768 addressing non-traditional sources like jacketed reactors. The second option suggested by Kaneka is to add a second sentence that excludes jacketed reactors from the definition of "cooling tower heat exchange system."

RESPONSE

The commission maintains that non-traditional systems such as jacketed reactors should be subject to the requirements of the division. However, because these systems are considered to be less likely to leak, the rule was revised to allow cooling towers in dedicated service to jacketed reactors to be monitored according to the same requirements for cooling towers with circulation rates less than 8,000 gpm. A definition of a jacketed reactor has also been specified in adopted §115.760(b)(2).

TCC commented that the commission should consider HRVOC refrigeration machines as a separate cooling tower heat exchange system with alternate monitoring options. TCC commented that the commission should consider an alternate monitoring method for refrigeration machine systems based on inventory determined by level monitoring. Celanese and Enterprise commented that the commission should consider HRVOC refrigeration machines as a separate cooling tower heat exchange system with alternate monitoring options. Celanese and Enterprise commented that this allows units that contain both <5% HRVOC in the unit and refrigeration machines to implement alternative monitoring methods. Celanese and Enterprise recommended modifying the definition of cooling tower heat exchange system to reflect this change. Celanese and Enterprise suggested an alternate monitoring method based on inventory determined by level monitoring be used for refrigeration machine systems. Additionally, Celanese and Enterprise suggested that an alternate calculation method for maximum potential cooling water flow through the refrigeration system be allowed as an alternative to a flow meter.

RESPONSE

The commission agrees that systems containing a finite volume of HRVOC, such as the refrigeration systems described by the commenters, should be allowed an alternative to the continuous on-line monitoring requirements in §115.764(a). Therefore, the commission added alternate monitoring options for this type of system in adopted §115.764(h) and specified additional recordkeeping requirements for these types of systems in adopted §115.766(a)(7). Also, §115.760(b) has been revised to include a definition of a "finite volume system" as a system in which a fixed amount of HRVOC is contained or circulated, and changes in the amount of HRVOC in the system can only occur through transfers into the system to maintain the system level, transfers out of the system for maintenance purposes, or leakage out of the system.

Section 115.764 issues

GHASP commented that the commission should consider whether extending cooling tower requirements to units that circulate at least 3,000 gpm would provide significant additional emission control benefits. GHASP suggested that the commission could implement a lower threshold for Harris County only in §115.764. Sierra Club suggested that the requirements in §115.764(b) be expanded to include all cooling towers that circulate 3,000 gpm instead of 8,000 gpm.

RESPONSE

The commission currently requires 3,000 gpm cooling towers to conduct periodic testing under this rule and does not foresee a significant benefit to requiring continuous monitoring for a 3,000 gpm cooling tower over an 8,000 gpm cooling tower. Furthermore, if the commission were to make the suggested change, owners and operators may not have sufficient time to comply with the December 31, 2005, compliance date. Therefore, no changes were made in response to this comment.

TCC commented that the commission should agree that the grouping of butenes is acceptable for purposes of determining speciated strippable HRVOCs.

RESPONSE

The commission previously stated in the adoption of the technical corrections to Chapter 115, Subchapter H, as published in the November 7, 2003, issue of the *Texas Register* (28 TexReg 9847), that speciation of individual butenes is not necessary. However, in the interest of furthering the commission's understanding of the science of HRVOC, the commission requested that butenes are further speciated into groupings of 2-butene and 1-butene/isobutene, whenever possible. Specifically, the commission would like industry to report how much of the butenes emitted in the HGB area are cis- and trans 2-butenes.

TCC commented that the multi-point calibration in §115.764(a)(6) and (b)(6) should be consistent with §115.725(d)(2)(A)(i) to indicate that mid-level calibration check procedures in Section 10.2 of 40 CFR Part 60, Appendix B, Performance Specification 9 can be performed at least once every calendar week. This is in addition to language already proposed that allows calibration to be performed once every calendar quarter. ExxonMobil and TxOGA requested that the mid-level calibration procedure in Section 10.2 of performance Specification 9 be changed to require only once per week instead of daily.

RESPONSE

The on-line analyzers used to monitor as specified in §115.764(a)(6) and (b)(6) will be required to achieve a better sensitivity than the monitors required under §115.725(d)(2), because the expected concentrations of strippable HRVOC will be in the low ppmv range or possibly less than one ppmv. Problems that affect the performance of the analyzer may be more common when monitoring at low concentrations. The commission maintains that more frequent calibration checks are necessary for monitoring systems required in §115.764(a)(6) and (b)(6) to ensure proper performance of the analyzer and has not made the suggested change.

TCC commented that §115.764(a)(6) and (b)(6) should be made consistent with §115.764(a)(5) and (b)(5).

RESPONSE

Subsections (a)(6) and (b)(6) are alternative monitoring requirements to subsections (a)(5) and (b)(5), respectively. The commission contends that the rules are consistent, and therefore, has not made the suggested changes.

Dow and TCC suggested that the commission clarify in §115.764(a)(1) that the requirement to measure total cooling water return flow to within +/-5% accuracy would allow for unmeasured bypass flows which are occasionally diverted upstream of the continuous flow monitor (for reasons such as freeze protection bypass lines, chemical treatment lines, etc.), provided that such flows are significantly less than total return flow such that the 5% accuracy requirement on total flow is met at all times. Dow and TCC also requested that the commission clarify that recent historical volumetric flow rate data can be substituted during times of bypass if larger flows are diverted to the cooling water basin. ExxonMobil and TxOGA commented that they would like the commission to add §115.764(h) regarding flow monitoring locations and bypass lines. ExxonMobil and TxOGA suggested that flow monitoring should be allowed to be located at any point that represents the total flow of cooling water returning to the cooling tower. TCC commented that the commission should revise these rules to allow installation of continuous flow monitors at "a representative location to the cooling tower" in lieu of a requirement to install "on each inlet."

RESPONSE

The commission agrees that owners or operators should be allowed to select a flow monitoring location that represents the total flow rate to the cooling tower and revised §115.764(a)(1) and (b)(2) to allow this. The commission has not made the suggested change to allow the bypass to not be monitored, because sufficient flexibility has been provided in the rules to allow owners or operators to find a suitable monitoring location to monitor total flow.

Dow suggested that the commission revise the requirements in §115.764(a)(1) and (b)(1) to replace the word "calibration" with the word "verification." Dow stated that a true calibration would require removing the flow meter from service and comparing it against a reference meter or installing a master meter in parallel. Dow stated that verification would assure that a meter, which has already been "type certified" to be accurate within plus or minus 5% by the manufacturer in a flow lab, is in fact installed and configured correctly in the field.

RESPONSE

The term "calibration" is consistent with the terminology used for these requirements in other state rules and federal regulations; therefore, the suggested change has not been made.

Dow commented that the commission should modify §115.764(a)(2) and (6), and (b)(6) to clarify that approved modifications to Appendix P of the commission's sampling procedures manual can also be used as the sampling approach for collection of all grab samples.

RESPONSE

The suggested change is not necessary. If a requested modification to Appendix P has been approved as provided in §115.764(f), then the approval would be applicable to §115.764(a)(2) and (6) and (b)(6), unless otherwise specified in the site-specific approval. Therefore, no change has been made to the rules in response to this comment.

Dow commented that §115.764(a)(6) and (b)(6) does not specifically define when the first grab samples have to be taken in cases where the online analyzer goes down. Dow suggested that the commission clarify that the first grab sample has to be taken within 36 hours for §115.764(a)(6) and within 72 hours for §115.764(b)(6). TCC commented that the commission should clarify when monitoring begins for purposes of this rule, and suggested 72 hours after continuous monitor outage. ExxonMobil and TxOGA commented on §115.764(a)(2) and (6) and (b)(6) stating that manual sampling should not be required for shorter outages. The commenters expressed a belief that the length of outage that triggers the requirement for manual sampling should allow sufficient time to schedule appropriate personnel. ExxonMobil suggested that when handling data in analyzer outages for calibrations or any other reason for any outage less than 24 hours, the owner or operator should use the average of the last good value and the first good value following the outage. For each outage of 24 hours or greater, the owner or operator should use the results of at least one manual sample taken during that period. TCC also commented that the commission should allow operators that install both a sampling system and a monitoring system to use the sampling system in lieu of Appendix P of the commission's sampling procedures manual and that the systems should be approved in the QAP.

RESPONSE

The commission agrees that the duration of continuous monitor downtime necessary to trigger manual sampling and the data handling procedure during these events should be specified in the rule. Section 115.764(a)(1) and (6) and (b)(6) has been revised to specify that manual sampling is required when the downtime of the monitoring system is 24 hours or greater. A procedure for data handling and recordkeeping during monitor downtime periods has also been provided in §115.764(a)(6) and (b)(6). The commission also agrees that because the sampling system has been validated using EPA Method 301 in 40 CFR Part 63, Appendix A, to be equivalent to the air-stripping system in Appendix P of the commission's sampling procedures manual, then that sampling system would be acceptable for collecting samples for speciation when only the analyzer portion of the monitoring system is down. Section 115.764(a)(6) and (b)(6) has been revised to allow this option.

ExxonMobil and TxOGA requested clarification on the calculations in §115.764(a)(3) and (b)(3) to continuously operate monitoring systems at least 95% of the time. Specifically, ExxonMobil, MCC, and TxOGA asked whether the normal calibration time is subtracted from the total operating time or from the monitor outage time.

RESPONSE

Normal calibration time would be included in the total operating hours with valid quality-assured data when determining the percent measurement data availability as specified in §115.725(d)(3) and §115.764(a)(3) and (b)(3).

ExxonMobil, MCC, TCC, and TxOGA commented on §115.764(a)(5) and (b)(5), suggesting that when the cooling water strippable VOC concentration is greater than 50 ppb, then additional sampling should begin the next calendar day to allow for scheduling personnel and equipment.

RESPONSE

The commission agrees and has made the suggested change to §115.764(a)(5) and (b)(5).

TCC commented that the commission should revise §115.764(a)(5) and (b)(5) to trigger daily sampling based on concentrations of total HRVOC greater than or equal to 50 ppb.

RESPONSE

The requirements in §115.764(a)(5) and (b)(5) are based on the approach of monitoring and testing for total strippable VOC as an indicator for the presence of HRVOC, as this approach is more cost effective than requiring continuous monitoring and testing for HRVOC. The suggested change would require owners or operators to monitor and test for HRVOC specifically in order to determine if the HRVOC concentration in the water has exceeded 50 ppbw, unless all heat exchangers in an affected cooling tower heat exchanger system were in 100% HRVOC service. The commission provided the option to continuously monitor HRVOC in §115.764(a)(6) and (b)(6) in previous rulemaking. If this option is selected, the 50 ppbw action level is no longer applicable. Therefore, the commission has not made the suggested change.

ATOFINA-Petrochemicals expressed a belief that speciation of strippable VOC represents a significant and unnecessary capital expense and an ongoing maintenance expense that can be avoided if all detected VOC is reported as HRVOC, based on process knowledge. ATOFINA-Petrochemicals recommended that §115.764(a)(5) be revised to allow facilities to forego the daily sampling requirement of cooling tower inlet water if the affected facility agrees to a more conservative interpretation of sample results and reports all detected VOC as HRVOC. SUNOCO also suggested that facilities be allowed to report all total strippable VOC results as HRVOC based on process knowledge rather than perform sampling and analysis to determine speciated HRVOCs.

RESPONSE

The total strippable VOC monitoring is not intended to be used for HRVOC quantification purposes, but to serve as an indicator of strippable VOC in the cooling water at or above the action level. The approach suggested by the commenters may be acceptable for some situations, and facilities considering this suggested approach may submit a request under the provisions for modifications and alternatives in §115.764(f). This will allow site-specific technical concerns to be addressed on a case-by-case basis. Therefore, the commission has not made the suggested change.

ExxonMobil, MCC, and TxOGA commented that the option of providing direct continuous monitoring of strippable HRVOCs in §115.764(a)(6) and (b)(6) should be in place of all monitoring of strippable VOCs and periodic monitoring of total and speciated HRVOCs, except for when the online strippable HRVOC monitoring system is down.

RESPONSE

The commission does not consider the suggested change necessary. The option to perform direct continuous monitoring of strippable HRVOCs is provided in §115.764(a)(6) and (b)(6). Section 115.764(a)(6) and (b)(6) exempts owners or operators from the other monitoring or periodic testing requirements of §115.764(a)(2), (4), and (5) or (b)(2), (4), and (5), as applicable. Owners or operators electing to monitor according to §115.764(a)(6) and (b)(6) are only required to perform periodic testing during out-of-order periods of the on-line monitors. No change has been made to the rule.

Dow suggested that the commission add another option to §115.764(e) to allow the measurement of cooling water supply flow, prior to the heat exchangers.

RESPONSE

The commission agrees as long as the monitoring location is representative of the total flow. Adopted §115.764(g)(2) has been added to provide this option.

Dow commented that it would like the commission to clarify in §115.766(e)(1) that pump performance information provided by the manufacturer or pump performance information provided by a third party is sufficient documentation to use the, "pump curve run out" method for determining cooling water flow. Dow stated that in some cases, for existing pumps, only a generic pump design curve without specific test data is available to make these determinations. Dow stated in other cases, a pump curve may not be available from the original manufacturer, especially if the pump is an older pump and the manufacturer is no longer in business. Dow commented that some of the recordkeeping requirements in §115.766(e) and (f) present a significant challenge for older pump systems. Dow suggested that the rule allow the use of third-party testing and determination of pump performance data if the owner or operator cannot compile all of the required information. TCC commented that §115.766(e)(1) and (f)(2) should be deleted or that the rules should clarify that pump performance information provided by the manufacturer or other pump performance information as available is sufficient documentation to use the pump curve methods for determining cooling water flow.

RESPONSE

The commission agrees that a third-party pump performance test would be appropriate for existing pumps where no certified pump curve is available. The commission changed the rule language accordingly.

TCC commented that §115.764(e)(2) should be revised to allow the monitoring of the cooling water supply header pressure.

RESPONSE

Monitoring of each pump's discharge pressure is necessary due to possible variability in the design and size of the pumps used in cooling tower heat exchanger systems with multiple pumps in service. Monitoring the overall header pressure may not accurately reflect the flow rate from individual pumps. Therefore, the suggested change has not been made.

ExxonMobil and TxOGA commented on §115.764(e)(2) that the calculation of flow based on pump performance data and status is not affected by the number of pumps in operation.

RESPONSE

The commission disagrees with the commenter that the number of pumps in operation does not affect flow rate. No change has been made in response to this comment.

Dow suggested that the commission specify that the alternative provided in §115.764(g) to monitor only HRVOC-containing process units at a point leaving the HRVOC-containing process units in lieu of using a monitoring location at the inlet of the cooling tower, per §115.764(a)(1) and (b)(1), should also apply to systems having multiple cooling towers. Dow commented that it would like the commission to clarify either in the rule or the preamble to the rule that the phrase in §115.764(g), "at a point that represents the flow of cooling water from only the HRVOC-containing process unit and prior to mixing with cooling tower water from other units" means that these points could be on a header leaving the HRVOC-containing unit, or could be on a header downstream of individual heat exchangers.

RESPONSE

The commission adopts §115.764(g) to specify that alternative monitoring locations may be used for cooling tower heat exchanger systems in which a single cooling tower services both HRVOC and non-HRVOC process units. The amendment allows the owner or operator to monitor from locations that represent the flow and concentrations from HRVOC processes. The rule has also been revised to apply the alternative provisions in §115.764(g) to single cooling towers that service multiple heat exchange systems. The commission declines to make the suggested change regarding multiple cooling towers because the cooling tower is the emission point at which HRVOCs are released into the atmosphere. However, the commission may consider modifications to monitoring or monitoring locations under alternative procedures in §115.764(f).

ExxonMobil and TxOGA commented that they would like the commission to add §115.764(i) to allow the sample line to the stripper to be longer than the 50-foot limit in Appendix P of the commission's sampling procedures manual as long as the sample flow is sufficient to meet the delivery time concern of Appendix P. TCC commented that the commission should clarify for purposes of these rules, that the 50-foot length requirement in the Appendix P, Special Procedure for Cooling Tower Monitoring, is waived provided the two- minute transfer time is met.

RESPONSE

The suggested change is not necessary. The 50-foot limitation specified in Appendix P is only applicable during manual sampling performed according to that procedure when required by the rule. The sampling systems for the continuous monitoring systems specified in the rule should be designed to minimize the sample transfer time to two minutes or less, consistent with the rationale of the 50-foot limit in Appendix P.

Section 115.766 issues

ExxonMobil and TxOGA commented that they would prefer that the term, "hourly" not be used in §115.766(a)(3) and (4) as it may lead to the misunderstanding that records are required to be kept each hour in real time.

RESPONSE

The commission disagrees with the comment. The short-term limit in §115.766(a)(3) and (4) is based on a one-hour time period, therefore, the records showing compliance with this limit must be based on the same time period. The commission has not made the suggested change.

ExxonMobil and TxOGA expressed their belief that in §115.766(a)(4) the concentration of total strippable VOC be used in emission calculations when the analytical value is below detection limits should be no more than one-half of the detection limit. TCC commented that the commission should be consistent and use the same one-half of the detection limit as the basis for calculating emissions as in §115.766(a)(3).

RESPONSE

If an owner or operator is allowed to use one-half the detection for total strippable VOC without specifying a required minimum detection limit for the system, this would possibly allow circumvention of the 50 ppbw action level by selecting a monitor with a detection limit up to 99 ppbw. The commission had proposed to remove the requirement for the continuous strippable VOC monitor to achieve a ten ppbw detection limit to provide flexibility. However, in order to provide the option of using one-half the detection limit for total strippable VOC data, a minimum detection limit capability must be specified in the rule to ensure that the action level is enforceable. Therefore, §115.766(a)(3) has been revised as suggested, and §115.764(a)(2) has been revised to specify that the continuous strippable VOC monitoring must be capable of achieving a minimum detection limit of 25 ppbw or less. The required minimum detection limit is sufficiently below the action level to ensure enforcement of the action level and the certainty of data when an exceedance of the action level is indicated, but is still high enough to provide flexibility to owners or operators in the selection of the monitoring system.

ExxonMobil and TxOGA expressed a belief that the requirements to maintain all records related to corrective actions during monitor downtimes in §115.766(a)(6) is an unnecessary potential compliance issue and should not be mandated in this rule. ExxonMobil and TxOGA further stated that the requirement to maintain a high on-stream performance is sufficient to assure monitoring reliability. Dow suggested that the commission clarify or eliminate the weekly recordkeeping requirements in §115.766(a)(6). TCC stated that this rule should be deleted, because there is no need for a requirement related to "corrective action" if operators are already subject to an emission cap.

RESPONSE

The commission agrees with Dow's comment. The recordkeeping for corrective action in §115.766(a)(6) is intended to be applicable only to corrective actions made to the continuous monitoring systems during monitor downtime, not the corrective actions an owner or operator may take to assure compliance with an annual cap. Maintaining these records are necessary for field investigators to verify that on-line monitors are meeting the minimum 95% data availability specified in the rule and that owners or operators are making good faith efforts to properly maintain and operate monitors. The rule has been revised to reflect the intent of this requirement.

TCC commented that the use of the term "continuous" should be stricken from §115.766(b)(1) and (2), because it implies use of a "continuous recorder" to document exemptions. ExxonMobil and TxOGA commented that the requirement in §115.766(b) to keep records documenting continuous compliance with an exemption is overly burdensome and implies that some sort of continuous monitoring is required.

RESPONSE

The commission contends that this requirement is not overly burdensome. As stated in the November 7, 2003, issue of the *Texas*

Register (28 TexReg 9847), the commission's intent is to ensure that the requirements of §115.766(b) are met at all times, but not to state or imply that the requirement in §115.766(b) has anything to do with continuous monitoring.

Sierra Club requested the phrase "available for review upon request" in §§115.726(i), 115.766(c), 115.782(c)(1)(B)(i), 115.786(f), and 115.789(4) be defined. Sierra Club questioned how soon a regulated entity would have to make the records available to an investigator when they are requested.

RESPONSE

The commission's intent is that the owner or operator provide the requested records within one business day.

Sierra Club requested that the "root cause" of the continuous monitoring system's downtime be required under §115.726(d)(3) and §115.766(a)(6).

Sections 115.726(d)(3) and 115.766(a)(6) currently require companies to maintain records that detail all corrective actions to the continuous emissions monitoring systems during any monitor downtimes and any delay in corrective action by documenting the dates, reasons, and durations of such occurrences. The commission considers maintaining records of the reasons for any monitor downtime to be sufficient to provide documentation for the cause of the monitor downtime.

Sierra Club commented that §115.726(a)(1)(B) should require submittal of a QAP 60 days prior to use of the HRVOC process so that the commission would have the opportunity to review the QAP before use of the process begins. Sierra Club also objected to automatic approval of the QAP, as provided under §115.726(a)(1)(C) and §115.766(i)(3), if the commission has not approved or provided a deficiency letter within 180 days. Sierra Club stated that automatic approval would exert on the commission to approve QAPs that are not reviewed or given insufficient review due to the lack of personnel or the lack of adequate training. Sierra Club suggested a longer time period of 270 days.

RESPONSE

The commission revised the rule regarding the submission and approval of QAPs. The revised rule requires written QAPs to be developed, implemented, and followed, but the QAPs are only required to be submitted upon request by the executive director. Any modifications or alternatives to the monitoring requirements or methods specified in the rule must still be approved by the executive director. Any such requests must be specifically approved in written response from the commission, and default approval will not occur. Owners or operators of affected facilities must comply with all requirements of the rules until any such site-specific request has been approved. This approach will allow the commission to adequately review and respond to modifications and alternative requests. This is consistent with the other commission procedures to address such requests regarding other commission rule and permit monitoring requirements.

ExxonMobil and TxOGA commented that the only pump performance records that should be required in §115.766(e) and (f) should be those records necessary to establish the pump performance characteristics and calculate flow based on discharge pressure. TCC commented that §115.766(e)(1) and (f)(2) should be deleted or that the rules should clarify that pump performance information provided by the manufacturer or other pump performance information as available is sufficient documentation to use the pump curve methods for determining cooling water flow.

RESPONSE

The commission contends that the specified records are necessary to determine flow rate based on pump discharge pressure. However, the commission agrees that a third-party pump performance test would be appropriate for existing pumps where no certified pump curve is available. The commission has changed the rule language accordingly.

TCC and Dow commented that daily records should not be specified for a calendar year compliance requirement in §115.726(g) and §115.766(g). ExxonMobil, MCC, and TxOGA expressed a belief that the requirement in §115.726(g) to maintain annual emission information is unnecessary and that the cap and trade rule has sufficient requirements for annual emission reporting. Dow expressed a belief that the daily requirement in §115.766(g) will be difficult to meet because it will often take several days to insert emissions into the hourly calculations. Dow suggested that monthly records of the HRVOC emissions should be adequate to document compliance with an annual HRVOC emission limit.

RESPONSE

The requirement to maintain daily records for demonstrating compliance with the annual cap is necessary to allow field investigators to ascertain the compliance status of a facility during a site inspection, which may occur at any time during the calendar year. The enforcement of the rules would be eroded if facilities were only required to calculate their annual emissions relative to the long-term cap at the end of the compliance period. Additionally, not all sites will be included in the cap and trade program. The commission expects historical information updates to be made daily, as information is available. Monthly records would be inadequate because of the short-term cap requirements. No changes were made in response to this comment.

Dow suggested that the commission revise the requirements in §115.766(h) to clarify that hourly records of the HRVOC emission are to be made available within the next 30 days.

RESPONSE

The suggested time of 30 days to submit hourly records of HRVOC emissions is not appropriate or adequate because owners or operators are required to maintain these records on site and update the records continuously with the most recent monitoring and testing data. Records demonstrating compliance must be made available upon request as is specified in §115.766(c).

Section 115.767 issues

TCC and Dow commented that the commission should clarify that a cooling tower heat exchanger system is exempt from the requirements of the division if each heat exchanger associated with the system meets either exemption §115.767(1) or §115.767(2) and should clarify that the exemption provided in §115.767(1) is valid as long as the pressure difference is maintained during times of normal operations. The commission should also clarify that the exemption provides for cases where the cooling water is operated at a higher pressure as long as the five pounds per square inch, gauge difference is maintained during normal operations, excluding upsets and periods of maintenance, startup, and shutdown.

RESPONSE

As stated in the November 7, 2003, issue of the *Texas Register* (28 TexReg 9847), the commission's intent is to ensure that the exemption criteria of §115.767(1) are met at all times.

ExxonMobil and TxOGA expressed a belief that the qualification for the differential pressure exemption criteria in §115.767(1) should not require installation of continuous pressure monitors at each exchanger, and that design criteria and process information should be sufficient. TCC commented that the commission should delete the requirement for "continuous" pressure monitoring to document compliance with the exemption.

RESPONSE

Continuous monitoring of pressure is needed to demonstrate compliance with the exemption. Therefore, the commission declines to make the suggested change.

Dow expressed a belief that the commission should provide an exemption in §115.767(3) for cooling tower heat exchange systems that have an intervening fluid between the return cooling water and the process fluid containing HRVOC greater than 100 ppmw.

RESPONSE

The commission agrees with the commenter and added an exemption in §115.767(5) to specify that any cooling tower heat exchange system with an intervening cooling fluid containing less than 100 ppmw of HRVOC between the process and the cooling water is exempt from the requirements of this division, except for applicable recordkeeping requirements.

Dow commented that it is seeking clarification related to the exemptions provided in the rule regarding systems that have some exchangers that meet the pressure exemption and some exchangers that meet the less than 100 ppm exemption. ExxonMobil and TxOGA suggested combining the exemptions in §115.767(1) and (2).

RESPONSE

The exemptions in §115.767(1) and (2) are intended for different purposes and therefore cannot be combined. The intent of §115.767(1) is that only those heat exchangers with HRVOC concentrations greater than 100 ppmw must meet the pressure exemption level. The intent of §115.767(2) is to exempt cooling tower heat exchange systems where each heat exchanger meets the 100 ppm exemption, regardless of the operating pressures.

Dow suggested a change to §115.767(4) to clarify that a cooling tower heat exchange system that will be permanently out of service by April 1, 2006, is exempt from the requirements of the division, with the exception of the notification and recordkeeping requirements of §115.766(j), because §115.766(j) includes a notification as well as recordkeeping requirements.

RESPONSE

The commission agrees with the commenter and made the suggested change.

ATOFINA commented that the commission should allow flexibility regarding the use of detection limits for certain HRVOCs that a facility has no potential to emit. Celanese stated that the commission should exempt all cooling tower heat exchange systems from the cap that contain less than 5% by weight HRVOC, regardless of other cooling tower systems at the site. Celanese stated that the calculation of cooling tower emissions uses the cooling water flow rate and analytical results. If no HRVOC is found, the detection limit (current rule) or one-half the detection limit (proposed rule) is used in the calculations. Due to the high cooling water flow rate, even a low detection limit results in overstated emissions. Under the proposed rule, for example, a 100,000 gpm cooling tower using an analysis with a ten ppbw detection limit would require over one ton per year of allowance without any actual emissions using the proposed rule. For a small - medium site, this will represent a larger portion of the cap, although there may not be any actual emissions from the cooling tower.

RESPONSE

To provide greater flexibility, the commission revised the rules with regard to detection limit capability for HRVOC measurement. If an owner or operator wishes to minimize the impact of detection limits on calculated HRVOC emission rates, the more sensitive on-line analyzers or laboratory analyses should be selected. The flexibility suggested by ATOFINA for individual HRVOCs may be addressed in a site- specific request for modification. No change has been made to the rule in response to this comment.

Section 115.769 issues

TCC commented that the compliance date for cooling towers in §115.769 should be consistent with any compliance date extensions for flares/vents.

RESPONSE

With the exception of the cap compliance date, the commission previously extended all deadlines in Divisions 1 and 2 by one additional year. Furthermore, the revision to the QAP and test plan provisions of the rules no longer constrains owners or operators to potentially waiting for approval of a QAP or test plan. The commission has not changed the compliance deadlines with regard to the testing and monitoring requirements; however, the commission agrees that additional time is needed to make the necessary emissions reductions to demonstrate compliance with the emissions specifications. All sites in Harris County must comply with HRVOC emissions cap and trade program by January 1, 2007. Harris County sites subject to the short-term limit in §115.761(c)(1) and Harris County sites subject to the annual emissions specification in §115.761(b) must continue to comply with the April 1, 2006, compliance date. However, the commission adopts §115.727(f) and §115.767(6) to specify that all sites subject to Divisions 1 and 2 that are located in the HGB ozone nonattainment area, excluding Harris County, are exempt from §115.722(b) and (c)(2) and §115.761(b) and (c)(2). The commission adopts §115.729(a)(3) and §115.769(a)(3) that specify the exemptions in §115.727(f) and §115.767(6) will no longer apply upon public notice of revocation by the commission. Upon revocation of these exemptions, sites subject to these divisions located in the HGB ozone nonattainment area, excluding Harris County, must comply with the compliance schedule or within 180 days of public notice, whichever is later.

TCC commented that the commission should replace the words "being brought into HRVOC service" with the words "after approval of the plan so that §115.769(b) reads ". . . testing and monitoring must be conducted as soon as practicable, but no later than 60 days after approval of the plan."

RESPONSE

The commission revised the rule regarding the submission and approval of QAPs. The revised rule requires written QAPs to be developed, implemented, and followed, but the QAPs are only required to be submitted upon request by the executive director.

The suggested change would be inconsistent with the revised rule. Therefore, no change has been made to the rule.

Section 115.780 issues

ATOFINA-American stated that the commission proposal for a separate equipment leak monitoring program is not necessarily compatible with other leak detection and repair (LDAR) programs that facilities are required to comply with, such as the "Texas 28 VHP" equipment leak program and the federal NSPS and the MACT equipment leak programs. ATOFINA-American stated that the commission should ensure that any time a facility must comply with the HRVOC program, that this requirement satisfies all state-origin LDAR requirements for any portion of the facility that must comply with LDAR regulations. ATOFINA-American also stated that the commission should ensure that any LDAR provisions in the HRVOC program do not conflict with the various NSPS and MACT programs. ATOFINA-American suggested that the commission provide an analysis in the final rule preamble describing how these programs work together to meet the commission's goals and make any necessary adjustments to ensure maximum consistency among the programs. ATOFINA-American also suggested that the commission should provide an explanation that each component is subject to only one state-origin LDAR program to ensure consistency.

RESPONSE

The commission made no changes to the rule in response to this comment. The various fugitive monitoring programs have been developed to serve different purposes, and this rule does not override any other state or federal requirements for leak monitoring. Sources must be in compliance with all applicable rules.

TCC commented that §115.780(b) should be deleted in order to have the option to use discrete emission reduction credits to address cumulative emissions in DOR programs in lieu of a process shutdown.

RESPONSE

This requirement was added to the HRVOC fugitive rule to be consistent with the vent and flare rules in Division 1, and the cooling tower rules in Division 2. Discrete emission reduction credits are not compound specific; therefore, they cannot be used to offset HRVOC emissions. However, under specific cases, general VOC credits may be allowed to offset HRVOC emissions. These specific cases are addressed in the RESPONSE TO COMMENTS section of the Chapter 101 HRVOC cap and trade preamble published in this issue of the *Texas Register*.

Section 115.781 issues

Sierra Club questioned how a visual inspection under §115.781(b)(5) could determine that water seal controls are properly designed and restrict ventilation, and stated that a visual check would not necessarily verify that a water seal is working unless an analyzer is used.

RESPONSE

The visual inspection is to determine whether or not water is present in the seal, thus controlling emissions to the atmosphere.

ExxonMobil requested that §115.781(b)(1) and (2) be deleted, and stated that the exemptions in Subchapter D, Division 3 are necessary to make the program reasonable and workable.

RESPONSE

Section 115.787 contains exemptions that apply to components in HRVOC service. These exemptions are similar, but not identical to, the exemptions provided in Subchapter D, Division 3 because of differences in the purposes and the specific requirements of the two divisions.

ExxonMobil stated that the inconsistent use of the terms "VOC" and "HRVOC" contributes to the confusion of whether specific components have special requirements based on being in VOC or HRVOC service and suggested that "HRVOC" be added in several parts of §115.781(b). Dow suggested that "HRVOC" be added to §115.781(b)(8) to clarify that the provision is applicable only to PRVs in gaseous HRVOC service.

RESPONSE

The commission made no changes to the rule in response to this comment. Section 115.787 specifies that components that are not in HRVOC service are exempt from the requirements of Subchapter H, except for the recordkeeping requirement to document the exemption.

ExxonMobil requested that follow-up after repairs made during a unit shutdown required by §115.781(b)(4) should be either monitoring or inspection and should be allowed the full following calendar month to complete.

RESPONSE

Repaired components should be monitored as soon as possible after returning to service to confirm that the repair was successful. The 30 days allowed in the rule should be sufficient to monitor all repaired components.

ExxonMobil commented that the requirements in Subchapter H, Division 3 for monitoring fugitive components should clearly apply only to components in HRVOC service and that no changes should be made to the monitoring program for components in VOC service that do not contain HRVOC.

RESPONSE

The requirements in Subchapter H, Division 3 do not change monitoring requirements for components in VOC service that do not contain HRVOC.

ExxonMobil commented that the designation "unsafe-to-monitor" in §115.781(b)(7)(A) should not be restricted to components that are dangerous to monitor on a quarterly basis.

RESPONSE

The commission revised §115.781(b)(7)(A) to clarify that the exclusion for unsafe-to-monitor components is not restricted to components that are monitored on a quarterly basis.

ExxonMobil and TCC commented that the list of unsafe-to-monitor components should not be required to be made available immediately under §115.781(b)(7)(A), and expressed a belief that this is requirement is overly demanding.

RESPONSE

The commission contends that the list of components should be available to a commission investigator or any local pollution control agency with jurisdiction within the same business day it is requested.

ATOFINA-American supported the proposed modification to the definition of "difficult to monitor" and expressed appreciation that the commission understood the Occupational Safety and Health

Administration-related burdens with requiring periodic confined space entries for LDAR monitoring.

RESPONSE

The commission appreciates the comment.

ExxonMobil commented that difficult-to-monitor components in §115.781(b)(7)(B) should apply to any components regulated by confined space entry and suggested that the words "is below floors or deck gratings" be deleted.

RESPONSE

The commission agrees that any component that would require a confined space permit for access should be considered as a difficult-to-monitor component and revised the provision accordingly.

ExxonMobil commented that the unsafe-to-monitor and difficult-to-monitor definitions should not be a subset of the additional requirement of the general VOC program, but should be the same in both the VOC and HRVOC program.

RESPONSE

The commission made changes to the definitions of "Unsafe-to-monitor" and "Difficult-to-monitor" in the general fugitive rules in Chapter 115, Subchapter D, Division 3 to make use of the terms consistent with the HRVOC rules.

Dow suggested that the word "immediately" in §115.781(b)(7)(A) be clarified consistent with the intent stated in the preamble to the proposed rule. Sierra Club requested that the definition of "immediately" provided for §115.781(b)(7)(A) be added to the general rules and applied to all recordkeeping requirements for HRVOC, other VOC rules, and other commission rules. Sierra Club stated that the change is needed so that investigators would not have to waste time waiting for the regulated entity to produce required records.

RESPONSE

The commission does not intend to define "immediately"; however, as stated in the preamble, the word "immediately" is used to specify that if requested by staff of the Houston regional office, or any air pollution control agency having jurisdiction, the owner or operator must provide the site's unsafe-to-monitor list within that business day. Adding the definition "immediately" to the general air rules in Chapter 101 was not proposed as part of this rule package, and therefore, is outside the scope of this rulemaking.

ATOFINA-American stated that the ATOFINA Crosby plant manufactures organic peroxides, uses one of the listed HRVOC compounds in the production process of some of the facility's products, and has a quarterly LDAR monitoring program (Texas 28 VHP) as part of the operating permit. ATOFINA-American stated that LDAR monitoring is conducted on organic peroxide production units that are placed on hold for process safety and worker safety reasons.

RESPONSE

The commission recognizes ATOFINA-American's safety concerns; however, based on the comments made by ATOFINA-American, it is unclear whether the components in the described process meet the commission's definition for "unsafe- to-monitor." In accordance with §115.781(b)(7)(A), an unsafe-to-monitor component is a component that the owner or operator determines is unsafe to monitor because monitoring personnel would be exposed to an immediate danger as a consequence of conducting the monitoring. The commission is unsure of ATOFINA-American's meaning by the statement that it monitors quarterly for organic peroxide production units that are placed "on hold."

TCC commented that the commission should confirm the monitoring requirements for PRVs and that safety valves that relieve to the atmosphere directly or are routed to a flare only require monitoring of the body of the PRV.

RESPONSE

As noted earlier in this preamble, the body of all PRVs in gaseous service must be monitored with a hydrocarbon gas analyzer for fugitive leaks on a quarterly basis unless the PRV is equipped with a rupture disc upstream of the PRV. Within 24 hours following actuation, or longer if the vent is considered to be unsafe to monitor or difficult to monitor, the vent from the PRV must be monitored to ensure that the relief mechanism has properly reseated. However, if the emissions from the PRV are released to a control device, the vent monitoring is not required. This requirement does not supersede any monitoring requirements found in §115.725.

Dow recommend that §115.781(b)(8) provide additional flexibility for the monitoring location for safety valves to be consistent with EPA Method 21, Section 8.3.1.4 found in 40 CFR Part 60, Appendix A.

RESPONSE

The procedure specified in Section 8.3.1.4 of EPA Method 21 would be an appropriate procedure to perform the monitoring required in §115.781(e) after a pressure relief device is vented directly to the atmosphere. The monitoring required in §115.781(b)(8) for the various components of a PRV should be performed according to the appropriate sections of EPA Method 21.

Dow recommended deleting the requirement in §115.781(b)(10) to record a default pegged value of 100,000 ppmv for readings that are higher than the upper end of the scale (i.e., pegged) even when using the highest scale setting or a dilution probe.

RESPONSE

The commission declines to make the requested change. The use of the highest pegged value if actual, monitored values are not available because the reading is higher than the upper end of the scale is required to encourage the recording of actual monitored values. The commenter has the option of using the actual recorded values or to use a dilution probe when necessary to obtain actual readings up to 100,000 ppmv. The commission also notes that if the commenter is obtaining a reading, the monitor is not "pegged."

Dow suggested correcting §115.781(e) by removing the requirement to report results of monitoring after pressure release events.

RESPONSE

Section 115.781(e) states that the results of monitoring after pressure relief events are to be reported in accordance with §115.786, but this section does not require reporting. It does require that records be maintained of all monitoring and inspections conducted in accordance with §115.781. The commission thus changed the reference in §115.781(e) from "reported" to "recorded."

ExxonMobil commented that the list of components specified for monitoring in §115.781(b)(3) is not the same as the list in §115.781(f) that specifies alternatives and stated that some components are missing from the alternatives list.

RESPONSE

Sampling connections, agitators, junction box vents, covers and seals on VOC water separators, and process drains are intentionally excluded from the list in §115.781(f). The commission included the following discussion in the response to comments when the Subchapter H, Division 3 requirements were published in the January 3, 2003, issue of the *Texas Register*: "Because bolted manways, heat exchanger heads, hatches, and sump covers have no moving parts, they are analogous to connectors (and in some cases even could be considered a subset of connectors). Therefore, the commission maintains that it is appropriate for these components be included in a leak-skip option for connectors." Sampling connections, agitators, junction box vents, covers and seals on VOC water separators, and process drains are not analogous to connectors, and therefore, were not included in the leak-skip option.

Dow requested that the leak skip provisions in §115.781(f) be clarified to indicate whether all component types should be averaged together or considered separately to determine the leaking percentage. Dow expressed a belief that they should be averaged together.

RESPONSE

The commenter is correct. The percentage of leaking components should be determined on an average basis.

GHASP expressed concern that the HRVOC fugitive monitoring rules in §115.781(f) allow the company to determine the component leak rate percentage that in turn establishes greater or lesser leak monitoring intervals. Sierra Club expressed a similar concern, and stated that the percentage of leaking components found by regulated entities is often much lower than the percentage found by the commission or local programs. Sierra Club suggested that quarterly monitoring be required regardless of the percentage of leaking components until the commission has adequately addressed this enforcement concern. As an option, Sierra Club suggested that skip periods be allowed only after the commission or local program has conducted a fugitive monitoring investigation and found a similar percentage of leaking components as the regulated entity for the past 12 months. GHASP requested that the rules state specifically that the commission retains the discretion to determine that a different monitoring interval applies based on its interpretation of enforcement investigations and all credible evidence regarding the leak detection rate at a particular facility.

RESPONSE

The component monitoring requirements of this rule are consistent with EPA regulations and are based on actual measurements. The commission can take appropriate enforcement actions against a regulated entity if it determines that the percentage of leaking components has been determined incorrectly.

Sierra Club opposed the provision in §115.781(g) of "best efforts to transfer, on a daily basis, electronic data" because there are no standards to determine what the phrase means. Sierra Club asserted that this is a "should" phrase that must be a "shall" phrase.

RESPONSE

The commission revised §115.781(g) to state that data must be transferred within seven days. Paper logs are allowed in this rule under certain circumstances and the owner or operator is allowed to transfer paper logs to a database within seven days. The change would make the requirements to transfer information to the database the same whether the information is collected electronically or on paper.

Sierra Club requested that the "auditing process" referred to in §115.781(g)(1) be defined. ExxonMobil requested that the data required by §115.781(g)(1) and (2) not include a determination of acceptable rates for monitoring for each run performed. ExxonMobil commented that this determination would be impractical to make for all runs routinely due to the high number of variables that affect it, and stated that the determination should only be part of an audit program and should be made only when the time of the monitoring seems questionable.

RESPONSE

The reference to an "auditing process" in §115.781(g)(1) is redundant with the auditing program required by §115.788. The commission deleted the reference from §115.781(g)(1).

Dow suggested that an additional sentence be added to §115.781(g)(1) to be consistent with Method 21.

RESPONSE

As noted in response to the previous comment, the commission deleted the requirement to determine an acceptable rate of monitoring; therefore the change suggested by Dow is unnecessary.

ExxonMobil commented that records of each audible/visual/olfactory inspection should not be required except for details of any leaking component found because more detailed recordkeeping is overly burdensome and wastes resources without reducing emissions. TCC and Dow requested that the commission clarify in §115.781(g)(2) that transfer of "manually recorded monitoring data" refers only to transfer of information related to actual LDAR component monitoring rather than to audible/visual/olfactory inspections.

RESPONSE

The commission deleted the reference to records of audible/visual/olfactory inspections from §115.781(g)(2). The reference was included in the proposed rule by mistake.

Dow suggested rewording §115.781(g) and (g)(2), because an electronic database is not required by §115.356.

RESPONSE

The commission agrees that an electronic database is not required by §115.356 and revised §115.781(g) and (g)(2) accordingly.

Dow requested that the requirement in §115.781(g)(3) to maintain changes to the database by notation in the database or in a log be changed. Dow noted that additional flexibility is needed because some monitoring contractors keep track of changes using a manual system such as tag maintenance cards rather than in a log. A single log would be impractical if there are many contractor personnel on site using maintenance cards.

RESPONSE

The commission declines to make the suggested change. The owner or operator is responsible for maintaining the security of the database and ensuring that all modifications to the database are properly tracked.

Section 115.782 issues

Dow recommended that clarification be added to §115.782(b)(1) to state that one business day refers to the normal Monday through Friday business days, excluding company holidays.

RESPONSE

The commission declines to add clarification to the rule language, and notes that business days are typically Monday through Friday, excluding national holidays.

TCC recommended that the commission provide an exemption for certain facilities such as caverns that are primarily storage or transfer operations with no shutdown/startup emissions from cumulative emission calculations triggered by this rule. Dow proposed that the cumulative mass emission comparison calculation for DOR should not be required for certain distribution and storage areas (e.g., caverns, outside-battery-limit-pipelines, marine terminals) that are not part of a manufacturing process but are subject to Chapter 115 fugitive rules because they are connected via pipeline to a manufacturing process subject to Chapter 115 fugitive rules.

RESPONSE

The commission revised the DOR calculation to be on a daily basis instead of cumulative. The emission comparison for emissions from the types of facilities described by the commenters would be emissions from the nonrepairable leaking components at the distribution or storage area compared to emissions from shutdown, clearing, and restart of the distribution or storage area that must be shutdown in order for the repairs to be safely completed.

Sierra Club commented that the rules in §115.782(c)(1)(B)(i)(II) and (iii) and (2)(A)(i) are too long and complicated and should be broken into several parts to make them easier to understand.

RESPONSE

The commission appreciates the comment and acknowledges that the cited rules are complex, but does not agree that breaking them into additional parts would make them easier to understand. The commission made changes to the rules and added discussion to this preamble to try to make the rules easier to understand.

TCC commented that the commission should clarify §115.782(c)(1)(B)(i)(III) concerning "Procedures and Schedule for Leak Repair and Follow-up." Specifically, TCC suggested that the commission clarify that the recordkeeping compliance date, March 31, 2004, is the starting point for identifying leakers for the purpose of cumulative mass emission calculations.

RESPONSE

The commission changed the emission calculation procedure to be on a daily basis rather than cumulative. Therefore, the requested change is not necessary.

TCC commented that the commission should clarify that in §115.782(c)(1)(B)(i)(IV) for purposes of DOR, the leaking components in HRVOC service are compared with HRVOC emissions resulting from shutdown, clearing, and subsequent startup of the unit.

RESPONSE

The commission declines to make the suggested change. The measurement of VOCs using Method 21 will not differentiate between HRVOCs and other VOCs; therefore, there is no practical way to accurately determine HRVOC emissions from the fugitive components.

ExxonMobil commented that the time limit for extraordinary efforts to count for leaks over 10,000 ppmv should be 15 days for consistency. TCC commented that the commission should review the repair timing throughout §115.782 for consistency. TCC expressed a belief that some language originally drafted in the general fugitive rules was directly copied into the HRVOC rule for purposes of this proposal, and that this created unnecessary confusion regarding the intended changes. TCC suggested a first extraordinary attempt for valves leaking greater than 10,000 ppmv be required within 22 days instead of 14 days. Dow recommended that the time limits for extraordinary repair of HRVOC valves specified in §115.782(c)(2)(A)(i) be made consistent with the time limits for other types of components specified in §115.782(c)(1)(B)(iii) to eliminate confusion and ease programming ability. Dow also noted that the term "components" should be used instead of "valves."

RESPONSE

TCC is correct that certain language from the general fugitive rules was directly copied into the HRVOC rules, leading to some confusion because of the different purposes and requirements of the general fugitive and HRVOC fugitive programs. The language in the general fugitive rules specified criteria by which emissions from nonrepairable valves and other components could be excluded from the calculation of cumulative mass emissions from leaking components if extraordinary efforts to repair the leaking were attempted. The use of extraordinary efforts would be optional. In the HRVOC fugitive rules, extraordinary efforts to repair leaking valves are required and not optional. The commission replaced the term "valve" with "components" to clarify that §115.782(c)(1)(B)(iii) applies to components other than valves. The commission does not agree that the time for a first extraordinary attempt for valves leaking greater than 10,000 ppmv should be extended to 22 days. The purpose of requiring extraordinary efforts to repair valves leaking at a rate greater than 10,000 ppmv within 14 days is to ensure expeditious repair of significant leaks. Because the purpose of the specification of time periods for application of extraordinary efforts of repair in the two cited clauses are different, the specification of different time periods does not create an inconsistency. Furthermore, the specification of time periods in §115.782(c)(1)(B)(iii) does not preclude the use of extraordinary efforts at a later date (for example, on components that were on the DOR list before March 31, 2004.) If a component on the DOR list is successfully repaired by extraordinary efforts, it would no longer be on the DOR list and its emissions would no longer be included in the total daily mass emission rate from leaking components.

Dow requested that the word "scheduled" be added before the word "shutdown" in §115.782(c)(1)(B)(iv).

RESPONSE

The commission agrees that adding the word "scheduled" clarifies the meaning of the referenced clause and has made the suggested change.

Dow recommended that the DOR language in §115.782(c)(1)(C) be revised to allow replacing any seal system with one that is expected to provide better performance.

RESPONSE

The commission is not including Dow's suggested wording to allow DOR for replacement with a seal design that "the owner

or operator expects will provide better performance." The owner or operator is not required to demonstrate how it determined that replacement of a single seal with one of the listed options is "required" in order to repair a leaking pump. The provision, as worded, does not prevent replacing existing dual mechanical seal systems or sealless pumps with more efficient systems. The language suggested by Dow is too subjective and would be practicably unenforceable.

Dow recommended that a second extraordinary attempt not be required in §115.782(c)(2)(A)(i) and §115.782(c)(1)(B)(iii) for components that were initially leaking in excess of 10,000 ppmv if the first extraordinary effort attempt lowers the leak concentration to below 10,000 ppmv.

RESPONSE

The commission declines to make the suggested changes to the rule. The provision for the second extraordinary effort is to ensure that the component is repaired. If the first attempt is unsuccessful, but brings the leak below 10,000 ppmv, the component is still not fully repaired. If the component were initially identified as leaking at a rate below 10,000 ppmv, the owner or operator would be required to make an extraordinary effort at repair. Therefore, requiring a second extraordinary effort if the initial effort brings the leak rate below 10,000 ppmv is consistent with the intent of the requirements. If the second extraordinary effort is unsuccessful, then the component should be added to the DOR list but the associated emissions do not have to be counted toward the total cumulative mass emissions from leaking components.

ATOFINA-American stated that facilities should not be required to commence cumulative mass emissions calculations from each component that is placed on the shutdown repair list as proposed in §115.782(c)(1)(B)(i). ATOFINA-American stated that facilities should commence the calculations after any possible extraordinary efforts are completed, because it may not be possible to commence extraordinary efforts until several days after the leak is first noted.

RESPONSE

The commission agrees with ATOFINA-American's comment that the calculations need not commence until the company has determined whether extraordinary efforts will be attempted and has changed the rule accordingly. The commission also notes that the calculation has been changed from a cumulative basis to a daily basis. If extraordinary efforts are attempted within the timing specified in the rule, the emissions from the component need not be included in the mass emission calculation even if the repair is unsuccessful.

TCC suggested that the commission reconsider the requirements to compare cumulative HRVOC emissions from components on DOR versus the emissions associated with shutdown, clearing, and startup of a given process unit. TCC suggested that the rule instead require a comparison of daily HRVOC emissions from components on the DOR list to the maximum daily emissions associated with a scheduled shutdown, clearing, and startup of a unit. ExxonMobil commented that the DOR requirements should not require a shutdown for repair that will create peak emissions that will be contrary to the SIP objectives. ExxonMobil stated that short-term emissions from the DOR components should be compared to the short-term emissions that would result from a shutdown for repair because avoiding long- term emissions from DOR components with a shutdown for repair that will create short-term emissions over a few hours or days would make exceedance of the air quality standards more likely. ExxonMobil further stated that if a meaningful limit of accumulation of DOR emission rates is needed, the commission should set a limit to avoid allowing an ongoing emission rate that is significant to the allowable emissions based on modeling. ExxonMobil further commented that if accumulated DOR emissions are to be compared to shutdown related emissions, the decision should only involve future emissions.

RESPONSE

The commission agrees that requiring a shutdown that would generate short- term emissions in order to eliminate emissions that have accumulated over a long- term period may not be the best strategy to minimize ozone formation. For this reason, the commission modified the rule to require a comparison of daily VOC emissions from components on the DOR list to the maximum daily emissions associated with a scheduled shutdown, clearing, and startup of a unit.

ExxonMobil noted that mandated shutdowns for repair of DOR components should not require shutdowns too frequently to avoid discouraging industry from working to reduce or eliminate shutdown emissions. TCC and Dow recommended that the commission provide a *de minimis* shutdown, clearing, and startup emission level below which it is acceptable to delay repair until the total cumulative mass emissions for leaking components in HRVOC service exceed the *de minimis* emission level or the actual shutdown, clearing, and startup emissions, whichever level is greater. Dow suggested a level of 1,000 pounds.

RESPONSE

The DOR provision may have the unintended consequence of penalizing facilities that have minimized shutdown/clearing/startup emissions. For this reason the commission added a *de minimis* limit of 500 pounds. A shutdown for repair of leaking components would not be required if the total daily emissions from leaking components are less than 500 pounds even if the shutdown/clearing/startup emissions are less than this *de minimis* level.

Section 115.786 issues

ExxonMobil and Dow commented that the report period for each corresponding report date for nonrepairable components in §115.786(c) should be specified as "January 31 for the previous July 1 through December 31, and July 1 for the previous January 1 through June 30."

RESPONSE

The commission agrees that including the reporting period adds clarity to the rule and has made the suggested change.

ExxonMobil commented that §115.786(c)(4) should clarify that the required record is the date of the last scheduled process unit shutdown instead of the date of the last process unit turnaround.

RESPONSE

The commission agrees that the suggested wording more clearly explains the intent of the provision and has changed the rule accordingly.

TCC commented that the commission should provide sufficient time to make updates to the DOR records that are required per §115.786(d)(2). TCC expressed a belief that updating records

each business day does not provide sufficient time when a component is added at the end of a business week. TCC requested that five business days be allowed to make the updates. ATOFINA-American stated that the same-day calculation required in §115.786(d)(2) is infeasible, especially if the leak is observed on a weekend and the personnel responsible for such calculations are unavailable for several days due to weekends or holidays. ATOFINA-American stated that such calculations should be performed within two business days after the completion of any extraordinary efforts to prevent the leak from being placed on the shutdown list, or the decision that extraordinary efforts are unfeasible. ATOFINA-American expressed a belief that this requirement would require an undue burden on the affected facility, keeping highly-skilled employees on call speculatively awaiting the rare event that a single component leak might become subject to the shutdown list.

RESPONSE

The commission agrees that performing the calculations within one business day may not be feasible in all instances, and has changed the requirement to specify that records be updated within five business days after it is determined that a leaking component will require a process unit shutdown to repair.

Section 115.787 issues

ATOFINA-American stated that the commission previously encouraged facilities to install rupture disks on PRVs to minimize emissions to the atmosphere, and that this configuration is also expected in units that must comply with any of the several EPA LDAR standards, including the NSPS to which the American Acryl complex is subject. ATOFINA-American also stated that EPA has historically recognized that non-monitoring technologies are available to determine if a rupture disk has failed, such as visible flag-type monitors that can be observed by an operator on regular inspection rounds. EPA also has provisions to allow facilities to petition for an applicability determination that allows other monitoring systems to be used, including pressure indicators between the PRV and the rupture disk. ATOFINA- American also stated that many facilities installed rupture disks in very close proximity to PRVs so that interstitial pressure changes would be easy to monitor, and that actual monitoring of this space was not anticipated and is included in the affected piping systems. ATOFINA-American stated that additional sampling probe locations to facilitate leak measurements are not practical or feasible in these systems, because such installation would require the removal of each existing PRV/rupture disk combination and the replacement of the assembly with a design that would accommodate the additional sampling location. ATOFINA-American stated that the proposal in §115.787(e) to delete the monitoring exemption for PRVs with rupture disks does not take into account the inconsistency between the proposed standard and the existing NSPS that the proposal would contravene, nor the removal of all PRVs to facilitate monitoring at a facility, and that the commission should allow alternate monitoring systems for PRV monitoring or delete the proposed requirement. TCC opposed the commission's proposed deletion of the exemption in §115.787(e) from inspection/monitoring for PRVs equipped with a rupture disk. TCC expressed a belief that this exemption should be retained because it stated that adding a rupture disk under the relief valve further assures there is no flow or leaking through the relief valve. Dow proposed that the commission retain the existing exemptions for PRVs that are equipped with an upstream rupture disk and PRVs that are routed to a closed vent system and control device.

RESPONSE

The commission agrees that in cases where the rupture disk is on the upstream side, fugitive emissions from PRVs are effectively prevented. Therefore, PRVs so equipped should be exempt from the monitoring requirements in §115.781(b)(8). The commission revised the rule accordingly.

ATOFINA-American stated that it uses an HRVOC in two units on a batch campaign basis, and that the campaigns only constitute a portion of the operating year for each unit. ATOFINA-American also stated that the commission should recognize that HRVOC monitoring is only appropriate in continuous process units continuously using or producing HRVOC, and not in batch manufacturing units using HRVOCs intermittently.

RESPONSE

Components that contact process fluids containing less than 5.0% HRVOC by weight on an annual average basis are exempt from the requirements of Division 3, except for the recordkeeping requirements in §115.786(d) and (e). Furthermore, the commission does not differentiate between batch processes or continuous processes, because the rule is based on emissions regardless of frequency.

Section 115.788 issues

EPA expressed concern that no documentation has been provided to justify the projected emission reductions due to improvements to the fugitive emission program. EPA agreed that emission reductions should be expected, and commented that the commission must commit to confirming that the projected emission levels have been achieved. EPA stated that sources should be required to use correlation equations to estimate emissions in future inventories. EPA stated that the commission should conduct a rule effectiveness study to determine how effective sources are in detecting and repairing leaks and suggested that data from the third-party audits could provide the basis for this study.

RESPONSE

The commission is committed to conducting a rule effectiveness study after the third-party audit program has progressed and more data is available. The commission is also planning to require the use of correlation equations to calculate fugitive emissions for annual emission inventory reporting.

TCC suggested that the commission revise the audit provisions in §115.788. TCC expressed a belief that the audit should be a random sampling of applicable units at the site rather than every unit at the site.

RESPONSE

The commission agrees with the commenter that random sampling from among all applicable units at the site will accomplish the purpose of the leak survey requirement and has revised the audit rules to reflect this change. It is the commission's intent that the fugitive audit program be used to identify any patterns that are indicative of failure to properly implement Test Method 21. The random sample must be such that each valve has an equal chance of being selected from the total number of valves being sampled. The use of a random sampling of valves at the site that are in HRVOC service, are not exempted from quarterly

monitoring by §115.787, and are not listed on either the difficult-to-monitor or the unsafe-to-monitor lists, will allow the independent third-party organization to identify any potential patterns showing failure to properly implement Test Method 21, without being overly burdensome on the company. To implement this audit program properly, the pool of valves to be selected from must contain valves that are monitored on a quarterly basis, so an accurate leaker rate can be determined.

Dow recommended that accounts with greater than five process units in HRVOC service should only be required to audit a maximum of four process units per year and that accounts with less than or equal to five process units in HRVOC service should only be required to audit each process unit every five years.

RESPONSE

The commission revised the audit rules to apply to the site rather than individual process units.

TCC suggested that the commission should allow owners and operators a certain number of days after the end of the monitoring period to complete the audit. Dow recommended that the field survey required under the third-party audit provisions in §115.788(a)(2)(A) begin within 45 days after the monitoring service has completed its work to allow for situations where the usual monitoring service may not be completed until the end of the monitoring period.

RESPONSE

The commission revised the rule language such that the field survey must be completed by the end of the next monitoring period.

TCC suggested that §115.788(a)(2)(C) be deleted if the commission adopts the TCC suggested random sampling strategy.

RESPONSE

The commission adopts the random sampling strategy suggested, and therefore, deleted §115.788(a)(2)(C).

TCC and Dow suggested that §115.788(a)(3)(C) be deleted, because it is duplicative with §115.788(a)(3)(A).

RESPONSE

The commission agrees that the provisions are duplicative and has merged §115.788(a)(3)(C) with §115.788(a)(3)(A).

TCC commented that it cannot identify the benefit of contacting the Houston regional office prior to the third-party audit and therefore suggested that the requirement in §115.788(c) to provide verbal notification to the Houston regional office prior to the audit be deleted.

RESPONSE

Notification to the Houston regional office would provide an investigator with the opportunity to be present to observe the audit. This notification is especially needed because the adopted rules only require one audit per site each year.

Dow recommended that the owner or operator be allowed to provide a verbal or written notification containing the auditing schedule for the year with updates submitted as necessary for §115.788(c).

RESPONSE

The commission has not made the suggested change, because the method of conducting the audits and the numbers of audits to be performed has been revised to a single audit each year.

Dow requested clarification of "completion of the audit" in §115.788(d) relative to submitting results from the audit.

RESPONSE

The audit is considered complete when the owner or operator has received the completed audit report from the third-party organization. The owner or operator must submit the audit report and, if applicable, a corrective action plan as specified in §115.788(e), within 30 days after completion of the audit. The owner or operator is responsible for ensuring that the third-party organization delivers the audit report in a timely manner to be compliant with §115.788(a)(2)(A).

Dow requested confirmation that the use of data from the most recent monitoring period is acceptable under §115.788(d)(2) when comparing the percentage of leaking components identified by the independent third-party organization during the field survey and by the contracted or usual monitoring service.

RESPONSE

The commission revised the reporting requirements. The area that this comment is addressing is now provided in §115.788(d)(3). The site's percentage of leaking components is based on the average of the previous four quarters of monitoring.

TCC opposed the requirement for a corrective action plan in §115.788(e) and expressed a belief that it is an unnecessary paperwork burden. TCC suggested that the owner of the audit indicate in the final report how identified deficiencies will be addressed. Dow recommended that the term "corrective action plan" be avoided in the §115.788(e) audit provisions because it carries a specific meaning within the general rules that govern excessive emission events.

RESPONSE

The commission disagrees with the commenters that the requirement to include corrective action plans with the audit report is unnecessary. The intent of the requirement is to ensure that an owner or operator has identified any deficiencies in the monitoring program and has taken steps to correct those deficiencies. Section 115.788(e) does not specify the exact content of the corrective action plan or imply that the corrective action plan must meet the requirements of Chapter 101. Therefore, the commission has not made any changes in response to this comment.

Sierra Club commented that no time frame is given in §115.788(e) for when the plan must be submitted, and suggested no later than 30 days after the report has been completed and provided to the regulated entity.

RESPONSE

The rule already requires the timing suggested by the commenter. If a corrective action plan is needed it must be submitted with the audit report per §115.788(e). The audit report is required in §115.788(d) to be furnished to the Houston regional office and any local air pollution program with jurisdiction within 30 days after completion of the audit. The audit is considered complete when the owner or operator has received the completed audit report from the third-party organization. Therefore, the corrective action plan would be required within 30 days after completion of the audit.

SUBCHAPTER A. DEFINITIONS

30 TAC §115.10

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and §382.016, concerning Monitoring Requirements Examination of Records, that authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants.

§115.10. Definitions.

Unless specifically defined in Texas Health and Safety Code, Chapter 382, (also known as the Texas Clean Air Act) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the Texas Clean Air Act, the following terms, when used in this chapter (relating to Control of Air Pollution from Volatile Organic Compounds), have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this chapter are found in §3.2 and §101.1 of this title (relating to Definitions).

(1) Background--The ambient concentration of volatile organic compounds in the air, determined at least one meter upwind of the component to be monitored. Test Method 21 (40 Code of Federal Regulations Part 60, Appendix A) shall be used to determine the background.

(2) Beaumont/Port Arthur area--Hardin, Jefferson, and Orange Counties.

(3) Capture efficiency--The amount of volatile organic compounds (VOC) collected by a capture system that is expressed as a percentage derived from the weight per unit time of VOCs entering a capture system and delivered to a control device divided by the weight per unit time of total VOCs generated by a source of VOCs.

(4) Carbon adsorption system--A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(5) Closed-vent system--A system that:

(A) is not open to the atmosphere;

(B) is composed of piping, ductwork, connections, and, if necessary, flow-inducing devices; and

(C) transports gas or vapor from a piece or pieces of equipment directly to a control device.

(6) Component--A piece of equipment, including, but not limited to, pumps, valves, compressors, connectors, and pressure relief valves, which has the potential to leak volatile organic compounds.

(7) Connector--A flanged, screwed, or other joined fitting used to connect two pipe lines or a pipe line and a piece of equipment. The term connector does not include joined fittings welded completely around the circumference of the interface. A union connecting two pipes is considered to be one connector.

(8) Continuous monitoring--Any monitoring device used to comply with a continuous monitoring requirement of this chapter will be considered continuous if it can be demonstrated that at least 95% of the required data is captured.

(9) Covered attainment counties--Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

(10) Dallas/Fort Worth area--Collin, Dallas, Denton, and Tarrant Counties.

(11) El Paso area--El Paso County.

(12) Emergency flare--A flare that only receives emissions during an upset event.

(13) External floating roof--A cover or roof in an open-top tank which rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete and separate closure seals, one above the other, containing an enclosed space between them. For the purposes of this chapter, an external floating roof storage tank that is equipped with a self-supporting fixed roof (typically a bolted aluminum geodesic dome) shall be considered to be an internal floating roof storage tank.

(14) Fugitive emission--Any volatile organic compound entering the atmosphere that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(15) Gasoline bulk plant--A gasoline loading and/or unloading facility, excluding marine terminals, having a gasoline throughput less than 20,000 gallons (75,708 liters) per day, averaged over each consecutive 30-day period. A motor vehicle fuel dispensing facility is not a gasoline bulk plant.

(16) Gasoline terminal--A gasoline loading and/or unloading facility, excluding marine terminals, having a gasoline throughput equal to or greater than 20,000 gallons (75,708 liters) per day, averaged over each consecutive 30-day period.

(17) Heavy liquid--Volatile organic compounds that have a true vapor pressure equal to or less than 0.044 pounds per square inch absolute (0.3 kiloPascal) at 68 degrees Fahrenheit (20 degrees Celsius).

(18) Highly-reactive volatile organic compound--As follows.

(A) In Harris County, one or more of the following volatile organic compounds (VOCs): 1,3- butadiene; all isomers of

butene (e.g., isobutene (2-methylpropene or isobutylene), alpha- butylene (ethylethylene), and beta-butylene (dimethylethylene, including both cis- and trans- isomers)); ethylene; and propylene.

(B) In Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, one or more of the following VOCs: ethylene and propylene.

(19) Houston/Galveston or Houston/Galveston/Brazoria area--Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(20) Incinerator--For the purposes of this chapter, an enclosed control device that combusts or oxidizes volatile organic compound gases or vapors.

(21) Internal floating cover--A cover or floating roof in a fixed roof tank that rests upon or is floated upon the liquid being contained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell. For the purposes of this chapter, an external floating roof storage tank that is equipped with a self-supporting fixed roof (typically a bolted aluminum geodesic dome) shall be considered to be an internal floating roof storage tank.

(22) Leak-free marine vessel--A marine vessel with cargo tank closures (hatch covers, expansion domes, ullage openings, butterworth covers, and gauging covers) that were inspected prior to cargo transfer operations and all such closures were properly secured such that no leaks of liquid or vapors can be detected by sight, sound, or smell. Cargo tank closures must meet the applicable rules or regulations of the marine vessel's classification society or flag state. Cargo tank pressure/vacuum valves must be operating within the range specified by the marine vessel's classification society or flag state and seated when tank pressure is less than 80% of set point pressure such that no vapor leaks can be detected by sight, sound, or smell. As an alternative, a marine vessel operated at negative pressure is assumed to be leak-free for the purpose of this standard.

(23) Light liquid--Volatile organic compounds that have a true vapor pressure greater than 0.044 pounds per square inch absolute (0.3 kiloPascal) at 68 degrees Fahrenheit (20 degrees Celsius), and are a liquid at operating conditions.

(24) Liquefied petroleum gas--Any material that is composed predominantly of any of the following hydrocarbons or mixtures of hydrocarbons: propane, propylene, normal butane, isobutane, and butylenes.

(25) Low-density polyethylene--A thermoplastic polymer or copolymer comprised of at least 50% ethylene by weight and having a density of 0.940 grams per cubic centimeter or less.

(26) Marine loading facility--The loading arm(s), pumps, meters, shutoff valves, relief valves, and other piping and valves that are part of a single system used to fill a marine vessel at a single geographic site. Loading equipment that is physically separate (i.e., does not share common piping, valves, and other loading equipment) is considered to be a separate marine loading facility.

(27) Marine loading operation--The transfer of oil, gasoline, or other volatile organic liquids at any affected marine terminal, beginning with the connections made to a marine vessel and ending with the disconnection from the marine vessel.

(28) Marine terminal--Any marine facility or structure constructed to transfer oil, gasoline, or other volatile organic liquid bulk cargo to or from a marine vessel. A marine terminal may include one or more marine loading facilities.

(29) Metal-to-metal seal--A connection formed by a swage ring that exerts an elastic, radial preload on narrow sealing lands, plastically deforming the pipe being connected, and maintaining sealing pressure indefinitely.

(30) Natural gas/gasoline processing--A process that extracts condensate from gases obtained from natural gas production and/or fractionates natural gas liquids into component products, such as ethane, propane, butane, and natural gasoline. The following facilities shall be included in this definition if, and only if, located on the same property as a natural gas/gasoline processing operation previously defined: compressor stations, dehydration units, sweetening units, field treatment, underground storage, liquified natural gas units, and field gas gathering systems.

(31) Petroleum refinery--Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(32) Polymer or resin manufacturing process--A process that produces any of the following polymers or resins: polyethylene, polypropylene, polystyrene, and styrenebutadiene latex.

(33) Pressure relief valve--A safety device used to prevent operating pressures from exceeding the maximum allowable working pressure of the process equipment. A pressure relief valve is automatically actuated by the static pressure upstream of the valve, but does not include:

(A) a rupture disk; or

(B) a conservation vent or other device on an atmospheric storage tank that is actuated either by a vacuum or a pressure of no more than 2.5 pounds per square inch gauge.

(34) Printing line--An operation consisting of a series of one or more printing processes and including associated drying areas.

(35) Process drain--Any opening (including a covered or controlled opening) that is installed or used to receive or convey wastewater into the wastewater system.

(36) Process unit--The smallest set of process equipment that can operate independently and includes all operations necessary to achieve its process objective.

(37) Rupture disk--A diaphragm held between flanges for the purpose of isolating a volatile organic compound from the atmosphere or from a downstream pressure relief valve.

(38) Shutdown or turnaround--For the purposes of this chapter, a work practice or operational procedure that stops production from a process unit or part of a unit during which time it is technically feasible to clear process material from a process unit or part of a unit consistent with safety constraints, and repairs can be accomplished.

(A) The term shutdown or turnaround does not include a work practice that would stop production from a process unit or part of a unit:

(i) for less than 24 hours; or

(ii) for a shorter period of time than would be required to clear the process unit or part of the unit and start up the unit.

(B) Operation of a process unit or part of a unit in recycle mode (i.e., process material is circulated, but production does not occur) is not considered shutdown.

(39) Startup--For the purposes of this chapter, the setting into operation of a piece of equipment or process unit for the purpose of production or waste management.

(40) Strippable volatile organic compound (VOC)--Any VOC in cooling tower heat exchange system water that is emitted to the atmosphere when the water passes through the cooling tower.

(41) Synthetic organic chemical manufacturing process--A process that produces, as intermediates or final products, one or more of the chemicals listed in 40 Code of Federal Regulations §60.489 (October 17, 2000).

(42) Tank-truck tank--Any storage tank having a capacity greater than 1,000 gallons, mounted on a tank-truck or trailer. Vacuum trucks used exclusively for maintenance and spill response are not considered to be tank-truck tanks.

(43) Transport vessel--Any land-based mode of transportation (truck or rail) equipped with a storage tank having a capacity greater than 1,000 gallons that is used to transport oil, gasoline, or other volatile organic liquid bulk cargo. Vacuum trucks used exclusively for maintenance and spill response are not considered to be transport vessels.

(44) True partial pressure--The absolute aggregate partial pressure of all volatile organic compounds in a gas stream.

(45) Vapor balance system--A system that provides for containment of hydrocarbon vapors by returning displaced vapors from the receiving vessel back to the originating vessel.

(46) Vapor control system or vapor recovery system--Any control system that utilizes vapor collection equipment to route volatile organic compounds (VOC) to a control device that reduces VOC emissions.

(47) Vapor-tight--Not capable of allowing the passage of gases at the pressures encountered except where other acceptable leak-tight conditions are prescribed in this chapter.

(48) Waxy, high pour point crude oil--A crude oil with a pour point of 50 degrees Fahrenheit (10 degrees Celsius) or higher as determined by the American Society for Testing and Materials Standard D97-66, "Test for Pour Point of Petroleum Oils."

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER H. HIGHLY-REACTIVE VOLATILE ORGANIC COMPOUNDS

DIVISION 1. VENT GAS CONTROL

30 TAC §§115.720, 115.722, 115.725 - 115.727, 115.729

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.014, concerning Emission Inventory, that authorizes the commission to require information to develop an emissions inventory of air contaminants in the state; §382.016, concerning Monitoring Requirements Examination of Records, that authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants; §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe sampling methods and procedures to be used to determine violations of and compliance with the commission's rules, variances, and orders; and §382.034, concerning Research and Investigations, that authorizes the commission to conduct or require any research or investigations advisable or necessary to perform duties under Texas Health and Safety Code, Chapter 382.

§115.720. Applicability and Definitions.

(a) Applicability. In the Houston/Galveston/Brazoria area, as defined in §115.10 of this title (relating to Definitions), any site with a controlled or uncontrolled vent gas stream containing highly-reactive volatile organic compounds (HRVOC), as defined in §115.10 of this title, or a flare that emits or has the potential to emit HRVOC is subject to this division (relating to Vent Gas Control) in addition to the applicable requirements of Subchapter B, Divisions 2 and 6 of this chapter (relating to Vent Gas Control; and Batch Processes) and Subchapter D, Division 1 of this chapter (relating to Process Unit Turnaround and Vacuum- Producing Systems in Petroleum Refineries).

(b) Definitions. The following terms, when used in this division, have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this division are found in §§3.2, 101.1, and 115.10 of this title (relating to Definitions).

(1) Degassing safety device - A device other than a flare used to prevent the release of unburned organic vapors from a geologic storage facility resulting from either equipment or containment failure.

(2) Supplementary fuel - Natural gas or fuel gas added to the gas stream to increase the net heating value.

(3) Pilot gas - Natural gas or fuel gas that does not contain greater than 5% by weight highly-reactive volatile organic compounds that is directed to the combustion point of a flare to maintain a continuous ignition source.

§115.722. Site-wide Cap and Control Requirements.

(a) The owner or operator of a site subject to this division shall additionally comply with the requirements of Chapter 101, Subchapter H, Division 6 of this title (relating to Highly- Reactive Volatile Organic Compound Emissions Cap and Trade Program).

(b) All sites subject to this division or Division 2 of this subchapter (relating to Cooling Tower Heat Exchange Systems) that are exempt from the highly-reactive volatile organic compound (HRVOC) emissions cap and trade program, in accordance with §101.392(a) of this title (relating to Exemptions), are limited to ten tons of HRVOC emissions per calendar year.

(c) Each site subject to this division is subject to the following emission limitations.

(1) HRVOC emissions at each site located in Harris County that is subject to this division or Division 2 of this subchapter must not exceed 1,200 pounds of HRVOC per one-hour block period from any flare, vent, pressure relief valve, cooling tower, or any combination.

(2) HRVOC emissions at each site located in the Houston/Galveston/Brazoria area as defined in §115.10 of this title (relating to Definitions), excluding Harris County, that is subject to this division or Division 2 of this subchapter must not exceed 1,200 pounds of HRVOC per one-hour block period from any flare, vent, pressure relief valve, cooling tower, or any combination.

(3) For any exceedance of the HRVOC emission limits specified in paragraph (1) or (2) of this subsection, the emission limits specified in paragraph (1) or (2) of this subsection must be used to determine compliance with subsection (a) or (b) of this section instead of the total amount of actual emissions.

(d) All flares must continuously meet the requirements of 40 Code of Federal Regulations §60.18(c)(2) - (6) and (d) as amended through October 17, 2000 (65 FR 61744) when vent gas containing HRVOC is being routed to the flare.

(1) Average net heating value over a one-hour block period will be used to demonstrate compliance with the minimum net heating value requirements.

(2) The exit velocity averaged over a one-hour block period must be used to demonstrate compliance with the maximum exit velocity requirements.

(e) An owner or operator may not use emission reduction credits or discrete emission reduction credits in order to demonstrate compliance with this division.

§115.725. Monitoring and Testing Requirements.

(a) Except for pressure relief valves as defined in §115.10 of this title (relating to Definitions), each vent gas stream that is not controlled by a flare at a site must be tested by applying the appropriate reference method tests and procedures specified in §115.125 of this title (relating to Testing Requirements) to establish maximum potential highly- reactive volatile organic compound (HRVOC) hourly emission data expected during any operation not defined as an emissions event or a scheduled maintenance, startup, or shutdown activity under §101.1 of this title (relating to Definitions). The data shall be used in accordance with the test plan required under §115.726 of this title (relating to Recordkeeping and Reporting Requirements) to demonstrate compliance with the control requirement of §115.722(a) - (c) of this title (relating to Site-wide Cap and Control Requirements). For cyclic or batch processes, the HRVOC emissions shall be considered as zero during non-operational periods other than startup, shutdown, or maintenance activities.

(1) For each uncontrolled vent subject to the requirements of this subsection, the owner or operator shall:

(A) select an operational parameter or parameters that directly affects the HRVOC emissions from the vent;

(B) install, calibrate, maintain, and operate according to manufacturer's recommendations, a continuous monitoring system to monitor and record the parameter or parameters selected under subparagraph (A) of this paragraph; and

(C) establish operating limits for the selected parameter or parameters as the hourly average of the parameter or parameters during the HRVOC emission test required under this subsection.

(2) For each vent subject to the requirements of this subsection that is controlled by a control device other than a flare, the owner or operator shall:

(A) select an operational parameter or parameters that directly affects the HRVOC emissions directed to the control device;

(B) select an operational parameter or parameters of the control device that directly affects the control efficiency of the control device;

(C) install, calibrate, maintain, and operate according to manufacturer recommendations, continuous monitoring systems to monitor and record the parameters selected under subparagraphs (A) and (B) of this paragraph; and

(D) establish operating limits for the selected parameters required under subparagraphs (A) and (B) of this paragraph as the hourly averages of the parameters during the HRVOC emission test required under this subsection.

(3) To demonstrate compliance with the control requirements of §115.722(a) - (c) of this title during emission events and scheduled startup, shutdown, and maintenance activities, the owner or operator shall determine the HRVOC emissions from each vent using one of the following:

(A) testing using the appropriate reference methods and procedures specified in this section; or

(B) process knowledge and engineering calculations. If process knowledge and engineering calculations are used to determine HRVOC emissions during emission events and scheduled startup, shutdown, and maintenance activities, the monitoring plans required under paragraph (4) of this subsection must also include all process information and calculations used to calculate the HRVOC emissions.

(4) The owner or operator shall develop, implement, and follow a written monitoring plan for the continuous monitoring systems required in paragraphs (1) and (2) of this subsection prior to performing the monitoring and testing under this subsection. Upon written request by the executive director, the monitoring plans shall be submitted within 30 days for review. The executive director may require additional or alternative monitoring requirements. At a minimum, monitoring plans shall include:

(A) specifications for all monitors used in the continuous monitoring systems;

(B) process and control device information supporting the selection of parameters;

(C) actual testing or manufacturer data documenting the control efficiency of the control device; and

(D) schedule of quarterly inspections of the continuous monitoring systems to insure proper operation.

(5) After the initial HRVOC emission test required under this subsection, the owner or operator may perform additional emission testing to update the data used to demonstrate compliance with the

control requirements of §115.722(a) - (c) of this title. Written notification of the testing must be submitted to the Houston Regional Office as specified in §115.726(a)(2) of this title.

(6) Testing using the appropriate reference methods and procedures specified in §115.125 of this title that was conducted prior to December 31, 2004, may be used in lieu of conducting the testing specified in this subsection, provided that:

(A) the owner or operator of the affected source obtains approval for the testing report and data from the executive director if the prior testing was not performed as a demonstration of compliance with an applicable state permit, other state rule, or federal regulation, and the test report submitted to the commission; and

(B) the testing establishes maximum potential HRVOC emissions data expected during any operation that is not defined as an emissions event or a scheduled maintenance, startup, or shutdown activity under §101.1 of this title.

(C) the operational parameters selected as required under paragraphs (1) or (2) of this subsection were monitored at the time of testing with a monitoring system meeting the requirements of this subsection or an equivalent monitoring system. If the prior testing meets all provisions under this paragraph and is used to satisfy the testing requirement of this subsection, then the owner or operator shall comply with the monitoring system and written monitoring plan requirements of this subsection by no later than the compliance schedule in §115.729 of this title (relating to Counties and Compliance Schedules) instead of the time required in paragraph (4) of this subsection.

(7) The executive director may waive testing for no more than one-half of the vents that are identical in design and operation if the owner or operator demonstrates that all the vents are identical in design and operation, and the emissions from all of the vents can be expected to be identical.

(A) The request for a waiver shall be submitted with the test plan required under §115.726(a) of this title. Information required to support the waiver request shall include, but is not limited to, the following:

(i) identification of each vent expected to be identical;

(ii) each specific vent to be tested;

(iii) a detailed technical explanation demonstrating that the measured emissions from the selected vents can be expected to be representative of emissions from all vents;

(iv) specific technical information for each vent and the process associated with each vent demonstrating that the vents and associated processes are identical in design and operation;

(v) maintenance records for each vent and associated process demonstrating the vents and associated processes have been maintained in a similar manner; and

(vi) any additional information or data requested by the executive director necessary to demonstrate that the emissions from the vents can be expected to be identical.

(B) The executive director shall review the request for waiver and may provide a temporary waiver authorizing testing of no more than one-half of the vents. The results of the tests must be submitted to the executive director no later than 60 days after completion of testing. The executive director will determine if any further testing is required based on the review of the test results. If further testing is required, the owner or operator must perform the additional testing no later than 60 days after receiving written notification from the executive director.

(C) To demonstrate compliance with the control requirements of §115.722(a) - (c) of this title, the HRVOC emission test results from the vent gas stream with the maximum HRVOC emission rate of those vents tested under this paragraph must be used for those vent gas streams for which a waiver of testing, temporary or permanent, has been authorized.

(b) The following alternatives may be used in lieu of the testing requirements of subsection (a) of this section, for vent gas streams that are not controlled by a flare or are not pressure relief valves. The vent gas stream must comply with the process parameter monitoring requirements of subsection (a) of this section, except as specified in paragraph (1)(D) of this subsection.

(1) The vent gas stream may be equipped with a continuous emissions monitoring system (CEMS), provided that:

(A) the CEMS meets the monitoring requirements of 40 Code of Federal Regulations (CFR) §60.13(b) and (d) - (f);

(B) the monitor shall initially and at a minimum quarterly thereafter be subjected to a cylinder gas audit per 40 CFR Part 60, Appendix B, Performance Specification 2, Section 16 to assess system bias and ensure accuracy;

(C) the measured concentration shall be used in combination with flow rate determined in accordance with subparagraph (D) of this paragraph to determine the hourly HRVOC emission rate;

(D) the following parameter monitoring requirements are used in lieu of the requirements of subsection (a)(1) or (2) of this section:

(i) the owner or operator must install, calibrate, maintain, and operate according to manufacturer's recommendations, a continuous monitoring system on the vent or in the associated process systems sufficient to determine the volumetric flow; and

(ii) if volumetric flow rate is not monitored directly, the owner or operator must determine through engineering calculations, manufacturer's information, or actual testing the correlation between the monitored parameter and the volumetric flow rate; and

(E) the owner or operator complies with the requirements for a written monitoring plan specified in subsection (a)(4) of this section.

(2) Process knowledge, including scientific calculations and other process monitoring data sufficient to demonstrate compliance status, may be used to determine maximum potential HRVOC hourly emission data. Types of vent gas streams for which process knowledge may be used in lieu of testing are:

(A) analyzer vents;

(B) steam system vents;

(C) vent gas streams where there is no HRVOC present except during emissions events; or

(D) degassing safety devices, as defined in §115.720 of this title (relating to Applicability and Definitions).

(c) Affected pressure relief valves not controlled by a flare shall be monitored as follows.

(1) Install, calibrate, maintain, and operate according to manufacturer's recommendations, a continuous monitoring system on the pressure relief valve or in the associated process systems sufficient to determine:

(A) the time and duration of each pressure relief event;

(B) the status of the pressure relief valve as either:

(i) open or closed to the atmosphere; or

(ii) the percentage the valve is open to the atmosphere; and

(C) the volumetric flow rate during a pressure relief event.

(i) If volumetric flow rate is not monitored directly, the owner or operator must determine through engineering calculations, manufacturer's information, or actual testing the correlation between the monitored parameter and the percentage the pressure relief valve is open to the atmosphere to the volumetric flow rate.

(ii) If the monitoring system only indicates an open or closed status as specified in subparagraph (B)(i) of this paragraph, the owner or operator must assume the pressure relief valve is 100% open during a pressure relief event for purposes of calculating volumetric flow rate.

(2) For purposes of determining compliance with the control requirement of §115.722(a) - (c) of this title during pressure relief events, the owner or operator may use process knowledge, including scientific calculations and other process monitoring data, to determine HRVOC emission rates. The volumetric flow rate determined in accordance with paragraph (1)(C) of this subsection shall be used in combination with the process knowledge to determine HRVOC emission rates.

(3) The owner or operator shall develop, implement, and follow a written monitoring plan to satisfy the requirements of paragraphs (1) and (2) of this subsection. The monitoring plan must include:

(A) specifications for all monitors used to satisfy the requirements of paragraphs (1) and (2) of this subsection;

(B) all engineering calculations, manufacturer's information, or actual testing supporting the correlation of the monitored parameters to actual volumetric flow rate specified in paragraph (1)(C)(i) of this subsection;

(C) supporting documentation of the actual testing or process knowledge used to determine HRVOC emissions as provided in paragraph (2) of this subsection;

(D) at a minimum, quarterly inspections of all pressure relief valves and associated monitors to insure proper operation per the manufacturer's specifications; and

(E) a list identifying all pressure relief valves in HRVOC service subject to the requirements of this subsection.

(4) Upon written request by the executive director, the monitoring plan required under paragraph (3) of this subsection must be submitted within 30 days for review. The executive director may require additional or alternative monitoring requirements.

(d) Except as specified in subsections (e) - (k) of this section, the owner or operator of an affected flare must conduct continuous monitoring, to demonstrate compliance with §115.722(a) - (d) of this title as follows:

(1) install, calibrate, maintain, and operate a continuous flow monitoring system capable of measuring the flow rate over the full potential range of operation. The executive director may approve alternative means of determining the flare flow rate for a period of time not to exceed 1.0% of the annual operating time of the flare. The monitoring system must be capable of measuring the entire gas stream flow to the flare (i.e., all vent gas and supplemental fuel sources) and may consist of one or more flow measurements at one or more header locations. For correcting flow rate to standard conditions (defined as 68 degrees Fahrenheit and 760 millimeters of mercury (mm Hg)), temperature and pressure in the main flare header must be monitored continuously. The monitors must be calibrated to meet accuracy specifications as follows:

(A) the temperature monitor must be calibrated annually to within ±2.0% at absolute temperature;

(B) the pressure monitor must be calibrated annually to within ±5.0 mm Hg; and

(C) the flow monitor, or velocity monitor used to determine flow rate, must be initially calibrated, prior to installation, to demonstrate accuracy to within 5.0% at flow rates equivalent to 30%, 60%, and 90% of monitor full scale. After installation, the flow monitor or velocity monitor must be calibrated annually according to manufacturer's specifications;

(2) install, calibrate, maintain, and operate an on-line analyzer system capable of determining HRVOC at least once every 15 minutes. The on-line analyzer system must also be capable of measuring, at least once every 15 minutes, other potential constituents (e.g., hydrogen, nitrogen, methane, and carbon dioxide, and volatile organic compounds (VOC) other than HRVOCs) sufficient to determine the molecular weight and net heating value of the gas combusted in the flare to within 5.0%. Samples must be collected from a location on the main flare header such that the measured constituents, including any supplementary fuel, are representative of the combined gas combusted in the flare system. Net heating value of the gas combusted in the flare must be calculated according to the equation given in 40 CFR §60.18(f)(3) as amended through October 17, 2000 (65 FR 61744). The samples must be used to demonstrate continuous compliance with the requirements of §115.722(a) - (d) of this title. Pilot gas may not be included in the determination of the net heating value.

(A) Calibration of the on-line analyzer shall be as follows:

(i) for the HRVOC constituents, follow the procedures and requirements of Section 10.0 of 40 CFR Part 60, Appendix B, Performance Specification 9, as amended through October 17, 2000 (65 FR 61744), except that the multi-point calibration procedure in Section 10.1 of Performance Specification 9 must be performed at least once every calendar quarter instead of once every month, and the mid-level calibration check procedure in Section 10.2 of Performance Specification 9 must be performed at least once every calendar week instead of once every 24 hours. The calibration gases used for calibration procedures must be in accordance with Section 7.1 of Performance Specification 9;

(ii) for the constituents monitored to determine net heating value and molecular weight, the owner or operator may elect to follow either the calibration procedures specified for HRVOC constituents in clause (i) of this subparagraph or the calibration procedures recommended by the analyzer manufacturer. If the owner or operator elects to follow manufacturer's recommended procedures:

(I) those calibration procedures must include, at a minimum, single point calibration checks at least once every calendar week to meet the acceptance criteria specified in Section 10.2 of Performance Specification 9 with certified standards of the top two non-HRVOC constituents affecting molecular weight and net heating value; and

(II) the owner or operator shall include in the quality assurance plan (QAP) required under §115.726(a) of this title, manufacturer's information and data to demonstrate the accuracy and reliability of the analyzer for those monitored constituents for which routine calibration checks are not performed;

(iii) the range of calibration standards for the HRVOCs and other constituents may be based on the typical concentrations observed rather than the full potential range of concentrations. Data must be included in the QAP required under §115.726(a) of this title to demonstrate the accuracy of the analyzer at maximum potential concentrations outside of the proposed calibration range; and

(iv) the executive director may specify additional calibration requirements during approval of the QAP under §115.726(a)(1)(B) of this title.

(B) If the on-line analyzer, required in this paragraph, measures concentrations on a dry basis, the results must be corrected for moisture when determining net heating value according to the requirements in 40 CFR §60.18(f)(3) or when determining mass rates using volumetric flow rates that are on a wet basis. The following methods may be used to determine moisture for this correction:

(i) a continuous moisture analyzer installed, calibrated, maintained, and operated according to the manufacturer's recommendations;

(ii) assume saturated moisture conditions for the temperature and pressure at the sample extraction point in the flare header for conditions up to 20% moisture by volume;

(iii) assume 0% moisture for flare systems where moisture is not expected to be present due to the process nature of the vent streams routed to the flare; or

(iv) process information and engineering calculations for conditions, such as steaming operations, where moisture is expected to be greater than 20% by volume;

(3) continuously operate each monitoring system as required by this section at least 95% of the time when the flare is operational, averaged over a calendar year. The percent measurement data availability must be calculated as the total flare operating hours for which valid quality-assured data was recorded divided by the total flare operating hours. Time required for normal calibration checks required under paragraphs (1) and (2) of this subsection is not considered downtime for purposes of this calculation;

(4) during any period of monitor downtime of the on-line analyzer specified in paragraph (2) of this subsection exceeding eight consecutive hours, take a sample daily, starting within ten hours of the initial on-line analyzer malfunction. The sampling location must be such that the measured constituents, including any supplementary fuel, is representative of all of the major constituents going to the flare system. For determining the HRVOC concentrations in the flare header gas, the samples must be analyzed for the concentrations of HRVOC according to the procedures in 40 CFR Part 60, Appendix A, Method 18 as amended through October 17, 2000 (65 FR 61744). Samples must also be analyzed by American Standard of Testing Materials Standard D1946-77 to determine other potential constituents (e.g., hydrogen, nitrogen, methane, and carbon dioxide, and VOCs other than HRVOCs) sufficient to determine the molecular weight and net heating value of the gas combusted in the flare to within 5.0%. Net heating value of the gas combusted in the flare must be calculated according to the equation given in 40 CFR §60.18(f)(3). During periods of monitor downtime, these samples must be used to demonstrate that continuous compliance with the requirements of §115.722(a) - (d) of this title is met;

(5) for each one-hour block period, calculate the average net heating value of the gas combusted in the flare according to the equation given in 40 CFR §60.18(f)(3). Pilot gas must not be included in the determination of the net heating value;

(6) for each one-hour block period, calculate the average actual exit velocity of the flare based on continuous flow rate, temperature, and pressure monitor data, according to 40 CFR §60.18(f)(4); and

(7) calculate the HRVOC hourly average mass emission rates from the flare using the data gathered according to paragraphs (1) - (6) of this subsection, assuming a 99% destruction efficiency for ethylene and propylene and a 98% destruction efficiency for all other HRVOCs when the flare meets the heating value and exit velocity requirements of 40 CFR §60.18. During each one-hour block period when the flare is not in compliance with the net heating value or exit velocity requirements of 40 CFR §60.18, a destruction efficiency of 93% shall be assumed to calculate HRVOC mass emission rates.

(e) Flares used solely for abatement of emissions from marine loading operations or transport vessel loading and unloading operations are not required to comply with the monitoring requirements of subsection (d) of this section, provided the following specific requirements are satisfied.

(1) To demonstrate compliance with the minimum net heating value requirements of §115.722(d) of this title, a calorimeter must be calibrated, installed, operated, and maintained, in accordance with manufacturer recommendations, to continuously measure and record the net heating value of the gas sent to the flare, in British thermal units/standard cubic foot of the gas.

(2) The flare's actual exit velocity for each loading activity must be calculated on a one- hour block average basis, based on the maximum loading rate and the supplemental fuel rate corrected to standard temperature and pressure and the unobstructed (free) cross- sectional area of the flare tip, according to 40 CFR §60.18(f)(4) to demonstrate compliance with the exit velocity requirements of §115.722(d) of this title.

(3) The HRVOC hourly average mass emission rates from the flare must be calculated to demonstrate compliance with the site-wide cap in §115.722 of this title, using total HRVOC sent to the flare calculated based on loading emission calculations, and the speciated composition of the material being sent to the flare, assuming a 99% destruction efficiency for ethylene and propylene and a 98% destruction efficiency for all other HRVOCs when the flare meets the net heating value and exit velocity requirements of 40 CFR §60.18. During each one-hour block period when the flare does not meet the net heating value or exit velocity requirements of 40 CFR §60.18, a destruction efficiency of 93% must be assumed to calculate HRVOC mass emission rates.

(4) For flares that receive greater than 95% of an individual HRVOC at all times, the owner or operator may use process knowledge to determine net heating value for demonstrating compliance with §115.722(d) of this title.

(f) Flares used solely for abatement of emissions from scheduled or unscheduled maintenance, startup, or shutdown activities must comply with the continuous monitoring requirements in subsection (d) of this section, or satisfy all of the following requirements.

(1) A single flare must not be operated in HRVOC service for more than 720 hours at a site in any 12 consecutive months.

(2) The total number of hours for which a site may send HRVOCs temporarily to multiple flares as described in this subsection must not exceed 1,440 hours in 12 consecutive months.

(3) To demonstrate compliance with the minimum net heating value requirements of §115.722(d) of this title, a calorimeter must be calibrated, installed, operated, and maintained, in accordance with manufacturer recommendations, to continuously measure and record the net heating value of the gas sent to the flare, in British thermal units per standard cubic foot of the gas.

(4) The flow rate of the gas routed to the flare, in standard cubic feet per minute must be determined by either:

(A) complying with the monitoring requirements of subsection (d)(1) of this section; or

(B) using process knowledge and engineering calculations.

(5) The flare's actual exit velocity for each activity must be calculated on a one-hour block average basis, corrected to standard temperature and pressure and the unobstructed (free) cross-sectional area of the flare tip, according to 40 CFR §60.18(f)(4). The HRVOC hourly average mass emission rates from the flare must be calculated to demonstrate compliance with §115.722(a) - (c) of this title, using total HRVOC sent to the flare calculated based on process knowledge or actual measurement, assuming a 99% destruction efficiency for ethylene and propylene and a 98% destruction efficiency for all other HRVOCs when the flare meets the net heating value and exit velocity requirements of 40 CFR §60.18. During each one-hour block period when the flare does not meet the net heating value or exit velocity requirements of 40 CFR §60.18, a destruction efficiency of 93% must be assumed to calculate HRVOC mass emission rates.

(6) For flares that at all times receive greater than 95% of an individual HRVOC, the owner or operator may use process knowledge to determine net heating value for demonstrating compliance with §115.722(d) of this title.

(g) For an emergency flare, as defined in §115.10 of this title, subject to the requirements of this division, the owner or operator shall:

(1) comply with the continuous monitoring requirements in subsection (d) of this section; or

(2) use process knowledge and engineering calculations to determine compliance with the requirements of §115.722(a) - (d) of this title during an upset event. If this option is selected the owner or operator shall comply with the following:

(A) for emergency flares equipped with a physical seal (e.g., a water seal) that prevents emissions from being sent to the flare except during an upset event, the owner or operator shall install, calibrate, operate, and maintain, according to manufacturer's specifications, a continuous monitoring system that:

(i) monitors the status of the physical seal to ensure that emissions are not directed to the flare except during an upset event;

(ii) automatically records the time and duration of each event when emissions are sent to the flare; and

(iii) verifies that the physical seal has been restored after each event;

(B) for emergency flares not equipped with a physical seal that prevents emissions from being sent to the flare except during an upset event, the owner or operator shall:

(i) install, calibrate, operate, and maintain, according to manufacturers' specifications, a flow monitoring or indicating system to determine and record the time and duration of each event when emissions are sent to the flare; and

(ii) determine through process knowledge, engineering calculations, or actual testing, the baseline flow rate from any purge/sweep gas and the minimum flow rate indicative of an upset event;

(C) the owner or operator shall develop, implement, and follow a written monitoring plan to satisfy the requirements of subparagraph (A) or (B) of this paragraph. The monitoring plan must include:

(i) specifications for all monitors used to satisfy the requirements of subparagraph (A) or (B) of this paragraph;

(ii) the engineering calculations, process information, and actual testing used to determine volumetric flow rate, flare tip exit velocity, net heating value, and HRVOC emissions for compliance with §115.722(a) - (d) of this title; and

(iii) at a minimum, quarterly inspections of the continuous monitoring system to ensure proper operation;

(D) upon written request by the executive director, the monitoring plans required in accordance with subparagraph (C) of this paragraph shall be submitted within 30 days for review. The executive director may require additional or alternative monitoring requirements; and

(E) the flare's actual exit velocity for each activity must be calculated on a one-hour block average basis, corrected to standard temperature and pressure and the unobstructed (free) cross-sectional area of the flare tip, according to 40 CFR §60.18(f)(4). The HRVOC hourly average mass emission rates from the flare must be calculated, using total HRVOC sent to the flare calculated based on process knowledge or actual measurement, assuming a 99% destruction efficiency for ethylene and propylene and a 98% destruction efficiency for all other HRVOCs when the flare meets the net heating value and exit velocity requirements of 40 CFR §60.18. During each one-hour block period when the flare does not meet the net heating value or exit velocity requirements of 40 CFR §60.18, a destruction efficiency of 93% must be assumed to calculate HRVOC mass emission rates.

(h) Flares other than emergency flares that temporarily receive HRVOC emissions during any operation that is not a scheduled or unscheduled maintenance, startup, or shutdown activity as defined in §101.1 of this title must satisfy the following requirements.

(1) The flare must not be operated in HRVOC service for more than 336 hours at the plant site in any 12 consecutive months.

(2) The total number of hours for which a site may send HRVOCs temporarily to multiple flares as described in this subsection must not exceed 672 hours in 12 consecutive months.

(3) In lieu of the flow monitoring requirements of subsection (d)(1) of this section, the owner or operator may use one of the following to demonstrate compliance with §115.722(a) - (d) of this title:

(A) process knowledge;

(B) actual measurement; or

(C) for flares that temporarily receive HRVOC emissions from flare systems that are monitored in accordance with subsection (d) of this section, the flow monitoring data from the monitored flare system may be used as data substitution. Maximum one-hour average flow rate, excluding data from startups, shutdowns, maintenance, or emissions events, from the previous 30 operational days must be used to determine compliance with §115.722(a) - (d) of this title.

(4) In lieu of implementing the continuous monitoring requirements specified in subsection (d) (2) of this section, the owner or operator may use one of the following to demonstrate compliance with §115.722(a) - (d) of this title:

(A) for all flares in temporary HRVOC service, daily sampling in accordance with subsection (d) (4) of this section to determine net heating value and HRVOC concentrations; or

(B) for flares that temporarily receive HRVOC emissions for less than 72 consecutive hours from flare systems that are monitored in accordance with subsection (d) of this section, the monitoring data from the monitored flare system may be used as data substitution to satisfy compliance with §115.722(a) - (d) of this title. Maximum one-hour average total HRVOC concentrations and minimum one-hour average net heating value, excluding data from scheduled startups, shutdowns, maintenance, or emissions events, from the previous 30 operational days shall be used to determine compliance with §115.722(a) - (d) of this title.

(5) If an emissions event as defined in §101.1 of this title occurs while HRVOC emissions are being routed to a flare temporarily under this subsection, the owner or operator shall demonstrate compliance with the requirements of §115.722(a) - (d) of this title using process knowledge and engineering calculations in accordance with subsection (g)(2)(E) of this section.

(i) For flares specifically designed to receive and control liquid or dual phase streams containing HRVOCs, process knowledge and engineering calculations must be used to determine compliance with the requirements of §115.722(a) - (d) of this title in accordance with subsection (g)(2)(E) of this section.

(j) Flares that are used to control vent gases from metal alkyl production processes must comply with the continuous monitoring requirements in subsection (d) of this section, or satisfy the following requirements.

(1) The flow rate of the gas routed to the flare, in standard cubic feet per minute, must be determined by complying with the monitoring requirements of subsection (d)(1) of this section, for demonstrating compliance with the site cap and exit velocity requirements in §115.722(a) - (d) of this title, in accordance with subsection (g)(2)(E) of this section. The owner or operator may submit a request to the executive director for alternative operational parameter monitoring in lieu of the flow monitoring specified in this paragraph for situations in which direct flow monitoring is not possible.

(2) Process knowledge and engineering calculations may be used to determine net heating value and HRVOC concentrations for demonstrating compliance with §115.722(a) - (d) of this title in accordance with subsection (g)(2)(E) of this section.

(k) For flares that are in multi-purpose service (e.g., an emergency flare that is also used to control emissions from emissions events and scheduled startup, shutdown, and maintenance activities), the owner or operator shall:

(1) comply with all continuous monitoring requirements in subsection (d) of this section; or

(2) comply with the most stringent requirements of each applicable subsection of this section. For the purposes of this paragraph:

(A) only flares subject to the monitoring requirements of subsections (e), (f), or (g) of this section can be considered as multi-purpose flares;

(B) the requirements of the applicable subsections that shall apply are as follows:

(i) for determining minimum net heating value for demonstrating compliance with §115.722(d) of this title, the requirements in subsections (e)(1) or (f)(3) of this section apply;

(ii) to determine volumetric flow rate and HRVOC emissions for demonstrating compliance with the exit velocity requirements and the site-wide cap requirements in §115.722(a) - (d) of this title, the following requirements shall apply:

(I) the requirements in subsection (e)(2) and (3) of this section during any loading operation, as specified in subsection (e) of this section; and

(II) the requirements in subsection (f)(4) and (5) of this section during any emissions event or scheduled startup, shutdown, or maintenance activity;

(iii) for flares used for scheduled or unscheduled startup, shutdown, or maintenance activities, as specified in subsection (f) of this section, the operational time limits in subsection (f)(1) and (2) of this section apply for time periods involving those specified activities; and

(iv) for flares used as emergency flares, as specified in §115.725(g), the requirements in subsection (g)(2)(A) - (D) of this section apply; and

(C) multiple clauses under subparagraph (B) of this paragraph apply. For example, a flare used for emergencies and startup, shutdown, and maintenance activities is subject to subparagraph (B)(i), (ii)(II), (iii), and (iv) of this paragraph.

(l) The owner or operator shall continuously operate each monitoring system as required by this section at least 95% of the operational time of the applicable flare, vent gas stream, or pressure relief valve, averaged over a calendar year. The percent measurement data availability must be calculated as the total operating hours for which valid quality-assured data was recorded divided by the total operating hours. Time required for normal calibration checks required by the provisions of this section is not considered downtime for purposes of this calculation. For the purposes of this calculation, the following apply:

(1) the operational time of an affected flare is any time the flare has the potential to receive HRVOCs;

(2) the operational time of an affected vent gas stream is any time the vent gas stream has the potential to emit HRVOCs; and

(3) the operational time of an affected pressure relief valve is any time HRVOCs are present upstream of the pressure relief valve.

(m) Minor modifications to either test methods or monitoring methods may be approved by the executive director. Test methods or monitoring methods other than those specified in this section may be used if approved by the executive director and validated by 40 CFR Part 63, Appendix A, Test Method 301 (December 29, 1992). For the purposes of this subsection, substitute "executive director" in each place that Test Method 301 references "administrator." The owner or operator does not require prior approval from the executive director for the following alternative monitoring approaches.

(1) In lieu of monitoring constituents for net heating value in accordance with subsection (d) (2) of this section, the owner or operator may install an online calorimeter to determine the net heating value. The calorimeter must be calibrated, installed, operated, and maintained, in accordance with manufacturer recommendations, to continuously measure and record the net heating value of the gas

sent to the flare, in British thermal units/standard cubic foot of the gas; and

(2) The owner or operator may elect to demonstrate compliance with the minimum net heating value requirements of §115.722(d) of this title using the following procedure:

(A) install, calibrate, operate, and maintain a continuous flow monitor to monitor the supplementary fuel used to increase the net heating value of the gas stream sent to the flare; and

(B) continuously maintain sufficient supplementary fuel flow to meet the minimum net heating value requirements specified in §115.722(d) of this title while assuming zero net heating value contribution from all vent gas streams routed to the flare.

(3) The owner or operator of a flare in dedicated service for storage tanks with 95% or greater of an individual HRVOC may elect to determine net heating value and HRVOC concentrations using process knowledge and engineering calculations in lieu of the on-line analyzer required in subsection (d)(2) of this section.

(n) Upon written request by the executive director, the owner or operator shall submit the engineering calculations and process information used to determine volumetric flow rate, flare tip exit velocity, net heating value, and HRVOC emissions for compliance with the requirements of §115.722(a) - (d) of this title where applicable under the requirements of this section. The information must be submitted within 30 days for review.

§115.726. Recordkeeping and Reporting Requirements.

(a) To satisfy the requirements of §115.725 of this title (relating to Monitoring and Testing Requirements), the owner or operator of each affected flare or vent gas stream shall, as applicable:

(1) develop, implement, and follow a written quality assurance plan (QAP) for the monitoring requirements (including installation, calibration, operation, and maintenance of continuous emissions monitoring systems) of this division (relating to Vent Gas Control) for each flare monitored in accordance with §115.725(d) of this title.

(A) The owner or operator shall maintain records on-site of the QAP and any revisions to the QAP.

(B) Upon written request by the executive director, the QAP required in this paragraph shall be submitted within 30 days for review. The executive director may specify revisions to the QAP;

(2) develop, implement, and follow a written test plan for flares and vent gas streams required to be tested in accordance with §115.725(a) of this title. The owner or operator must submit written notification to the Houston regional office at least 45 days prior to conducting any flare and vent gas stream testing required by §115.725(a) of this title to provide the commission opportunity to request a pretest meeting and observe the testing. The written notification must include, at a minimum, the following:

(A) the proposed test date; and

(B) the written test plan required by this paragraph.

(b) The owner or operator of a vent gas stream subject to the requirements of §115.725(a) of this title shall comply with the following recordkeeping requirements as applicable:

(1) maintain records of all testing conducted in accordance with §115.725(a) of this title to determine highly-reactive volatile organic compound (HRVOC) emission rates on a pounds-per-hour basis for each affected vent gas stream;

(2) maintain hourly records of the parameter monitoring in accordance with §115.725(a)(1) or (2) of this title;

(3) maintain records of the monitoring plans required under §115.725(a)(4) of this title;

(4) maintain hourly records of HRVOC emission rates on a pound-per-hour basis for each affected vent gas stream monitored in accordance with §115.725(b)(1) of this title;

(5) maintain records of all continuous emissions monitoring system calibrations and cylinder gas audits performed in accordance with §115.725(b)(1)(A) and (B) of this title;

(6) maintain records of all process information and calculations used to determine vent gas flow rate as specified in §115.725(b)(1)(C) of this title; and

(7) maintain records of all process information, actual testing, process monitoring data, and calculations used to comply with §115.725(a) of this title under the alternatives to the testing requirements in §115.725(b)(2) of this title;

(c) The owner or operator of a pressure relief valve subject to the requirements of §115.725(c) of this title shall comply with the following recordkeeping requirements:

(1) maintain records of the date, time, duration, volumetric flow rate, and speciated and total HRVOC emission rates on a pounds-per-hour basis for each pressure relief event;

(2) maintain hourly records of the parameter monitoring in accordance with §115.725(c)(1) of this title;

(3) maintain records of all process information, monitored data, and calculations used to determine volumetric flow rate and HRVOC hourly emission data as specified in §115.725(c)(2) of this title; and

(4) maintain records of the monitoring plans required under §115.725(c)(3) of this title.

(d) The owner or operator of a flare at a site that is subject to §115.722 of this title (relating to Site-wide Cap and Control Requirements) or the continuous monitoring requirements of §115.725 of this title shall comply with the following recordkeeping requirements:

(1) maintain hourly records of the speciated and total HRVOC emission rates on a pounds-per-hour basis for each affected flare in order to demonstrate compliance with §115.722 of this title;

(2) maintain records of all monitoring, testing, and calibrations performed in accordance with the provisions of §115.725 of this title;

(3) maintain records on a weekly basis that detail all corrective actions made to the continuous monitoring systems during monitor downtimes, and any delay in corrective action taken by documenting the dates, reasons, and durations of such occurrences;

(4) maintain records of each one-hour block average calculated net heating value of the gas stream routed to the flare and each one-hour block average calculated exit velocity at the flare tip, determined in accordance with the provisions of §115.725 of this title; and

(5) for flares subject to the monitoring requirements of §115.725(e) of this title, maintain records of each loading activity including, but not limited to:

(A) the nominal size of vessel being loaded;

(B) the start time and the end time for each vessel loaded;

(C) any compounds loaded at a concentration greater than 1% by weight, in addition to the compounds at a concentration

greater than 1% by weight loaded into the vessel immediately previous to the current loading operation, if the vessel being loaded is not clean;

(D) the quantity of material loaded;

(E) the loading rate in gallons per minute;

(F) the method of loading, such as submerged fill, bottom fill, or splash loading; and

(G) all process information, monitored data, and calculations used to determine volumetric flow rate and HRVOC hourly emission data;

(6) for flares used solely for the abatement of emissions from scheduled or unscheduled maintenance, startup, or shutdown activities in §115.725(f) of this title, the owner or operator shall maintain records, including, but not limited to:

(A) the date, time, and duration for each flaring event;

(B) the volumetric flow rate, in standard cubic feet per minute, of the gas routed to the flare recorded in 15-minute block average periods, or portion thereof, for each flaring event; and

(C) all process information, monitored data, and calculations used to determine volumetric flow rate and HRVOC hourly emission data;

(7) for emergency flares subject to the requirements of §115.725(g) of this title, maintain records including, but not limited to:

(A) the date, time, and duration for each flaring event;

(B) the volumetric flow rate, in standard cubic feet per minute, of the gas routed to the flare recorded in 15-minute block average periods, or portion thereof, for each flaring event;

(C) all process information, monitored data, and calculations used to determine net heating value, volumetric flow rate, and HRVOC hourly emission data;

(D) hourly records of the parameter monitoring in accordance with §115.725(g)(2)(A) or (B) of this title; and

(E) records of the monitoring plans required under §115.725(g)(2)(C) of this title;

(8) for flares subject to the requirements of §115.725(h) or (i) of this title, maintain records including, but not limited to:

(A) the date, time, and duration for each flaring event;

(B) the volumetric flow rate, in standard cubic feet per minute, of the gas routed to the flare recorded in 15-minute block average periods, or portion thereof, for each flaring event; and

(C) all process information, monitored data, and calculations used to determine net heating value, volumetric flow rate, and HRVOC hourly emission data;

(9) for flares subject to the requirements of §115.725(j) of this title, the owner or operator shall maintain records including, but not limited to:

(A) the volumetric flow rate, in standard cubic feet per minute, of the gas routed to the flare recorded in 15-minute block average periods, or portion thereof, for each flaring event;

(B) all process information, monitored data, and calculations used to determine net heating value and HRVOC hourly emission data; and

(C) hourly records of parameter monitoring, if alternative parameter monitoring is approved by the executive director as specified in §115.725(j)(1)(A) of this title; and

(10) for flares considered to be multi-purpose flares, as specified in §115.725(k) of this title, the owner or operator shall maintain all applicable records as required in paragraphs (5)- (7) of this subsection.

(e) Records for exemptions in §115.727(a) - (e) of this title (relating to Exemptions) shall include the following.

(1) The owner or operator of any site claiming exemption under §115.727(a) of this title shall maintain records to document that each vent gas stream that is routed to a flare contains less than 5.0% by weight HRVOC at all times and each vent gas stream not routed to a flare does not exceed 100 parts per million by volume HRVOC at any time.

(2) The owner or operator of any flare claiming exemption under §115.727(b) of this title shall maintain records that document that the HRVOC content of the gas stream that is routed to the flare does not exceed 5.0% by weight at any time.

(3) The owner or operator of any vent gas stream or flare claiming exemption under §115.727 of this title shall comply with the following recordkeeping requirements:

(A) for vent gas streams, maintain records that demonstrate continuous compliance with the exemption criteria of §115.727(c) of this title; or

(B) for flares, maintain records that demonstrate continuous compliance with the exemption criteria of §115.727(d) of this title.

(f) The owner or operator claiming an exemption under §115.727(e) of this title shall submit written notification to the executive director no later than December 31, 2005.

(g) The owner or operator of each site subject to §115.722 of this title shall maintain daily records to demonstrate compliance with the tons per calendar year emissions limits specified in §115.722(a) and (b) of this title, including:

(1) cooling tower emissions from cooling towers that are subject to Division 2 of this subchapter (relating to Cooling Tower Heat Exchange Systems); and

(2) all emissions from flares, vents, and pressure relief valves subject to the requirements of §115.725 of this title.

(h) The owner or operator of each site subject to §115.722 of this title shall maintain hourly records to demonstrate compliance with the one-hour block emissions limits specified in §115.722(c) of this title, including:

(1) cooling tower emissions from cooling towers that are subject to Division 2 of this subchapter; and

(2) all emissions from flares, vents, and pressure relief valves subject to the requirements of §115.725 of this title.

(i) The owner or operator shall maintain on-site, all records required in this division and other records as necessary to demonstrate continuous compliance and records of periodic measurements for at least five years and make them available for review upon request by authorized representatives of the executive director, United States Environmental Protection Agency, or any local air pollution control agency with jurisdiction.

(j) The owner or operator of an affected flare, vent gas stream, or pressure relief valve subject to the requirements of this division that is reclassified as to the applicable requirements of the division or the exemption status, shall comply with the following:

(1) for affected flares, vent gas streams, or pressure relief valves that become exempt from the requirements of this division, maintain records of the date that the exemption became applicable as well as the recordkeeping requirements of subsection (e) of this section; and

(2) for affected flares, vent gas streams, or pressure relief valves that are reclassified as to operational status and the applicable requirements of the division (i.e., a continuous operation flare monitored in accordance with §115.725(d) of this title reclassified as an emergency flare and monitored according to §115.725(g) of this title), maintain records of the date of change in operational status and reclassification.

§115.727. Exemptions.

(a) Any site for which all individual gas streams routed to a flare contain less than 5.0% by weight of highly-reactive volatile organic compounds (HRVOC) at all times, and all individual vent gas streams not routed to a flare contain less than 100 parts per million by volume (ppmv) HRVOC at all times, is exempt from the requirements of §115.722(a) - (c) of this title (relating to Site-wide Cap and Control Requirements).

(b) For a flare that at no time receives a gas stream containing 5.0% or greater HRVOC by weight:

(1) the gas stream directed to the flare shall be treated as a vent gas stream for purposes of determining compliance with §115.722(a) - (c) of this title; and

(2) the flare is exempt from the continuous monitoring requirements of §115.725(d) - (k) of this title (relating to Monitoring and Testing Requirements) and §115.726(d) of this title (relating to Recordkeeping and Recording Requirements) and is therefore not required to submit a quality assurance plan under §115.726(a) of this title.

(c) For vent gas streams that are not routed to a flare, the following exemptions may apply.

(1) A vent gas stream that has no potential to emit HRVOCs is exempt from the requirements of this division, with the exception of the recordkeeping requirements of §115.726(e)(3)(A) of this title.

(2) A vent gas stream that has the potential to emit HRVOCs, but that has an HRVOC concentration less than 100 ppmv at all times or has a maximum potential flow rate equal to or less than 100 dry standard cubic feet per hour is exempt from this division with the exception of the recordkeeping requirements of §115.726(e)(3)(A) of this title. The maximum potential HRVOC emissions for the sum of all vent gas streams claimed under this exemption, must be less for the account specified in §115.722(a) or (b) of this title than 0.5 tons per year.

(3) Vent gas streams from the following sources are exempt from the requirements of this division with the exception of the recordkeeping requirements of §115.726(e)(3)(A) of this title:

(A) vent gas streams resulting from the combustion of less than 5.0% by weight HRVOC in boilers, furnaces, engines, turbines, incinerators, and heaters;

(B) pressure tanks that maintain working pressure sufficient at all times to prevent any vapor or gas loss to the atmosphere;

(C) laboratory vent hoods;

(D) instrumentation air systems;

(E) atmospheric storage tanks;

(F) wastewater system vents;

(G) cooling towers; and

(H) equipment leak fugitive components, except for vents from pressure relief valves occurring when the process pressure is sufficient to overcome the preset pressure relief point of the pressure relief valve and emissions are either released directly to the atmosphere or routed to a control device.

(d) Any flare that at no time receives a total gas stream with greater than 100 ppmv HRVOC is exempt from the requirements of this division, with the exception of the recordkeeping requirements of §115.726(e)(3)(B) of this title.

(e) Any flare that will be permanently out of service by April 1, 2006, is exempt from the requirements of this division, with the exception of the notification and recordkeeping requirements in §115.726(f) of this title.

(f) All sites that are subject to this division and that are located in the Houston/Galveston/ Brazoria area as defined in §115.10 of this title (relating to Definitions), excluding Harris County, are exempt from §115.722(b) and (c)(2) of this title, except as provided in §115.729(a)(3) of this title (relating to Counties and Compliance Schedules).

§115.729. Counties and Compliance Schedules.

(a) The owner or operator of each vent gas stream, pressure relief valve, and flare in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall demonstrate compliance with the requirements of this division (relating to Vent Gas Control) as soon as practicable, but no later than December 31, 2005, with the exception of the following:

(1) §115.722(a) and (c)(2) of this title (relating to Site-wide Cap and Control Requirements) for which the owner or operator shall demonstrate compliance as soon as practicable, but not later than January 1, 2007;

(2) §115.722(b) and (c)(1) of this title for which the owner or operator shall demonstrate compliance as soon as practicable, but no later than April 1, 2006; and

(3) the exemption in §115.727(f) of this title (relating to Exemptions) will no longer apply upon public notice of revocation by the commission. Upon revocation of §115.727(f) of this title, sites subject to this division located in the Houston/Galveston/Brazoria area, as defined in §115.10 of this title (relating to Definitions), excluding Harris County, shall comply with paragraphs (1) and (2) of this subsection by the dates specified in those paragraphs, or within 180 days of public notice, whichever is later.

(b) For vent gas streams, flares, and pressure relief valves that become subject to the requirements of this subdivision after December 31, 2005, testing and monitoring must be conducted as soon as practicable, but no later than 60 days after being brought into highly- reactive volatile organic compound service.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6087

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DIVISION 2. COOLING TOWER HEAT EXCHANGE SYSTEMS

30 TAC §§115.760, 115.761, 115.764, 115.766, 115.767, 115.769

STATUTORY AUTHORITY

The amendments and new sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments and new sections are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.014, concerning Emission Inventory, that authorizes the commission to require information to develop an emissions inventory of air contaminants in the state; §382.016, concerning Monitoring Requirements Examination of Records, that authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants; §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe sampling methods and procedures to be used to determine violations of and compliance with the commission's rules, variances, and orders; and §382.034, concerning Research and Investigations, that authorizes the commission to conduct or require any research or investigations advisable or necessary to perform duties under Texas Health and Safety Code, Chapter 382.

§115.760. Applicability and Cooling Tower Heat Exchange System Definitions.

(a) Applicability. Any site with a cooling tower heat exchange system in the Houston/ Galveston/Brazoria area, as defined in §115.10 of this title (relating to Definitions), that emits or has the potential to emit a highly-reactive volatile organic compound, as defined in §115.10 of this title, is subject to the requirements of this division (relating to Cooling Tower Heat Exchange Systems) in addition to the applicable requirements of any other division in this subchapter or any other subchapter in this chapter.

(b) Definitions. The following terms, when used in this division, have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this division are found in §§3.2, 101.1, and 115.10 of this title (relating to Definitions).

(1) Cooling tower heat exchange system - Cooling towers, associated heat exchangers, pumps, and ancillary equipment where water is used as a cooling medium and the heat from process fluids is transferred to cooling water. This does not include fin-fan coolers. This also does not include comfort cooling tower heat exchange systems (i.e., those used exclusively in cooling, heating, ventilation, and air conditioning systems).

(2) Jacketed reactor - A heat exchange system where water is used as a cooling medium around a heavy walled reactor rather than a conventional heat exchanger tube design. For the purposes of this definition, a reactor is a device or vessel in which one or more chemicals or reactants, other than air, are combined or decomposed in such a way that the molecular structure of one or more chemicals are altered and one or more new organic compounds are formed.

(3) Finite volume system - A system in which a fixed amount of highly-reactive volatile organic compounds is contained or circulated, and changes in the amount of highly-reactive volatile organic compound in the system can only occur through transfers into the system to maintain the system level, transfers out of the system for maintenance purposes, or leakage out of the system (e.g., a propylene refrigeration system).

§115.761. Site-wide Cap.

(a) The owner or operator of a site subject to this division shall additionally comply with the requirements of Chapter 101, Subchapter H, Division 6 of this title (relating to Highly- Reactive Volatile Organic Compound Emissions Cap and Trade Program).

(b) All sites subject to this division or Division 1 of this subchapter (relating to Vent Gas Control) that are exempt from the highly-reactive volatile organic compound (HRVOC) emissions cap and trade program, in accordance with §101.392(a) of this title (relating to Exemptions), are limited to ten tons of HRVOC emissions per calendar year.

(c) Each site subject to this division is subject to the following emission limitations.

(1) HRVOC emissions at each site located in Harris County that is subject to this division or Division 1 of this subchapter must not exceed 1,200 pounds of HRVOCs per one-hour block period from any flare, vent, pressure relief valve, cooling tower, or any combination.

(2) HRVOC emissions at each site located in the Houston/Galveston/Brazoria area as defined in §115.10 of this title (relating to Definitions), excluding Harris County, that is subject to this division or Division 1 of this subchapter must not exceed 1,200 pounds of HRVOCs per one-hour block period from any flare, vent, pressure relief valve, cooling tower, or any combination.

(3) For any exceedance of the HRVOC emission limits specified in paragraph (1) or (2) of this subsection, the emission limits specified in paragraph (1) or (2) of this subsection must be used to determine compliance with subsection (a) or (b) of this section instead of the total amount of actual emissions.

(d) An owner or operator may not use emission reduction credits or discrete emission reduction credits in order to demonstrate compliance with this division.

§115.764. Monitoring and Testing Requirements.

(a) The owner or operator of a cooling tower heat exchange system with a design capacity to circulate 8,000 gallons per minute (gpm) or greater of cooling water shall:

(1) install, calibrate, operate, and maintain a continuous flow monitor on each inlet of each cooling tower. Each monitor shall be calibrated on an annual basis to within ±5.0% accuracy. When the

cooling tower flow monitor is down, flow measurements shall be used for the most recent 24-hour period in which the flow measurements are representative of cooling tower operations during monitor downtime;

(2) install, calibrate, operate, and maintain a system to continuously determine the total strippable volatile organic compound (VOC) concentration at each inlet of each cooling tower. The continuous monitoring system must have a minimum detection limit capability of no more than 25 parts per billion by weight (ppbw) of strippable VOC in the cooling water. The continuous monitor must be calibrated with methane or a VOC that best represents potential leakage into the cooling tower system and the emissions from the system. Calibration must be checked weekly or more frequently, as necessary, to maintain a monitor drift of less than 5.0%. During out-of-order periods of the VOC monitor(s) of 24 hours or greater, a sample must be collected for total VOC analysis according to the air-stripping method in Appendix P of the Texas Commission on Environmental Quality Sampling Procedures Manual (January 2003). This sample must be collected at least three times per calendar week, with an interval of no less than 36 hours between samples;

(3) continuously operate each monitoring system as required by this section at least 95% of the time when the cooling tower is operational, averaged over a calendar year. The percent measurement data availability must be calculated as the total operating hours of the cooling tower heat exchange system for which valid quality-assured data was recorded divided by the total operating hours of the cooling tower heat exchange system. Time required for normal calibration checks required under this subsection is not considered downtime for purposes of this calculation;

(4) determine the speciated strippable highly-reactive volatile organic compound (HRVOC) concentration by collecting samples from each inlet of each cooling tower at least once per month in accordance with the air-stripping method in Appendix P;

(5) if the concentration of total strippable VOC is equal to or greater than 50 ppbw in the cooling tower water for more than a one-hour block of time, collect an additional sample to determine speciated and total HRVOC in accordance with the air-stripping method in Appendix P from each inlet of the affected cooling tower at least once daily, beginning on the next calendar day. The additional sampling to determine speciated and total HRVOC shall continue on a daily basis until the concentration of total strippable VOC drops below 50 ppbw; and

(6) in lieu of the monitoring in paragraph (2) of this subsection and the sampling for speciation of strippable HRVOC in paragraphs (4) and (5) of this subsection, a continuous on-line monitor capable of providing total HRVOC and speciated HRVOCs in ppbw may be installed. The sampling system for the continuous on-line monitoring system must be demonstrated equivalent to the air-stripping apparatus used in Appendix P for determining strippable HRVOC concentrations in the water as specified in subsection (f) of this section. The continuous on-line monitor system must satisfy the requirements of Sections 8.3, 10, 13.1, and 13.2 of 40 Code of Federal Regulations (CFR) Part 60, Appendix B, Performance Specification 9, as amended through October 17, 2000 (65 FR 61744). The multi-point calibration procedure in Section 10.1 of Performance Specification 9 must be performed at least once every calendar quarter instead of once every month. During out-of-order periods of the on-line HRVOC monitor(s) of 24 hours or greater, sampling must be performed for total and speciated HRVOC analysis according to the air-stripping method in Appendix P. Sampling must be performed at least three times per calendar week, with an interval of no less than 36 hours between sampling times, until the continuous on-line monitor is properly operating and within the required performance specifications.

(A) During out-of-order periods of the monitoring system, data should be handled as follows for purposes of recordkeeping and demonstrating compliance:

(i) For each out-of-order period less than 24 hours, the maximum one-hour average HRVOC concentrations from the 24-hour period immediately prior to the out-of-order period must be used; and

(ii) For each out-of-order period of 24 hours or greater, the maximum one-hour average HRVOC concentrations from the 24-hour period immediately prior to the out-of-order period must be used for the time period from the initial outage of the monitoring system to time of collection of the first manual sample required by this paragraph. The results of each manual sample must be used for the time period from collection of that sample to the collection of the subsequent sample, or to the time that the continuous monitoring system is on-line and within the required performance specifications.

(B) For periods that only the analyzer system is out of order and the sampling system (i.e., HRVOC sparging or stripping system) is still functioning within normal specifications, the owner or operator may elect to collect the manual samples required by this paragraph using the sampling system of the continuous HRVOC monitoring system.

(b) The owner or operator of a cooling tower heat exchange system with a design capacity to circulate less than 8,000 gpm of cooling water or a cooling tower heat exchange system in dedicated service to a jacketed reactor, as defined in §115.760(b) of this title (relating to Applicability and Cooling Tower Heat Exchange System Definitions), shall:

(1) install, calibrate, operate, and maintain a continuous flow monitor on each inlet of each cooling tower. Each monitor must be calibrated on an annual basis to within ±5.0% accuracy. When the cooling tower flow monitor is down, flow measurements must be used for the most recent 24-hour period in which the flow measurements are representative of cooling tower operations during monitor downtime;

(2) determine the total strippable VOC concentration by collecting samples from each inlet of each cooling tower at least twice per week in accordance with the air-stripping method in Appendix P with an interval of not less than 48 hours between samples;

(3) operate each monitoring system as required by this section at least 95% of the time when the cooling tower is operational, averaged over a calendar year. The percent measurement data availability must be calculated as the total operating hours of the cooling tower heat exchange system for which valid quality-assured data was recorded divided by the total operating hours of the cooling tower heat exchange system. Time required for normal calibration checks required under this subsection is not considered downtime for purposes of this calculation;

(4) determine the speciated strippable HRVOC concentration by collecting samples from each inlet of each cooling tower at least once per month in accordance with the air-stripping method in Appendix P;

(5) if the concentration of total strippable VOC is equal to or greater than 50 ppbw in the cooling tower water, collect an additional sample to determine total strippable VOC, speciated HRVOC, and total HRVOC from each inlet of the affected cooling tower at least once daily, beginning on the next calendar day, in accordance with the air-stripping method in Appendix P. The additional sampling to determine total strippable VOC, speciated HRVOC, and total HRVOC must continue on a daily basis until the concentration of total strippable VOC drops below 50 ppbw; and

(6) in lieu of the monitoring in paragraph (2) of this subsection and the sampling for speciation of strippable HRVOC in paragraphs (4) and (5) of this subsection, a continuous on-line monitor capable of providing total HRVOC and speciated HRVOCs in ppbw may be installed. The sampling system for the continuous on-line monitoring system must be demonstrated equivalent to the air-stripping apparatus used in Appendix P for determining strippable HRVOC concentrations in the water as specified in subsection (f) of this section. The continuous on-line monitor system must satisfy the requirements of Sections 8.3, 10, 13.1, and 13.2 of 40 CFR Part 60, Appendix B, Performance Specification 9. The multi-point calibration procedure in Section 10.1 of Performance Specification 9 must be performed at least once every calendar quarter instead of once every month. During out-of-order periods of the on-line HRVOC monitor(s) of 24 hours or greater, sampling must be performed for total and speciated HRVOC analysis according to the air-stripping method in Appendix P. Sampling must be performed at least twice per calendar week, with an interval of no less than 72 hours between sampling times, until the continuous on-line monitor is properly operating and within the required performance specifications.

(A) During out-of-order periods of the monitoring system, data should be handled as follows for purposes of recordkeeping and demonstrating compliance.

(i) For each out-of-order period less than 24 hours, the maximum one-hour average HRVOC concentrations from the 24-hour period immediately prior to the out-of-order period must be used.

(ii) For each out-of-order period of 24 hours or greater, the maximum one-hour average HRVOC concentrations from the 24-hour period immediately prior to the out-of-order period must be used for the time period from the initial outage of the monitoring system to time of collection of the first manual sample required by this paragraph. The results of each manual sample must be used for the time period from collection of that sample to the collection of the subsequent sample, or to the time that the continuous monitoring system is on-line and within the required performance specifications.

(B) For periods that only the analyzer system is out of order and the sampling system (i.e., HRVOC sparging or stripping system) is still functioning within normal specifications, the owner or operator may elect to collect the manual samples required by this paragraph using the sampling system of the continuous HRVOC monitoring system.

(c) When periodic sampling is required, the owner or operator of the cooling tower heat exchange system shall determine the speciated HRVOC concentration as soon as this information is available, but no later than seven days after the sample(s) have been collected. Samples collected in a Tedlar™ bag must be analyzed no later than 72 hours after the samples have been collected. The samples must be analyzed according to the procedures in Test Method 18, 40 CFR Part 60, Appendix A, and/or Method TO-14A, published in "U.S. EPA Compendium for Determination of Toxic Organic Compounds in Ambient Air (1996)," United States Environmental Protection Agency Document Number 625/R96/010B.

(d) In lieu of subsections (a)(2) - (5) and (b)(2) - (5) of this section, the owner or operator of cooling tower heat exchange systems in which no individual heat exchanger has 5.0% or greater HRVOC in the process-side fluid, shall determine total strippable VOC and the HRVOC concentration in the cooling tower water at least once per month, with an interval of not less than 20 days between samples, according to the air-stripping method in Appendix P. If the total strippable VOC concentration in the cooling tower water is 50 ppbw or greater, the owner or operator shall determine the total strippable VOC weekly and the HRVOC concentration weekly. The additional sampling for the total strippable VOC concentration and HRVOC concentration continue until the total strippable VOC concentration drops below 50 ppbw.

(e) In lieu of using a continuous flow monitor as described in subsections (a)(1) and (b)(1) of this section, the owner or operator of a cooling tower heat exchange system may:

(1) use the maximum potential flow rate based on manufacturer's pump performance data, assuming no back pressure; or

(2) install, calibrate, operate, and maintain, in accordance with the manufacturer's recommendations, a monitor to continuously measure and record each cooling water pump discharge pressure to establish the total dynamic head of the cooling water system. The owner or operator of the cooling water system must establish, use, and demonstrate in the QAP required in §115.766(i) of this title (relating to Recordkeeping and Reporting Requirements, a calculation methodology that will provide, on a continuous basis, the cooling water circulation flow rate (in gpm) based on the following: cooling water discharge pressure for each pump; the manufacturer's certified pump performance data; and the number of pumps in operation. This calculated flow rate will then be used to determine the hourly emission rate in pounds per hour, as required by §115.766(a)(3) of this title.

(f) Minor modifications to the monitoring and testing methods in this section may be approved by the executive director. Monitoring and testing methods other than those specified in this section may be used if approved by the executive director and validated by 40 CFR Part 63, Appendix A, Test Method 301 (December 29, 1992). For the purposes of this subsection, substitute "executive director" in each place that Test Method 301 references "administrator."

(g) In lieu of using the monitor location described in subsections (a), (b), and (h) of this section:

(1) the owner or operator of cooling tower heat exchange systems in which a single cooling tower services both HRVOC and non-HRVOC process units, or a single cooling tower that services multiple types of heat exchange systems (i.e., jacketed reactor or finite volume system), may:

(A) install a flow monitor or monitors, meeting the requirements of subsections (a)(1) and (b)(1) of this section at a point that represents the flow of cooling water from only the HRVOC-containing process units; and

(B) monitor the total strippable VOC or HRVOC concentration, in accordance with subsection (a), (b), (d), or (h) of this section at a point leaving the HRVOC-containing process unit and prior to mixing with cooling tower water from other units; or

(2) the owner or operator of cooling tower heat exchange systems may elect to monitor cooling water flow rate at a location that is representative of the total flow rate to the cooling tower.

(h) In lieu of the requirements of subsection (a) of this section, the owner or operator of a cooling tower heat exchange system in dedicated service to a finite volume system, as defined in §115.760(b) of this title, with HRVOC and with a design capacity to circulate 8,000 gallons gpm or greater of cooling water may elect to comply with the following requirements:

(1) install, calibrate, operate, and maintain a continuous flow monitor on each inlet of each cooling tower. Each monitor must be calibrated on an annual basis to within ±5.0% accuracy. When the cooling tower flow monitor is down, flow measurements must be used for the most recent 24-hour period in which the flow measurements are representative of cooling tower operations during monitor downtime;

(2) determine the speciated strippable HRVOC concentration by collecting samples from each inlet of each cooling tower at least once per month in accordance with the air-stripping method in Appendix P;

(3) determine the total strippable VOC concentration by collecting samples from each inlet of each cooling tower at least twice per week in accordance with the air-stripping method in Appendix P with an interval of not less than 48 hours between samples;

(4) if the concentration of total strippable VOC is equal to or greater than 50 ppbw in the cooling tower water, collect an additional sample to determine total strippable VOC, speciated HRVOC, and total HRVOC from each inlet of the affected cooling tower at least once daily in accordance with the air-stripping method in Appendix P. The additional sampling to determine total strippable VOC, speciated HRVOC, and total HRVOC must continue on a daily basis until the concentration of total strippable VOC drops below 50 ppbw;

(5) install, calibrate, operate, and maintain a continuous monitoring system to monitor the inventory level of the HRVOC in the finite volume system;

(6) develop, implement, and follow a written monitoring plan to satisfy the requirements of paragraph (5) of this subsection. The monitoring plan must include:

(A) specifications for all monitors used to satisfy the requirements of paragraph (5) of this subsection;

(B) the normal hourly variation in the inventory level for the continuous monitoring system;

(C) all process information, design specifications, and engineering calculations, used to establish the normal hourly variation in the inventory level; and

(D) at a minimum, quarterly inspections of the continuous monitoring system to ensure proper operation;

(7) if the hourly inventory level monitored in accordance with paragraphs (5) and (6) of this subsection is not within the normal hourly variation in the inventory level established as required in paragraph (5) of this subsection, except during maintenance activities, then the owner or operator must perform sampling for total strippable VOC as specified in paragraph (3) of this subsection within 24 hours. If the concentration of total strippable VOC is equal to or greater than 50 ppbw in the cooling tower water, then the owner or operator shall perform daily sampling to determine total strippable VOC, speciated HRVOC, and total HRVOC in accordance with paragraph (4) of this subsection until the concentration of total strippable VOC drops below 50 ppbw; and

(8) upon written request by the executive director, the monitoring plan required in accordance with paragraph (6) of this subsection must be submitted within 30 days for review. The executive director may require additional or alternative monitoring requirements.

§115.766. Recordkeeping and Reporting Requirements.

(a) The owner or operator of any cooling tower heat exchange system subject to §115.761 of this title (relating to Site-wide Cap) shall comply with the following recordkeeping requirements:

(1) establish and maintain a process diagram of the cooling tower heat exchange system, including the locations at which the system will be monitored and sampled such that the cooling water is not exposed to the atmosphere prior to sampling;

(2) maintain records of all monitoring, testing, and calibrations performed in accordance with the provisions of §115.764 of this title (relating to Monitoring and Testing Requirements);

(3) maintain hourly records that document the emission rate in pounds per hour (lb/hr) for each hour for speciated highly-reactive volatile organic compounds (HRVOC) and total HRVOC from the cooling water for each cooling tower heat exchange system as required by §115.764(a), (b), (d), or (h) of this title. The flow rate of the cooling water in conjunction with the most recently monitored concentration of the speciated HRVOC or total HRVOC in the cooling tower water, shall be used to calculate the respective emission rate in lb/hr. If the concentration results of the speciated HRVOC or total HRVOC analyses are below the minimum detection limit (i.e., non-detected), then half the detection limit(s) must be used to calculate HRVOC emissions;

(4) maintain hourly records of the total strippable VOC concentration in the cooling water for cooling tower heat exchanger systems monitored in accordance with §115.764(a)(2) of this title, and maintain records of each test for total strippable VOC concentration performed in accordance with §115.764(b)(2), (d), or (h) of this title. If the concentration results of the total strippable VOC testing or monitoring are below the minimum detection limit, then one-half the detection limit must be used to calculate average total strippable VOC concentration;

(5) maintain hourly records of the cooling water flow rate;

(6) maintain records on a weekly basis that detail all corrective actions made to the continuous monitoring systems during monitor downtimes, and any delay in corrective action taken by documenting the dates, reasons, and durations of such occurrences; and

(7) for cooling tower heat exchange systems that comply with §115.764(h) of this title, maintain records including, but not limited to:

(A) the monitoring plan required by §115.764(h)(6) of this title;

(B) hourly records of the inventory level of the finite volume system from the continuous monitoring system required by §115.764(h)(6) of this title; and

(C) the date, time, purpose, and amount of all transfers of HRVOC into and out of the finite volume system;

(b) The owner or operator of any cooling tower heat exchange system claiming an exemption under §115.767 of this title (relating to Exemptions) shall comply with the following recordkeeping requirements:

(1) maintain records of the heat exchanger pressure differential to document continuous compliance with the exemption criteria of §115.767(1) of this title; or

(2) maintain records of the content of the process side fluid or intervening fluid in each heat exchanger to demonstrate continuous compliance with the exemption criteria of §115.767(2) and (5) of this title.

(c) The owner or operator shall maintain all records necessary to demonstrate continuous compliance and records of periodic measurements for at least five years and make them available for review upon request by authorized representatives of the executive director, United States Environmental Protection Agency, or any local air pollution control agency with jurisdiction.

(d) The owner or operator of any cooling tower heat exchange system using the alternate periodic monitoring available under §115.764(d) of this title shall maintain sufficient records to demonstrate that no individual heat exchanger has 5.0% or greater HRVOC in the process-side fluid.

(e) The owner or operator of any cooling tower heat exchange system using manufacturer's pump performance data to determine the maximum potential flow rate, as specified in §115.764(e)(1) of this title, shall maintain the following records for each pump:

(1) certified pump performance information from the manufacturer. If manufacturer's certified information is unavailable, then pump performance information that is generated by a qualified independent third-party organization using a code or standard of practice acceptable to the executive director may be used;

(2) the operating status of each pump;

(3) the motor manufacturer, model number, and rated brake horsepower;

(4) the impeller manufacturer, model number, size, and design;

(5) any change to a cooling tower heat exchange system pump or pumping system in which the change would modify the basis for design pumping capacity; and

(6) the effect of any change on the maximum potential flow rate.

(f) The owner or operator of any cooling tower heat exchange system using a system to monitor cooling water pump discharge pressure to determine the continuous flow rate for each cooling tower, as specified in §115.764(e)(2) of this title, shall maintain the following records for each pump:

(1) the continuous measurement of cooling water pump discharge pressure;

(2) certified pump performance information from the manufacturer. If manufacturer's certified information is unavailable, then pump performance information that is generated by a qualified independent third-party organization using a code or standard of practice acceptable to the executive director may be used;

(3) the operating status of each pump;

(4) the motor manufacturer, model number, and rated brake horsepower;

(5) the impeller manufacturer, model number, size, and design;

(6) any change to a cooling tower heat exchange system pump or pumping system in which the change would modify the basis for design pumping capacity; and

(7) the effect of any change on the maximum potential flow rate.

(g) The owner or operator of each site subject to §115.761 of this title shall maintain daily records to demonstrate compliance with the tons per calendar year emissions limits specified in §115.761(a) and (b) of this title, including:

(1) flare, vent gas, and pressure relief valve emissions that are subject to Division 1 of this subchapter (relating to Vent Gas Control); and

(2) all cooling towers subject to the requirements of §115.764 of this title.

(h) The owner or operator of each site subject to §115.761 of this title shall maintain hourly records to demonstrate compliance with the one-hour block emissions limits specified in §115.761(c) of this title, including:

(1) flare, vent gas, and pressure relief valve emissions that are subject to Division 1 of this subchapter; and

(2) all cooling towers subject to the requirements of §115.764 of this title.

(i) The owner or operator of an affected cooling tower heat exchange system shall develop, implement, and follow a written quality assurance plan (QAP) for the installation, calibration, operation, and maintenance for the monitoring equipment required by this division as follows.

(1) The owner or operator shall maintain records of the QAP and any revisions to the QAP on site.

(2) Upon written request by the executive director, the QAP required in this paragraph shall be submitted within 30 days for review. The executive director may specify revisions to the QAP.

(j) The owner or operator claiming an exemption under §115.767(4) of this title shall submit written notification to the executive director no later than December 31, 2005.

§115.767. Exemptions.

The following exemptions apply.

(1) Any cooling tower heat exchange system in which each individual heat exchanger with greater than 100 parts per million by weight (ppmw) highly-reactive volatile organic compounds (HRVOC) in the process side fluid is operated with the minimum pressure on the cooling water side at least five pounds per square inch, gauge (psig) greater than the maximum pressure on the process side, as demonstrated by continuous pressure monitoring and recording at all heat exchangers with greater than 100 ppmw HRVOC in the process side fluid, is exempt from the requirements of this division (relating to Cooling Tower Heat Exchange Systems), with the exception of the recordkeeping requirements of §115.766(b) and (c) of this title (relating to Recordkeeping and Reporting Requirements).

(2) Any cooling tower heat exchange system in which no individual heat exchanger has greater than 100 ppmw HRVOCs in the process side fluid is exempt from the requirements of this division, with the exception of the recordkeeping requirements of §115.766(b) and (c) of this title.

(3) Any site for which no stream directed to a cooling tower heat exchange system contains 5.0% or greater by weight HRVOC is exempt from the requirements of §115.761 of this title (relating to Site-wide Cap).

(4) Any cooling tower heat exchange system that will be permanently out of service by April 1, 2006, is exempt from the requirements of this division, with the exception of the notification and recordkeeping requirements in §115.766(j) of this title.

(5) Any cooling tower heat exchange system with an intervening cooling fluid containing less than 100 ppmw of HRVOC between the process and the cooling water is exempt from the requirements of this division, with the exception of the recordkeeping requirements of §115.766(b) and (c) of this title. For purposes of this exemption:

(A) intervening fluid is a fluid that serves to isolate the cooling water from the process fluid and is not sent through a cooling tower or discharged; and

(B) discharge does not include emptying for maintenance purposes.

(6) All sites that are subject to this division and that are located in the Houston/ Galveston/Brazoria area as defined in §115.10

of this title (relating to Definitions), excluding Harris County, are exempt from §115.761(b) and (c)(2) of this title, except as provided in §115.769(a)(3) of this title (relating to Counties and Compliance Schedules).

§115.769. Counties and Compliance Schedules.

(a) The owner or operator of each cooling tower heat exchange system in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall demonstrate compliance with this division (relating to Cooling Tower Heat Exchange Systems) as soon as practicable, but no later than December 31, 2005, with the exception of the following:

(1) §115.761(a) and (c)(2) of this title (relating to Site-wide Cap) for which the owner or operator shall demonstrate compliance as soon as practicable, but no later than January 1, 2007;

(2) §115.761(b) and (c)(1) of this title for which the owner or operator shall demonstrate compliance as soon as practicable, but no later than April 1, 2006; and

(3) the exemption in §115.767(6) of this title (relating to Exemptions) will no longer apply upon public notice of revocation by the commission. Upon revocation of §115.767(6) of this title, sites subject to this division located in the Houston/Galveston/Brazoria area, as defined in §115.10 of this title (relating to Definitions), excluding Harris County, shall comply with paragraphs (1) and (2) of this subsection by the dates specified in those paragraphs, or within 180 days of public notice, whichever is later.

(b) For cooling tower heat exchange systems that become subject to the requirements of this division after December 31, 2005, testing and monitoring must be conducted as soon as practicable, but no later than 60 days after being brought into highly-reactive volatile organic compound service.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2004.

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Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: December 23, 2004
Proposal publication date: July 9, 2004
For further information, please call: (512) 239-6087

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30 TAC §§115.766 - 115.768

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeals are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.014, concerning Emission Inventory, that authorizes the commission to require information to develop an emissions inventory of air contaminants in the state; §382.016, concerning Monitoring Requirements Examination of Records, that authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants; and §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe sampling methods and procedures to be used to determine violations of and compliance with the commission's rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron Perdue
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DIVISION 3. FUGITIVE EMISSIONS

30 TAC §§115.780 - 115.783, 115.786 - 115.789

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.014, concerning Emission Inventory, that authorizes the commission to require information to develop an emissions inventory of air contaminants in the state; §382.016, concerning Monitoring Requirements Examination of Records, that authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants; §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe sampling methods and procedures to be used to determine violations of and compliance with the commission's rules, variances, and orders; and

§382.034, concerning Research and Investigations, that authorizes the commission to conduct or require any research or investigations advisable or necessary to perform duties under Texas Health and Safety Code, Chapter 382.

§115.780. Applicability.

(a) Any process unit or process within a petroleum refinery; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or natural gas/gasoline processing operation in the Houston/Galveston/Brazoria area, as defined in §115.10 of this title (relating to Definitions), in which a highly-reactive volatile organic compound, as defined in §115.10 of this title, is a raw material, intermediate, final product, or in a waste stream is subject to the requirements of this division (relating to Fugitive Emissions) in addition to the applicable requirements of Subchapter D, Division 3 of this chapter (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas).

(b) An owner or operator may not use emission reduction credits or discrete emission reduction credits in order to demonstrate compliance with this division.

§115.781. General Monitoring and Inspection Requirements.

(a) The owner or operator shall identify the components of each process unit in highly- reactive volatile organic compound (HRVOC) service that is subject to this division (relating to Fugitive Emissions). Such identification must allow for ready identification of the components, and distinction from any components that are not subject to this division. The components must be identified by one or more of the following methods:

(1) a plant site plan;

(2) color coding;

(3) a written or electronic database;

(4) designation of process unit boundaries;

(5) some form of weatherproof identification; or

(6) process flow diagrams that exhibit sufficient detail to identify major pieces of equipment, including major process flows to, from, and within a process unit. Major equipment includes, but is not limited to, columns, reactors, pumps, compressors, drums, tanks, and exchangers.

(b) Each component in the process unit must be monitored according to the requirements of Subchapter D, Division 3 of this chapter (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas), except that the following additional requirements apply.

(1) The exemptions of §115.357(1) - (12) of this title (relating to Exemptions) do not apply.

(2) The leak-skip provisions of §115.354(7) and (8) of this title (relating to Inspection Requirements) do not apply.

(3) The emissions from blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC; connectors; heat exchanger heads; sight glasses; meters; gauges; sampling connections; bolted manways; hatches; agitators; sump covers; junction box vents; covers and seals on volatile organic compound water separators; and process drains shall be monitored each calendar quarter (with a hydrocarbon gas analyzer).

(4) All components for which a repair attempt was made during a shutdown shall be monitored (with a hydrocarbon gas analyzer) and inspected for leaks within 30 days after startup is completed following the shutdown.

(5) All process drains equipped with water seal controls, as defined in §115.140 of this title (relating to Industrial Wastewater Definitions), shall be inspected weekly to ensure that the water seal controls are effective in preventing ventilation, except that daily inspections are required for those seals that have failed three or more inspections in any 12-month period. Upon request by the executive director, United States Environmental Protection Agency, or any local program with jurisdiction, the owner or operator shall demonstrate (e.g., by visual inspection or smoke test) that the water seal controls are properly designed and restrict ventilation.

(6) All process drains not equipped with water seal controls shall be inspected monthly to ensure that all gaskets, caps, and/or plugs are in place and that there are no gaps, cracks, or other holes in the gaskets, caps, and/or plugs. In addition, all caps and plugs shall be inspected monthly to ensure that they are tightly fitting.

(7) An unsafe-to-monitor or difficult-to-monitor component for which quarterly monitoring is specified may instead be monitored as follows.

(A) An unsafe-to-monitor component is a component that the owner or operator determines is unsafe to monitor because monitoring personnel would be exposed to an immediate danger as a consequence of conducting the monitoring. Components that are unsafe to monitor shall be identified in a list made immediately available upon request. If an unsafe- to-monitor component is not considered safe to monitor within a calendar year, then it shall be monitored as soon as possible during safe-to-monitor times.

(B) A difficult-to-monitor component is a component that cannot be inspected without elevating the monitoring personnel more than two meters above a permanent support surface or that requires a permit for confined space entry as defined in 29 Code of Federal Regulations §1910.146. A difficult-to-monitor component for which quarterly monitoring is specified may instead be monitored annually.

(8) All pressure relief valves in gaseous service that are not equipped with a rupture disk upstream of the relief valve with a pressure-sensing device between the rupture disk and the pressure relief valve shall be monitored for fugitive leaks each calendar quarter (with a hydrocarbon gas analyzer).

(9) A leak is defined as a screening concentration greater than 500 parts per million by volume above background as methane for all components.

(10) Monitored screening concentrations must be recorded for each component in gaseous or light liquid service. Notations such as "pegged," "off scale," "leaking," "not leaking," or "below leak definition" may not be substituted for hydrocarbon gas analyzer results. For readings that are higher than the upper end of the scale (i.e., pegged) even when using the highest scale setting or a dilution probe, record a default pegged value of 100,000 parts per million by volume.

(c) Pumps, compressors, and agitators must be:

(1) inspected visually each calendar week for liquid dripping from the seals; or

(2) equipped with an alarm that alerts the operator of a leak.

(d) If securing the bypass line valve in the closed position to comply with §115.783(1)(B) of this title (relating to Equipment Standards), the seal or closure mechanism must be visually inspected to ensure the valve is maintained in the closed position and the vent stream is not diverted through the bypass line:

(1) on a monthly basis; and

(2) after any maintenance activity that requires the seal to be broken.

(e) For any pressure relief device that has vented directly to the atmosphere (uncontrolled), the associated vent must be monitored (with a hydrocarbon gas analyzer) and inspected within 24 hours after actuation and the results recorded in accordance with §115.786 of this title (relating to Recordkeeping Requirements). If the associated vent is considered unsafe to monitor, then the vent must be monitored as soon as possible during safe-to- monitor times. If the associated vent is considered difficult to monitor, it must be monitored within 15 days after a release. This requirement does not supersede any monitoring requirements found in §115.725 of this title (relating to Monitoring and Testing Requirements).

(f) As an alternative to the requirements of subsection (b)(3) of this section for blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers, the owner or operator may elect to monitor all of these components in a process unit by April 1, 2006, and then conduct subsequent monitoring at the following frequencies:

(1) once per year (i.e., 12-month period), if the percent leaking blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers in the process unit was 0.5% or greater, but less than 2.0%, during the last required annual or biennial monitoring period;

(2) once every two years, if the percent leaking blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers was less than 0.5% during the last required monitoring period. An owner or operator may comply with this paragraph by monitoring at least 40% of the components in the first year and the remainder of the components in the second year. The percent leaking connectors, bolted manways, heat exchanger heads, hatches, and sump covers will be calculated for the total of all monitoring performed during the two-year period;

(3) if the owner or operator of a process unit in a biennial leak detection and repair program calculates less than 0.5% leaking blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers from the two-year monitoring period, the owner or operator may monitor the components one time every four years. An owner or operator may comply with the requirements of this paragraph by monitoring at least 20% of the components each year until all connectors, bolted manways, heat exchanger heads, hatches, and sump covers have been monitored within four years;

(4) if a process unit complying with the requirements of paragraph (3) of this subsection using a four-year monitoring interval program has greater than or equal to 0.5% but less than 1.0% leaking blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers, the owner or operator shall increase the monitoring frequency to one time every two years. An owner or operator may comply with the requirements of this paragraph by monitoring at least 40% of the components in the first year and the remainder of the components in the second year. The owner or operator may again elect to use the provisions of paragraph (3) of this subsection when the percent leaking components decreases to less than 0.5%;

(5) if a process unit complying with requirements of paragraph (3) of this subsection using a four-year monitoring interval program has greater than or equal to 1.0% but less than 2.0% leaking blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers, the owner or operator shall increase the monitoring frequency to one time per year. The owner or operator may again elect to use the provisions of paragraph (3) of this subsection when the percent leaking components decreases to less than 0.5%; and

(6) if a process unit complying with requirements of paragraph (3) of this subsection using a four-year monitoring interval program has 2.0% or greater leaking blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers, the owner or operator shall increase the monitoring frequency to quarterly. The owner or operator may again elect to use the provisions of paragraph (3) of this subsection when the percent leaking components decreases to less than 0.5%.

(g) Except as provided in paragraph (2) of this subsection, the owner or operator shall use dataloggers and/or electronic data collection devices during all monitoring required by this section. The owner or operator shall transfer electronic data from electronic datalogging devices to an electronic or hard copy database within seven days of monitoring.

(1) For all monitoring events in which an electronic data collection device is used, the collected monitoring data must include the identification of each component and each calibration run, the maximum screening concentration detected, the time of monitoring (i.e., the time that the organic vapor concentration is read or recorded for each component), a date stamp, an operator identification, an instrument identification, and calibration gas concentrations and certification dates.

(2) The owner or operator may use paper logs where necessary or more feasible (e.g., small rounds (less than 100 components), re-monitoring following component repair, or when dataloggers are broken or not available), and shall record, at a minimum, the information required in paragraph (1) of this subsection. The owner or operator shall transfer any manually recorded monitoring data to the electronic or hard copy database within seven days of monitoring.

(3) Each change to the database regarding the monitored concentration, date and time read, repair information, addition or deletion of components, or monitoring schedule must be detailed in a log or inserted as a notation in the database. All such changes must include the name of the person who made the change, the date of the change, and an explanation to support the change.

§115.782. Procedures and Schedule for Leak Repair and Follow-up.

(a) Tagging. Upon the detection or designation of a leaking component, a weatherproof and readily visible tag, bearing the component identification and the date the leak was detected, must be affixed to the leaking component. The tag must remain in place until the leaking component is repaired.

(b) General rule - time to repair.

(1) For leaks detected over 10,000 parts per million by volume (ppmv), a first attempt at repairing the leaking component shall be made no later than one business day after the leak is detected, and the component shall be repaired no later than seven calendar days after the leak is detected.

(2) For all other leaks, a first attempt at repairing the leaking component shall be made no later than five calendar days after the leak is detected, and the component shall be repaired no later than 15 calendar days after the leak is detected.

(c) Delay of repair.

(1) For all components (except valves specified in paragraph (2) of this subsection), repair may be delayed beyond the period designated in subsection (b) of this section for any of the following reasons:

(A) the component is isolated from the process and does not remain in highly- reactive volatile organic compound (HRVOC) service;

(B) if the repair of a component within seven or 15 days (as specified in subsection (b) of this section) after the leak is detected would require a process unit shutdown that would create more emissions than the repair would eliminate, the repair may be delayed until the next scheduled process unit shutdown, provided that:

(i) the owner or operator maintains, and makes available upon request, documentation to authorized representatives of the United States Environmental Protection Agency (EPA), the executive director, and any local air pollution control agency having jurisdiction which includes a calculation of:

(I) the expected mass emissions resulting from the next scheduled process unit shutdown, clearing, and subsequent startup of the unit, including the basis for the calculation and all assumptions made;

(II) the mass emission rates from each leaking component in the process unit for which delay of repair is sought as determined by using the methods in the EPA correlation approach in Section 2.3.3 of the EPA guidance document *Protocol for Equipment Leak Emission Estimates* (EPA-453/R-95-017, November 1995) alone or in combination with the mass emission sampling approach in Chapter 4 of the guidance document (EPA-453/R- 95-017, November 1995). To use the EPA correlation approach, the estimated hourly mass emission rate for each component shall be based on the component's current screening concentration using Test Method 21. The initial calculation must be performed within 30 days after the leak is detected. Where the monitoring instrument is not calibrated to read past the leak definition or 100,000 ppmv, the pegged emission rate values in Tables 2-13 and 2-14 in Section 2.3.3 of the EPA guidance document "Protocol for Equipment Leak Emission Estimates" shall be used as appropriate. If the mass emission sampling approach is used, it replaces the estimated emissions rate of the EPA correlation approach in the calculation;

(III) the daily mass emissions from each leaking component in HRVOC service in the process unit for which delay of repair is sought calculated as 24 times the hourly mass emission rate determined as required by subclause (II) of this clause,; and

(IV) the total daily mass emissions in the process unit from the calculations made in subclause (III) of this clause for leaking components in HRVOC service in the unit for which delay of repair is sought; and

(ii) the total daily mass emissions from leaking components in HRVOC service in the process unit for which delay of repair is sought as determined in clause (i)(IV) of this subparagraph will be less than the daily mass emissions resulting from shutdown, clearing, and subsequent startup of the unit as determined in clause (i)(I) of this subparagraph or 500 pounds, whichever is greater; or

(iii) as an alternative to the requirements of clause (i) and (ii) of this subparagraph, delay of repair is allowed for each leaking component for which the owner or operator has chosen to undertake "extraordinary efforts" to repair the leak. For purposes of this subparagraph, "extraordinary efforts" is defined as nonroutine repair methods (e.g., sealant injection) or utilization of a closed-vent system to capture and control the leaks by at least 90%. For leaks detected over 10,000 ppmv, extraordinary efforts shall be undertaken within 22 calendar days after the leak is found; however, the owner or operator may keep the leaking component on the shutdown list only after two unsuccessful attempts to repair a leaking component through extraordinary efforts, provided that the second extraordinary effort attempt is made within 37 calendar days after the leak is found. For all other leaks, extraordinary efforts shall be undertaken within 30 calendar days after the leak is found, and a second extraordinary effort attempt is not required; or

(iv) repair or replacement of the component occurs at the next scheduled shutdown. The executive director, at his discretion, may require an early process unit shutdown, or other appropriate action, based on the number and severity of leaks awaiting a shutdown; or

(C) the components are pumps, compressors, or agitators, and:

(i) repair requires replacing the existing seal design with:

(I) a dual mechanical seal system that includes a barrier fluid system;

(II) a system that is designed with no externally actuated shaft penetrating the housing; or

(III) a closed-vent system and control device that meets the requirements of §115.783 of this title (relating to Equipment Standards); and

(ii) repair is completed as soon as practicable, but not later than six months after the leak was detected.

(2) For valves that are not pressure relief valves or automatic control valves, repair may only be delayed beyond the period designated in subsection (b) of this section if:

(A) repair or replacement of these valves occurs at the next scheduled process unit shutdown; and

(i) the owner or operator has undertaken "extraordinary efforts" to repair the leaking valve. For purposes of this subparagraph, "extraordinary efforts" is defined as nonroutine repair methods (e.g., sealant injection) or utilization of a closed-vent system to capture and control the leaks by at least 90%. For leaks detected over 10,000 ppmv, extraordinary efforts shall be undertaken within 14 calendar days after the leak is found; however, the owner or operator may keep the leaking valve on the shutdown list only after two unsuccessful attempts to repair a leaking valve through extraordinary efforts, provided that the second extraordinary effort attempt is made within 15 days of the first extraordinary effort attempt. For all other leaks, extraordinary efforts shall be undertaken within 30 calendar days after the leak is found, and a second extraordinary effort attempt is not required; or

(ii) the owner or operator maintains, and makes available upon request, documentation to authorized representatives of EPA, the executive director, and any local air pollution control agency

having jurisdiction that demonstrates that there is a safety, mechanical, or major environmental concern posed by repairing the leak by using "extraordinary efforts" and emissions from the leaking valves are included in the calculation of total daily mass emissions required by paragraph (1)(B)(i)(IV) of this subsection; or

(B) the valve is isolated from the process and does not remain in HRVOC service.

§115.783. Equipment Standards.

The following equipment standards apply.

(1) Closed-vent systems containing bypass lines (excluding low-leg drains, high-point bleeds, analyzer vents, open-ended valves or lines, and pressure relief valves needed for safety purposes) that could divert a vent stream away from the control device and to the atmosphere, must have either:

(A) a flow indicator that determines whether vent stream flow is present in the bypass line at least once every 15 minutes; or

(B) the bypass line valve secured in the closed position with a car-seal or a lock-and-key type configuration.

(2) Whenever highly-reactive volatile organic compound emissions are vented to a closed-vent system, control device, or recovery device used to comply with the provisions of this chapter, the system or control device is subject to the requirements of Division 1 of this subchapter (relating to Vent Gas Control).

(3) Pumps, compressors, and agitators installed on or after July 1, 2003, shall be equipped with a shaft sealing system that prevents or detects emissions of volatile organic compounds from the seal.

(A) Acceptable shaft sealing systems include:

(i) seals equipped with piping capable of transporting any leakage from the seal(s) back to the process;

(ii) seals with a closed-vent system capable of transporting to a control device any leakage from the seal or seals;

(iii) dual seals with a heavy liquid or non-volatile organic compounds barrier fluid or gas at higher pressure than process pressure; and

(iv) seals with an automatic seal failure detection and alarm system.

(B) The executive director may approve shaft sealing systems different from those specified in subparagraph (A) of this paragraph. The executive director:

(i) shall consider on a case-by-case basis the technological circumstances of the individual pump, compressor, or agitator; and

(ii) must determine that the alternative shaft sealing system will result in the lowest emissions level that the pump, compressor, or agitator is capable of meeting after the application of best available control technology before approving the alternative shaft sealing system.

(C) Any owner or operator affected by the executive director's decision to deny a request for approval of an alternative shaft sealing system may file a motion to overturn the executive director's decision. The requirements of §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) apply. Executive director approval does not necessarily constitute satisfaction of all federal requirements nor eliminate the need for approval by the United States Environmental Protection Agency in cases where specified criteria for determining equivalency have not been clearly identified in this section.

(4) The following equipment standards shall apply to process drains.

(A) If water seal controls, as defined in §115.140 of this title (relating to Industrial Wastewater Definitions), are used:

(i) the only acceptable alternative to water as the sealing liquid in a water seal is the use of ethylene glycol, propylene glycol, or other low vapor pressure antifreeze, that may be used only during the period of November through February; and

(ii) as an alternative to the weekly water seal inspections of §115.781(b)(5) of this title (relating to General Monitoring and Inspection Requirements), the owner or operator may choose to equip the process drain with:

(I) an alarm that alerts the operator if the water level in the vertical leg of the drain falls below 50% of the maximum level, and a device that continuously records the status of the water level alarm, including the time period for which the alarm has been activated; or

(II) a flow-monitoring device indicating either positive flow from a main to a branch water line supplying a trap or water being continuously dripped into the trap; and a device that continuously records the status of water flow into the trap.

(B) For process drains not equipped with water seal controls, the process drain shall be equipped with:

(i) a gasketed seal; or

(ii) a tightly-fitting cap or plug.

(5) No valves shall be installed or operated at the end of a pipe or line containing highly- reactive volatile organic compounds unless the pipe or line is sealed with a second valve, a blind flange, or a tightly-fitting plug or cap. The sealing device may be removed only while a sample is being taken or during maintenance operations, and when closing the line, the upstream valve shall be closed first.

§115.786. Recordkeeping Requirements.

(a) If using a flow indicator to comply with §115.783(1)(A) of this title (relating to Equipment Standards), the owner or operator shall:

(1) maintain hourly records of whether the flow indicator was operating and whether a diversion was detected at any time during the hour; and

(2) record all periods when:

(A) the vent stream is diverted from the control stream; or

(B) the flow indicator is not operating.

(b) If securing the bypass line valve in the closed position to comply with §115.783(1)(B) of this title, the owner or operator shall:

(1) maintain a record of the dates that the monthly visual inspection of the seal or closure mechanism has been performed;

(2) record the date and time of all periods when:

(A) the seal mechanism is broken;

(B) the bypass line valve position has changed; or

(C) the key for a lock-and-key type lock has been checked out; and

(3) maintain a record of each time the bypass line valve was opened, including:

(A) the date and time the valve was opened;

(B) the date and time the valve was closed;

(C) the reason(s) the valve was opened;

(D) the estimated flow rate through the valve; and

(E) the resulting emissions, including the basis for the emissions estimate.

(c) Records of all non-repairable components subject to §115.782(c) of this title (relating to Procedures and Schedule for Leak Repair and Follow-up) must be maintained. Reports must be submitted by January 31st for the previous July 1 through December 31 and July 31st for the previous January 1 through June 30 of each year to the Houston regional office and any local air pollution control agency having jurisdiction. The report shall contain:

(1) the component identification code;

(2) the component type;

(3) the leak concentration measurement and date;

(4) the date of the last scheduled process unit shutdown; and

(5) the total number of non-repairable components awaiting repair or replacement.

(d) The owner or operator shall maintain records in accordance with §115.356 of this title (relating to Monitoring and Recordkeeping Requirements), including records identifying, by one or more of the methods specified in §115.781(a)(1) - (6) of this title (relating to General Monitoring and Inspection Requirements), and justifying each exemption claimed exempt under §115.787 of this title (relating to Exemptions). The following additional requirements also apply:

(1) the calculation showing the estimated volatile organic compound (VOC) emission rates of the component as required by §115.782(c)(1)(B)(i)(II) of this title if extraordinary efforts are not going to be initiated; and

(2) records for each process unit with leaking components, updated within five business days after a leaking component is determined to require a process unit shutdown to repair and where extraordinary efforts to repair the component will not be pursued, including the following:

(A) the date, calculations, and estimated daily VOC emissions as required by §115.782(c)(1)(B)(i)(III) of this title;

(B) the date, calculations, and comparison of daily VOC emissions as required by §115.782(c)(1)(B)(i)(IV) and (ii) of this title; and

(C) the date of each process unit shutdown required due to VOC emissions of leaking components exceeding the expected VOC emissions from the shutdown.

(e) The owner or operator shall maintain a record of the results of all monitoring and inspections conducted in accordance with §115.781 of this title.

(f) The owner or operator shall maintain all records for at least five years and make them available for review upon request by authorized representatives of the executive director, United States Environmental Protection Agency, or local air pollution control agencies with jurisdiction.

§115.787. Exemptions.

(a) Components that contact a process fluid containing less than 5.0% highly-reactive volatile organic compounds by weight on an annual average basis are exempt from the requirements of this division (relating to Fugitive Emissions), except for §115.786(e) and (f) of this title (relating to Recordkeeping Requirements).

(b) The following are exempt from the shaft sealing system requirements of §115.783(3) of this title (relating to Equipment Standards):

(1) submerged pumps or sealless pumps (e.g., diaphragm, canned, or magnetic-driven pumps); and

(2) pumps, compressors, and agitators installed before July 1, 2003.

(c) The following components are exempt from the requirements of this division:

(1) conservation vents or other devices on atmospheric storage tanks that are actuated either by a vacuum or a pressure of no more than 2.5 pounds per square inch gauge (psig);

(2) components in continuous vacuum service;

(3) valves that are not externally regulated (such as in-line check valves);

(4) any site as defined in §122.10 of this title (relating to General Definitions) with less than 250 components in volatile organic compound (VOC) service;

(5) components that are insulated, making them inaccessible to monitoring with a hydrocarbon gas analyzer;

(6) sampling connection systems, as defined in 40 Code of Federal Regulations (CFR) §63.161 (January 17, 1997), that meet the requirements of 40 CFR §63.166(a) and (b) (June 20, 1996); and

(7) instrumentation systems, as defined in 40 CFR §63.161 (January 17, 1997), that meet the requirements of 40 CFR §63.169 (June 20, 1996).

(d) All pumps, compressors, and agitators that are equipped with a shaft sealing system that prevents or detects emissions of VOC from the seal are exempt from the monitoring requirement of §115.781(b) and (c) of this title (relating to General Monitoring and Inspection Requirements). These seal systems may include, but are not limited to, dual seals with barrier fluid at higher pressure than process pressure, seals degassing to vent control systems kept in good working order, or seals equipped with an automatic seal failure detection and alarm system. Submerged pumps or sealless pumps (including, but not limited to, diaphragm, canned, or magnetic driven pumps) may be used to satisfy the requirements of this subsection.

(e) Each pressure relief valve equipped with an upstream rupture disk is exempt from the requirements of §115.781(b)(8) of this title, provided that the pressure relief valve complies with §115.725(c) of this title (relating to Monitoring and Testing Requirements). The rupture disk must replaced as soon as practicable, but no later than 30 calendar days after a failure is detected.

(f) The following valves are exempt from the requirements of §115.783(5) of this title:

(1) pressure relief valves;

(2) open-ended valves or lines in an emergency shutdown system that are designed to open automatically in the event of an emissions event;

(3) open-ended valves or lines containing materials that would autocatalytically polymerize or would present an explosion, serious overpressure, or other safety hazard if capped or equipped with a double block and bleed system; and

(4) valves rated greater than 10,000 psig.

(g) Any site as defined in §122.10 of this title with less than 100 components in highly- reactive volatile organic compound service is exempt from §115.788 of this title (relating to Audit Provisions).

§115.788. Audit Provisions.

(a) At least once every calendar year, the owner or operator of a site as defined in §122.10 of this title (relating to General Definitions) that is subject to the highly-reactive volatile organic compound (HRVOC) fugitive monitoring requirements of this division shall retain the services of an independent third-party organization to conduct an audit of the process units subject to HRVOC monitoring in this division. The field survey conducted as part of the audit must be based on a random sampling of the affected valves at the site. The random sample must be such that each valve has an equal chance of being selected from the total number of valves being sampled. The valves to be considered in this random sampling are all of the valves at the site in HRVOC service that are not exempted from quarterly monitoring by §115.787 of this title (relating to Exemptions) and are not listed on either the difficult-to-monitor or the unsafe-to-monitor lists. The independent third-party organization shall:

(1) verify that all affected valves are properly tagged in accordance with §115.782(a) of this title (relating to Procedures and Schedule for Leak Repair and Follow-up).

(2) perform a field survey to determine the representative percentage of leaking valves determined from the random sampling of the affected units at the site as follows.

(A) The field survey must begin after the owner or operator's contracted or usual monitoring service has completed monitoring the valves for that monitoring period. The field survey must be completed by the end of the next monitoring period.

(B) The following table must be used to determine the number of valves required to be monitored in the field survey. The total population valve count is all of the valves in HRVOC service that are not exempted from quarterly monitoring by §115.787 of this title and are not listed on either the difficult-to-monitor or the unsafe-to-monitor lists based on the average of the previous four quarters of monitoring. The company claimed leaker rate is the number of leaking valves found in the total population valve count based on the previous four quarters of monitoring divided by the total population valve count.
Figure: 30 TAC §115.788(a)(2)(B)

(C) The following alternatives may be used in lieu of subparagraph (B) of this paragraph to determine the number of valves required to be monitored in the field survey. The required sample size must be calculated using a hypergeometric distribution that characterizes sampling from a given finite population of valves without replacement and reported leaker rate. Commercially available statistical software programs may be used. The sample size must be determined according to the following requirements:

(i) the total population valve count is all of the valves in HRVOC service that are not exempted from quarterly monitoring by §115.787 of this title and are not listed on either the difficult-to-monitor or the unsafe-to-monitor lists based on the average of the previous four quarters of monitoring. The company claimed leaker rate is the number of leaking valves found in the total population valve count based on the previous four quarters of monitoring divided by the total population valve count;

(ii) Type I error rate must be less than or equal to 0.05. A Type I error occurs when the company claimed leaker rate accurately reflects the true proportion of leakers, yet the test falsely indicates that the true percentage of leakers is greater than reported (false positive); and

(iii) Type II error rate must be less than or equal to 0.20, when the minimum difference between the company's claimed leaker rate and the true population leaker rate is at least 2%. A Type II error occurs when the true leaker rate is in fact greater than the reported rate, but the test fails to so indicate (false negative).

(D) The independent third-party organization shall perform the field survey in accordance with Test Method 21 (40 Code of Federal Regulations Part 60, Appendix A);

(3) conduct a review of all data generated by monitoring technicians in the previous quarter. This review must include:

(A) identification of data patterns indicative of failure to properly implement Test Method 21 including, but not limited to, a review of the number of valves monitored per technician and the time between monitoring events to validate that the sampling procedures accurately reflect the requirements of Test Method 21 including identification of specific instances in which a monitoring technician recorded data faster than was physically possible due to the hydrocarbon gas analyzer response time and/or the time required for the technician to move to the next component; and

(B) a review of records to verify that the calibration requirements of Test Method 21 have been properly implemented.;

(b) For purposes of this section, an independent third-party organization is an organization in which the owner or operator (including any subsidiary, parent company, sister company, or joint venture) of the petroleum refinery; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or natural gas/gasoline processing operation has no ownership or other financial interest. If the owner or operator's routine monitoring is done by a contractor rather than by in-house monitoring, then the independent third-party organization must be a different contractor from that ordinarily used for those services.

(c) The owner or operator shall submit a verbal notification to the Houston regional office and any local air pollution control agency having jurisdiction that provides the date that the independent third-party organization is scheduled to begin the audit. The notification must be submitted at least 30 days prior to the start date of the audit.

(d) The owner or operator shall furnish the Houston regional office and any local air pollution control agency having jurisdiction a copy of the results of the audit authored by the independent third-party organization within 30 days after completion of the audit requirements listed in subsection (a) of this section. The report must include:

(1) the number of valves that were not tagged, but should have been tagged in accordance with §115.782(a) of this title;

(2) the number of valves monitored during the field survey, the number of leaking valves found during the field survey, the percentage of leaking valves identified by the independent third-party organization during the field survey, and a detailed description of the sampling scheme used to ensure that a random sample of valves was selected so that each valve had an equal chance of being selected from the total number of valves being sampled;

(3) the total number of valves in HRVOC service that are not exempted from quarterly monitoring by §115.787 of this title and are not listed on either the difficult-to-monitor or the unsafe-to-monitor lists monitored based on the average of the previous four quarters of

monitoring, the total number of leaking valves found at the site by the owner or operator's contracted or usual monitoring service based on the average of the previous four quarters of monitoring, and the percentage of leaking valves based on the average of the previous four quarters of monitoring;

(4) the methodology used to select the field survey sample size. If the alternative provided in subsection (a)(2)(C) of this section was used to determine the number of valves to be sampled in the field survey, documentation must include the actual Type I and Type II error rates associated with the sample size used and a detailed description of the methodology used to calculate the sample size; and

(5) a summary of the independent third-party organization's review of all data generated by monitoring technicians in the previous quarter by the owner or operator's contracted or usual monitoring service for each of the categories specified in subsection (a)(3)(A) and (B) of this section.

(e) If the results of the independent third-party audit indicate deficiencies in the implementation of Test Method 21, the owner or operator shall submit a corrective action plan with the audit report to the Houston regional office or any local air pollution control agency having jurisdiction.

(f) Authorized representatives of the executive director, United States Environmental Protection Agency, or any local air pollution control agency with jurisdiction may conduct an audit of the owner or operator's leak detection and repair program.

(g) In lieu of complying with subsections (a) - (d) of this section, an owner or operator may request approval from the executive director of an alternative method that demonstrates equivalency with the independent third-party audit, provided that the request:

(1) includes a detailed explanation of how the equivalency will be demonstrated, including the appropriate recordkeeping and reporting requirements that will be implemented that are sufficient to demonstrate compliance with the alternative method; and

(2) demonstrates that it is a replicable procedure and details how the equivalency will be demonstrated.

(h) Upon review of the audit results, the executive director may specify additional corrective actions beyond any potential corrective actions submitted in the documentation required under subsection (e) of this section.

§115.789. Counties and Compliance Schedules.

The owner or operator of each petroleum refinery; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or natural gas/gasoline processing operation in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall demonstrate compliance with the requirements of this division (relating to Fugitive Emissions) in accordance with the following schedule.

(1) The initial monitoring of all components for which monitoring is required under this division, but are not required to be monitored under Subchapter D, Division 3 of this chapter (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas), must occur as soon as practicable, but no later than March 31, 2004, except that:

(A) the schedule in §115.781(f) of this title (relating to General Monitoring and Inspection Requirements) applies to blind flanges, caps, or plugs at the end of a pipe or line containing highly-reactive volatile organic compounds, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers for which the owner or operator has notified the appropriate regional office and any local air pollution control program with jurisdiction that §115.781(f) of this title will be used to establish the monitoring schedule for these components; and

(B) on or before March 31, 2004, the owner or operator shall notify the appropriate regional office and any local air pollution control program with jurisdiction that §115.781(f) of this title will be used to establish the monitoring schedule for blind flanges, caps, or plugs at the end of a pipe or line containing highly-reactive volatile organic compounds, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers. The owner or operator shall monitor all of these components at least one time in each process unit by April 1, 2006, and then conduct subsequent monitoring at the frequencies noted in §115.781(f) of this title. For those process units with an initial start-up date after March 31, 2004, the notification of the intent to use §115.781(f) of this title shall be made within 60 days after the initial start-up date. In this case, the owner or operator shall monitor all of these components at least one time in each process unit within one year of the initial start-up date, and then conduct subsequent monitoring at the frequencies noted in §115.781(f) of this title.

(2) All requirements in §115.782 of this title (relating to Procedures and Schedule for Leak Repair and Follow-up) and all equipment upgrades required by §115.783 of this title (relating to Equipment Standards) must be made as soon as practicable, but no later than March 31, 2004, except that control devices used to comply with the requirements of §115.783(2) of this title must be in compliance in accordance with §115.729 of this title (relating to Counties and Compliance Schedules).

(3) The initial independent third-party audit required by §115.788 of this title (relating to Audit Provisions) shall be completed and the results of the audit submitted to the executive director as soon as practicable, but no later than December 31, 2005.

(4) Compliance with the recordkeeping required by §115.786 of this title (relating to Recordkeeping Requirements) must be implemented and made available upon request to authorized representatives of the executive director, United States Environmental Protection Agency, or any local air pollution control agency having jurisdiction as soon as practicable, but no later than March 31, 2004.

(5) The initial monitoring of pump seals and compressor seals using a leak definition of 500 parts per million by volume, as required by §115.781(b)(9) of this title, must begin as soon as practicable, but no later than March 31, 2004.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407122
Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: December 23, 2004
Proposal publication date: July 9, 2004
For further information, please call: (512) 239-6087

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30 TAC §115.785

STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and §382.016, concerning Monitoring Requirements Examination of Records, that authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407123
Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: December 23, 2004
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SUBCHAPTER D. PETROLEUM REFINING, NATURAL GAS PROCESSING, AND PETROCHEMICAL PROCESSES
DIVISION 3. FUGITIVE EMISSION CONTROL IN PETROLEUM REFINING, NATURAL GAS/GASOLINE PROCESSING, AND PETROCHEMICAL PROCESSES IN OZONE NONATTAINMENT AREAS

30 TAC §§115.352, 115.354 - 115.357, 115.359

The Texas Commission on Environmental Quality (commission) adopts the amendments to §§115.352, 115.354 - 115.357, and 115.359; and corresponding revisions to the state implementation plan (SIP). Sections 115.352 and 115.354 - 115.357 are adopted *with changes* to the proposed text as published in the July 9, 2004, issue of the *Texas Register* (29 TexReg 6571). Section 115.359 is adopted *without change* and will not be republished.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted amendments to §§115.352, 115.354 - 115.357, and 115.359 improve the language with regard to the commission's intent as to what is required by these sections, and remove provisions that require extensive recordkeeping and reporting but that do not contribute directly to emission reductions.

SECTION BY SECTION DISCUSSION

General Administrative Rule Language Changes

The commission adopts amendments to change the word "shall" to "must" or "may" and the word "which" to "that" in numerous locations in the rule language to conform to the drafting rules in the *Texas Legislative Council Drafting Manual*, October 2002. The commission also adopts amendments throughout the rule language to add hyphens to the terms "unsafe to monitor" and "unsafe to inspect" when the terms are used as adjectives.

The commission adopts amendments to spell out acronyms the first time they are used in a section and delete acronyms that are only used once in a section. The acronym "EPA" is spelled out as "United States Environmental Protection Agency" in §§115.352, 115.354, 115.356, 115.357, and 115.359. The term "Code of Federal Regulations" is acronymed as "CFR" in §115.352 and the acronym "CFR" is spelled out in §115.355. The acronym "HRVOC" is spelled out as "highly-reactive volatile organic compound" in §115.352. The acronym "API" is deleted in §115.355. The acronym "VOC" is deleted in §115.356. The acronym "kPa" is spelled out as "kiloPascals" in §115.357.

The commission adopts amendments to change all references from the Houston/Galveston area to the Houston/Galveston/Brazoria area in §§115.352 and 115.354 - 115.357 to correspond to federal references to the area.

Section 115.352, Control Requirements

The commission adopts the amendment to §115.352(2) that restores the language as it was prior to the amendments that were published in the January 3, 2003, issue of the *Texas Register* (28 TexReg 9835) with the exception of subparagraph (C) and the first sentence of subparagraph (D). The amendment deletes subparagraphs (A), (B), and (E) of the 2003 amendments that specified the procedure to be used to demonstrate that emissions from leaking components that cannot be repaired without a process unit shutdown, are less than the emissions that a shutdown would generate. The amendment removes this language from the general fugitive rules in Chapter 115, Subchapter D (concerning Petroleum Refining, Natural Gas Processing, and Petrochemical Processes) and concurrent rulemaking moves the language to Chapter 115, Subchapter H, Division 3 (concerning Fugitive Emissions), so that it now applies only to components in HRVOC service. In response to comments received, the adopted amendment adds a sentence at the end of paragraph (2) to state that the repair of a leaking component may be delayed until the next scheduled process unit shutdown if repair within 15 days after the leak is detected would require a process unit shutdown that would create more emissions than the repair would eliminate.

In response to comment, the commission adds §115.352(2)(C) to allow delay of repair of up to six months for pumps, compressors, or agitators if the repair is completed as soon as possible, but not later than six months after leak detection, and the repair involves upgrading existing seals or venting to a closed vent system and control device in accordance with 30 TAC §115.122(a)(2), concerning Control Requirements.

In response to comments, the commission adopts the amendment to §115.352(7) that changes the term "nonaccessible component" to "difficult-to-monitor component" to be consistent with the use of the term "difficult-to-monitor component" in Chapter 115, Subchapter H. The adopted amendment uses the terminology "difficult-to-monitor" instead of the proposed terminology "nonaccessible" because this term more accurately describes these components. The amendment also expands the use of the term "difficult-to-monitor component" to include components that would require a permit for confined space entry as defined in 29 CFR §1910.146 (concerning Permit-required confined spaces). Components that cannot be accessed for monitoring without permit-required confined space entry should be allowed the same reduction in monitoring frequency as elevated components. The amendment also adds the phrase "as specified in §115.356(4) of this . . ." at the end of paragraph (7) and in the last sentence of paragraph (9) to specify to whom the list must be made available.

The commission adopts the amendment to §115.352(8) that deletes the requirement to monitor new and reworked piping connections. The monitoring requirement is being moved to §115.354(11) so that it will be located in the same section with other monitoring requirements.

Section 115.354, Monitoring and Inspection Requirements

The commission adopts the amendment that changes the title of §115.354 from "Inspection Requirements" to the more descriptive title "Monitoring and Inspection Requirements" because the section contains requirements for both monitoring and inspection of fugitive components. To more clearly describe the requirements of the section, the amendment also changes the first sentence to state that affected persons must conduct a monitoring and inspection program.

The amendment changes the word "measure" in §115.354(1), (2), and (4) to the word "monitor" to maintain consistency with other language that refers to the required activity as "monitoring."

The commission adopts the amendment to §115.354(1)(A) to specify that only process drains receiving or contacting affected volatile organic compound wastewater streams, as defined in Subchapter B, Division 4 of this chapter (concerning Industrial Wastewater), are required to conduct the yearly hydrocarbon gas analyzer monitoring. This amendment ensures that drains with little or no potential for VOC emissions would not be subject to the annual monitoring requirement.

The commission adopts the amendment to §115.354(1)(B) and (C) to specify that only those difficult-to-monitor and unsafe-to-monitor components that would otherwise be subject to more frequent monitoring are subject to annual monitoring. Amendments published in the November 7, 2003, issue of the *Texas Register* (28 TexReg 9835) replaced the term "valves" with the more general term "components." The resulting language could have been interpreted to mean that all difficult-to-monitor and unsafe-to- monitor components would be subject to annual monitoring, even though some components (such as flanges) would not be subject to monitoring even if they were not difficult to monitor or unsafe to monitor. The amendment adds language specifying that annual monitoring for difficult-to-monitor and unsafe-to-monitor components is required only if the component would otherwise be subject to more frequent monitoring under §115.354(2). The adopted amendment also deletes the proposed reference to "paragraph (2) of this section" from the first sentence of §115.354(1)(C), and replaces the reference to "complying with paragraph (2) of this section" with the words "conducting the monitoring" in the second sentence of paragraph (1)(C) to clarify that the exclusion for unsafe-to- monitor components is not limited to components that would otherwise be monitored quarterly. The amendment also adds the phrase "as specified in §115.356(4) of this . . ." to the sentence in paragraph (1)(C) that begins with "Components that . . ." to specify to whom the list must be made available. Finally, the amendment changes the phrase ". . . during safe to monitor times" to the phrase ". . . during times that are safe to monitor" to be consistent with the language in new paragraph (11).

The commission adopts the amendment to §115.354(3) that exempts flanges from weekly visual, audio, olfactory inspections if the flanges are monitored at least once each calendar year using EPA Test Method 21 as found in 40 CFR Part 60, Appendix A (October 17, 2000). Flanges that are monitored at the same frequency and with the same methodology for other reasons should be allowed the same exemption from weekly inspections as flanges that are monitored under the HRVOC rules. The amendment to §115.354(3) also specifies that flanges that cannot be safely inspected are not subject to the weekly inspection requirement, but must be inspected as soon as possible during a time it is safe to inspect. Flanges that are unsafe to inspect must be identified in a list made available upon request.

In response to comment, the commission adopts the amendment to §115.354(4) that allows an exclusion from monitoring relief valves that have vented to the atmosphere within 24 hours after venting if the relief valves are unsafe to monitor or difficult to monitor. Relief valves that are unsafe to monitor must be monitored as soon as possible during times that are safe and relief valves that are difficult to monitor must be monitored within 15 days after a release instead of within 24 hours.

The commission adopts the amendment to §115.354(5) that allows difficult-to- monitor leaking components to be identified by reference tagging. A leaking component may be detected by audio, visual, or olfactory inspection, but physically attaching a tag to the component may be extremely difficult. The amendment allows such leaks to be tagged at grade level with a reference to the elevated component.

In response to comment, the commission adds the words "the" and "period" to the second sentence of adopted §115.354(7) to more clearly define what is required.

In response to comment, the commission adopts the amendment that deletes §115.354(10), regarding the use of dataloggers and/or electronic data collection devices, from the general fugitive rules in Subchapter D and in concurrent rulemaking moves the requirement to Subchapter H, Division 3, so that it applies only to components in HRVOC service.

The commission adopts the amendment to renumber paragraph (11) as paragraph (10) because the existing paragraph (10) is deleted.

The commission adopts §115.354(11) that contains the requirement to monitor new and reworked piping connectors. The requirement previously located in §115.352(8) was moved to §115.354 to be located in the same section as other monitoring requirements. In response to comment, the word "connections" is replaced with the word "connectors" because connector is a term defined in 30 TAC §115.10 that more clearly describes the intent of the subsection. The adopted amendment deleted the proposed language that specified that joined fittings welded

completely around the circumference of the interface are not subject to this monitoring requirement, because the definition of "connector" in §115.10 specifically excludes these welded connections because of their low potential for leaks. Finally, the amendment changes the phrase ". . . during safe times" to the phrase ". . . during times that are safe to monitor" to be consistent with the language in paragraph (1)(C).

Section 115.355, Approved Test Methods

The commission adopts the amendment to add the most recent date of Test Method 21 of October 17, 2000, to the CFR citation in §115.355.

Section 115.356, Recordkeeping Requirements

The commission adopts the amendment that changes the title of §115.356 from "Monitoring and Recordkeeping Requirements" to "Recordkeeping Requirements" to better reflect the content of the section. The amendment also reworded the first sentence of §115.356 and paragraph (2)(C) to state the requirement more clearly.

The commission adopts the amendment to §115.356(2) that deletes subparagraph (D) and reletters the remaining subparagraphs as appropriate. Subparagraph (D) is deleted because it requires the maintenance of unnecessary records. Records of flange inspections are required only if a leak is detected.

The commission adopts the amendment to §115.356(2)(D), which is relettered from §115.356(2)(E), that deleted the phrase "data required in §115.354(10) of this title" because §115.354(10) is deleted.

The commission adopts the amendment that reletters §115.356(2)(F) as §115.356(2)(E) and adds the words "if applicable." This subparagraph lists the items for which records are required to be maintained for leaking components; however, some of these required data elements are not applicable for all components. The wording change specifies that only those records applicable for a particular leaking component need to be maintained. The amendment adds the CFR citation for Test Method 21 in §115.356(2)(E)(i). The amendment deletes §115.356(2)(E)(vi) and renumbers paragraphs (2)(E)(vii) and (viii) to (2)(E)(vi) and (vii) because records of extraordinary efforts to repair leaking components are no longer required. The amendment also deletes §115.356(2)(E)(ix). This requirement to maintain a record of the estimated VOC emission rate of the component is deleted from Subchapter D and moved in concurrent rulemaking to Subchapter H so that it will be applicable only to components in HRVOC service. The amendment reletters §115.356(2)(G) to §115.356(2)(F) because of the deletion of §115.356(2)(E).

The commission adopts the amendment that deletes §115.356(3). The requirement to maintain records of estimated VOC emissions from leaking components is deleted from Subchapter D and moved in concurrent rulemaking to Subchapter H so that it will be applicable only to components in HRVOC service. The amendment also renumbers §115.356(4) and (5) as §115.356(3) and (4), respectively.

The commission adopts the amendment that changes the word "valve" in renumbered paragraph (3) to the more general term "component" to make clear that records identifying components other than valves that are unsafe to monitor or difficult to monitor must be maintained. Additionally, the amendment to §115.356(3)(A) requires that records be maintained to identify and justify each unsafe-to-inspect flange.

The commission adopts the amendment to change the term "nonaccessible" in §115.356(3)(B) to "difficult-to-monitor" to be consistent with the change in terminology in §115.352(7).

The commission adopts the amendment to §115.356(3)(C) that provides several options for documenting component exemptions. The previous requirement to maintain records of each exemption by component would have required more extensive records for certain exempt components than would have been required for monitored components. The options listed allow more flexibility in recordkeeping while maintaining the integrity of the requirement to document the basis for exemptions. For example, a section of a process unit that handles only fluids having a vapor pressure of 0.044 pounds per square inch, absolute or less could be shown as such on a site plan instead of having each component listed separately as qualifying for the exemption in §115.357(1).

Section 115.357, Exemptions

The commission adopts the amendment to §115.357(2), (5) - (7), (10), and (11) to specify that the affected persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston/Brazoria (HGB) areas must comply with the recordkeeping requirements of §115.356(3)(C) to identify exempt components and justify the exemptions claimed.

The amendment to §115.357(1) requires that components in heavy liquid service that are exempt from instrument monitoring be inspected by visual, auditory, and/or olfactory means according to the same schedule as would be required for instrument monitoring rather than only by visual monitoring. The amendment results in inspection requirements for unmonitored heavy liquid components consistent with inspection requirements for unmonitored flanges.

The amendment to the exemption in §115.357(10) for connectors in instrumentation systems is expanded to include all components in the instrumentation system. The commission adopts §115.357(11) to exempt components in sampling connection systems as defined in 40 CFR §63.161 (January 17, 1997), that meet the requirements of 40 CFR §63.166(a) and (b) (June 20, 1996). These exemptions are consistent with exemptions in §115.787 for instrumentation and sampling connection systems in HRVOC service.

The commission adopts §115.357(12) to exempt insulated components from the monitoring requirements in §115.354(1), (2), and (4), because the removal of insulation in order to allow access by a monitor probe is expensive and could expose personnel to a safety hazard.

The commission adopts §115.357(13) that provides a *de minimis* vapor pressure cutoff of 0.002 pounds per square inch, absolute at 68 degrees Fahrenheit. Components with a VOC vapor pressure equal to or below this cutoff would be exempt from the requirements in this division. This cutoff is consistent with the commission's Air Permits Division policy that fugitive emissions from compounds with a vapor pressure below this level do not need to be calculated.

The amendment renumbers paragraphs (11) and (12) as paragraphs (13) and (14), respectively. The word "may" has been added to renumbered §115.357(14) to clarify that the exemptions in §115.357 do not exempt components in the HGB area from the requirements of Subchapter H. The previous wording could have been misconstrued to imply that certain components are subject to the Subchapter H requirements.

Section 115.359, Counties and Compliance Schedules

The commission adopts the amendment to §115.359 that removes the reference to §115.356(2)(D) because that requirement is deleted, as noted earlier. In addition, the amendment changes the reference to the title of §115.356, which is also changed. The amendment to §115.359(3) deletes the reference to paragraph (4) because existing §115.356(3) is deleted, and §115.356(4) is renumbered as paragraph (3).

FINAL 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 rulemaking action 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The amendments to Chapter 115 and revisions to the SIP improve implementation of Chapter 115 by making changes to language and organization to improve the language with regard to the commission's intent as to what is required by the rules, and remove provisions that require extensive recordkeeping and reporting but that do not contribute directly to emission reductions. The amendments also delete certain requirements from Subchapter D and move them to Subchapter H so that they will be applicable only to sources of HRVOC in the HGB area. The amendments will not have adverse effects as a result of enforcement and administration of the amendments, because the amendments do not impose any new requirements. Many of these sources are owned or operated by utilities, petrochemical plants, refineries, and other industrial, commercial, or institutional groups, and each group could be considered a sector of the economy. This is based on the analysis provided in the proposal preamble, including the discussion in the PUBLIC BENEFITS AND COSTS section of the proposal preamble. The remaining amendments in this rulemaking are intended to correct typographical errors, update cross-references, add flexibility, and delete obsolete language. None of these amendments are expected to adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The amendments do not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Section 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 amendments implement requirements of the Federal Clean Air Act (FCAA), codified in 42 United States Code (USC), §§7410, *et seq.*, §110, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the primary national ambient air quality standard (NAAQS) in each air quality control region of the state. While 42 USC, §7410, does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the FCAA does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of the FCAA. 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. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis 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 proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC, §7410, does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis 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. Because 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 Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is

no greater than is necessary or appropriate to meet the requirements of 42 USC, §7410. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as the HGB area. As discussed earlier in this preamble, controls on upsets and routine industrial VOC emissions are necessary to address some of the elevated ozone levels observed in the HGB area; these controls will result in reductions in ozone formation in the HGB area and help bring the HGB area into compliance with the air quality standards established under federal law as NAAQS for ozone. Compliance with these rules will reduce ambient VOC and ozone in the HGB area and the commission is submitting these to the EPA as one of several measures in the federally approved SIP. Therefore, the amendments are necessary components of and consistent with the ozone attainment demonstrations SIP for the HGB area, as required by 42 USC, §7410.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. The commission presumes 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); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *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).

As discussed earlier in this preamble, this rulemaking implements requirements of 42 USC, §7410. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. Therefore, the amendments do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor are adopted solely under the general powers of the agency. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of the Texas Health and Safety Code and Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code (also known as the Texas Clean Air Act), §§382.011, 382.012, 382.016, 382.017, and 382.021. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the amendments do not meet any of the four applicability requirements.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the rulemaking action under Texas Government Code, §2007.043. The adopted amendments will not impose any new requirements on individuals or businesses required to comply with the rules. The purposes of the amendments are to improve the language with regard to the commission's intent as to what is required by the rules, and to remove certain requirements for sources in general VOC service and make the requirements applicable only to sources in HRVOC service. The amendments also make a variety of changes that correct typographical errors, update cross-references, add flexibility, and amend requirements to achieve the intended emission reductions of the program. The commission does not anticipate any adverse fiscal implications resulting from the implementation of the amendments, and the amendments will not place a burden on private, real property.

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this rulemaking action, because it is reasonably taken to fulfill an obligation mandated by federal law. The emission limitations and control requirements within this rulemaking action were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS.

In addition, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the adopted amendments do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and significantly advance the health and safety purpose. This action is taken in response to the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and HGB areas exceeding the federal ozone NAAQS, which adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by reducing ozone levels in the these areas. Consequently, these amendments meet the exemption in Texas Government Code, §2007.003(b)(13). This rulemaking action therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). For these reasons, the amendments do not constitute a takings under Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking action and found that the adoption is an action identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in §505.11, and therefore will require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission determined that under 31 TAC §505.22 the rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this 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)). No new sources of air contaminants will be authorized and ozone levels will be reduced as a result of these amendments. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area

(31 TAC §501.14(q)). This rulemaking action complies with 40 CFR. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

Chapter 115 is an applicable requirement under 30 TAC Chapter 122; therefore, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 115 requirements for each emission unit affected by the revisions to Chapter 115 at their sites.

PUBLIC COMMENT

Public hearings for this rulemaking were held on August 2, 2004, in Houston; August 3, 2004, in Beaumont; and August 5, 2004, in Austin. The following persons submitted written or oral comment: BP Products North America, Inc. (BP); Chevron Phillips Chemical Company, L.P. (Chevron-Phillips); Dow Chemical Company (Dow); Environmental Defense; EPA; ExxonMobil; Galveston-Houston Association for Smog Prevention (GHASP); Sierra Club - Houston Regional Group (Sierra Club); Texas Chemical Council (TCC); Texas Oil and Gas Association (TxOGA); and Valero.

RESPONSE TO COMMENTS

Dow and TCC generally supported the direction of the proposal. BP supported the TCC comments. Chevron-Phillips and Dow supported the TCC comments regarding the general VOC fugitives rules. Environmental Defense, GHASP, and Sierra Club generally opposed the proposal. Dow, ExxonMobil, GHASP, TCC, TxOGA, Valero, and EPA expressed concerns and/or suggested changes to the proposal.

RESPONSE

The commission appreciates the comments.

Dow and TCC supported the deletion of §115.352(2)(A), (B), and (E) and suggested that an additional sentence be included to fully restore the previous language as it existed prior to the amendments that were published in the January 3, 2003, issue of the *Texas Register* (28 TexReg 9835).

RESPONSE

The commission appreciates the support. The suggested sentence has been added at the end of §115.352(2) to fully restore the previous language.

ExxonMobil, TxOGA, and Valero supported the deletion of §115.352(2)(A), (B), and (E), and stated that the existing prescriptive rule would drive mandatory shutdowns to repair leaking components that would create emissions that would actually be a greater impact contrary to the rule objective. ExxonMobil, TxOGA, and Valero noted that both VOC and nitrogen oxides (NO_x) emissions associated with a shutdown should be considered because both pollutants are ozone precursors. ExxonMobil, TxOGA, and Valero asserted that most VOC emissions generated during a shutdown would be abated in a control device such as a flare, which will generate additional NO_x emissions. ExxonMobil, TxOGA, and Valero also noted that the short-term impact of shutdown emissions should be considered. The calculation in the current rule focuses on the overall net emissions from leaking components over the entire time frame until the next shutdown. These emissions would be a small daily amount, while the shutdown emissions would be over a short time period and thus could have a greater potential to contribute to an ozone event. ExxonMobil, TxOGA, and Valero further noted that a shutdown should not be required during ozone alerts. ExxonMobil, TxOGA, and Valero commented that calculation of emissions from leaking components should be only forward in time, from the time of decision until the scheduled shutdown, because emissions that occurred prior to that time cannot be offset. ExxonMobil, TxOGA, and Valero also commented that correlation equations should be allowed for leaking components in heavy liquid service if the components are monitored, because using the default pegged rate would overstate the impact of these leaks. ExxonMobil, TxOGA, and Valero commented that no time limit should be set for extraordinary efforts to repair leaking valves as a condition of the components being excluded from the delay of repair emission calculations. ExxonMobil, TxOGA, and Valero commented that shutdown to repair leaking fugitive components within 15 days is impractical. ExxonMobil, TxOGA, and Valero noted that proper planning for a unit shutdown would require at least three months, and often as much as a year, and commented that moving up the date of the next scheduled shutdown should be an option. ExxonMobil, TxOGA, and Valero also noted that shutdown emissions depend on the scope of work planned, because this would affect the amount of unit equipment that would have to be cleared for repair work. Technology and procedures for clearing equipment for repairs and controlling emissions are being improved over time. ExxonMobil, TxOGA, and Valero commented that the rules should encourage the evolution of procedures to minimize shutdown emissions and not penalize them by driving more frequent shutdowns. ExxonMobil, TxOGA, and Valero commented that some units have made successful efforts to minimize shutdown-related emissions, such that a low level of emissions from leaking components could trigger a required shutdown. ExxonMobil, TxOGA, and Valero suggested that a minimal threshold be developed below which a shutdown to repair leaking components would not be required. ExxonMobil, TxOGA, and Valero also noted that monitoring of all leaking components repaired during a shutdown within 30 days was impractical.

RESPONSE

These comments reflect the rule that was in effect prior to these adopted amendments, and not the proposed rule that was published in the July 9, 2004, issue of the *Texas Register* (29 TexReg 6571). The comments provide support for the changes that were proposed and are now being adopted. As pointed out by the commenters, the requirements could have a detrimental effect on ozone levels by requiring a facility to shut down during the ozone season, causing an increase in VOC and NO_x emissions over a period of a few days, in order to eliminate emissions that have occurred over a period of years. The shutdown requirements could also have the unintended consequence of penalizing facilities that have minimized shutdown emissions by requiring them to shut down more frequently to repair leaking components.

Environmental Defense, GHASP, and Sierra Club opposed the proposed deletion of §115.352(2)(A), (B), and (E). The Sierra Club stated that more stringent delay-of-repair emission estimates are needed to ensure that regulated entities are repairing leaking components as soon as possible and are not abusing the delay of repair provisions. GHASP expressed concerned about the removal of language setting out requirements for undertaking "extraordinary efforts" to control leaks. GHASP noted that in

the absence of this language investigators will have a more difficult time establishing whether a plant is addressing leaks in a timely manner.

RESPONSE

The commission made no changes to the rules in response to these comments. The deleted provisions are more stringent than EPA requirements for reasonably available control technology (RACT) and would add a significant cost burden to entities without having any direct environmental benefit. Costs for the additional shutdowns that could be required by the rule have been estimated as $2.5 million to $5 million per year, not including the additional recordkeeping requirements to document the calculation of projected emissions. Moreover, as discussed in the previous comment, the requirements could have a detrimental effect by requiring a facility to shut down during the ozone season, causing an increase in VOC and NO_x emissions over a period of a few days, in order to eliminate emissions that would have occurred over a period of years. Regulated entities are required by §115.356(2)(E) to maintain records of the date a leaking component is discovered, the date that a first attempt at repair is made, the date the component is repaired, the date and instrument reading of the recheck procedure that verified the repair, and the date on which a non-repairable leaking component is placed on the shutdown list. These records allow investigators to determine whether leaks are addressed in a timely manner.

GHASP was opposed to the proposed deletions "at the request of industry." GHASP stated that the use of this language in the proposal demonstrates that the changes cannot be justified as in the public interest. GHASP expressed a belief that one reason for the change was to ensure that the requirements do not apply to any facilities outside the Houston region, but noted that the rule deletions would also reduce requirements for facilities not in HRVOC service in the Houston region.

RESPONSE

The commission made no changes to the rules in response to these comments. The commission evaluates all proposed rules and rule changes with regard to the public interest, regardless of which person or group originally suggested the changes. The rule deletions reduce requirements for facilities not in HRVOC service in the HGB area, as noted by GHASP. Maintaining the deleted requirements could have a detrimental effect in the HGB area by requiring a facility to shut down during the ozone season, causing an increase in VOC and NO_x emissions over a period of a few days, in order to eliminate emissions that have occurred over a period of years.

TCC requested that an additional provision be added to §115.352(2) to allow for delay of repair up to six months after a leak is detected for pumps, compressors, or agitators if the repair would require replacement of the existing seal design with dual mechanical seals including a barrier fluid, a system with no externally actuated shaft penetrating the housing, or a closed vent system and control device. The additional provision would make the Subchapter D rules consistent with the Subchapter H rules for HRVOC fugitives and with federal fugitive rules.

RESPONSE

The commission agrees that by not allowing the six-month delay of repair for upgrading seal systems for pumps and compressors, the Subchapter D requirements for general VOC fugitives are more stringent than the Subchapter H requirements for HRVOC fugitives. Sources subject to Subchapter H must also continue to comply with Subchapter D requirements. For this reason, the commission added §115.352(2)(C) to include the suggested change for pumps and compressors.

Dow suggested a similar change as suggested by TCC in the previous comment but Dow's change would exclude agitators because agitators are not subject to the provisions of the general VOC rules. Dow also suggested more general wording that would allow the delay of repair for replacing the existing seal design with one that the owner or operator expects will provide better performance instead of limiting the delay to the specified replacement options. Dow noted that replacement of single seal systems is generally not required but is desired, and that documentation of procedures documenting how a replacement was determined to be required would be lengthy and burdensome. Dow expressed a belief that the replacement of existing dual mechanical seal systems or sealless pumps with more efficient systems should also qualify for delay of repair.

RESPONSE

Dow's statement that "agitators are not subject to the provisions of the general VOC rules" is not correct, because the definition of component in §115.10 as "A piece of equipment, including, but not limited to, pumps, valves, compressors, connectors, and pressure relief valves, which has the potential to leak VOC" includes agitators. There are no requirements to monitor agitators in the general VOC rules, but if a leak is detected by other means, the leak would be required to be repaired in accordance with the control requirements of §115.352. The commission is not including Dow's suggested wording to allow delay for replacement with a seal design that "the owner or operator expects will provide better performance." The owner or operator is not required to demonstrate how it determined that replacement of a single seal with one of the listed options is "required" in order to repair a leaking pump. The new provision, as worded, does not prevent replacing existing dual mechanical seal systems or sealless pumps with more efficient systems. The language suggested by Dow is too subjective and would be practicably unenforceable.

TCC suggested that the terms "nonaccessible component" in §115.352(7), "inaccessible component," and "difficult-to-monitor component" be combined into a single term "difficult-to-monitor" that combines all three concepts. TCC further suggested that the term "difficult-to-monitor" be defined in §115.10.

RESPONSE

The commission replaced the term "nonaccessible" with the term "difficult-to-monitor" because this term more accurately describes these components. The commission declines to add the definition of "difficult-to-monitor" to §115.10 or to include the concept of "inaccessible" with "difficult-to-monitor." The term "inaccessible" is used to refer to components that are inaccessible to a monitor probe because of insulation, while the terms "nonaccessible" and "difficult-to-monitor" refer to components that are difficult to access due to their location.

ExxonMobil, TxOGA, and Valero supported the revisions to move all the inspection requirements to §115.354, which is the section concerning inspections.

RESPONSE

The commission appreciates the support.

TCC suggested rewording §115.354(1)(A) to specify that only process drains that are subject to the monitoring and control requirements of Subchapter B, Division 4 of this chapter are required to be monitored. ExxonMobil, TxOGA, and Valero suggested that only drains that receive VOCs above 10% should be required to be monitored.

RESPONSE

The commission made no change in response to these comments. Under the TCC suggested wording, process drains that receive or contact affected VOC wastewater streams that are exempt from the control requirements in Subchapter B, Division 4 would not be subject to the annual monitoring. These drains may still have potential for VOC emissions and should be monitored. The rule as written would not require monitoring of drains receiving wastewater with less than 1,000 parts per million by weight (ppmw) of VOC at a flow rate greater than or equal to ten liters per minute, or wastewater with less than 10,000 ppmw VOC at any flow rate. These thresholds are adequate to ensure that process drains with little or no potential for VOC emissions would not be subject to the annual monitoring requirement. The 10% VOC cutoff requested by ExxonMobil, TxOGA, and Valero would be equivalent to a VOC concentration of 100,000 ppmw, which would be less stringent than the cutoff in Subchapter B, Division 4, and would not require monitoring of a number of drains with potential for VOC emissions.

ExxonMobil, TxOGA, and Valero commented that only accessible components should require annual monitoring in accordance with §115.354(1).

RESPONSE

The amended §115.354(1)(B) and (C) specifies that only those difficult-to-monitor and unsafe-to-monitor components that would otherwise be subject to more frequent monitoring would be subject to annual monitoring. The commission appreciates the support for this change.

Dow, ExxonMobil, TCC, and TxOGA commented that the exclusion for unsafe-to-monitor components in §115.354(1)(C) is unduly restricted to components that are monitored on a quarterly basis and suggested that the reference to paragraph (2) be deleted. They noted that any component for which monitoring or inspection would expose personnel to immediate danger should be considered as unsafe to monitor or inspect.

RESPONSE

The commission revised §115.354(1)(C) to clarify that the exclusion for unsafe-to- monitor components is not restricted to components that are monitored on a quarterly basis.

ExxonMobil, TxOGA, and Valero supported the change to §115.354(3) that allows components required to be monitored for reasons other than the HRVOC rules to be exempt from inspection requirements.

RESPONSE

The commission appreciates the support.

TCC requested that language be added to §115.354(3) to specify that components other than flanges that are unsafe to inspect would only be monitored during safe-to- monitor times.

RESPONSE

The commission declines to make the suggested change. Section 115.354(3) specifies inspection requirements only for flanges, not other connectors or components, therefore, there is no need to include language stating that other components are to be monitored only during safe-to-monitor times.

TCC suggested that the word "measure" be replaced with "monitor" in §115.354(1), (2), and (4) to more accurately describe the required activity.

RESPONSE

The commission made the requested change to be consistent with other references that require "monitoring" of fugitive components.

ExxonMobil, TxOGA, and Valero commented that monitoring of a relief valve after a relief event as required by §115.354(4) may require alternative means of testing due to difficult access. TCC requested that §115.354(4) be revised to specify that relief valves that are unsafe to monitor be exempt from the requirement to monitor them within 24 hours after a release.

RESPONSE

The commission agrees that personnel should not be exposed to danger as a result of complying with the requirement. Therefore, the commission added an exemption from monitoring relief valves that are unsafe to monitor, provided the relief valve is monitored during a safe-to-monitor time as soon as possible after relieving. The commission also acknowledges that monitoring difficult-to-monitor relief valves within 24 hours after a release may not be feasible, and changed the requirement to specify that difficult-to- monitor relief valves must be monitored as soon as possible after a release, but at least within 15 days.

ExxonMobil, TxOGA, and Valero expressed support for the change to §115.354(5) that would allow nonaccessible leaking components to be identified by reference tagging.

RESPONSE

The commission appreciates the support.

ExxonMobil, TxOGA, and Valero commented on §115.354(6), which allows the executive director to increase monitoring in a process area if there are an excessive number of leaks. ExxonMobil, TxOGA, and Valero noted that there is no guidance or criteria by which the executive director determines that there is an excessive number of leaks.

RESPONSE

The commission made no change to the rule in response to these comments. The cited provision has been part of the fugitive rules for more than ten years, and no change was proposed to this paragraph. The determination of what is excessive may depend on the nature of the process area and the specific component types located in the process area. Therefore, the executive director must have sufficient flexibility to make case-by-case evaluations.

Dow and TCC suggested a revision to §115.354(7) to add the words "the" and "period" as follows: ". . . the percent of valves leaking must be determined by dividing the sum of valves leaking during *the* current monitoring *period* and valves for which repair has been delayed . . .."

RESPONSE

The commission agrees that the suggested change more clearly states the intent of the provision and changed the provision accordingly.

ExxonMobil, TxOGA, and Valero commented that an acceptable rate for monitoring as required in §115.354(10)(A) should only be determined when necessary as part of an auditing plan and asserted that, given the extreme variability of contributing conditions, it is not feasible to determine an acceptable rate of monitoring for each and every monitoring run.

RESPONSE

These comments reflect the rule that was in effect prior to these adopted amendments, and not the proposed rule that was published in the July 9, 2004, issue of the *Texas Register* (29 TexReg 6571). The comments provide support for the changes that were proposed and are now being adopted.

Dow suggested deleting the requirement in §115.354(10) to use a default pegged value of 100,000 parts per million by volume (ppmv) for readings that are higher than the upper end of the scale (pegged) even when using the highest scale setting or a dilution probe. Dow stated that there is no logical reason to change the ppmv reading from what is recorded in the field to a pegged value of 100,000 ppmv, and that to do so would require software changes or manual data revisions. Dow stated that it uses an analyzer with a linear range of 1 - 10,000 ppmv and a dynamic range up to 50,000 ppmv and that accuracy declines as the reading goes above the linear range into the dynamic range. Dow also stated that it does not use a dilution probe. If the instrument detects a reading above 10,000 ppmv, the data logger records the actual screening value and transfers it to the database. For most emission calculations Dow would use the 10,000 ppmv pegged value, but for emission calculations for components for which delay of repair is sought under Subchapter H it uses the 100,000 ppmv pegged value as required by §115.782(c)(1)(B)(i)(II).

RESPONSE

The commission declines to make the requested change. It is the commission's intent to require the use of actual, monitored values or to use the highest pegged value to encourage the recording of actual monitored values. The commenter has the option of using the actual recorded values up to 50,000 ppmv or to use a dilution probe when necessary to obtain actual readings up to 100,000 ppmv. The commission also notes that if the commenter is obtaining a reading, the monitor is not "pegged."

EPA expressed disappointment at the proposed deletion of the requirements in §115.354(10) to employ data loggers for recordkeeping. EPA stated that the use of data loggers is the most practical way to maintain data for large facilities and that the requirement to establish the time of each data entry is a practical way to help insure that the leak surveys are performed carefully. EPA further stated that careful performance of the leak surveys is the most important factor in the effectiveness of the fugitive emission control program, and that it was unclear why this "seemingly cost effective method of attempting to ensure effectiveness of the program is proposed to not be implemented, especially in light of the evidence that VOC emissions are underestimated." EPA expressed a belief that part of the underestimation likely stems from overestimation of the effectiveness of the fugitive emission control program. GHASP, Sierra Club, and Environmental Defense also opposed the deletion of §115.354(10). GHASP expressed concern that removing the requirements for use of electronic data collection devices during monitoring; use of an electronic database; and documentation of an auditing process to assure proper calibration, identify response time failures, and assess pace anomalies would make it more difficult for investigators to verify that plants are meeting the expectations of the pollution control plan relied on in the SIP. GHASP also noted that the greater diligence required by the Subchapter D rules seems highly warranted, considering the importance of other reactive VOC emissions. Environmental Defense stated that eliminating existing monitoring, recordkeeping, and control requirements would be a major step backward, and that the proposed deletions would render stepped-up inspection and enforcement efforts to ensure that facilities are complying with monitoring and control requirements impossible.

RESPONSE

The deleted provisions that are more stringent than EPA requirements for RACT and would not have any direct environmental benefit. The requirement to determine an acceptable rate of monitoring for each and every monitoring run may not be feasible due to the extreme variability of contributing conditions. The absence of the detailed records on the company's leak monitoring would not impact the commission's ability to conduct its own leak surveys to determine whether the company is conducting Method 21 fugitive monitoring properly. The commission is not restricted from taking an enforcement action if the commission determines that the company is not performing its leak detection and repair program properly.

TCC requested that §115.354(11) be changed to require new connectors to be monitored before the end of the monitoring period in which the installation occurred, instead of within 30 days as is now required. TCC also suggested changing the word "connections" to "connectors"; requiring new connectors to be inspected for leaks by audio, visual, and/or olfactory methods within 30 days of being placed in VOC service; and deleting the last sentence stating that "Joined fittings welded completely around the circumference of the interface are not subject to this requirement." TCC noted that new connectors are usually put into service during turnarounds and that monitoring a specific subset of all components in a process unit within 30 days after a turnaround would be difficult and inefficient. Dow suggested that §115.354(11) be changed to require new connections to be monitored within 90 days and stated that the longer time period would allow for better alignment with the regular quarterly monitoring of other components. Dow also suggested that an exclusion be made for connectors that are nonaccessible or unsafe to monitor.

RESPONSE

The commission changed the word "connections" to "connector" because the word "connector" is a term defined in §115.10 that more clearly describes the intent of the subsection. The commission agrees that personnel should not be exposed to danger as a result of complying with the requirement and thus has added an exemption from monitoring connectors that are unsafe to monitor provided they are monitored as soon as possible during a safe-to-monitor time. The commission does not agree to extend the time period for monitoring or to allow an exclusion for nonaccessible (now described as "difficult-to- monitor") components. New connectors are most likely to leak within a short time after they are placed in service and should be monitored as soon as possible so these leaks can be detected and repaired promptly.

ExxonMobil, TxOGA, and Valero supported the proposed deletion of the requirement to maintain records of all audio, visual, and olfactory inspections, and commented that records should be required only when a leaking component is found.

RESPONSE

The commission appreciates the support for the change.

Dow and TCC suggested that §115.356(2)(E)(vi), which requires maintaining records of the dates and nature of each extraordinary effort to repair leaking components, be deleted because references to extraordinary efforts to repair are otherwise proposed for deletion from Subchapter D.

RESPONSE

The commission agrees that maintaining the records of extraordinary efforts to repair leaking components is not needed because documentation of such efforts is not required to justify delay of repair of these components. The commission made the change in response to this comment.

TCC suggested that the phrase "if applicable" be deleted from §115.356(2)(E) because it is unnecessary. ExxonMobil, TxOGA, and Valero commented that some of the required data elements are not applicable for all components.

RESPONSE

The commission included the phrase to clarify that only the applicable records need to be maintained. The commission made no change in response to these comments.

TCC suggested that the word "and" at the end of §115.356(2)(E)(vii) be deleted because the following item is proposed for deletion.

RESPONSE

The word "and" at the end of §115.356(2)(E)(vii) is necessary because subparagraphs (A) - (F) are a series of records on components and process areas. The commission made no change in response to this comment.

Dow and TCC requested that §115.356(2) and (3)(C) be expanded to specify that the options in §115.781(a)(1) - (6) are acceptable as documentation for exemptions. ExxonMobil, TxOGA, and Valero commented that the documentation of exemption for each component is infeasible.

RESPONSE

The commission agrees that the options in §115.781(a)(1) - (6) provide sufficient documentation to provide the basis for claimed exemptions and changed the rule accordingly.

Dow and TCC requested that an exemption from monitoring be added for components that are insulated and therefore inaccessible to monitoring with a hydrocarbon analyzer. Dow and TCC also requested that insulated components be exempt from audio, visual, or olfactory inspections.

RESPONSE

The commission agrees that the rules should not require insulation to be removed for the purpose of conducting monitoring, because the removal of insulation could result in safety hazards and could increase the chance of leaks due to thermal stresses. Therefore, the commission provided an exemption from monitoring insulated components. The commission does not agree that insulated components should be exempt from audio, visual, or olfactory inspections because removing insulation is not necessary to conduct these inspections.

TCC suggested that the commission replace the word "schedules" in §115.357(1) with the word "frequency."

RESPONSE

The commission declines to make the suggested change because the word "schedules" more clearly describes the required activity.

ExxonMobil, TxOGA, and Valero commented that components contacting low vapor pressure materials referenced in §115.357(1) should require alternate audible, visual, and olfactory inspections, not just visual.

RESPONSE

This comment reflects the rule that was in effect prior to these adopted amendments, and not the proposed rule that was published in the July 9, 2004, issue of the *Texas Register* (29 TexReg 6571). The commission appreciates the support for the change to require audio, visual, and olfactory inspections for the low vapor pressure components instead of just visual.

ExxonMobil, TCC, and TxOGA requested that the exemption in §115.357(3) be revised to specify that compressors in hydrogen service are exempt if the hydrogen content exceeds 50% by volume during normal operations, excluding times of upsets, shutdowns, maintenance activities, or start-ups.

RESPONSE

The commission made no change to the rule in response to this comment. The exemption for compressors in hydrogen service was included in the RACT requirements because an exemption for these compressors was allowed in the new source performance standards for equipment leaks of VOC from petroleum refineries in 40 CFR Subpart GGG, §60.593(b). The 40 CFR Subpart GGG provision does not specify that the hydrogen content must exceed 50% only during normal operations. However, the testing that would be required to demonstrate that a compressor is in hydrogen service would be conducted during "normal operation" and not during times of upsets, shutdowns, maintenance activities, or start-ups. Therefore, the correct interpretation of the existing provision is as the commenters suggest.

ExxonMobil, TxOGA, and Valero suggested that an exemption for reciprocating pumps and compressors should apply to all such equipment and not be limited to natural gas/gasoline processing. ExxonMobil, TxOGA, and Valero noted that reciprocating pumps and compressors in all processes have the same difficulty in meeting emission control requirements and stated that they are rarely used in processes, and only when specifically needed.

RESPONSE

The commission made no change in response to these comments. RACT guidelines allow an exemption for reciprocating pumps and compressors in natural gas/gasoline processing. The exemption was included in Subchapter D, Division 3 when previous regulations for natural gas/gasoline were incorporated into this division.

Dow suggested that §115.357(8) be revised to eliminate the exemption from repair of components in ethylene and propylene service for leaks greater than 500 ppmv but less than 10,000 ppmv. Dow noted that the exemption is no longer usable for facilities in HRVOC service.

RESPONSE

Dow is correct that the exemption may no longer be used for components in HRVOC service in the HGB area. However, the

provisions in Subchapter D also apply to facilities in the Beaumont/Port Arthur, Dallas/Fort Worth, and El Paso areas. These areas are not subject to the HRVOC provisions in Subchapter H and may still make use of the provision. Therefore, the commission made no change in response to this comment.

TCC and Dow requested that exemptions be added to §115.357 for sampling connection systems and instrumentation systems, because exemptions for these systems are allowed in the HRVOC fugitive rules.

RESPONSE

The commission revised the rule to extend the exemption in §115.357(10) to sampling connection systems and instrumentation systems that meet the hazardous organic national emissions standards for hazardous air pollutant requirements in 40 CFR §63.166 and §63.169. These systems were exempted from the requirements in Subchapter H, Division 3, because of the low emission potential for these small components. Exemption from the requirements in Subchapter D, Division 3 is warranted for the same reason.

ExxonMobil, TxOGA, and Valero requested that the additional requirement to meet 40 CFR §163.169 be dropped from §115.357(10) as a condition of the exemption.

RESPONSE

The commission declines to make the requested change. The provisions for instrumentation systems in 40 CFR §63.169 do not require scheduled visual, audible, or olfactory inspections, however, if a leak is indicated by these or other detection methods, it must be repaired. If the leak is repaired such that the indication of a possible leak is eliminated, monitoring is not required. This is a reasonable condition for the exemption.

EPA stated that the proposed exemption in §115.357(11) for components with a vapor pressure equal to or less than 0.002 pounds per square inch, absolute does not meet the guidelines of RACT. Because the components would be in heavy liquid service, EPA asserted that they must meet the more relaxed monitoring requirements for that service.

RESPONSE

The commission declines to make the suggested change. The maximum VOC concentration that could occur from such a component would be 136 ppmv, which would not reach the threshold of a "leak" with a leak definition of 500 ppmv. The maximum leak rate calculated from the EPA correlation equations would be 0.0024 pound per hour for pumps. For valves, the maximum leak rate would be 0.0007 pound per hour. For other component types, the maximum leak rate would be lower still. The recordkeeping required for these components is not worthwhile given their low emission potential.

ExxonMobil, TxOGA, and Valero commented that the reference to dual applicability in §115.357(11) should not create additional applicability criteria for Subchapter H.

RESPONSE

The commission added the word "may" to the referenced provision to clarify the intent of the provision. The intent is to note that the exemptions in §115.357 do not exempt components in the HGB area from the requirements of Subchapter H. The current wording could be misconstrued to imply that certain components are subject to the Subchapter H requirements.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under Texas Health and Safety Code, §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; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §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; §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; and §382.021 concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures.

§115.352. Control Requirements.

For the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston/Brazoria areas as defined in §115.10 of this title (relating to Definitions), no person shall operate a petroleum refinery; a synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or a natural gas/gasoline processing operation, as defined in §115.10 of this title, without complying with the following requirements.

(1) Except as provided in paragraph (2) of this section, no component may be allowed to have a volatile organic compound (VOC) leak for more than 15 calendar days after the leak is found that exceeds the following:

(A) for all components except pump seals and compressor seals, a screening concentration greater than 500 parts per million by volume (ppmv) above background as methane, or the dripping or exuding of process fluid based on sight, smell, or sound; and

(B) for pump seals and compressor seals, a screening concentration greater than 10,000 ppmv above background as methane, or the dripping or exuding of process fluid based on sight, smell, or sound.

(2) A first attempt at repair must be made no later than five calendar days after the leak is found and the component must be repaired no later than 15 calendar days after the leak is found, unless the repair of the component would require a unit shutdown that would create more emissions than the repair would eliminate. A component in gas/vapor or light liquid service is considered to be repaired when it is monitored with an instrument using United States Environmental Protection Agency Test Method 21 in 40 Code of Federal Regulations (CFR) Part 60, Appendix A (October 17, 2000) and shown to no longer have a leak after adjustments or alterations to the component. A component in heavy liquid service is considered to be repaired when it is inspected by audio, visual, and olfactory means and shown to no longer have a leak after adjustments or alterations to the component. If the repair of a component within 15 days after the leak is detected would require a process unit shutdown that would create more emissions than the repair would eliminate, the repair may be delayed until the next scheduled process unit shutdown.

(A) Delay of repair beyond a process unit shutdown will be allowed for a component if that component is isolated from the process and does not remain in VOC service.

(B) Valves that can be safely repaired without a process unit shutdown may not be placed on the shutdown list.

(C) Delay of repair will be allowed for pumps, compressors, or agitators if the repair is completed as soon as practicable, but not later than six months after the leak was detected, and the repair requires replacing the existing seal design with:

(i) a dual mechanical seal system that includes a barrier fluid system;

(ii) a system that is designed with no externally actuated shaft penetrating the housing; or

(iii) a closed-vent system and control device that meets the requirements of §115.122(a)(2) of this title (relating to Control Requirements).

(3) All leaking components, as defined in paragraph (1) of this section, that cannot be repaired until a process unit shutdown must be identified for such repair by tagging. The executive director, at his discretion, may require an early process unit shutdown or other appropriate action based on the number and severity of tagged leaks awaiting a process unit shutdown.

(4) No valves may be installed or operated at the end of a pipe or line containing VOC unless the pipe or line is sealed with a second valve, a blind flange, or a tightly-fitting plug or cap. The sealing device may be removed only while a sample is being taken or during maintenance operations, and when closing the line, the upstream valve must be closed first.

(5) Construction of new and reworked piping, valves, and pump and compressor systems must conform to applicable American National Standards Institute, American Petroleum Institute, American Society of Mechanical Engineers, or equivalent codes.

(6) New and reworked underground process pipelines must contain no buried valves such that fugitive emission monitoring is rendered impractical.

(7) To the extent that good engineering practice will permit, new and reworked components must be so located to be reasonably accessible for leak-checking during plant operation. A difficult-to-monitor component is a component that cannot be inspected without elevating the monitoring personnel more than two meters above a permanent support surface or that requires a permit for confined space entry as defined in 29 CFR §1910.146 (December 1, 1998). Difficult-to-monitor components must be identified in a list to be made available upon request as specified in §115.356(4) of this title (relating to Recordkeeping Requirements).

(8) New and reworked piping connections must be welded, flanged, or consist of pressed and permanently formed metal-to-metal seals. Screwed connections are permissible only on new piping smaller than two inches in diameter.

(9) For pressure relief valves installed in series with a rupture disk, pin, second relief valve, or other similar leak-tight pressure relief component, a pressure gauge or an equivalent device or system must be installed between the relief valve and the other pressure relief component to monitor for leakage past the first component. When leakage is detected past the first component, that component must be repaired or replaced at the earliest opportunity, but no later than the next process unit shutdown. Equivalent devices or systems must be identified in a list to be made available upon request as specified in §115.356(4) of this title and must have been approved by the methods required by §115.353 of this title (relating to Alternate Control Requirements).

(10) Any petroleum refinery; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or natural gas/gasoline processing operation in the Houston/Galveston/Brazoria area in which a highly-reactive volatile organic compound, as defined in §115.10 of this title, is a raw material, intermediate, final product, or in a waste stream is subject to the requirements of Subchapter H of this chapter (relating to Highly-Reactive Volatile Organic Compounds) in addition to the applicable requirements of this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas).

§115.354. Monitoring and Inspection Requirements.

All affected persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/ Galveston/Brazoria areas must conduct a monitoring and inspection program consistent with the following provisions.

(1) Monitor yearly (with a hydrocarbon gas analyzer) the emissions from all:

(A) process drains that receive or contact affected volatile organic compound wastewater streams as defined in Subchapter B, Division 4 of this chapter (relating to Industrial Wastewater);

(B) difficult-to-monitor components as identified in §115.352(7) of this title (relating to Control Requirements) that would otherwise be subject to more frequent monitoring under paragraph (2) of this section; and

(C) unsafe-to-monitor components that would otherwise be subject to more frequent monitoring. An unsafe-to-monitor component is a component that the owner or operator determines is unsafe to monitor because monitoring personnel would be exposed to an immediate danger as a consequence of conducting the monitoring. Components that are unsafe to monitor must be identified in a list made available upon request as specified in §115.356(4) of this title (relating to Recordkeeping Requirements). If an unsafe-to- monitor component is not considered safe to monitor within a calendar year, then it must be monitored as soon as possible during times that are safe to monitor.

(2) Monitor each calendar quarter (with a hydrocarbon gas analyzer) the screening concentration from all:

(A) compressor seals;

(B) pump seals;

(C) accessible valves; and

(D) pressure relief valves in gaseous service.

(3) Inspect weekly, by visual, audio, and/or olfactory means, all flanges, excluding flanges that are monitored at least once each calendar year using United States Environmental Protection Agency Test Method 21 in 40 Code of Federal Regulations Part 60, Appendix A (October 17, 2000) and excluding flanges that are unsafe to inspect. Flanges that are unsafe to inspect must be identified in a list made available upon request. If an unsafe-to- inspect flange is not considered safe to inspect within the required weekly time frame, then it must be inspected as soon as possible during a time that it is safe to inspect.

(4) Monitor (with a hydrocarbon gas analyzer) emissions from any relief valve that has vented to the atmosphere within 24 hours

of the release, excluding relief valves that are unsafe to monitor or difficult to monitor. Relief valves that are unsafe to monitor must be monitored as soon as possible after relieving during times that are safe to monitor. Relief valves that are difficult to monitor must be monitored within 15 days after a release.

(5) Upon the detection of a leaking component, affix to the leaking component a weatherproof and readily visible tag, bearing an identification number and the date the leak was detected. This tag must remain in place until the leaking component is repaired. Tagging of difficult-to-monitor leaking components may be done by reference tagging. The reference tag should be located as close as possible to the leaking component and should clearly identify the leaking component and its location.

(6) The monitoring schedule of paragraphs (1) - (3) of this section may be modified to require an increase in the frequency of monitoring in a given process area if the executive director determines that there is an excessive number of leaks in that process area.

(7) After completion of the required quarterly valve monitoring for a period of at least two years, the operator of a petroleum refinery; synthetic organic chemical, polymer, resin, or methyl-tert-butyl ether manufacturing process; or a natural gas/gasoline processing operation may request in writing to the executive director that the valve monitoring schedule be revised based on the percent of valves leaking. The percent of valves leaking must be determined by dividing the sum of valves leaking during the current monitoring period and valves for which repair has been delayed (including valves that have been classified as non-repairable under §115.357(8) of this title (relating to Exemptions)) by the total number of valves subject to the requirements. This request must include all data that have been developed to justify the following modifications in the monitoring schedule.

(A) After two consecutive quarterly leak detection periods with the percent of valves leaking equal to or less than 2.0%, an owner or operator may begin to skip one of the quarterly leak detection periods for the valves in gas/vapor and light liquid service.

(B) After five consecutive quarterly leak detection periods with the percent of valves leaking equal to or less than 2.0%, an owner or operator may begin to skip three of the quarterly leak detection periods for the valves in gas/vapor and light liquid service.

(8) Alternate monitoring schedules approved before November 15, 1996, under §§115.324(a)(8)(A), 115.334(3)(A), and 115.344(3)(A) of this title (relating to Inspection Requirements), as in effect December 3, 1993, are approved monitoring schedules for the purposes of paragraph (7) of this section.

(9) All component monitoring must occur when the component is in contact with process material and the process unit is in service. If a unit is not operating during the required monitoring period but a component in that unit is in contact with process fluid that is circulating or under pressure, then that component is considered to be in service and is required to be monitored. Valves must be in gaseous or light liquid service to be considered in the total valve count for alternate valve monitoring schedules of paragraph (7) of this section.

(10) Monitored screening concentrations must be recorded for each component in gaseous or light liquid service. Notations such as "pegged," "off scale," "leaking," "not leaking," or "below leak definition" may not be substituted for hydrocarbon gas analyzer results. For readings that are higher than the upper end of the scale (i.e., pegged) even when using the highest scale setting or a dilution probe, record a default pegged value of 100,000 parts per million by volume.

(11) All new connectors must be checked for leaks within 30 days of being placed in volatile organic compound service by monitoring with a hydrocarbon gas analyzer for components in light liquid and gas service and by using visual, audio, and/or olfactory means for components in heavy liquid service. . Components that are unsafe to monitor or inspect are exempt from this requirement if they are monitored or inspected as soon as possible during times that are safe to monitor.

(12) All exemptions for valves with a nominal size of two inches or less expired on July 31, 1992 (final compliance date).

§115.355. Approved Test Methods.

For all affected persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston/Brazoria areas, compliance with this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas) must be determined by applying the following test methods, as appropriate:

(1) Test Method 21 (40 Code of Federal Regulations Part 60, Appendix A (October 17, 2000)) for determining volatile organic compound leaks;

(2) determination of true vapor pressure using American Society for Testing and Materials Test Methods D323-89, D2879, D4953, D5190, or D5191 for the measurement of Reid vapor pressure, adjusted for 68 degrees Fahrenheit (20 degrees Celsius) in accordance with American Petroleum Institute Publication 2517, Third Edition, 1989;

(3) minor modifications to these test methods approved by the executive director; or

(4) equivalent determinations using published vapor pressure data or accepted engineering calculations.

§115.356. Recordkeeping Requirements.

All affected persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/ Galveston/Brazoria areas shall maintain the following, either electronically or in hard copy form:

(1) records identifying each process unit subject to fugitive monitoring in accordance with this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas) including, at a minimum, the following information:

(A) the name of each process unit;

(B) a scale plot plan showing the location of each process unit;

(C) process flow diagrams for each process unit showing the general process streams and major equipment on which the components are located; and

(D) the expected volatile organic compound emissions if the process unit is shut down for repair of components or other equipment, including:

(i) the total emissions;

(ii) the calculations used; and

(iii) engineering assumptions applied;

(2) records on components and process areas that contain, at a minimum, the following data:

(A) the name of the process unit where the component is located;

(B) the type of component (e.g., pump, compressor, valve, pressure relief valve, etc.;

(C) all data collected in accordance with the monitoring and inspection requirements of §115.354 of this title (relating to Monitoring and Inspection Requirements) for each component required to be monitored with a hydrocarbon gas analyzer;

(D) the calibration of the monitoring instrument;

(E) if a component is found leaking, if applicable:

(i) the component identification and method of leak determination (Test Method 21 in 40 Code of Federal Regulations Part 60, Appendix A (October 17, 2000), sight/sound/smell, or inert gas or hydraulic testing);

(ii) the date that a leaking component is discovered;

(iii) the date that a first attempt at repair was made to a leaking component;

(iv) the date that a leaking component is repaired;

(v) the date and instrument reading of the recheck procedure after a leaking component is repaired;

(vi) the date that the leaking component is placed on the shutdown list; and

(vii) the date that the leaking component was taken out of service; and

(F) maintain records of any audio, visual, and olfactory inspections of connectors, but only if a leak is detected;

(3) records by process unit identifying and justifying each :

(A) unsafe-to-monitor component and unsafe-to-inspect flange;

(B) difficult-to-monitor component; and

(C) each exemption by component claimed under §115.357 of this title (relating to Exemptions). The components may be identified by one or more of the following methods:

(i) a plant site plan;

(ii) color coding;

(iii) a written or electronic database;

(iv) designation of process unit boundaries;

(v) some form of weatherproof identification; or

(vi) process flow diagrams that exhibit sufficient detail to identify major pieces of equipment, including major process flows to, from, and within a process unit. Major equipment includes, but is not limited to, columns, reactors, pumps, compressors, drums, tanks, and exchangers; and

(4) all monitoring records for at least five years and make them available for review upon request by authorized representatives of the executive director, United States Environmental Protection Agency, or local air pollution control agencies with jurisdiction, except that the five-year record retention requirement does not apply to records generated before December 31, 2000.

§115.357. Exemptions.

For all affected persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston/Brazoria areas, the following exemptions apply.

(1) Components that contact a process fluid containing volatile organic compounds (VOCs) having a true vapor pressure equal to or less than 0.044 pounds per square inch, absolute (psia) (0.3 kiloPascals) at 68 degrees Fahrenheit (20 degrees Celsius) are exempt from the instrument monitoring (with a hydrocarbon gas analyzer) requirements of §115.354(1) and (2) of this title (relating to Monitoring and Inspection Requirements) if the components are inspected by visual, audio, and/or olfactory means according to the inspection schedules specified in §115.354(1) and (2) of this title.

(2) Conservation vents or other devices on atmospheric storage tanks that are actuated either by a vacuum or a pressure of no more than 2.5 pounds per square inch, gauge (psig), pressure relief valves equipped with a rupture disk or venting to a control device, components in continuous vacuum service, and valves that are not externally regulated (such as in-line check valves) are exempt from the requirements of this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas), except that each pressure relief valve equipped with a rupture disk must comply with §115.352(9) and §115.356(3)(C) of this title (relating to Control Requirements and Recordkeeping Requirements).

(3) Compressors in hydrogen service are exempt from the requirements of §115.354 of this title if the owner or operator demonstrates that the percent hydrogen content can be reasonably expected to always exceed 50.0% by volume.

(4) All pumps and compressors that are equipped with a shaft sealing system that prevents or detects emissions of VOC from the seal are exempt from the monitoring requirement of §115.354 of this title. These seal systems may include, but are not limited to, dual pump seals with barrier fluid at higher pressure than process pressure, seals degassing to vent control systems kept in good working order, or seals equipped with an automatic seal failure detection and alarm system. Submerged pumps or sealless pumps (including, but not limited to, diaphragm, canned, or magnetic driven pumps) may be used to satisfy the requirements of this paragraph.

(5) Reciprocating compressors and positive displacement pumps used in natural gas/gasoline processing operations are exempt from the requirements of this division except §115.356(3)(C) of this title.

(6) Components at a petroleum refinery or synthetic organic chemical, polymer, resin, or methyl-tert-butyl ether manufacturing process, that contact a process fluid that contains less than 10% VOC by weight and components at a natural gas/gasoline processing operation that contact a process fluid that contains less than 1.0% VOC by weight are exempt from the requirements of this division except §115.356(3)(C) of this title.

(7) Plant sites covered by a single account number with less than 250 components in VOC service are exempt from the requirements of this division except §115.356(3)(C) of this title.

(8) Components in ethylene, propane, or propylene service, not to exceed 5.0% of the total components, may be classified as non-repairable beyond the second repair attempt at 500 parts per million by volume (ppmv). These components will remain in the fugitive monitoring program and be repaired no later than 15 calendar days after the concentration of VOC detected via United States Environmental Protection Agency Test Method 21 in 40 Code of Federal Regulations (CFR) Part 60, Appendix A (October 17, 2000) exceeds 10,000 ppmv. For the purposes of this division, components that contact a process fluid with greater than 85% ethylene, propane, or propylene by weight are considered in ethylene, propane, or propylene service, respectively.

(9) The following valves are exempt from the requirements of §115.352(4) of this title:

(A) pressure relief valves;

(B) open-ended valves or lines in an emergency shutdown system that are designed to open automatically in the event of an emissions event;

(C) open-ended valves or lines containing materials that would autocatalytically polymerize or would present an explosion, serious overpressure, or other safety hazard if capped or equipped with a double block and bleed system; and

(D) valves rated greater than 10,000 psig.

(10) Instrumentation systems, as defined in 40 CFR §63.161 (January 17, 1997), that meet 40 CFR §63.169 (June 20, 1996) are exempt from the requirements of this division except §115.356(3)(C) of this title.

(11) Sampling connection systems, as defined in 40 CFR §63.161 (January 17, 1997), that meet the requirements of 40 CFR §63.166(a) and (b) (June 20, 1996) are exempt from the requirements of this division except §115.356(3)(C) of this title.

(12) Components that are insulated, making them inaccessible to monitoring with a hydrocarbon gas analyzer, are exempt from the monitoring requirements of §115.354(1), (2), and (4) of this title.

(13) Components/systems that contact a process fluid containing VOC having a true vapor pressure equal to or less than 0.002 psia at 68 degrees Fahrenheit are exempt from the requirements of this division except §115.356(3)(C) of this title.

(14) In the Houston/Galveston/Brazoria area, the requirements of Subchapter H of this chapter (relating to Highly-Reactive Volatile Organic Compounds) may apply to components that qualify for one or more of the exemptions in paragraphs (1) - (11) of this section at any petroleum refinery; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or natural gas/gasoline processing operation in which a highly- reactive volatile organic compound, as defined in §115.10 of this title (relating to Definitions), is a raw material, intermediate, final product, or in a waste stream.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6087

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CHAPTER 117. CONTROL OF AIR POLLUTION FROM NITROGEN COMPOUNDS

SUBCHAPTER D. SMALL COMBUSTION SOURCES

DIVISION 1. WATER HEATERS, SMALL BOILERS, AND PROCESS HEATERS

30 TAC §117.460, §117.465

The Texas Commission on Environmental Quality (commission) adopts the amendments to §117.460 and §117.465, and corresponding revisions to the state implementation plan (SIP). Sections 117.460 and 117.465 are adopted with changes to the proposed text as published in the August 27, 2004, issue of the *Texas Register* (29 TexReg 8249).

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On April 19, 2000, the commission adopted rules, published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 4101), that require new water heaters, small boilers, and process heaters statewide to meet specific nitrogen oxides (NO_x) emission limits. These rules were part of a SIP control strategy for attainment with the ozone national ambient air quality standard.

Under the adopted rules, manufacturers, distributors, retailers, and installers of natural gas-fired water heaters with a maximum rated capacity of no more than 75,000 British thermal units per hour (Btu/hr), designated as a "Type 0 unit" in the adopted rules, are required to meet the emission specifications in §117.465. Specifically, Type 0 units manufactured, distributed, sold, or installed on or after January 1, 2005, are required to meet a 10 nanogram per joule (ng/J) heat output limit for NO_x.

Type 0 water heaters can be classified as conventional, power-vent, and direct-vent units. The commission's proposed definitions stated that a power-vent unit is a unit that has a mechanically induced draft to vent flue gas to a side wall, and that a direct-vent unit is a unit that has a sealed combustion venting system that both draws combustion air from and vents combustion products to the outside air. The commission revised these definitions in response to comments, and the changes are addressed in the RESPONSE TO COMMENTS section of this preamble.

Since the adoption of the current rule, two American National Standards Institute (ANSI) standards (the flammable vapor ignition resistance standard and the lint, dirt, and oil standard); the United States Department of Energy (DOE) energy efficiency standard; and the EPA insulation foam ban have been implemented. The ANSI lint, dirt, and oil standard and the flammable vapor ignition resistance standard were effective on July 1, 2003, and were established for gas-fired water heater safety reasons. The DOE energy efficiency standard was effective on January 20, 2004. The EPA foam ban was effective on January 1, 2003, and affects gas-fired water heaters, as water heater manufacturers have historically used hydrochlorofluorocarbon as a blowing agent for creating foam insulation. The implementation of these standards has delayed the progression of the water heater technology and design for the commission's currently adopted rule's 10 ng/J emission limit that requires a low-NO_x burner. Therefore, a design will not be available for sale on the market by the January 1, 2005, compliance date that meets both the 10 ng/J NO_x emission limit and maintains the current level of safety, efficiency, and reliability as required in the ANSI, DOE, and EPA standards. The incorporation of the low- NO_x design development and subsequent ANSI, DOE, and EPA testing will require a delay in the commission's adopted rule effective date.

The commission originally proposed a one-year delay for conventional Type 0 water headers with a capacity equal to or less than 50 gallons, and a two-year delay for conventional Type 0 water heaters with a capacity that exceeds 50 gallons. Subsequent to the initiation of the rulemaking proposal, the commission received a petition from the Gas Appliance Manufacturers Association (GAMA) on June 22, 2004, regarding the water heater rules. GAMA petitioned the commission to adopt a rule that would amend §117.465 to delay implementation of the 10 ng/J NO_x emission limit for some categories of gas water heaters and to provide an exclusion for two other specific categories of water heaters. For conventional water heaters with storage volumes of 50 gallons or less, the petitioner requested a delay in the implementation of the 10 ng/J NO_x emission limit from January 1, 2005, to January 1, 2006. For conventional water heaters with storage volumes greater than 50 gallons, the petitioner requested a delay in the implementation of the 10 ng/J NO_x emission limit from January 1, 2005, to January 1, 2007. In addition, the petitioner requested that power-vent and direct-vent water heaters be excluded from the 10 ng/J NO_x emission limit, but still require them to continue to comply with the current 40 ng/J NO_x emission limit. GAMA formally withdrew the petition on July 2, 2004.

Based on the comments received and uncertainties in the testing results for the ANSI, DOE, and EPA standards, the commission adopts language to allow a two-year delay for all conventional Type 0 units, giving manufacturers an additional year beyond what was requested in the petition for units with storage volumes of 50 gallons or less. This rulemaking has been, and continues to be driven by the strategies employed by California's South Coast Air Quality Management District (SCAQMD). To the extent that SCAQMD is extending compliance dates, and in conjunction with a desire to remain in a position to observe results of this program, the commission maintains that the exemption as adopted will allow Texas to reap the maximum benefit from lessons learned in California. As part of its independent research efforts, the commission has conducted discussions with water heater manufacturers, users, suppliers, and other interested persons. It has become clear that there remains uncertainty about the time frame within which conventional water heaters, which operate in compliance with the previously adopted emission standards, will be available for public consumption. In adopting the two-year exemption, the commission will avoid the real threat of a significant impact on the market in the event that people are unable to obtain compliant conventional water heaters. Although manufacturers have previously indicated that a compliant water heater may be available following a one-year extension, the lack of any support submitted to suggest that compliant conventional water heaters will be ready for distribution has led the commission to desire that a buffer be instituted to ensure that negative consequences will not result and adequate time will exist for the water heaters to be readied for distribution. The commission remains intent on instituting these new standards in order to control emissions for attainment purposes, and is balancing this interest against the necessity to ensure that the market won't be affected by unavailable water heaters, in order to reach a fair and reasonable solution.

The adopted amendments to Chapter 117 will exclude power-vent and direct-vent units from the 10 ng/J emission limit. These units are already more expensive than conventional gas-fired water heaters, and the low-NO_x requirements could make them economically unfeasible for a consumer to purchase. Current estimates show that approximately 0.099% of the gas water heaters that are sold annually in the State of Texas are power-vent units. Similarly, estimates show that approximately 0.12% of the gas water heaters that are sold annually in the State of Texas are direct-vent units. Therefore, the exclusion of direct-vent and power-vent units will have minimal impact on existing NO_x emissions when compared to the conventional units. The commission estimates that the statewide emission reductions that would no longer be anticipated as a result of the adopted exclusion will be 0.002 ton per day (tpd) in 2007, 0.006 tpd in 2010, and 0.012 tpd in 2015. The commission will continue to evaluate the annual water heater sales estimates to ensure that any increased costs resulting from low-NO_x water heaters do not result in a significant market shift toward excluded units. As discussed more fully in the RESPONSE TO COMMENTS section of this preamble, the adopted amendments will not impact the commission's commitments to maintain the EPA reasonably available control measure requirements as specified in the Texas SIP.

Using GAMA and American Gas Association (AGA) assumptions and incorporating a two- year delay of the 10 ng/J NO_x emission limit for all Type 0 water heaters, the commission calculated a 2007 statewide emission reduction of 0.53 tpd by the end of 2007, 2.13 tpd by 2010, and 5.33 tpd by 2016. The 2007 statewide emission reduction reflected in the SIP model for the April 19, 2000, water heater rule is 1.0 tpd. Therefore, the 2007 shortfall is the difference between the modeled reductions (1.0 tpd) and the reductions that will be realized with the two-year delay (0.53 tpd) which is 0.47 tpd. The commission will use reductions from the Texas Emissions Reduction Program funding to substitute for the 0.47 tpd shortfall. While the proposed rules incorporated a delay for conventional water heaters, the commission also solicited comments on the alternative of exempting all conventional water heater units from the 10 ng/J emission limit upon adoption of the rules. The commission also solicited comments on the emission reductions that would be lost due to the originally proposed one- and two-year delays for conventional water heaters.

In addition, the commission solicited comments on the consumer cost difference between conventional gas-fired water heaters that meet the 40 ng/J emission limit and water heaters that meet the 10 ng/J emission limit, excluding costs not associated with the low-NO_x technology, and the availability of conventional gas-fired water heaters to meet that emission limit. The commission also solicited comments on the following anticipated consumer costs of a conventional gas-fired water heater that meets the 10 ng/J emission limit compared to the costs of an equivalent hot-water production capacity electric water heater: purchase costs, installation costs, and annual operating costs (on a per gallon of hot water basis).

The commission solicited comments on the impacts of extending the compliance dates or exempting conventional gas-fired water heaters from the 10 ng/J emission limit on the SIPs for the Dallas/Fort Worth, Houston/Galveston/Brazoria, and Beaumont/Port Arthur ozone nonattainment areas and the San Antonio, Austin/San Marcos, and Northeast Texas Early Action Compact (EAC) areas. The commission also solicited comments on what alternatives were available to compensate for the loss of credit if the conventional water heater units were exempt from the 10 ng/J emission limit with a resulting loss of NO_x reduction credit for each SIP. Finally, the commission solicited comments on the possibility of a shift in consumer products from conventional water heaters to power-vent and direct-vent units as they are exempt from the 10 ng/J emission limit and would not require the additional cost of a low-NO_x design. These comments

are addressed in the RESPONSE TO COMMENTS section of this preamble.

SECTION BY SECTION DISCUSSION

Section 117.460, Definitions

The commission adopts the amendment to §117.460 that adds definitions for "Direct-vent unit" and "Power-vent unit" and renumbers the subsequent definitions accordingly. In the RESPONSE TO COMMENTS section of this preamble, the commission revised the definitions of "Direct-vent unit" and "Power-vent unit" to be consistent with SCAQMD definitions. The amendment to §117.460 also corrects the reference of the "TCAA" to "Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act)." Finally, the amendment spells out the acronym terms and deletes the acronyms where they are not used again in the definitions for "Type 0 unit," "Type 1 unit," "Type 2 unit," and "Water heater."

Section 117.465, Emission Specifications

The commission adopts the amendment to §117.465 that restructures subsection (a) to establish a separate schedule for water heaters by specifying the requirements for boilers and process heaters in subsection (a), and by adding a subsection (b) specifying the requirements for water heaters. The amendment also eliminates paragraphs (3) and (4) because there no longer is a separate schedule for Type 0 water heaters based on storage volume. The amendment adds a paragraph (3) to clarify that the emission specifications for power-vent and direct-vent units manufactured on or after January 1, 2007, remain at 40 ng/J.

Amended §117.465(b) adds the emission specifications and effective dates for water heaters. These emission specifications incorporate a two-year delay for the 10 ng/J emission limit for Type 0 units. The amendment also reflects that the direct-vent and power-vent units will not be subject to the 10 ng/J emission limit.

Finally, the commission adopted the amendment to §117.465 that makes administrative changes from "shall" to "must" throughout the section to conform to the drafting guidelines in the Texas Legislative Council Drafting Manual, October 2002.

FINAL 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 rulemaking action 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The primary purpose of this rulemaking action is to extend the compliance date for the 10 ng/J NO_x emission limit relating to the manufacture, distribution, and sale of conventional water heaters with a maximum rated capacity of no more than 75,000 Btu/hr from January 1, 2005, to January 1, 2007. Another purpose of this rulemaking action is to exclude power-vent and direct-vent water heaters from the 10 ng/J emission limit. All water heaters must still meet the 40 ng/J emission limit in the existing rules. The original rules, adopted on April 19, 2000, did not constitute a major environmental rulemaking action, and the adopted amendments to the existing rules are minor in nature. Therefore, this rulemaking does not constitute a major environmental rule, and is not subject to a formal regulatory impact analysis.

In addition, this rulemaking action does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. 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 rulemaking action, which extends certain compliance dates and includes two minor exclusions vis a vis previously adopted rules, implements requirements of 42 United States Code (USC). More detailed discussions on the application of federal law to the substantive water heater rules are contained in the REGULATORY IMPACT ANALYSIS DETERMINATION section of the proposed and adopted versions of the previous rulemaking action pertaining to water heaters (December 31, 1999, issue of the *Texas Register* (24 TexReg 12007) and May 5, 2000, issue of the *Texas Register* (25 TexReg 4101) respectively). Furthermore, there is no contract or delegation agreement that covers the topic that is the subject of this action. Finally, this rulemaking action 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 Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.011, 382.012, and 382.017. Therefore, this rulemaking action does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is adopted solely under the general powers of the agency.

Based upon the foregoing, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the rulemaking action under Texas Government Code, §2007.043. The primary purpose of this rulemaking action is to extend the compliance date for the 10 ng/J NO_x emission limit relating to the manufacture, distribution, and sale of conventional water heaters with a maximum rated capacity of no more than 75,000 Btu/hr from January 1, 2005, to January 1, 2007. Another purpose of this rulemaking action is to exclude power-vent and direct- vent water heaters from the 10 ng/J emission limit. All water heaters must still meet the 40 ng/J emission limit in the existing rules.

The commission completed a takings impact assessment for the previously adopted water heater rules, and the adopted amendments will not cause an additional burden on private real property. The amendments will 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. Therefore, the adopted amendments do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking action and determined that the action is identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in §505.11, and therefore requires that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered.

The commission determined that under 31 TAC §505.22, this rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this 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(l)). Ozone levels will ultimately be reduced as a result of the adopted rulemaking, although the reduction will be delayed by two years. The CMP policy applicable to this rulemaking action, in conjunction with the previously adopted rules to be amended through the current rulemaking action, is the policy that commission rules comply with regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 Code of Federal Regulations. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

Chapter 117 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program; therefore, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, revise their operating permits to include the amended Chapter 117 requirements for each emission unit affected by the amendments to Chapter 117 at their sites.

PUBLIC COMMENT

A public hearing for this rulemaking action was held on September 14, 2004, in Austin, and the comment period closed on September 14, 2004. The AGA; AGA and the American Public Gas Association (AGA/APGA); Atmos Energy Corporation (Atmos); the Austin EAC Task Force (Austin EAC); City Public Service of San Antonio (CPS); Environmental Defense; EPA; and GAMA provided written or oral comment regarding these amendments. The AGA written comments included an attachment written by GARD Analytics, Inc., on behalf of AGA/APGA. Atmos and CPS supported the comments of AGA and APGA. BakerBotts, L.L.P., also provided comments on behalf of AGA/APGA.

RESPONSE TO COMMENTS

Comments of general support or opposition

Austin EAC and GAMA expressed general support for the amendments as proposed. No commenter expressed general opposition; however, AGA, AGA/APGA, Atmos, Austin EAC, Environmental Defense, EPA, and GAMA expressed concerns with and/or suggested changes to the proposed amendments.

GAMA stated that the association members in the water heater division are the makers of basically all of the major water heaters in the country, and as a result, a number of them are impacted by this particular rule. GAMA also stated that the water heater manufacturers are committed to reducing NO_x emissions from their products.

GAMA supported the proposal to delay the implementation of the 10 ng/J NO_x emission limit from January 1, 2005, to January 1, 2006, for conventional residential gas models with storage volumes of 50 gallons or less, and from January 1, 2005, to January 1, 2007, for models with storage volumes greater than 50 gallons. GAMA also supported the proposal to continue to require power-vent and direct- vent models to comply with the current 40 ng/J NO_x emission limit.

Consumer cost differences

GAMA stated that it could not provide any data to address the consumer cost issues, because of antitrust concerns. GAMA stated that as a matter of policy it does not collect information on product costs or the prices consumers pay for the products manufactured by members of GAMA. GAMA expressed a belief that the cost analysis in the comments submitted by AGA/APGA was well-researched and thorough.

RESPONSE

The commission will continue to monitor water heater manufacturer developments and SCAQMD research in the coming year for costs associated with the low-NO_x technology.

AGA/APGA commented that compliant water heaters, if and when available, are expected to carry a substantial consumer cost premium. AGA/APGA, citing an SCAQMD staff report regarding the Alzeta technology (an atmospheric, natural draft, fully mixed burner), estimated a $15 - $50 incremental manufacturing cost increase alone to bring currently available water heater designs into compliance with the 10 ng/J emission limit. When a typical industry standard 250% markup is added, the projected cost premium to the installation contractor increases to $25 - $85 over the cost of current atmospherically- vented models. AGA/APGA stated that the projected ultimate cost premium seen by the homeowner for the Alzeta technology could be as much as $100 when standard contractor overhead and profit markups are added. AGA/APGA also stated that the only Alzeta low- NO_x burner suitable for installation on a residential gas-fired water heater is a forced draft unit, and that the manufacturing cost increase for this forced draft unit would exceed the $25 - $85 projection over the cost of current atmospherically vented models. AGA/APGA stated that at present, the equipment cost premium for a power-vent unit relative to an atmospheric-vent unit is about $100. After adding the cost of a low- NO_x burner, and factoring in the additional material and labor costs of providing an electrical hook-up for the vent fan, a total install cost premium to the consumer would be about $300.

RESPONSE

The commission researched and affirmed the SCAQMD residential water heater reports and regulations. The commission obtained cost estimates for atmospherically-vented residential water heaters meeting the 10 ng/J emission specification from the November 1999 SCAQMD report to address consumer cost issues. The report states that "AQMD {Air Quality Management District} staff has received confirmation from Alzeta that the low-NO_x, portion of their technology would be $15 per water heater." The report also states that the cost for the DOE safety standards for water heaters that are resistant to ignition of flammable vapors is $35. The commission also obtained cost information from a burner vendor, BEKAERT, that indicates an $8.00 increase in cost for a low- NO_x burner that meets the 10 ng/J emission specification. AGA combined the Alzeta low-NO_x burner cost of $15 and the DOE technology cost of $35 and attributed the total of those costs to the commission's low-NO_x emission specification. In the 1999 proposal of the water heater emission specification,

the commission stated that only $15 of the cost was attributable to the low-NO_x technology and further contends for the purpose of these amendments that a price range of $8.00 - $15 is a more accurate cost estimate. In addition, the SCAQMD report indicated that the retail markup factor to the manufacturing cost would be up to 244%. If this assumption is used, the projected cost to the installation contractor increases the burner cost by $19 - $37. The AGA stated that a forced draft system would be required to meet the low-NO_x emission specifications, however, at the present time a comprehensive low-NO_x water heater design has not been fully developed. In addition, actual cost estimates are not yet available.

AGA/APGA stated that the residential water heater market typically consists of electric and gas-fired storage tank water heaters with a storage capacity of 30 - 50 gallons, and that although tankless (instantaneous) electric and gas water heaters as well as electric heat pump water heaters are commercially available, together they account for less than 2% of the total residential market. AGA/APGA divided the residential water heater market into the following appliance configurations: 1) atmospheric vent, natural gas-fired storage water heater (40 ng/J); 2) power-vent, natural gas-fired storage water heater (40 ng/J); 3) atmospheric vent, natural gas-fired storage water heater (10 ng/J); 4) power-vent, natural gas-fired storage water heater (10 ng/J); and 5) electric resistance storage heater. AGA/APGA stated that the factors affecting the ultimate cost differentials to the consumer among these five configurations include variations in equipment purchase costs, installation costs, and annual operating costs. In the replacement market, most consumers will replace an existing water heater with the same configuration and fuel type unless there is a compelling reason to do otherwise, because historically, this has been the homeowner's lowest cost alternative. Therefore, AGA/APGA limited its comments to purchase and installation costs, which in its opinion, indicates the cost considerations that most affect unit selection.

AGA/APGA anticipated that the equipment cost for an atmospheric vent gas-fired water heater that would meet the 10 ng/J NO_x emission limit would be $132 more than an equivalent electric water heater, while the installation cost for a gas-fired water heater would be $72 less, for a total cost premium of $60. AGA/APGA noted, however, that the only known burner suitable for installation on a residential natural gas-fired water heater that can meet the 10 ng/J emission limit is incompatible with atmospheric vent units. AGA/APGA anticipated that the equipment cost premium for a gas-fired water heater that meets the 10 ng/J emission limit over an equivalent electric water heater would be $232 for a power-vent heater, while the installation costs would increase by $58, for a total cost premium of $290. AGA/APGA noted that the cost estimates do not include additional material and labor costs associated with more stringent water heater venting requirements, nor do they account for increased space requirements for appliances that may have a larger footprint.

RESPONSE

As mentioned in the previous response, the commission's current estimates for the low- NO_x technology would increase the cost of a water heater by $8.00 - $15 (or $19 - $37 with the 244% markup). The commission obtained annual operating costs of water heaters from GAMA's Consumers' Directory of Certified Efficiency Ratings for Heating and Water Heating Equipment (May 2004). Based on the national average unit cost of fuel, an estimated annual cost of operation for a gas-fired water heater would be $163, compared to an estimated annual cost of operation for an electric water heater of $420. This results in a higher annual operating cost of $257 for electric water heaters. AGA stated that the installation cost of an electric water heater is $72 more than a gas-fired water heater. The commission contends that the increase in cost of a low-NO_x compliant gas-fired water heater would be minimal compared to the increased annual operation cost of $257 and installation cost of $72 that would be realized by the operation of an equivalent electric water heater.

Consumer shift

GAMA stated that as a result of the residential storage water heater industry's inability to comply with the current January 1, 2005, effective date of the 10 ng/J NO_x emission limit, Texas consumers needing to replace their existing residential gas storage water heater with a like or similar model manufactured after that date will be unable to do so. Instead, GAMA stated that consumers would have to purchase and have installed some other type of water heater that is not subject to the 10 ng/J NO_x emission limit, and in most cases consumers would choose to replace their gas storage model with an electric storage model. GAMA commented that its concern with the 10 ng/J NO_x emission limit is not a matter of potential lost sales, because GAMA members manufacture and sell electric water heaters as well as gas water heaters, and that both types are of equal quality. GAMA expressed a belief that it is not in the financial or environmental interest of Texas citizens to make them replace gas water heaters with electric models because: 1) the consumers will incur the increased installation cost of adding the electric circuit needed to power the water heater; 2) the consumer's total monthly energy bill will increase because heating water with electricity is typically three times more expensive than gas heating; and 3) emissions from power plants will increase because of the increased electricity demand.

RESPONSE

The commission contends that increased installation costs and the added annual operating costs, which are three times more expensive than gas heating as described in the response to the previous comment, would prevent a market shift from gas-fired to electric water heaters.

GAMA stated that the potential for consumers to shift to power-vent or direct-vent water heaters is an unlikely consequence, because in a replacement situation, the change would require some alteration of the residential structure to accommodate the new vent system. GAMA further stated that a replacement may also require relocating the new water heater, and the cost of alterations in addition to the increased cost of a power-vent or direct-vent model will preclude any significant shift by consumers.

RESPONSE

The commission agrees with the statement made by GAMA that the alteration of a residential structure to accommodate the new vent system, the possible relocation of the new water heater, and the increased cost of a power-vent or direct-vent model would preclude any significant shift by consumers.

AGA/APGA stated that the implicit assumption of the proposed rulemaking is that the entire new construction and replacement market for gas-fired water heaters will shift to gas- fired units that meet the new limit for NO_x emissions. AGA/APGA stated that the assumption is flawed because the market for residential water heaters is extremely competitive and substantial incremental

costs are projected for water heater manufacturers to incorporate low-NO_x technology into existing product lines. AGA/APGA cited the results of an internet search that showed the price range for a 40-gallon atmospheric vented unit with a six-year warranty ranged from $228 - $270, and the price range for an equivalent electric resistance unit ranged from $158 - $190.

RESPONSE

As mentioned in a previous response, the commission's current estimates for the low- NO_x technology would increase the cost of a water heater by $8.00 - $15 (or $19 - $37 with the 244% markup). The commission contends that this cost increase of a low-NO_x compliant gas-fired water heater would be minimal compared to the increased annual operation cost and installation cost that would be realized by the installation and operation of an equivalent electric water heater. Although the AGA stated that the price difference in its analysis shows that an electric water heater is currently $70 - $80 cheaper, the installation cost difference of $72 and annual operating cost difference of $257 would still show a financial benefit by purchasing a gas-fired water heater. Furthermore, the commission conducted an analysis of water heaters on the market and in order for a consumer to purchase an electric water heater to produce the same amount of hot water as a gas-fired water heater a consumer would have to purchase a larger unit. Specifically, a 40-gallon electric water heater produces an equivalent amount of hot water as a 30-gallon gas-fired water heater. Therefore, the cost differential between a gas-fired water heater and an electric water heater would be less than the amount mentioned by the AGA.

AGA/APGA commented that because the first cost is the primary consideration for homebuilders in selecting a water heater for the new construction market, any increase in the cost of natural gas water heaters relative to electric units puts natural gas units at a significant competitive disadvantage. AGA/APGA expressed an expectation that given a projected installed cost premium of almost $300 and the price elasticity of demand for household appliances of -0.63, the market share for natural gas water heaters, if the 10 ng/J emission limit were to take effect, would decrease from a current 60% share to a 40% share of the market. AGA/APGA also commented that during the same period, the installed inventory of electric water heaters is expected to increase correspondingly. Finally, AGA/APGA stated that because the replacement and new construction markets are very sensitive to the assumed price elasticity of demand, if the market for gas residential water heaters is more elastic, there will be an even greater shift to electric water heaters.

RESPONSE

As discussed in previous comments, the estimated cost of the new technology is minimal, and the commission will continue to monitor technology and testing advances and any associated costs. Furthermore, commission research shows that 85% of all water heater purchases are replacements and that new construction only makes up 15% of the market. Because existing homeowners make up 85% of the market and because retrofit, unit relocation, remodeling, electrical outlet installation, and annual operating costs would exceed the incremental costs of a low-NO_x technology, the commission does not expect a market shift.

Effects on SIP emission reduction strategies

EPA stated that the initial statewide rule for water heaters was approved on October 26, 2000 (65 FR 64148), as part of the Texas SIP, and that the commission declared a NO_x SIP credit of 0.5 tpd. EPA commented that the proposal does not provide for where or how the 0.5 tpd NO_x credit will be accounted or compensated. EPA further stated that commission adoption of a rule revision that fails to account for a previously-declared SIP emission reduction credit would be difficult for the commission or EPA to refute potential backsliding arguments. EPA suggested that the commission provide an explanation on how the loss of credit will be accounted for in the SIP control plan.

RESPONSE

During the initial rulemaking of this control measure, the commission utilized emission reduction calculations from an Environ report which stated that the state would realize a decrease of 0.5 - 1.0 tpd of NO_x for the Dallas/Fort Worth one-hour ozone nonattainment area by 2007. Since then, the commission has recalculated emission reductions using SCAQMD methodologies and incorporating AGA and GAMA data. Current commission estimates show that a 1.60 tpd NO_x reduction would occur by the 2007 attainment demonstration date without the compliance date delay and a 0.53 tpd NO_x reduction will occur with the compliance date delay in effect. As the 2000 Texas SIP revision accounted for a 1.0 tpd NO_x reduction by the 2007 attainment date demonstration date and the delay will demonstrate a 0.53 tpd emission reduction, there will be a 0.47 tpd shortfall. The commission will use reductions from the Texas Emissions Reduction Program funding to substitute for the 0.47 tpd shortfall.

AGA/APGA expressed an expectation that absent a delay or exemption, the lack of technology to meet the 10 ng/J NO_x emission limit and the projected cost increases in the event such technology eventually were to become available will result in a market shift away from gas-fired water heaters to electric resistance units. AGA/APGA stated that this shift would be expected to increase rather than decrease NO_x emissions. AGA/APGA contended that a market shift from gas-fired to electric resistance water heaters, whenever it were to occur, would lead to an overall increase in NO_x emissions, taking into account emissions at the electrical power generating plants. Given the current power generation mix in Texas, the NO_x emissions associated with operating a water heater in a typical dwelling are 4.93 pounds per year for a conventional gas-fired water heater versus 11.02 pounds per year for a comparable electric water heater. AGA/APGA maintained that there would be no loss of emission reductions in the event of a delay of the implementation timetable, but that an extension would only delay the inevitable NO_x increase resulting from a market shift to electric resistance water heaters unless residential gas-fired water heaters are exempted from the 10 ng/J emission limit.

RESPONSE

As stated in previous comments, the commission does not agree with the cost estimates for the low-NO_x technology that AGA claims. Based on independent research conducted by the commission, the commission contends that the AGA costs are overestimated and as these costs are the basis for the market shift, it is unclear if a market shift would occur. Furthermore, federal, state, and local measures controlling electric utilities in Texas are projected to reduce NO_x by 50% statewide and by up to 80% in the Houston/Galveston/Brazoria area through various cap and trade programs by 2007. The emissions at Texas utilities are capped and owners or operators may not increase emissions above these caps unless emission credits are purchased. The Texas SIP includes all emission reduction credits that are currently in the bank and the commission's rules contain a usage

restriction system so that the use of credits does not affect the integrity of the cap.

AGA/APGA stated that exempting gas-fired water heater units from the 10 ng/J emission limit will prevent an increase in NO_x emissions due to fuel switching. AGA/APGA projected that if the implementation of the 10 ng/J emission limit causes a shift in the gas-fired water heater market share from the current 60% to 40% or less, overall future NO_x emissions attributable to residential water heaters will exceed current levels.

RESPONSE

As previously stated, the costs associated with retrofit, unit relocation, remodeling, electrical outlet installation, and annual operation would exceed the incremental costs of a low-NO_x technology; therefore, the commission does not expect a market shift. Furthermore, the federal, state, and local NO_x cap system for electric utilities would decrease overall NO_x emissions.

GAMA stated that failure by the commission to amend §117.465 as proposed would cause significant financial harm to Texas consumers and worsen air quality conditions in Texas.

RESPONSE

The commission is adopting a compliance date delay of two years. In addition, as previously stated, the federal, state, and local NO_x cap system for electric utilities would decrease overall NO_x emissions.

AGA/APGA stated that the application of the 10 ng/J emission limit to residential gas- fired water heaters would ultimately increase NO_x emissions due to fuel switching. AGA/APGA stated that as a result of a shift from gas-fired to electric resistance water heaters, the statewide impact of extending the compliance date from one to two years would be a significant decrease in statewide NO_x emissions for that period from those emissions that would be projected if the standard were to take effect.

RESPONSE

As previously stated, the costs associated with retrofit, unit relocation, remodeling, electrical outlet installation, and annual operation would exceed the incremental costs of a low-NO_x technology; therefore, the commission does not expect a market shift. Furthermore, the federal, state, and local NO_x cap system for electric utilities would decrease overall NO_x emissions.

Impacts on the SIPs

Environmental Defense did not object to delaying the effective date of the 10 ng/J emission limit if it is true, as the commission claims, that a "design has not been developed that meets both the 10 ng/J NO_x limit and maintains the current level of safety, efficiency, and reliability as required in the ANSI, DOE, and EPA standards." Environmental Defense stated that as a matter of policy, the commission should not reward noncompliant manufacturers if other manufacturers will succeed in developing and producing water heaters that would comply with the emission limit. Environmental Defense also stated that the proposal lacks any evidence to support the claim that no compliant products will be available on January 1, 2005, and that before delaying the effective date, the commission must clearly establish that no manufacturers will be able to market compliant water heaters by the existing date.

RESPONSE

Commission staff investigated all possible designs from all water heater manufacturers and a design that meets both the 10 ng/J emission specification and the ANSI, DOE, and EPA standards has not yet been developed. Burner technology that achieves the 10 ng/J standard does exist, but a water heater using the technology in conjunction with the ANSI, DOE, and EPA requirements does not exist. Specifically, the most recent water heater designs using the low-NO_x burner have not been able to pass all testing requirements for the ANSI, DOE, and EPA standards. In addition, SCAQMD is conducting investigations for possible designs and also adopted a compliance date delay on September 3, 2004. The commission will continue to monitor water heater technology and testing advances.

EPA stated that the proposal does not contain specific justification (technically and economically) in support of the proposal, and suggested that a more complete explanation of the compliance delay be included in the final rulemaking. EPA also requested that the commission provide justification or support for the stated conclusion in the proposal that "the proposed amendments would not impact the commission's commitments to maintain the EPA reasonably available control measure requirements as specified in the Texas SIP."

RESPONSE

The commission recognizes that a "reasonable available control measure" analysis is a SIP requirement and will document SIP requirements in the accompanying one-hour attainment demonstration scheduled for commission consideration on December 1, 2004.

The commission contends that delaying the effective date of the 10 ng/J standard for conventional water heaters from January 1, 2005, to January 1, 2007, will not interfere with the attainment demonstration for the one-hour ozone standard in 2007. In addition, the delay provides more time to review alternative control strategies submitted by the counties and their respective largest cities that may achieve equivalent emissions reductions and be proven cost-effective and appropriate for implementation by the individual counties. Based upon all data presently before the commission, the commission contends that the technology necessary to comply with the 10 ng/J standard by January 1, 2005, is not reasonably available. The delay does not significantly impact modeled ozone concentrations and will allow the commission additional opportunities to monitor the progress of the technology development. The commission made no changes to the rules in response to this comment.

Austin EAC and Environmental Defense expressed strong concerns with the proposed alternative of exempting all conventional water heater units from the 10 ng/J emission limit, and stated that future base case modeling for the Austin EAC area takes into account the 2001 low-NO_x water heater rule. Austin EAC and Environmental Defense stated that significant alterations to the 2001 rule will affect the future base case model and will necessitate model adjustments. Austin EAC and Environmental Defense also stated that if model adjustments are needed, there may not be enough time to adjust the model to meet the EAC SIP submittal deadline. Environmental Defense commented that by the commission's own estimates, an exemption of all conventional water heater units from the 10 ng/J emission limit will mean many lost tons of NO_x emissions that would occur as the water heater inventory turns over. Finally, Austin EAC requested that the commission consider the possible negative effects on EAC areas when considering exempting all conventional water heater units from the 10 ng/J emission limit, or when considering other rules that may affect local or transported ozone levels in the Austin/Round Rock metropolitan statistical area.

RESPONSE

The future case modeling run for the Austin EAC area originally included the reductions associated with the water heater control measure. Since the proposal of these amendments, the future case for Austin EAC area has been remodeled to exclude the reductions associated with the water heater control measure. The modeling results show that the area will be in attainment of the eight-hour ozone standard by 2007 as required by the EAC agreement. Actual emission reductions that occur as a result of the implementation of the water heater rule will be an additional margin of safety for the area.

Alternative measures to compensate for loss of credit

GAMA stated that the recent changes in federal minimum efficiency regulations for residential water heaters have raised the efficiency of gas water heaters on average by 10%, and that this increased efficiency directly correlates to an average 10% reduction in energy consumption. Therefore, NO_x emission rules aside, the installation of new water heaters will result in reduced NO_x emissions because these products are more efficient and consume less gas.

RESPONSE

The commission agrees that the federal minimum efficiency regulations for residential water heaters will result in reduced NO_x emissions. However, these changes are federally mandated, and therefore, they cannot be used as SIP credits. Only measures that result in surplus emission reductions can be used as SIP credits. Surplus measures are any measures that are not relied upon to meet air quality requirements.

Environmental Defense stated that before the commission contemplates an exemption of all conventional water heaters from the 10 ng/J emission limit, the commission must propose replacement measures to backfill for the measures proposed for repeal.

RESPONSE

As previously stated in this preamble, the commission does not currently contemplate the adoption of an exemption of all conventional water heaters from the 10 ng/J emission limit, but is adopting a two-year compliance delay. The commission will continue to monitor the progress of water heater technology and design.

Austin EAC commented that the Austin/Round Rock metropolitan statistical area would find it difficult to compensate for the loss of NO_x reduction credit if the conventional water heater units were exempted from the 10 ng/J emission limit. Austin EAC stated that after adjusting the future base case to account for the statewide loss of emission reductions, the area would either have to find additional measures or determine that a smaller safety margin is acceptable. Austin EAC also stated that the Austin area EAC SIP currently does not contain any contingency measures, and the initial response would be to resubmit the NO_x reduction measures that the commission previously declined to include in the SIP.

RESPONSE

The future case modeling run for the Austin EAC area originally included the reductions associated with the water heater control measure. Since the proposal of these amendments, the future case for the Austin EAC area has been remodeled to exclude the reductions associated with the water heater control measure. The modeling results show that the area will be in attainment of the eight-hour ozone standard by 2007 as required by the EAC agreement. Actual emission reductions that may occur as a result of the implementation of the water heater rule will be an additional margin of safety for the area.

AGA/APGA stated that its member companies are prepared to participate in any additional rule proceedings or studies that the commission may initiate on the issue of NO_x reduction.

RESPONSE

The commission will continue to solicit input and use knowledge on the future developments of compliant water heater designs.

Current compliance date of January 1, 2005

AGA/APGA stated that presently, there is no residential gas-fired water heater design available that would meet the 10 ng/J NO_x emission limit within acceptable safety, efficiency, and reliability standards. AGA/APGA also stated that a compliant design is not anticipated by the current compliance date or the proposed extension of the compliance date.

GAMA, on the other hand, expressed a belief that at the time the 10 ng/J emission limit was promulgated in 2000, the emission limit could be met. GAMA further stated that when the federal government subsequently came out with the new energy efficiency regulations and requirements, GAMA began to meet with the commission to pursue a delay regarding the 10 ng/J emission limit. GAMA expressed support of the proposed rule because the current implementation date cannot be met. GAMA stated that despite industry efforts to date, the revised federal efficiency standards (effective January 20, 2004) and the new safety standards requiring the flammable vapor ignition resistant technology (effective July 1, 2003) have prevented manufacturers from developing a burner component that meets the 10 ng/J NO_x emission limit while still satisfying applicable safety, performance, and reliability criteria. GAMA stated that the fundamental obstacle to overcome has been modifying the burner without adversely affecting the entire water heating system. Therefore, GAMA particularly supported the proposal regarding the Type 0 water heaters because the technology is simply not yet available to the manufacturers. GAMA also commented that there is a tremendous healthy competition among the manufacturers to be the first to meet the emission limit, and expressed a belief that this competition is a positive development.

RESPONSE

The commission notes that GAMA, which represents the water heater manufacturers, also presented the commission a schedule of goals in February of 2004 that indicated a completion of an EPA, ANSI, and commission compliant design by the end of 2005. Based on the comments received and uncertainties in the testing results for the ANSI, DOE, and EPA standards, the commission adopts language to allow a two-year delay for all conventional Type 0 units, giving manufacturers an additional year beyond what was originally proposed for units with storage volumes of 50 gallons or less and will continue to monitor water heater manufacturer developments in testing and technology.

GAMA stated that the additional year of delay to January 1, 2007, for models greater than 50 gallons is required because these models present additional technical challenges to meet the 10 ng/J NO_x emission limit. GAMA further stated that the burner, combustion chamber, air intake, exhaust, air distribution, and fuel flow control for the larger volume models differ from the 30 - 50 gallon models, and that all of these aspects affect how the burner components interact with the water heater as a system. Finally, GAMA stated that combustion systems designed for 30

- 50 gallon models will not operate with this category of larger volume products, and will require a redesign to meet the needs of the larger volume water heaters.

GAMA agreed with the rule proposal that would allow power and direct-vent units to remain at the 40 ng/J NO_x emission limit. GAMA stated that combustion systems designed for conventional water heater models and ultra-low-NO_x technology will not work with power-vent and direct-vent models. GAMA also stated that because sales of power-vent and direct-vent units represents a fraction of 1% of total water heater sales in Texas, the research and development required to achieve the 10 ng/J NO_x emission limit would be economically infeasible, not only for the manufacturers, but also for the consumers. Finally, GAMA stated that even if these products were able to comply with the 10 ng/J NO_x emission limit in the future, the reductions in statewide NO_x would be negligible.

RESPONSE

The commission is considering all aspects of manufacturer design difficulties and will continue to review the concerns stated regarding the development of a compliant water heater. The commission is incorporating a two-year delay and is also excluding power-vent and direct-vent units.

AGA/APGA urged the commission to provide an exemption, not just a delay in the compliance date, for all Type 0 water heaters covered by the rules. AGA/APGA expressed a belief that if the commission only granted a compliance date delay, as opposed to an actual exemption, the industry would be back in a few months because there is no technology on the horizon.

RESPONSE

Based on comments received in response to this rulemaking and in prior discussions with GAMA low-NO_x technology vendors, the commission maintains that the water heater manufacturing industry is making good faith efforts to develop a water heater design that meets both the 10 ng/J NO_x emission limit and the ANSI and EPA standards and testing requirements by the new compliance date. As GAMA commented, there is "tremendously healthy" competition among the manufacturers to develop a water heater meeting this emission specification. The commission recognizes that manufacturers are concerned about disclosure of proprietary information regarding design changes and innovative advances in technology. Therefore, information regarding the advances being made by the manufacturers may not be readily available to the commenter. The commission will continue to monitor the development of water heaters to meet the 10 ng/J emission standard and the ANSI and EPA requirements during the compliance date extension provided by the adoption of this rule.

Section 117.460, Definitions

GAMA requested that the phrase "sealed combustion" be dropped from the definition of "Direct-vent unit" because the term is an inappropriate and unnecessary adjective that confuses the definition. GAMA explained that in order to comply with the nationally recognized safety standards, all direct-vent gas appliances must comply with a test that verifies the air tightness of the direct-vent system that will be used with the specific appliance model. The applicable safety standard for residential gas storage water heaters, ANSI Z21.10.1, does not use the term "sealed combustion" and therefore, the commission's proposed definition implies that a Texas direct-vent water heater is somehow different than a direct-vent water heater certified to the national standard.

RESPONSE

The commission agrees and deleted the term "sealed combustion" from the proposed definition of "Direct-vent unit" to be consistent with national definitions. The definition will read, "A water heater with air intake and exhaust ducts that use a gravity system to collect air from outside a building for combustion and exhaust combustion byproducts to the outside of a building."

GAMA stated that the proposed definition for "Power-vent unit" is technically inaccurate, and requested that the commission adopt the definition as follows: "Power-vent unit - A water heater that has a mechanically induced draft for venting of combustion products." GAMA stated that the errors in the proposed definition are: 1) once the products of combustion exit the water heater, they are considered vent gases, not flue gases; and 2) while most power-vented water heaters are vented horizontally, they can be vented vertically. GAMA stated that its suggested definition uses the more appropriate general term "combustion products" and does not limit these products only to horizontal venting applications.

RESPONSE

The commission agrees and revised the definition of "Power-vent unit" to more general terms. The definition will read, "A water heater with a blower installed to assist in the expulsion of exhaust gases."

Section 117.463, Exemptions

AGA requested that all Type 0 water heaters be exempt from the 10 ng/J NO_x emission limit by deleting the language "used exclusively to heat swimming pools and hot tubs" from §117.463(3).

RESPONSE

The commission declines to make changes to §117.463, because changes were not proposed for this section. The exemption for heating swimming pools and hot tubs was added to the rule in response to comments in the 2000 amendments.

Section 117.465, Emission Specifications

GAMA stated that the proposed amendments provide a potential for significant confusion, in that §117.465(a) has been changed to apply only to boilers or process heaters, yet those product types are not defined. GAMA expressed a concern that the lack of a definition will invite debate about whether some specific unit is a water heater, a boiler, or a process heater. GAMA stated that the sole issue of the proposed change is Type 0 water heaters, i.e., models with inputs of no more than 75,000 Btu/hr, and that to GAMA's knowledge, those are the only Type 0 products available in Texas. GAMA suggested that if there is no data showing that Type 0 boilers and process heaters are being sold in Texas, then §117.465 should be simplified to refer only to natural gas-fired Type 0 water heaters.

RESPONSE

Boiler and process heater definitions are already contained in §117.10(6) and (40), respectively, and these are the applicable definitions for the terms as used in Chapter 117, Subchapter D, Division 1. Furthermore, the emissions specifications are based on unit type and date of manufacture. Restructuring of §117.465 is necessary because the extension of the compliance date is applicable to Type 0 water heaters, but not to Type 0 boilers or

process heaters. The commission declines to make the suggested change because there are Type 0 boilers and process heaters being sold in Texas that will be subject to the 10 ng/J NO_x emission specification. Additionally, the issues raised regarding the 10 ng/J emission specification have only been identified as being associated with water heaters, not boilers or process heaters.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act). The amendments are also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The amendments are adopted under federal mandates contained in 42 United States Code, §7410, that require states to introduce pollution control measures in order to reach specific air quality standards in particular areas of the state.

§117.460. Definitions.

Unless specifically defined in Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act) or in the rules of the commission, the terms used by the commission have the meanings commonly used in the field of air pollution control. In addition to the terms that are defined by Texas Health and Safety Code, Chapter 382, the following terms, when used in this division, have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this division are found in §§3.2, 101.1, and 117.10 of this title (relating to Definitions).

(1) Direct-vent unit--A water heater with air intake and exhaust ducts that use a gravity system to collect air from outside a building for combustion and exhaust combustion byproducts to the outside of a building.

(2) Heat output--The product H_o obtained when a Type 0, 1, or 2 unit is tested according to Section 9.3 of the South Coast Air Quality Management District Protocol: Nitrogen Oxides Emissions Compliance Testing for Natural Gas-Fired Water Heaters and Small Boilers (January 1998).

(3) Power-vent unit--A water heater with a blower installed to assist in the expulsion of exhaust gases.

(4) Type 0 unit--Any water heater, boiler, or process heater with a maximum rated capacity of no more than 75,000 British thermal units per hour.

(5) Type 1 unit--Any water heater, boiler, or process heater with a maximum rated capacity greater than 75,000, but no more than 400,000 British thermal units per hour.

(6) Type 2 unit--Any water heater, boiler, or process heater with a maximum rated capacity greater than 400,000, but no more than 2.0 million British thermal units per hour.

(7) Water heater--A closed vessel in which water is heated by combustion of gaseous fuel and is withdrawn for use external to the vessel at pressures not exceeding 160 pounds per square inch gauge, including the apparatus by which the heat is generated and all controls and devices necessary to prevent water temperatures from exceeding 210 degrees Fahrenheit.

§117.465. Emission Specifications.

(a) Natural gas-fired boilers and process heaters sold, distributed, installed, or offered for sale within the State of Texas must meet the following limits for nitrogen oxides (NO_x).

(1) Type 0 units manufactured on or after July 1, 2002, but no later than December 31, 2004, must not exceed:

(A) 40 nanograms per joule (ng/J) of heat output; or

(B) 55 parts per million by volume (ppmv) at 3.0% oxygen (O_2), dry.

(2) Type 0 units manufactured on or after January 1, 2005, must not exceed:

(A) 10 ng/J of heat output; or

(B) 15 ppmv at 3.0% O_2, dry.

(3) Type 1 units manufactured on or after July 1, 2002, must not exceed:

(A) 40 ng/J of heat output; or

(B) 55 ppmv at 3.0% O_2, dry.

(4) Type 2 units manufactured on or after July 1, 2002, must not exceed:

(A) 30 ppmv at 3.0% O_2, dry; or

(B) 0.037 pound per million British thermal units (lb/MMBtu) of heat input.

(b) Natural gas-fired water heaters sold, distributed, installed, or offered for sale within the State of Texas must meet the following limits for NO_x.

(1) Type 0 units manufactured on or after July 1, 2002, but no later than December 31, 2006, must not exceed:

(A) 40 ng/J of heat output; or

(B) 55 ppmv at 3.0% O_2, dry.

(2) Type 0 units, except power-vent and direct-vent units, manufactured on or after January 1, 2007, must not exceed:

(A) 10 ng/J of heat output; or

(B) 15 ppmv at 3.0% O_2, dry.

(3) Type 0 power-vent and direct-vent units manufactured on or after January 1, 2007 , must not exceed:

(A) 40 ng/J of heat output; or

(B) 55 ppmv at 3.0% O_2, dry.

(4) Type 1 units manufactured on or after July 1, 2002, must not exceed:

(A) 40 ng/J of heat output; or

(B) 55 ppmv at 3.0% O_2, dry.

(5) Type 2 units manufactured on or after July 1, 2002, must not exceed:

(A) 30 ppmv at 3.0% O_2, dry; or

(B) 0.037 lb/MMBtu of heat input.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6087

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CHAPTER 290. PUBLIC DRINKING WATER SUBCHAPTER F. DRINKING WATER STANDARDS GOVERNING DRINKING WATER QUALITY AND REPORTING REQUIREMENTS FOR PUBLIC WATER SYSTEMS

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§290.104, 290.106 - 290.108, 290.111, and 290.121. The commission also adopts the repeal of §290.115. Sections 290.106 and 290.108 are adopted *with changes* to the proposed text as published in the August 13, 2004 issue of the *Texas Register* (29 TexReg 7876). Sections 290.104, 290.107, 290.111, and 290.121 and the repeal of §290.115 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary purposes of the adopted amendments are to incorporate federal standards under Title 40 Code of Federal Regulations (CFR) Parts 141 and 142 for elevated levels of radionuclides and arsenic in drinking water and to address revisions to compliance and monitoring requirements, as promulgated by the United States Environmental Protection Agency (EPA) in the December 7, 2000, January 22, 2001, and March 25, 2003 issues of the *Federal Register* (65 FR 76708, 66 FR 6976, and 68 FR 14501).

The adopted amendments include a maximum contaminant level (MCL) for uranium, which is not currently regulated under state law, and revisions to the monitoring requirements for combined radium-226 and radium-228, gross alpha particle radioactivity, and beta particle and photon radioactivity. The adopted amendments also include a revised MCL for arsenic and revisions to compliance and new source monitoring requirements.

The federal Safe Drinking Water Act, §1413 establishes requirements that states must meet to maintain primary enforcement responsibility (i.e., primacy) for their public water systems, including adopting drinking water rules that are no less stringent than the corresponding federal regulations. This rulemaking is necessary in order to obtain federal approval to administer the arsenic and radionuclide drinking water standards and related compliance and monitoring requirements. Expiration of the extended rules adoption deadline granted by the EPA is December 7, 2004 for the regulations concerning radionuclides and January 21, 2005 for the regulations concerning arsenic and revisions to compliance and new source contaminants monitoring requirements.

One of the implementation issues with the adopted amendments involves the National Primary Drinking Water Regulations under 40 CFR §141.100, which covers criteria and procedures for public water systems using point-of-entry devices. The federal regulation sets limits on the use of point-of-entry devices. First, public water systems may use point-of-entry devices to comply with MCLs only if they meet the requirements of the aforementioned federal regulation. Second, it is the responsibility of the public water system to operate and maintain the point-of-entry treatment system. Third, the public water system must develop and obtain state approval for a monitoring plan before it may install point-of-entry devices for compliance. Under the plan approved by the state, point-of-entry devices must provide health protection equivalent to central water treatment. "Equivalent" means that the water would meet all National Primary Drinking Water Regulations and would be of acceptable quality similar to water distributed by a well-operated central treatment plant. Fourth, public water systems must apply effective technology under a plan approved by the state and maintain the microbiological safety of the water. In this regard, the state must require adequate certification of performance, field testing, and, if not included in the certification process, a rigorous engineering design review of the point-of-entry devices. The state must also require that the design and application of the point-of-entry devices must consider the tendency for increase in heterotrophic bacteria concentrations in water treated with activated carbon. It may be necessary for public water systems to use frequent backwashing, post-contactor disinfection, and heterotrophic plate count monitoring to ensure that the microbiological safety of the water is not compromised. Finally, the public water system shall protect all consumers in its system. In other words, every building connected to the system must have a point-of-entry device installed, maintained, and adequately monitored.

Utilization of point-of-use devices is covered specifically in the National Primary Drinking Water Regulations in the promulgation of the radionuclide rule and the arsenic rule. Two types of point-of- use devices have been identified under 40 CFR §141.66(h) as acceptable as small systems compliance technologies for radionuclides (i.e., point-of-use ion exchange and point-of-use reverse osmosis). Two types of point-of-use devices have been identified under 40 CFR §141.62(d) as acceptable as small system compliance technologies for arsenic (i.e., point-of-use activated alumina and point-of-use reverse osmosis). The federal regulations require public water systems using point-of- use devices for compliance to provide programs for long-term operation, maintenance, and monitoring to ensure proper performance.

These adopted commission rules do not explicitly address point-of-use or point-of-entry as alternatives to centralized provision of compliant water. Point-of-use and point-of-entry are considered one type of best available treatment technology in the National Primary Drinking Water Regulations for certain public water systems. The commission recognizes these treatment technologies and has included the reference to best available technology in the rules.

In the past, the agency addressed affordability issues with water systems through an enforcement tool called bilateral compliance

agreements. Through these compliance agreements, water systems agreed to provide feasibility studies that addressed the provision of compliant water for the entire water system. In many instances, these feasibility studies demonstrated that centralized provision of water, which met the standards, was not economically feasible. When this occurred, public water systems were able to propose analysis of point-of-use or point-of-entry technologies. The agency then analyzed, on a case-by-case basis, the validity of the technology and costs of these alternatives.

Due to the high costs of compliance associated with the adoption of the national primary drinking water standards for arsenic, radionuclides, and uranium that are the subject of this rulemaking, the commission is changing its policies with regard to the use of the bilateral compliance agreements. With the adoption of these standards, the commission recognizes that some water systems, particularly small water systems, need maximum flexibility in order to comply with the federal drinking water regulations for arsenic, radionuclides, and uranium. Accordingly, the commission is approving the use of point-of-use and point-of-entry technologies as a means of compliance for small water systems with arsenic, radionuclides, and uranium federal drinking water standards. In order to utilize these technologies, small systems may obtain approval by the commission and develop programs for the devices' long-term operation, maintenance, and monitoring by the water utility. Bottled water may also be used with approval by the commission on a temporary basis only to avoid unreasonable risk to health.

The previous radionuclides draft rulemaking was remanded on July 23, 2003 to the executive director by the commission for a year. That rulemaking has been merged with the arsenic rules in this rulemaking.

As discussed in more detail later in the SECTION BY SECTION DISCUSSION of this preamble, the following is a brief summary of the amendments being adopted. The adoption specifies an arsenic MCL of 0.010 milligrams per liter (mg/L), and sets forth requirements for water systems to treat the source water to meet the arsenic standard or provide an alternate source of water that meets the standard. This adoption contains revisions concerning monitoring and demonstration of compliance for new systems or sources of drinking water. There are also revisions concerning monitoring requirements and subsequent compliance determinations after initial exceedances for inorganic, volatile organic, and synthetic organic contaminants.

With regard to radionuclides, this adoption specifies a new MCL for uranium of 30 micrograms per liter, and sets requirements for water systems to treat the source water to meet the uranium standard or provide an alternate source of water that meets the standard. This adoption contains revisions concerning the monitoring requirements for combined radium-226 and radium-228, gross alpha particle radioactivity, and beta particle and photon radioactivity.

Finally, throughout the sections, certain administrative changes are adopted regarding the organization and wording of the rules to make the rules more understandable and to be consistent with *Texas Register* requirements and other agency rules.

SECTION BY SECTION DISCUSSION

The adoption amends §290.104(b), Figure: 30 TAC §290.104(b), to incorporate the new MCL for arsenic of 0.010 mg/L contained in 40 CFR §141.62, add the date that the currently existing MCL will be eliminated, and add the date that the new MCL will become effective. The date for this transition is January 23, 2006, as specified in 40 CFR §141.6(j). This change is also adopted under §290.106(b), Figure: 30 TAC §290.106(b). Under §290.104(c)(1), the adoption corrects "(mg/l)" by changing it to "(mg/L)." This correction is also adopted under §290.107(b)(1). Under §290.104(d), the adoption replaces the word "radiological" with the word "radionuclides" for consistency with the federal regulations. Under §290.104(f), the adoption adds the phrase "Residual Disinfectant Concentrations" that was inadvertently omitted in a previous adoption.

The adoption amends §290.106(a) to indicate the aforementioned transition date for the arsenic MCL by adding a new paragraph (4) that states, "Public water systems shall comply with the 0.05 mg/L MCL for arsenic until January 23, 2006 and comply with the 0.010 mg/L MCL for arsenic starting January 23, 2006." The adoption amends §290.106(c)(1) by adding the word "routine" because this paragraph relates to routine monitoring locations. The adoption splits the previously existing sentence under paragraph (1) into its correct component parts: the paragraph title and the initial sentence describing to which inorganic chemicals the paragraph applies, specifically all inorganic chemicals except for asbestos.

The adoption amends §290.106(c)(1) by adding subparagraph (D) to specify that public water systems must perform initial monitoring at a location that will allow them to establish whether a proposed new source of water meets the MCL, as implicit in 40 CFR §141.23(c)(9). The commission has changed the word "shall" to "must" in §290.106(c)(1)(D), from proposal, to conform to the drafting rules in the *Texas Legislative Council Drafting Manual*, October 2002. The adoption adds §290.106(c)(3) to contain the initial monitoring frequency requirements for inorganic chemicals contained in 40 CFR §141.23(c)(9).

The adoption renumbers previously existing §290.106(c)(3) as §290.106(c)(4) to allow insertion of new paragraph (3). The adoption renumbers previously existing §290.106(c)(3)(A) as §290.106(c)(4)(A) and adds the catchline "Routine monitoring frequency" to identify its applicability, with no change in stringency. The adoption renumbers previously existing §290.106(c)(3)(A)(i) as §290.106(c)(4)(A)(i) and specifies that routine inorganic samples must be collected at entry points, not at water sources. The previously existing language implies that each and every well or groundwater source has a unique entry point, which is not the case. The adoption renumbers previously existing §290.106(c)(3)(A)(ii) as §290.106(c)(4)(A)(ii) and specifies that inorganic samples must be collected at entry points, not at water sources. The previously existing language implies that each and every surface water source has a unique entry point, which is not the case. The adoption renumbers previously existing §290.106(c)(3)(A)(iii), relating to the definition of a round of sampling, as §290.106(c)(4)(A)(iii). Additionally, the adoption rewords this clause to specify that sampling occurs at entry points.

The adoption renumbers previously existing §290.106(c)(3)(B) as §290.106(c)(4)(B) and adds the catchline "Reduced monitoring." The adoption renumbers previously existing §290.106(c)(3)(B)(ii) as §290.106(c)(4)(B)(ii). Additionally, the sentence relating to sampling occurring since 1990 is removed since all systems that were in existence in 1990 have now been monitored.

The adoption renumbers previously existing §290.106(c)(3)(C) as §290.106(c)(4)(C) and adds the catchline "Increased monitoring." The reference to systems that exceed an MCL is removed from this subparagraph, because monitoring occurs

at specific sample sites, rather than in general for a system. In other words, a system may operate many entry points to the distribution system, but only those that exceed the MCL may be required to have increased monitoring, or increased monitoring may be required by rule at entry points that do not exceed the MCL. The adoption renumbers previously existing §290.106(c)(3)(C)(i) as §290.106(c)(4)(C)(i). Additionally, the term "violation" is replaced with the word "exceedance" since "violation" is a defined term and cannot be used to describe an otherwise undefined single sample exceedance of an MCL. Also, the adoption rewords this clause to make it clear that sampling occurs at a specific sample site, not system. The "system" is an entity with no physical location; the sample site is an actual geographic location. The adoption renumbers previously existing §290.106(c)(3)(C)(ii) as §290.106(c)(4)(C)(ii) and rewords it to specify that the sampling occurs at specific sampling sites.

The adoption renumbers previously existing §290.106(c)(4) and (5) as §290.106(c)(5) and (6). The adoption renumbers previously existing §290.106(c)(5)(A) as §290.106(c)(6)(A) and adds a catchline specifying that this paragraph relates to routine nitrate monitoring. The adoption adds the word "at" clarifying the sampling location for entry point monitoring in §290.106(c)(6)(A)(i). The adoption states that routine quarterly nitrate sampling occurs at each entry point to the distribution system that carries treated surface water in §290.106(c)(6)(A)(ii). The adoption states that routine annual nitrate sampling occurs at each entry point to the distribution system that carries only treated groundwater in §290.106(c)(6)(A)(iii). The adoption adds a catchline specifying that this paragraph relates to reduced monitoring frequency in §290.106(c)(6)(B).

The adoption deletes §290.106(c)(6)(B)(iv) because the requirement that entry points with sample results showing levels of nitrate greater than one-half the MCL must be sampled quarterly is contained in §290.106(c)(6)(C). The adoption adds a catchline specifying that this subparagraph relates to increased nitrate monitoring frequency in §290.106(c)(6)(C). The adoption renumbers previously existing §290.106(c)(6) as §290.106(c)(7). The adoption renumbers previously existing §290.106(c)(7) as §290.106(c)(8) and rewords the catchline to make it clear that the provisions in this paragraph relating to confirmation sampling are applicable to all of the inorganic contaminants covered by this section. The adoption replaces the word "shall" with the words "may be required to," as it relates to entry point confirmation sampling in §290.106(c)(8)(A). This will lessen the stringency of the requirement that any entry point sample result that exceeds an MCL be followed with a confirmation sample, and is consistent with the requirements of 40 CFR §141.23(f)(1). The adoption also adds the following phrase under §290.106(c)(8)(A) for clarity: "If an additional sample is required:". The commission renumbers previously existing §290.106(c)(8) as §290.106(c)(9) and updates the internal references to paragraphs of this subsection to take into account renumbering of the preceding paragraphs.

The adoption amends §290.106(f)(3) to use the language of 40 CFR §141.23(i)(1), which makes it clear that a public water system's compliance with the MCLs must be determined based on results from each individual entry point that the system operates.

The adoption amends §290.106(f)(4) to specifically reference the method detection limits adopted in 40 CFR §141.23(a)(4) for inorganic contaminants. This change makes it clear that the method detection limits below which a result may be considered zero are not the laboratory-specific reporting limits, but instead are these federally determined regulatory values.

In response to comment, the adoption adds §290.106(f)(6) to contain the federal requirement of 40 CFR §141.23(i)(1) and (2) that compliance determination be based on the samples results that are available, whether that number is greater or less than the minimum number of required samples.

In response to comment, the adoption adds §290.106(f)(7) to contain the federal requirement of 40 CFR §141.23(i)(2) that arsenic analytical results be reported to the nearest 0.001 mg/L.

In response to comment, the adoption also adds §290.106(i) to adopt by reference the federally approved small system compliance technologies for arsenic contained in 40 CFR §141.62(d).

The commission also adopts new §290.106(j) to provide for the use of bottled water on a temporary basis only and with approval of the commission pursuant to 40 CFR §141.101.

The adoption amends §290.107, concerning monitoring requirements for organic contaminants, to reorganize it to specify the sites from which samples may be collected and to clarify routine, reduced, and increased monitoring frequencies. These changes are intended to be made with no resultant change in the stringency of the section.

The adoption amends §290.107(c) to delete the reference to periods of normal operations that occur when all sources of water are being used at a given entry point to the distribution system. Although this is the exact language of the federal rule, the commission considers it to be impracticable because normal operating conditions change during the year, including the sources of water that are used. In this regard, for example, the commission notes that certain wells may only be used in the summer during periods of high water usage.

The adoption reorganizes the previously existing elements of §290.107(c)(1)(A) to avoid redundancy. The adoption amends §290.107(c)(1)(A)(i) to revise it to clearly state that routine samples shall be collected at entry points to the distribution system. Section 290.107(c)(1)(A)(ii) is revised to replace redundant requirements with the previously existing language of §290.107(c)(1)(A) requiring that subsequent sampling occur at the same sampling point. The adoption amends §290.107(c)(1)(A)(iii) to add the previously existing language of §290.107(c)(1)(A) requiring that the executive director approve any change in sampling point.

The adoption adds §290.107(c)(1)(B) to specify the initial monitoring frequency requirements for new sources of drinking water, as contained in 40 CFR §141.24(h)(20). The adoption renumbers previously existing §290.107(c)(1)(B) as §290.107(c)(1)(C) and rewords the catchline to make it clear that this subparagraph relates to routine sampling frequency for synthetic organic chemicals. The adoption renumbers previously existing §290.107(c)(1)(B)(ii) as §290.107(c)(1)(C)(ii). Additionally, the adoption makes it clear that a change in sampling frequency applies only to a given sampling point, not to all sampling points operated by a public water system in §290.107(c)(1)(C)(ii). The adoption renumbers previously existing §290.107(c)(1)(B)(iii) as §290.107(c)(1)(C)(iii) and makes it clear that a change in sampling frequency applies only to a given sampling point, not to all sampling points operated by a public water system.

The adoption renumbers previously existing §290.107(c)(1)(C) as §290.107(c)(1)(D). The adoption renumbers previously existing §290.107(c)(1)(C)(i) as §290.107(c)(1)(D)(i) and

amends it to make it clear that increased monitoring applies to specific entry points, not a system in general, and that increased monitoring is initiated when results for a specific entry point exceed the MCL, a condition that is not necessarily synonymous with a violation. Additionally, the apostrophe is removed from "MCL's" since the final "s" in this context is meant to denote the plural, not ownership, and the word "monitor" is replaced by "be monitored" for grammatical consistency. The adoption renumbers previously existing §290.107(c)(1)(C)(ii) as §290.107(c)(1)(D)(ii) and makes it clear that sampling is based on the type of water that exists at a given entry point, rather than the water type used by the system as a whole, and that sampling occurs at specific entry points. The adoption renumbers previously existing §290.107(c)(1)(C)(ii)(I) as §290.107(c)(1)(D)(ii)(I). The adoption renumbers previously existing §290.107(c)(1)(C)(ii)(II) as §290.107(c)(1)(D)(ii)(II) and clarifies the sampling frequency modification requirements that are applicable to specific groundwater entry point sampling sites. The adoption renumbers previously existing §290.107(c)(1)(C)(ii)(III) as §290.107(c)(1)(D)(ii)(III) and clarifies the sampling frequency modification requirements that are applicable to entry point sampling sites that carry surface water or groundwater under the direct influence of surface water. The adoption renumbers previously existing §290.107(c)(1)(C)(ii)(IV) as §290.107(c)(1)(D)(ii)(IV) and amends it to make it clear that the determination of whether sample results are reliably and consistently below the MCL shall be made at each individual sampling site, and for grammatical consistency. The adoption renumbers previously existing §290.107(c)(1)(C)(ii)(V) as §290.107(c)(1)(D)(ii)(V). The adoption amends this subclause to make it clear that monitoring waivers apply to specific entry point sampling sites, rather than to the public water system as a whole. The adoption renumbers previously existing §290.107(c)(1)(C)(ii)(VI), (iii), and (iv) as §290.107(c)(1)(D)(ii)(VI), (iii), and (iv).

The adoption renumbers previously existing §290.107(c)(1)(D) as §290.107(c)(1)(E) and updates references to subparagraphs (B) and (C) of this paragraph. The adoption renumbers previously existing §290.107(c)(1)(E) as §290.107(c)(1)(F). The adoption renumbers previously existing §290.107(c)(1)(E)(i) as §290.107(c)(1)(F)(i) and rewrites the sentence to simplify the grammar. The adoption renumbers previously existing §290.107(c)(1)(E)(ii) as §290.107(c)(1)(F)(ii). The adoption renumbers previously existing §290.107(c)(1)(E)(iii) as §290.107(c)(1)(F)(iii) and replaces the incorrect word "Composting" with the correct term "Compositing."

The adoption deletes previously existing §290.107(c)(1)(F), and moves the requirements related to initial monitoring for synthetic organic contaminants to subparagraph (B) of this paragraph.

The adoption reorganizes the elements of §290.107(c)(2)(A)(i) to clarify the routine sampling requirements for volatile organic chemicals. The adoption rewords §290.107(c)(2)(A)(i) to establish that samples must be collected at entry points to the distribution system. The adoption amends §290.107(c)(2)(A)(ii) to contain the requirement for subsequent sampling contained in previously existing §290.107(c)(2)(A)(i) and (ii). The adoption adds §290.107(c)(2)(A)(iii) to contain the requirement for executive director approval of sampling site changes contained in previously existing §290.107(c)(2)(A)(i) and (ii).

The adoption adds §290.107(c)(2)(B) to contain the initial monitoring requirements for new sources of drinking water of 40 CFR §141.24(f)(22). The adoption renumbers previously existing §290.107(c)(2)(B) as §290.107(c)(2)(C) and rewords the catchline to make it clear that this subparagraph relates to routine sampling frequency.

The adoption renumbers previously existing §290.107(c)(2)(B)(i) - (v) as §290.107(c)(2)(C)(i) - (v). The adoption updates a rule reference; adds the word "noncommunity" so that the rule correctly reads "nontransient, noncommunity"; and makes a typographical correction by replacing the word "triannual" with the word "triennial" in §290.107(c)(2)(C)(iv). The adoption renumbers previously existing §290.107(c)(2)(C) as §290.107(c)(2)(D). The adoption renumbers previously existing §290.107(c)(2)(C)(i) as §290.107(c)(2)(D)(i) and establishes that sampling shall be performed at entry point, and that increased sampling will be based on results exceeding the MCL rather than results violating the MCL, conditions that are not synonymous. The adoption renumbers previously existing §290.107(c)(2)(C)(ii), (iii), and (iii)(I) as §290.107(c)(2)(D)(ii), (iii), and (iii)(I). The adoption renumbers previously existing §290.107(c)(2)(C)(iii)(II) as §290.107(c)(2)(D)(iii)(II) and updates a rule reference. The adoption renumbers previously existing §290.107(c)(2)(C)(iii)(III) as §290.107(c)(2)(D)(iii)(III). The adoption renumbers previously existing §290.107(c)(2)(C)(iii)(IV) as §290.107(c)(2)(D)(iii)(IV) and updates a reference. The adoption renumbers previously existing §290.107(c)(2)(C)(iii)(V) and (iv) as §290.107(c)(2)(D)(iii)(V) and (iv).

The adoption renumbers previously existing §290.107(c)(1)(D) as §290.107(c)(2)(E). Previously existing §290.107(c)(2)(D)(i) - (vii) is renumbered as §290.107(c)(2)(E)(i) - (vii). The adoption renumbers previously existing §290.107(c)(2)(E) as §290.107(c)(2)(F). Previously existing §290.107(c)(2)(E)(i) - (iv) is renumbered as §290.107(c)(2)(F)(i) - (iv).

The adoption amends §290.107(f) to conform with 40 CFR §141.25(f) in order to adopt the plainer language relating to compliance determination as promulgated in the federal arsenic regulation. The adoption amends §290.107(f)(1) to contain the provisions of 40 CFR §141.24(f)(15) and (h)(11) concerning MCL violations. The adoption adds §290.107(f)(1)(A) - (E) to contain the provisions of 40 CFR §141.24(f)(15) and (h)(11), concerning compliance with the MCL and detection limits. The adoption deletes previously existing §290.107(f)(2), because the federal requirements contained in §290.107(f)(1) supercede these previously existing requirements.

The adoption renumbers previously existing §290.107(f)(3) as §290.107(f)(2). The adoption amends §290.107(h) to add the appropriate mail code for the Water Supply Division.

The adoption amends §290.108 to incorporate requirements of the federal radionuclides regulation and to correct minor typographical requirements. The adoption amends §290.108(a) to incorporate the federal requirements contained in 40 CFR §141.66(f), related to the compliance dates for entry point sampling and the new MCL for uranium. Also under §290.108(a), (b), and (d), the adoption replaces the word "radiological" with the word "radionuclide" for consistency with the federal regulations. In response to comment, the adoption amends §290.108(a)(1)(A) to clarify that the quantity "combined radium-226 and radium-228" is defined as the sum of the analytical results for the two chemicals, consistent with 40 CFR §141.66(b).

The adoption amends §290.108(b)(1) by replacing the reference to the existing regulated radionuclides with a reference to naturally occurring radionuclides. The specific regulated radionuclide MCLs are then set out individually in the subordinate subparagraphs. The adoption amends §290.108(b)(1)(A) and (B) for grammatical consistency, replacing "pCi/l" with "pCi/L." The adoption adds §290.108(b)(1)(C) to contain the new MCL for uranium consistent with 40 CFR §141.66(e).

The adoption amends §290.108(b)(2) in order to adopt by reference the MCLs for beta particle and photon radioactivity from man-made radionuclides in drinking water contained in 40 CFR §141.66(d). Therefore, the adoption deletes previously existing §290.108(b)(2)(A) and (B), and Table A (Figure: 30 TAC §290.108(b)(2)(B)). Adoption by reference is a streamlining measure and no public water systems in Texas are affected by these provisions.

The adoption amends §290.108(c) to change the word "radiochemicals" to "radionuclides" for consistency with the federal regulations. The adoption amends the monitoring requirements of §290.108(c)(1) to address the monitoring requirements of 40 CFR §141.26(a) and to better organize the monitoring frequency requirements. The word "combined" in the first sentence is added before "radium-226 and radium-228" for consistency, and the phrase "and uranium" is added to adopt the new MCL. The adoption deletes the remaining previously existing language and replaces it with the updated requirements of the federal radionuclides regulation.

The adoption amends §290.108(c)(1)(A) to incorporate the initial monitoring requirements of 40 CFR §141.26(a)(1)(ii). The adoption adds §290.108(c)(1)(A)(i) to contain the initial monitoring frequency of 40 CFR §141.26(a)(2)(iv) for results that exceed the MCL. The adoption adds §290.108(c)(1)(A)(ii) to contain the initial monitoring frequency of 40 CFR §141.26(a)(2) for results that do not exceed the MCL. In response to comment, the adoption adds §290.108(c)(1)(A)(iii) to contain the requirements for use of historical data to meet initial monitoring requirements, consistent with 40 CFR §141.26(a)(2)(ii)(A) - (C).

The adoption amends §290.108(c)(1)(B) to incorporate the routine monitoring requirements in 40 CFR §141.26(a)(3). The adoption adds §290.108(c)(1)(B)(i) to implement the monitoring frequencies stipulated in 40 CFR §141.26(a)(3)(i) and (iv). The adoption adds Table A (Figure: 30 TAC §290.108(c)(1)(B)(i)) to contain the minimum detection levels for the applicable chemicals as contained in 40 CFR §141.25(c)(1), Table B. In response to comments, the uranium minimum detection level contained in this table is amended to replace the term "reserved" with the uranium minimum detection level, as federally adopted in 40 CFR §141.25(c)(1). The adoption adds §290.108(c)(1)(B)(ii) to implement the monitoring frequencies stipulated in 40 CFR §141.26(a)(3)(ii) and (iv), adds §290.108(c)(1)(B)(iii) to implement the monitoring frequencies stipulated in 40 CFR §141.26(a)(3)(iii) and (iv), and adds §290.108(c)(1)(B)(iv) to implement the monitoring frequencies stipulated in 40 CFR §141.26(a)(3)(v).

The adoption amends §290.108(c)(1)(C) to incorporate the increased monitoring requirements of 40 CFR §141.26(a) and (c). The adoption adds §290.108(c)(1)(C)(i) to incorporate the monitoring frequencies for a system with any sample results exceeding one of the MCLs stipulated in 40 CFR §141.66(b), (c), and (e). In response to comments, the adoption adds the term "consecutive" in the language of §290.108(c)(1)(C)(i) to clarify that reduced monitoring is based on the results of four consecutive quarterly sampling events, rather than four non-consecutive quarters of monitoring. The adoption adds §290.108(c)(1)(C)(ii) to incorporate the return to routine monitoring frequencies stipulated in 40 CFR §141.26(a)(3)(iv). The adoption adds §290.108(c)(1)(C)(iii) to incorporate the compositing requirements of 40 CFR §141.26(a)(4); adds §290.108(c)(1)(C)(iv) to address the use of composite sample results in determining monitoring frequencies, as stipulated in 40 CFR §141.26(a)(4); adds §290.108(c)(1)(C)(v) to contain the previously existing language of §290.108(c)(1)(A); and adds §290.108(c)(1)(C)(vi) to contain the previously existing language of §290.108(c)(1)(E). In response to comments, the adoption amends §290.108(c)(1)(C)(vi) to remove the reference to increased sampling for systems with radium-226 concentrations greater than 3 picoCuries per liter (pCi/L), and thereby incorporates more exactly the federal requirements of 40 CFR §141.26(a)(1)(i).

The adoption amends §290.108(c)(1)(D) to incorporate the monitoring requirements related to the use of historical data of 40 CFR §141.26(a)(2). The adoption adds §290.108(c)(1)(D)(i) to contain the requirements of 40 CFR §141.26(a)(2)(ii)(A), adds §290.108(c)(1)(D)(ii) to contain the requirements of 40 CFR §141.26(a)(2)(ii)(B), and adds §290.108(c)(1)(D)(iii) to contain the requirements of 40 CFR §141.26(a)(2)(ii)(C).

The adoption amends §290.108(c)(1)(E) to incorporate the provision of 40 CFR §141.26(c)(4) allowing the state to invalidate the results of obvious sampling or analytical errors, adds §290.108(c)(1)(F) to incorporate the provision of 40 CFR §141.26(c)(1) establishing that the state may require confirmation samples, and adds §290.108(c)(1)(G) to incorporate the provision of 40 CFR §141.26(c)(2) establishing that the state shall designate the sampling schedule.

The adoption amends §290.108(c)(2) by adopting by reference the monitoring requirements for beta particle and photon radioactivity from man-made radionuclides in drinking water contained in 40 CFR §141.66(d). Adoption by reference is a streamlining measure and is used because no public water systems in Texas are currently impacted by these provisions.

The adoption amends §290.108(c)(3) to contain the requirements for sampling locations and to require that sampling sites be included in a system's monitoring plan, as required by 40 CFR §141.132(f). The adoption adds §290.108(c)(3)(A) to specify initial monitoring locations consistent with 40 CFR §141.26(a)(1)(ii) and adds §290.108(c)(3)(B) to specify routine monitoring locations consistent with 40 CFR §141.26(a)(1)(i). The adoption amends §290.108(e) to correct an internal reference and to update the name of the commission.

Also, the commission has changed the word "shall" to "must" in §290.108(c)(1)(C)(v) and (3)(A) and (B), from proposal, to conform to the drafting rules in the *Texas Legislative Council Drafting Manual*, October 2002.

The adoption amends §290.108(f) to add elements of the federal radionuclide regulation, to reorganize the subsection for clarity, and to correct grammatical and typographical errors. The adoption amends §290.108(f)(1) to use consistent language when referring to combined radium- 226 and radium-228. In response to comment, the adoption amends §290.108(f)(1) to change the term "average annual" level of a constituent to the term "running average annual" level to accurately adopt the requirements of 40 CFR §141.26(c)(3)(i). The adoption amends §290.108(f)(1)(A) and (B) to replace "pCi/l" with "pCi/L." In response to comment,

the adoption amends §290.108(f)(1)(B) to incorporate the federal requirement of 40 CFR §141.26(a)(5) that radium-228, in addition to radium-226, must be analyzed whenever the analytical result for gross alpha particle activity does not exceed 5 pCi/L. The adoption adds §290.108(f)(1)(C) to contain the direction for use of results less than the minimum detection limit as specified by 40 CFR §141.26(c)(3)(v), adds §290.108(f)(1)(D) to specify that all sample results will be used in calculating compliance, as contained in 40 CFR §141.26(c)(3)(iii), and adds §290.108(f)(1)(E) to specify that all sample results will be used in calculating compliance, even if the system fails to complete required increased monitoring, as contained in 40 CFR §141.26(c)(3)(iv). The adoption adds §290.108(f)(1)(F) to specify that if a system violates the MCL at one sample site, the system is out of compliance, as contained in 40 CFR §141.26(c)(3). In response to comments, the adoption adds §290.108(f)(1)(G) to add the requirement of 40 CFR §141.26(c)(1) that confirmation sample results be averaged with initial sample results when determining compliance. In response to comments, the adoption adds §290.108(f)(1)(H) to contain the requirement of 40 CFR §141.25(d) that analytical results be rounded to the same number of significant figures when determining compliance.

The adoption amends §290.108(f)(2) for consistency with the federal regulations by replacing the word "radioactivity" with the word "radionuclides" and by deleting the reference to monitoring frequency for man-made radionuclides. The adoption amends §290.108(g)(1) for consistent use of the term "combined radium-226 and radium-228" and to add the reference to uranium. The adoption also amends §290.108(g)(2) for consistency with the federal regulations by replacing the word "radioactivity" with the word "radionuclides."

In response to comment, the amendment adds §290.108(h) to adopt by reference the federal best available treatment technologies contained in 40 CFR §141.66(g). The commission also adds §290.108(i) to adopt by reference the federally approved small system compliance technologies for radionuclides contained in 40 CFR §141.66(h). The commission also adopts new §290.108(j) for the use of bottled water on a temporary basis only and with approval of the commission pursuant to 40 CFR §141.101.

The adoption amends §290.111(c)(4)(C) to correct an error introduced in the previous adoption of amendments to Chapter 290, which was published in the February 13, 2004 issue of the *Texas Register* (29 TexReg 1373). The section erroneously referenced combined filter effluent monitoring requirements instead of the individual filter effluent monitoring requirements that were in the version of the rules (i.e., prior to February 2004) originally contained in §290.111(c)(4).

The adoption amends §290.111(g) to make corrections noted by EPA, Region 6 during review of the aforementioned rulemaking, which incorporated the Long Term Stage 1 Enhanced Surface Water Treatment Rule. The adoption amends §290.111(g)(1) to correctly reference the 24-hour time frame for notification when a turbidity exceedance occurs, as contained in 40 CFR §141.202(a)(6). The adoption adds §290.111(g)(2), (g)(2)(A), and (g)(2)(B) to correctly reference the notification provisions of 40 CFR §141.202 and §141.203. The adoption renumbers previously existing §290.111(g)(2) and (3) as §290.111(g)(3) and (4).

The adoption amends §290.121(b)(2)(A), concerning monitoring plans, to add the phrase "or less frequent." This amendment addresses the allowance in the federal regulations that sampling frequency may be longer than one year in certain circumstances.

Finally, the adoption repeals §290.115 because this section is a transition rule for disinfection by-products that would be obsolete by the time this adoption becomes effective.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis 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. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments to Chapter 290 are intended to protect the environment or reduce risks to human health from exposure to arsenic and certain radionuclides emanating from naturally occurring radioactive material in excess of federal health standards in community drinking water systems and could materially affect certain systems. However, the amendments to Chapter 290 will not 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 because they will apply only to a limited number of water systems.

Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). This section only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law for acceptable exposure levels of arsenic or naturally occurring radioactive material in public drinking water systems and is consistent with federal rules; 2) does not exceed the requirements of state law under Texas Health and Safety Code, Chapter 341, Subchapter C; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program on arsenic or radionuclides in public drinking water systems, but rather is consistent with federal rules in order to allow the state to maintain its authority to implement the federal Safe Drinking Water Act; and 4) is not solely under the general powers of the agency, but rather specifically under Texas Health and Safety Code, §341.031, which allows the commission to adopt and enforce rules to implement the federal Safe Drinking Water Act, as well as the other general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the amendments and performed an assessment of whether they constitute a takings under Texas

Government Code, Chapter 2007. The primary purposes of the amendments are to incorporate federal standards under 40 CFR, Parts 141 and 142 for elevated levels of radionuclides and arsenic in drinking water and to address revisions to compliance and monitoring requirements, as promulgated by EPA in the December 7, 2000, January 22, 2001, and March 25, 2003 issues of the *Federal Register* (65 FR 76708, 66 FR 6976, and 68 FR 14501).

The adopted amendments will substantially advance these stated purposes by adopting an MCL for uranium, which is not currently regulated under state law, and revisions to the monitoring requirements for combined radium-226 and radium-228, gross alpha particle radioactivity, and beta and photon radioactivity. The amendments will also advance the stated purpose by adopting a revised MCL for arsenic and revisions to compliance and new source monitoring requirements.

Publication and enforcement of the adopted amendments will not affect private real property, which is the subject of the rules primarily because they amend and expand existing drinking water standards to authorize regulation of arsenic and radionuclides. The adopted amendments are not anticipated to affect private real property because they do not restrict or limit an owner's right to the property that would otherwise exist in the absence of this rulemaking. The rulemaking simply requires community water systems to comply with drinking water standards protective of human health and the environment. Furthermore, the rulemaking will make state standards for arsenic and radionuclides consistent with existing federal standards. Therefore, the adopted amendments do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking and found that the adoption is not a rulemaking subject to the Texas Coastal Management Program (CMP) because the rulemaking is neither identified in the Coastal Coordination Act Implementation rules, 31 TAC §505.11, nor will it affect any action or authorization identified in §505.11. Therefore, the rulemaking is not subject to the CMP. The purpose of the amendments is to bring community water systems into compliance with certain requirements concerning radionuclide and arsenic contaminants. The rulemaking does not govern air pollutant emissions, on-site sewage disposal systems, or underground storage tanks, which would make it subject to the CMP under §505.11(b)(2). The rulemaking also does not govern or authorize actions listed in §505.11(a)(6).

PUBLIC COMMENT

A public hearing on these rules was held on September 8, 2004, in Austin and the public comment period closed on September 13, 2004. Comments were received from: Brown McCarroll L.L.P. on behalf of the City of Andrews (Andrews); City of Eden (Eden); City of Melvin (Melvin); Brown McCarroll L.L.P. on behalf of the City of Seminole (Seminole); Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P. on behalf of the El Paso Water Utilities Public Service Board (EPWU); Hickory Underground Conservation District No. 1 (HUWCD); McPhee Environmental Supply, LLC (McPhee); Richland Special Utility District (Richland); Rochelle Water Supply Corporation (Rochelle); Texas Rural Water Association (TRWA); Texas Travel Industry Association (TTIA); and EPA. All commenters disagreed with, or had suggestions for, changes to portions of the proposed rules.

RESPONSE TO COMMENTS

Andrews, El Paso, and Seminole commented that TCEQ should adopt an allowance for exemptions as they are allowed under EPA rules.

The commission already has allowances for exemptions as codified in 30 TAC §290.102(b). It is the commission's commitment to be no less flexible than the exemption criteria described in EPA guidance and reflected in the settlement agreement between EPA and the Western Coalition of Arid States. This flexibility may take the form of an exemption or approval by the commission for small systems to utilize point-of-use or point-of-entry technologies for the long-term or bottled water on a temporary basis.

El Paso commented that TCEQ should incorporate alternative monitoring approaches as described in EPA's *Implementation Guidance*.

The commission agrees that alternate monitoring can be crafted to better determine exposure to a contaminant. These approaches are not codified in federal regulations but are mentioned in the adoption preamble of the arsenic rule in the *Federal Register*. The commission contends that it should approach review of alternate monitoring proposals based on guidance and not rule, similar to EPA's approach. This strategy will allow site-specific reviews on a case-by-case basis. It is the commission's commitment to be no less flexible than the alternative monitoring approaches discussed in the EPA guidance document and to develop guidance for water systems in Texas that may want to take advantage of alternative monitoring schemes.

Andrews and Seminole requested that the TCEQ put off rulemaking for one year in order to accurately assess and present the overall total cost of compliance with the rule.

The commission does not agree to a delay of one year for rule adoption. The commission has completed numerous studies through its staff and through contracts to accurately assess overall costs concerned with the rules. In addition, the commission has used studies completed by the EPA to help judge the accuracy of these costs. To delay the adoption would prohibit the commission from its responsibility to work with the water systems to assure viability of the water system. The arsenic MCL becomes effective on the federal level on January 23, 2006. The commission contends that adoption of these rules at this time places an agency of the State of Texas in the appropriate regulatory role and responsibility to the citizens of the State of Texas. To not adopt these rules would essentially abdicate the commission's responsibility to its citizens and leave the water suppliers and the citizens subject to direct implementation of these rules by the federal government.

McPhee provided literature to the commission on products for arsenic removal.

The commission acknowledges receipt of the literature.

Rochelle commented that TCEQ has not worked cooperatively in the past with small rural water suppliers and that an additional $1,200 per month would be an acceptable cost to achieve compliance.

The commission has worked with water systems to the extent practical through the use of compliance agreements to give water systems time to develop an affordable compliance option. One thousand two-hundred dollars per month is clearly an unaffordable water bill for a household.

Andrews, Eden, HUWCD, Richland, Seminole, and TRWA requested that any rulemaking that becomes final should include provisions for the use of point-of-use, point-of-entry, and bottled water as compliance methods.

The commission rules already reference federal regulations that list certain point-of-use and point-of-entry methods as best available treatment. This adoption by reference is found in §290.106(h) for inorganic chemicals including arsenic. This reference does not occur in the proposed revisions for radionuclide rules. The commission agrees to add this reference in §290.108(h). Limitations to the implementation are found in both the federal regulations and the federal Safe Drinking Water Act. Adoption of a state regulation that is contradictory to federal regulations and the federal Safe Drinking Water Act would not be acceptable to EPA and would render water systems in violation of the federal regulation and the federal Safe Drinking Water Act and subject to enforcement by EPA. In accordance with 40 CFR §141.101, bottled water may be used on a temporary basis to avoid an unreasonable risk to health. This option is provided to many water systems upon approval by the commission.

Andrews, Eden, HUWCD, Richland, Seminole, and TRWA requested that the rulemaking be remanded to the executive director to assess costs of compliance with this rule.

The commission contends that it has done an acceptable evaluation of the cost impacts to public water systems. The published cost impacts to water systems in Texas as an aggregate compare well to a national study of arsenic costs conducted by the American Water Works Association Research Foundation on the national cost impacts. The commission has completed several internal studies and has incorporated cost estimates gathered through intensive studies by the EPA to assess overall costs concerned with the rules. The cost of compliance with the amendments to the existing radionuclide rules were analyzed through evaluations performed by commission contractors and treatment cost analysis by staff using EPA-developed cost curves. The treatment technologies were chosen on the basis of adequate disposal availability and those costs were included in the cost estimate. While the commission cannot know the exact cost of compliance to each individual water system, it contends that the aggregate range of costs for the water systems represent a fair approximation of the impact in these groups for the first five years that the rules are in effect.

Andrews, Eden, HUWCD, Richland, and Seminole commented that they were unable to locate the reference to 40 CFR §141.23(c)(9) and asked for that citation to be verified.

The citation is found in the CFR as cited as part of the National Primary Drinking Water Regulations.

Andrews, Eden, HUWCD, Richland, and Seminole asked that the phrase "entry point" be defined.

The phrase "entry point" is a short version of the phrase "entry point to the distribution system" that is defined in 30 TAC §290.103(a)(9).

Andrews, Eden, HUWCD, Richland, and Seminole asked for clarification of the statement in the preamble to the proposed rule: "In other words, a system may operate many entry points to the distribution system, but only those that exceed the MCL may be required to have increased monitoring, or increased monitoring may be required by rule at entry points that do not exceed the MCL."

This statement clarifies that under the adopted rules, the executive director can impose increased monitoring at any entry point. This refers to two equivalent cites in the federal regulations, 40 CFR §141.23(g) for inorganic monitoring and §141.26(a)(1)(ii) for radionuclide monitoring, which give the state flexibility in requiring additional monitoring.

Eden, HUWCD, and Richland asked whether the water system may collect confirmation samples and commented that radionuclide results vary widely.

The commission responds that the water system may request that additional samples be collected to verify the level of a contaminant. However, compliance is based on an average of quarterly samples or composites in the case of radionuclides.

Andrews, Eden, HUWCD, Richland, and Seminole commented that some samples should be reasonably discarded.

The commission agrees that water samples that are truly not representative of the water for the time period allotted may need to be invalidated as found in §290.108(c)(1)(E) or reevaluated as to the time period that the sample represents. However, all valid samples must be used in the compliance determination as required in the National Primary Drinking Water Regulations.

Andrews, Eden, HUWCD, Richland, and Seminole commented that an MCL violation at one sampling site that places the system out of compliance eliminates the possibility of blending to achieve compliance.

The commission disagrees with this interpretation. The violation calculation would be based on all valid samples that would be collected from the blended water entering the drinking water distribution system. A violation would occur only if the average blended water concentration was greater than the MCL. Additionally, this language is exactly consistent with the language of the federal rule contained in CFR §141.26(a)(1)(i) and (ii).

Eden, HUWCD, and Richland commented that the fiscal impact in the proposed rules does not address the cost of radionuclide compliance for water systems that are currently in violation of existing rules.

The commission only developed fiscal impacts of the rules that were proposed to be amended and did not estimate fiscal costs of the existing rules previously adopted by the commission. Since those commenters are not affected by these amendments, a fiscal impact statement in the proposed rules is not necessary. The commission has made evaluations to determine the fiscal impacts to those existing radionuclide violators incurred as a result of previous rulemaking and that information has been given stakeholders who have requested the information.

Andrews, Eden, HUWCD, Richland, and Seminole requested that the TCEQ quantify the increased costs that consumers are expected to see.

While this is not a required item of information for fiscal notes associated with rule proposals, the commission has looked at the potential increases in water bills to consumers based on the radionuclide rules. This evaluation shows that the cost to the consumer would range from less than $1.00 per month to greater than $100 per month depending on the technology employed to achieve compliance. Although a separate analysis was not done on costs to individual customers for the arsenic rules, the commission contends that the range of costs would be similar.

Eden, HUWCD, and Richland commented that it is disingenuous for the commission to imply that the fiscal implications for

systems that must provide capital improvements could be significant.

The commission contends that the cost to water systems will be in a range of costs from very affordable to completely unaffordable.

Eden, HUWCD, and Richland commented that the regulations do not protect the health of all the citizens in Texas because they do not apply to every person and entity that may draw water from an affected aquifer.

The commission agrees that the rules do not apply to any entity other than those served by community public water systems. The commission has no statutory authority to regulate water that is not provided by a public water system.

Andrews and Seminole requested that TCEQ explain the sampling cost increase of $100 per year per entry point that is above the MCL.

This calculation is based on the cost of analysis of $25 per sample collected from the entry point four times per year.

Andrews and Seminole requested an explanation of the estimate of costs of arsenic compliance for local governments and nonprofit water systems.

The staff approximated the costs in a range based on: 1) information extrapolated from a survey of costs received from water systems that are, or may be, potentially in violation of the radionuclide standards; and 2) information extrapolated from a project cost estimate submitted by a water system proposing to treat for arsenic. These values were compared to the aggregate cost data collected by the American Water Works Association Research Foundation, which estimated a national compliance cost of approximately $4 billion. Texas is estimated to have approximately 8% of the arsenic violators nationwide (8% of $4 billion is $360 million). Staff estimate the overall aggregate cost of capital and operations and maintenance, including disposal costs for the first five years, to be approximately $425 million. The estimate of operations and maintenance costs, including disposal for all water systems in Texas, is $65 million for five years or $13 million per year.

Andrews, Eden, HUWCD, Richland, and Seminole asked for the citation requiring water systems to sample every three years.

The existing sampling requirement for arsenic is found in renumbered §290.106(c)(4)(A)(i) and 40 CFR §141.23(c)(1) and §141.2, which define a *compliance period* as a three-year calendar year period within a compliance cycle. Each compliance cycle has 3 three-year compliance periods. Within the first compliance cycle, the first compliance period runs from January 1, 1993 to December 31, 1995; the second from January 1, 1996 to December 31, 1998; and the third from January 1, 1999 to December 31, 2001. This established the base monitoring requirement for a number of inorganic contaminants, including arsenic, where the source of water to the entry point is groundwater. The federal citation for radionuclides is found in 40 CFR §141.26(c)(3).

Andrews and Seminole commented that nowhere has it been cited that increased exposure to arsenic could affect cardiovascular, immunological, and neurological health.

There is sufficient evidence from human studies that arsenic exposure is associated with both cancer and non-cancer effects. These epidemiological studies have been reviewed and evaluated by scientific experts at the EPA (*http://www.epa.gov/iris/subst/0278.htm*); the National Academy of Sciences (Arsenic in Drinking Water: 2001 Update); and the Agency for Toxic Substances and Disease Registry (*http://www.atsdr.cdc.gov/toxprofiles/tp2.html*). Studies link inorganic arsenic ingestion to a number of health effects. Cancerous effects include skin, bladder, and lung cancer. Non-cancerous effects include cardiovascular, pulmonary, immunological, neurological, and endocrine effects.

Eden, HUWCD, Richland, and Rochelle also commented that there is no public benefit in the adoption of the radionuclide amendments.

Radionuclides emit "ionizing radiation," a known human carcinogen, when they radioactively decay (*http://www.epa.gov/radiation/docs/ionize/ionize2.htm*). The likelihood of developing cancer or genetic mutations from short-term exposure to the concentrations of radionuclides found in drinking water supplies is negligible. However, long- term exposures may result in increased risks of genetic effects and other effects such as cancer, precancerous lesions, benign tumors, and congenital defects (*http://atsdr1.atsdr.cdc.gov/tfacts144.html*; *http://www.epa.gov/ttn/atw/hlthef/radionuc.html*). Ingestion of uranium can also damage the kidney (*http://atsdr1.atsdr.cdc.gov/toxprofiles/tp150.html*). It is the reduction in risk to these health effects through reduction in exposure to contaminants (arsenic and radionuclides) that produces the public benefit.

Andrews, Eden, HUWCD, Richland, and Seminole commented that TCEQ should not use cost estimates developed by EPA on a national level.

Where the commission did not perform an independent cost analysis, it is appropriate to use the EPA cost estimates. The commission does not project any large nonprofit or private water systems to be in violation of the amendments to these rules. EPA cost data is used as information in this section where Texas-specific data is not available.

Andrews, Eden, HUWCD, Richland, and Seminole commented that a local employment impact statement should be required.

The staff determined that compliance with the proposed rules would have adverse cost implications for some public water systems. The increased costs would be passed on to consumers, who may see an increase in water bills. However, for the households served by a typical large water system that must take corrective action to meet the new radionuclide standard, the increase in water bills was estimated to be less than $3.00 per month ($30 per year). Households served by typical small water systems (those serving 10,000 persons or fewer) would probably experience increased water bills of between $4.00 and $9.00 per month ($50 - $100 per year). For systems out of compliance with the arsenic standard, it was estimated that for systems serving populations of less than 10,000, consumers may have to pay an additional $3.00 to $28 per month ($38 to $327 per year) for water that meets the new standard. For systems that serve more than 10,000, it was estimated that water bills may increase between $.07 and $3.00 per month ($.86 to $32 per year). Based upon these factors, staff determined that the proposed rules will not affect a local economy and therefore, a local employment impact statement is not required.

Andrews, Eden, HUWCD, Richland, and Seminole commented that this rule proposal should be considered a "major environmental rule."

These rules, which would regulate one additional radioactive parameter (uranium) and one additional metal (arsenic), do not satisfy the definition of a major environmental regulation because they do not 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. Based on agency surveys and sampling data, a small fraction (about 6%) of the 4,500 community water systems in Texas may be out of compliance with the new uranium and arsenic standards, may need to make capital improvements to their systems, or may incur additional operational and maintenance expenses in order to comply with the proposed MCLs for the additional parameters for safe drinking water.

Andrews, Eden, HUWCD, Richland, and Seminole commented that the rule proposal may not physically take or seize property, but has the effect of negatively impacting private property. They also commented that the increased cost of water will negatively impact the price of real estate in rural Texas.

The commission disagrees that these rules are a taking of private property. The commission recognizes that the Texas Constitution and United States Constitution guarantee that private property shall not be taken for public use without just compensation. However, these rules are not a restriction on the use or development of private property to the benefit of the public. Moreover, a decrease in property values does not constitute an automatic "taking" of the property. Courts have recognized that regulations may diminish property value to some extent without being compensable as long as the regulation does not significantly drop the property value, interfere with the use and enjoyment of the property, or deprive the property of all economical benefit or productive use. In this case, the governmental action does not impair the existing use of the property nor does it make the property incapable of earning a reasonable rate of return. Accordingly, the commission has determined that these rules do not represent a taking of private property.

Eden, HUWCD, and Richland asked that TCEQ confirm the effective date as December 8, 2003, and the end of the initial monitoring period as December 31, 2007.

These dates are as stated in federal regulations. While the sampling does not have to be completed until December 31, 2007, violations are to be determined based on any results reported after December 7, 2003. This language has been clarified by including specific requirements for using historical data in §290.108(c)(1)(A)(iii).

Andrews and Seminole commented that they are uncomfortable with the rule proposal in §290.106(c)(4)(C)(i) because it may subject a water system to arbitrary monitoring requirements by the executive director.

This provision of the rules indicates that new water sources must be sampled prior to being placed into service at a public water system. This would generally be one sample for inorganic contaminants; but, at the discretion of the executive director, more than one sample could be required. This would be exercised when there may be questions about the quality of the sample or where results may show a level of concern for any inorganic contaminant.

Andrews and Seminole commented that the increased monitoring requirement in §290.106(c)(4)(C)(i) is inconsistent and disproportionate to the alleged risks of consuming water less than 50 parts per billion of arsenic and implies that a dosage of arsenic over 10 parts per billion will cause an immediate health impact. Eden, HUWCD, and Richland also commented that increased monitoring for radionuclides implies that a dosage over the MCL will cause an immediate health impact.

The commission disagrees with these implications. In fact, the purpose of the required quarterly sample is to determine an exposure over a period of four quarters. It is the results over the four quarterly samples that would be used to determine if a violation exists and the potential for a health impact.

Eden, HUWCD, and Richland commented that the MCLs are based on a linear, no-threshold risk model and that the health effects have not been validated using epidemiological data or ingestion studies.

The commission agrees that the method of MCL development by EPA does rely on a linear, no-threshold model. The EPA classifies all radionuclides as known human carcinogens based on considerable epidemiological evidence that exposure to high doses of ionizing radiation causes cancer in humans and all radionuclides emit ionizing radiation. EPA's application of the linear, no-threshold model to estimate low-dose cancer risks from high-dose exposures is supported by groups of national and international radiation experts (e.g., International Commission on Radiological Protection, National Council on Radiation Protection and Measurements, National Academy of Sciences Committee on the Biological Effects of Ionizing Radiation, United Nations Scientific Committee on the Effects of Atomic Radiation, and the National Radiation Protection Board). Finally, the commission's public drinking water program is charged with administering EPA's standards, based on EPA's estimates of acceptable risk levels to the population. The EPA's final rule was adopted in December 2000. Public comment was sought prior to issuance of the rule and the validity and use of the linear, no-threshold model was addressed at that time. In addition, suit was brought in federal court which challenged the use of linear no-threshold models in the development of the federal rule. The Court upheld EPA's choice of model based upon the "rational relationship" standard. See *City of Waukesha v. EP*A, 320 F.3d 228, 249, 252 (D.C. Cir. 2003). In accordance with this standard, the court held that it may only reject an agency's choice of a scientific model when the model bears no rational relationship to the characteristics of the data to which it is applied. *Id*. at 248. The court held that EPA's use of the linear model met the "rational relationship" standard. *Id*. at 228 and 249.

Eden, HUWCD, and Richland commented that the detection limits for radionuclides listed in Table A are so low that the reduced monitoring would apply to very few, if any, water systems.

The commission's sampling data results indicate that about 50% of the entry points statewide would qualify for reduced monitoring on all radionuclides.

Eden, HUWCD, and Richland commented that the executive director's ability to require increased radionuclide monitoring based on changes to the operating conditions or when a source of water is in the vicinity of a mining operation, should be stricken from the rules.

The commission contends that this is necessary to determine the effect of changing events or when the source may be vulnerable to increases in contamination. This language (§290.108(c)(1)(C)(v)) is consistent with the language of the federal rule contained in 40 CFR §141.26(a)(1)(i) and (ii).

Eden, HUWCD, and Richland commented that the executive director's ability to require annual monitoring based on radium-226

results that are greater than 3 pCi/L is unnecessary and burdensome.

The commission notes that the federal rule allows the state discretion to schedule samples as needed, as described in CFR §141.26(a)(1)(ii) and has revised the rule language in §290.108(c)(1)(C)(vi) accordingly.

Eden, HUWCD, and Richland asked that appropriate historical data be further defined.

The commission agrees and will add language exactly analogous to 40 CFR §141.26(a)(2)(i) and (ii) as to the time period of acceptable data. This language has been clarified by including specific requirements for using historical data in §290.108(c)(1)(A)(iii).

Eden, HUWCD, and Richland commented that the ability of the executive director to require source monitoring when an entry point sample is greater than one-half of the MCL, should not be imposed.

This is consistent with 40 CFR §141.26(a)(3)(iii) in which the federal rule specifies exactly this monitoring frequency.

Eden, HUWCD, and Richland commented that the rules should address protocols for sampling and analysis.

The commission has previously adopted by reference 40 CFR §141.25 that prescribes analytical methods for radionuclides. This adoption by reference in §290.119 remains unchanged. The commission further prescribes sample collection procedures in the Public Water Supply Supervision Quality Assurance Project Plan, Chemical Sample Collection Contract Scope of Work, and Drinking Water Sampling Guide, all of which are subject to EPA review.

Andrews, Eden, HUWCD, Richland, Seminole, and TRWA commented that the rules should provide specificity as to the intended TCEQ actions and the ramifications of noncompliance with the rules.

The commission may assess administrative penalties for noncompliance with the rules in accordance with Texas Health and Safety Code, §341.049. As discussed in these responses to comments, however, the public drinking water program plans to work with public water systems to achieve compliance. For example, upon commission approval of point-of-use or point-of entry technologies or the use of bottled water on a temporary basis, alternative solutions may be worked out without the imposition of administrative penalties.

EPA commented that the proposed rules do not address compliance determination for arsenic when a system fails to collect one or more of the samples used to determine the running average of quarterly samples.

The commission agrees and has revised the rule language to add §290.106(f)(6) adopting the federal requirement of CFR §141.23(i)(1).

EPA commented that the proposed rules do not address averaging the results of the initial and confirmation sample results when a confirmation sample is collected for arsenic.

The commission disagrees, noting that the provision to use the average of an initial and confirmation sample for arsenic is contained in §290.106(f)(3)(B).

EPA commented that the proposal failed to address the rounding of arsenic sampling results to the nearest 0.001 mg/L.

The commission agrees and has added language to the rule to adopt the federal requirement of CFR §141.23(i)(4) regarding rounding of analytical results to §290.106(f)(7).

EPA commented that the uranium detection limit contained in §290.108(c)(1)(B)(i) should be 1 microgram per liter, rather than the word "reserved."

The commission agrees with this comment and has modified the rule language of §290.108(c)(1)(B)(i) accordingly.

EPA commented that the federal requirement of CFR §141.25(d), requiring that averages of data, rounded to the same number of significant figures as the MCL, should be used in determining compliance for regulated radionuclides.

The commission agrees and has added §290.108(f)(1)(H) accordingly.

EPA commented that the TCEQ failed to propose the specific date range (most recent monitoring period that began between June 2000 and December 8, 2003) in the language allowing community public water systems with a single entry point to satisfy initial monitoring requirements to use sample results from the distribution system, in §290.108(c)(1)(D)(i) - (iii).

By EPA's definition, the most recent nine-year compliance cycle began January 1, 2002, with its first three-year compliance period beginning at the same time. The reference to a most recent monitoring period with this artificial range of time is moot, since the most recent monitoring period that began between June 2000 and December 8, 2003 is, in fact, the monitoring period that began January 1, 2002 and that will end December 31, 2004. Additionally, since all Texas systems were scheduled for entry point monitoring beginning January 1, 2002, discontinuing distribution system monitoring, the reference is moot.

EPA commented that the proposed language failed to specify that a system must collect consecutive quarterly samples at any sample site where initial sample results exceed an MCL, as contained in the federal rule.

The commission agrees with this comment, and has modified the rule language of §290.108(c)(1)(C) accordingly.

EPA commented that the proposed language of §290.108(f)(1)(B) requires the analysis of radium-228 only if the concentration of radium-226 is greater than 3 picoCuries per liter, whereas the federal rule requires that samples be analyzed for radium-228 regardless of the concentration of radium-226.

The commission agrees with this comment, and has modified the rule language of §290.108(f)(1)(B) accordingly.

EPA commented that the proposed language should be revised to state that the results of initial and confirmation samples will be averaged for use in compliance determination.

The commission agrees that the language regarding averaging of initial and confirmation sample results must be included, and has added that language to §290.108(f)(1)(G), under compliance determination.

EPA commented that the compliance determination requirements for gross beta were not addressed in the proposed rule.

The commission disagrees, since §290.108(f)(2) references compliance determination for man-made radioactivity. There are no systems in Texas subject to this requirement.

EPA commented that the proposed language for radionuclide compliance determination used the term "annual average," rather than the federally required "running annual average."

The commission agrees with this comment and has altered the rule language under §290.108(f)(1) to conform to federal requirements.

EPA commented that the proposed language of §290.108(f)(1)(D) and (E) regarding compliance determination when a system has more or less samples than required should specify that these results will be averaged.

The commission disagrees with this comment. Since the referenced subparagraphs are subordinate to paragraph (1) in subsection (f) of §290.108, the reference in §290.108(f)(1) to the running annual average applies to its subparagraphs.

EPA commented that the summation of radium-226 and radium-228 for the purpose of compliance determination was not addressed in the proposed rules.

The commission agrees and has added language clarifying that point under §290.108(b)(1)(A), relating to MCLs.

EPA commented that the December 8, 2003 compliance date referenced in the proposed rules should also apply to the other radionuclides in addition to uranium.

The commission disagrees with the comment. The previous rules for radionuclides other than uranium, which are in place now, and were in place on December 8, 2003, remain unchanged. There is no need to reference a starting date for a rule provision that stays the same. The previous rule, with the same MCLs, will be in effect until the proposed rule is adopted, at which time the exact same MCLs will be put in place.

30 TAC §§290.104, 290.106 - 290.108, 290.111, 290.121

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and Texas Health and Safety Code, §341.031, which allows the commission to adopt rules to implement the federal Safe Drinking Water Act, 42 United States Code, §§300f - 300j-26.

§290.106. Inorganic Contaminants.

(a) Applicability. All public water systems are subject to the requirements of this section.

(1) Community and nontransient, noncommunity systems shall comply with the requirements of this section regarding monitoring, reporting, and maximum contaminant levels (MCLs) for all inorganic contaminants (IOCs) listed in this section.

(2) Transient, noncommunity systems shall comply with the requirements of this section regarding monitoring, reporting, and MCL for nitrate and nitrite.

(3) For purposes of this section, systems using groundwater under the direct influence of surface water shall meet the inorganic sampling requirements given for surface water systems.

(4) Public water systems shall comply with the 0.05 milligrams per liter (mg/L) MCL for arsenic until January 23, 2006 and comply with the 0.010 mg/L MCL for arsenic starting January 23, 2006.

(b) Maximum contaminant levels for IOCs. The MCLs for IOCs listed in the following table apply to community and nontransient, noncommunity water systems. The MCLs for nitrate, nitrite, and total nitrate and nitrite also apply to transient, noncommunity water systems. Figure: 30 TAC §290.106(b)

(c) Monitoring requirements for IOCs. Public water systems shall monitor for IOCs at the locations specified by the executive director. All monitoring conducted under the requirements of this section must be conducted at sites designated in the public water system's monitoring plan. Each public water system shall monitor at the time designated during each compliance period.

(1) Routine monitoring locations for IOCs except asbestos. Antimony, arsenic, barium, beryllium, cadmium, chromium, cyanide, fluoride, mercury, nitrate, nitrite, selenium, and thallium shall be monitored at each entry point to the distribution system.

(A) If a system draws water from more than one source and the sources are combined before distribution, the system must sample at an entry point that is representative of all sources and during periods of normal operating conditions.

(B) Systems shall take all subsequent samples at the same entry point to the distribution system unless the executive director determines that conditions make another entry point more representative of the source or treatment plant being monitored.

(C) The executive director may approve the use of composite samples.

(i) Compositing must be done in the laboratory or in the field by persons designated by the executive director.

(ii) Compositing shall be allowed only at groundwater entry points to the distribution system.

(iii) Compositing shall be allowed only within a single system. Samples from different systems shall not be included in a composite sample.

(iv) No more than five individual samples shall be included in a composite sample.

(v) The maximum number of individual samples allowed in a composite sample shall not exceed the number obtained by dividing the MCL for the contaminant by the detection limit of the analytical method and rounding the quotient to the next lowest integer. Detection limits for each analytical method are as listed in 40 Code of Federal Regulations (CFR) §141.23(a)(4)(i).

(vi) If the concentration in the composite sample is greater than or equal to the proportional contribution of the MCL (e.g., 20% of MCL when five points are composited) for any inorganic chemical, then a follow-up sample must be collected from each sampling point included in the composite sample.

(I) Follow-up samples must be collected within 14 days of receipt of the composite sample results.

(II) If duplicates of the original sample taken from each entry point to the distribution system used in the composite are available, the system may use these instead of resampling. The duplicates must be analyzed within 14 days of the composite.

(III) The follow-up or duplicate samples must be analyzed for the contaminant(s) which were excessive in the composite sample.

(D) Initial monitoring for a new water source must be conducted at a site representative of the water quality of the new source

of water. For systems with one well and one entry point, initial monitoring may be conducted at the entry point to the distribution system.

(2) Monitoring locations for asbestos. Asbestos shall be monitored at locations where asbestos contamination is most likely to occur.

(A) A system vulnerable to asbestos contamination due solely to source water shall sample at the entry point to the distribution system.

(B) A system vulnerable to asbestos contamination due solely to corrosion of asbestos-cement pipe shall sample at a tap served by asbestos-cement pipe, under conditions where asbestos contamination is most likely to occur.

(C) A system vulnerable to asbestos contamination due both to its source water supply and corrosion of asbestos-cement pipe shall sample at a tap served by asbestos-cement pipe, under conditions where asbestos contamination is most likely to occur.

(D) The executive director may require additional sampling locations based on the size, length, age, and location of asbestos-cement pipe in the distribution system. The system must provide information regarding the size, length, age, and location of asbestos-cement pipe in the distribution system to the executive director upon request.

(3) Initial monitoring frequency for IOCs except asbestos. Prior to using water as a drinking water source, public water systems shall monitor at the frequency determined by the executive director to ensure that the water distributed to customers will comply with the MCLs for antimony, arsenic, barium, beryllium, cadmium, chromium, cyanide, fluoride, nitrate, nitrate, nitrate and nitrite (total), mercury, selenium, and thallium.

(4) Monitoring frequency for IOCs except asbestos, nitrate, and nitrite. Community and nontransient, noncommunity public water systems shall monitor for antimony, arsenic, barium, beryllium, cadmium, chromium, cyanide, fluoride, mercury, selenium, and thallium at the following frequency.

(A) Routine monitoring frequency. A public water system shall routinely monitor for antimony, arsenic, barium, beryllium, cadmium, chromium, cyanide, fluoride, mercury, selenium, and thallium.

(i) Each groundwater entry point shall be sampled once every three years.

(ii) Each surface water entry point shall be sampled annually.

(iii) Each of the sampling frequencies listed in this paragraph constitutes one round of sampling for groundwater and surface water entry points, respectively.

(B) Reduced monitoring. The executive director may reduce the monitoring frequency for a system that has completed a minimum of three rounds of sampling by granting a waiver to the routine monitoring frequency for antimony, arsenic, barium, beryllium, cadmium, chromium, cyanide, fluoride, mercury, selenium, and thallium.

(i) Systems that use a new water source are not eligible for a waiver until three rounds of sampling from the new source have been completed.

(ii) To be considered for a waiver, systems shall demonstrate that all previous analytical results at that sample site were less than the MCL.

(iii) In determining the appropriate reduced monitoring frequency, the executive director shall consider:

(I) the reported contaminant concentrations from all previous samples;

(II) the degree of variation in reported concentrations; and

(III) other factors that may affect contaminant concentrations such as changes in groundwater pumping rates, changes in the system's configuration, changes in the system's operating procedures, or changes in the flow or characteristics of a reservoir or stream used as the water source.

(iv) If the executive director grants a waiver, it shall be made in writing and shall set forth the basis for the determination. The determination may be initiated by the executive director. The executive director shall review and, where appropriate, revise the waiver of monitoring frequency when other data relevant to the system becomes available.

(v) The term during which the waiver is effective shall not exceed one compliance cycle (i.e., nine years).

(vi) A system must take a minimum of one sample during each compliance cycle while the waiver is effective.

(C) Increased monitoring. The executive director may increase the monitoring frequency for antimony, arsenic, barium, beryllium, cadmium, chromium, cyanide, fluoride, mercury, selenium, or thallium.

(i) If the results from a sample site exceed any of the MCLs in subsection (b) of this section, the system shall immediately begin quarterly sampling at that sample site starting in the next quarter after the exceedance occurs.

(ii) After the initiation of quarterly monitoring, the executive director may return a system to the routine monitoring frequency if monitoring shows that the sampling site is reliably and consistently below the MCL.

(I) The executive director shall not decrease the quarterly sampling requirement until a groundwater system has taken a minimum of two quarterly samples.

(II) The executive director shall not decrease the quarterly sampling requirement until a surface water system has taken a minimum of four quarterly samples.

(5) Asbestos monitoring frequency. Community and nontransient, noncommunity water systems shall monitor for asbestos at the following frequency.

(A) A public water system shall routinely monitor for asbestos once during the first three years of each compliance cycle.

(B) The executive director may waive the routine monitoring frequency requirements for asbestos.

(i) When determining if a waiver should be granted, the executive director shall consider:

(I) the potential for asbestos contamination of the water source;

(II) the use of asbestos-cement pipe for finished water distribution; and

(III) the corrosivity of the water.

(ii) If the executive director grants a waiver, it shall be made in writing and shall set forth the basis for the determination. The determination may be initiated by the executive director. The executive director shall review and, where appropriate, revise the waiver of

monitoring frequency when other data relevant to the system becomes available.

(iii) The term during which the waiver is effective shall not exceed one compliance cycle (i.e., nine years).

(C) The executive director may increase the monitoring frequency for asbestos.

(i) A system that exceeds the MCL for asbestos shall sample quarterly beginning in the next quarter after the violation occurs.

(ii) After the initiation of quarterly sampling, the executive director may return a system to the routine monitoring frequency if monitoring shows that the system is reliably and consistently below the MCL.

(I) The executive director shall not decrease the quarterly sampling requirement until a groundwater system has taken a minimum of two quarterly samples.

(II) The executive director shall not decrease the quarterly sampling requirement until a surface (or combined surface water and groundwater) water system has taken a minimum of four quarterly samples.

(6) Nitrate monitoring frequency. All public water systems shall monitor for nitrate at the following frequency.

(A) Routine nitrate monitoring frequency. All public water systems shall routinely monitor for nitrate.

(i) All public water systems shall annually sample at each groundwater entry point to the distribution system.

(ii) A community or nontransient, noncommunity water system shall sample quarterly at each surface water entry point to the distribution system.

(iii) A transient, noncommunity water system shall sample annually at each surface water entry point to the distribution system.

(B) Reduced nitrate monitoring frequency. The executive director may reduce the monitoring frequency for community or nontransient, noncommunity water systems using surface water sources by granting a waiver to the routine monitoring frequency.

(i) To be considered for a waiver, a system shall demonstrate that the nitrate concentration in each sample collected during the previous four consecutive quarters was less than 50% of the nitrate MCL.

(ii) If the executive director grants a waiver, it shall be made in writing and shall set forth the basis for the determination. The determination may be initiated by the executive director. The executive director shall review and, where appropriate, revise the waiver of monitoring frequency when other data relevant to the system becomes available.

(iii) A system that receives a waiver to the routine nitrate monitoring frequency must sample annually for nitrate. The annual sample must be collected in the quarter that previously resulted in the highest nitrate concentration.

(C) Increased nitrate monitoring frequency. The executive director may increase the nitrate monitoring frequency for community or nontransient, noncommunity water systems using groundwater sources.

(i) A system that is sampling annually shall begin quarterly nitrate sampling if the nitrate concentration in any sample is equal to or greater than 50% of the nitrate MCL. Quarterly sampling must begin the first quarter after the elevated nitrate level was detected.

(ii) After the initiation of quarterly sampling, the executive director may return a system to the routine annual nitrate monitoring frequency if quarterly sampling shows that the system is reliably and consistently below the nitrate MCL for a minimum of four consecutive quarters.

(7) Nitrite monitoring frequency. All public water systems shall monitor for nitrite at the following frequency.

(A) All public water systems shall routinely take one nitrite sample during the first three years of each compliance cycle.

(B) The executive director may reduce the monitoring frequency for nitrite by granting a waiver to the routine monitoring frequency.

(i) To be considered for a waiver, a system shall demonstrate that the nitrite concentration in the initial sample was less than 50% of the nitrite MCL.

(ii) If the executive director grants a waiver, it shall be made in writing and shall set forth the basis for the determination. The determination may be initiated by the executive director. The executive director shall review and, where appropriate, revise the waiver of monitoring frequency when other data relevant to the system becomes available.

(iii) A system that receives a waiver to the routine nitrite monitoring frequency must sample at a frequency specified by the executive director.

(C) The executive director may increase the monitoring frequency for nitrite.

(i) A system shall sample quarterly for at least one year following any sample in which the nitrite concentration is greater than or equal to 50% of the MCL.

(ii) The executive director may allow a system to return to the routine monitoring frequency after determining the system is reliably and consistently less than the MCL.

(8) Confirmation sampling for all IOCs. The executive director may require a public water system to confirm the results of any individual sample.

(A) If a sample result exceeds the MCL, a public water system may be required to collect one additional sample to confirm the results of the initial test. If an additional sample is required:

(i) Confirmation samples must be collected at the same entry point to the distribution system as the sample that exceeded the MCL;

(ii) Confirmation samples for IOCs except nitrate and nitrite shall be collected as soon as possible after the system receives the analytical results of the first sample; and

(iii) Confirmation samples for nitrate and nitrite shall be collected within 24 hours of the system's receipt of notification of the analytical results of the first sample. Systems unable to comply with the 24-hour sampling requirement must immediately notify the consumers served by the public water system in accordance with subsection (f) of this section. Systems exercising this option must take and analyze a confirmation sample within two weeks of notification of the analytical results of the first sample.

(B) The executive director may require a confirmation sample for any sample with questionable results.

(9) More frequent monitoring. The executive director may require more frequent monitoring than specified in paragraphs (4) - (7) of this subsection.

(d) Analytical requirements for IOCs. Analytical procedures shall be performed in accordance with §290.119 of this title (relating to Analytical Procedures). Testing for inorganic contaminants shall be performed at a laboratory certified by the executive director.

(e) Reporting requirements for IOCs. Upon the request of the executive director, the owner or operator of a public water system must provide the executive director with a copy of the results of any test, measurement, or analysis required by this subsection. The copies must be submitted within ten days of the request or within ten days of their receipt by the public water system, whichever is later. The copies must be mailed to the Texas Commission on Environmental Quality, Water Supply Division, MC 155, P.O. Box 13087, Austin, Texas 78711-3087.

(f) Compliance determination for IOCs. Compliance with this section shall be determined using the following criteria.

(1) Compliance with the MCL for each IOC shall be based on the analytical results obtained at each individual sampling point.

(2) A public water system that exceeds the levels for nitrate, nitrite, or the sum of nitrate and nitrite specified in subsection (b) of this section commits an acute MCL violation. Compliance shall be based on the results of the single sample. If a confirmation sample is collected, compliance shall be based on the average result of the original and confirmation samples.

(3) A public water system that exceeds the levels of antimony, arsenic, asbestos, barium, beryllium, cadmium, chromium, cyanide, fluoride, mercury, selenium, or thallium (i.e., any IOC except nitrate and nitrite) specified in subsection (b) of this section at any sampling point commits an MCL violation.

(A) For systems that are sampling annually or less frequently, compliance may be based on the results of a single sample, if a confirmation sample is not collected.

(B) For systems that are sampling annually or less frequently, if a confirmation sample is collected, compliance will be based on the average result of the original and confirmation samples.

(C) For systems that are sampling more frequently than annually, compliance is based on the running annual average for each sampling point.

(D) If a single quarterly sample would cause the running annual average to be exceeded, then the system is immediately out of compliance.

(4) Any result below the method detection limits of 40 CFR §141.23(a)(4)(i) shall be considered to be zero for the purpose of calculating compliance.

(5) The executive director may exclude the results of obvious sampling errors from the compliance calculations.

(6) Compliance with the IOC MCLs must be based on the results of all samples required by the executive director, regardless of whether that number is greater or less than the minimum required number.

(7) For purposes of determining compliance, arsenic results must be reported to the nearest 0.001 mg/L.

(g) Public notice for IOCs. A public water system that violates the requirements of this section must notify the executive director and the system's customers.

(1) A public water system that violates the MCL for nitrate, nitrite, or the sum of nitrate and nitrite shall notify the executive director by the next business day and the water system customers of this acute violation in accordance with the requirements of §290.122(a) of this title (relating to Public Notification).

(2) A public water system that violates the MCL for nitrate, nitrite, or the sum of nitrate and nitrite that is unable to comply with the 24-hour confirmation sampling requirement must immediately notify the consumers served by the public water system in accordance with §290.122(a) of this title.

(3) A public water system that fails to meet the MCL for any of the regulated IOCs except nitrate and nitrite (i.e., antimony, arsenic, asbestos, barium, beryllium, cadmium, chromium, cyanide, fluoride, mercury, selenium, and thallium) shall notify the executive director by the end of the next business day and the water system customers in accordance with the requirements of §290.122(b) of this title.

(4) A public water system that fails to conduct the monitoring required by this section must notify its customers of the violation in accordance with the requirements of §290.122(c) of this title.

(5) If a public water system has a distribution system separable from other parts of the distribution system with no interconnections, the executive director may allow the system to give public notice to only the area served by that portion of the system that is out of compliance.

(h) Best available technology (BAT) for IOCs. BAT for treatment of violations of MCLs in subsection (b) of this section are listed in 40 CFR §141.62.

(i) Small system compliance technologies (SSCTs) for arsenic. SSCTs for arsenic are listed in 40 CFR §141.62(d) and may be utilized with commission approval. When point-of-use or point-of-entry devices are used for compliance, the water system must develop a program for the long-term operation, maintenance, and monitoring of the devices to ensure adequate performance.

(j) Bottled water. In accordance with 40 CFR §141.101, bottled water may be used on a temporary basis only and with approval by the commission in order to avoid unreasonable risk to health.

§290.108. Radionuclides Other than Radon.

(a) Applicability. All community water systems shall comply with the requirements of this section regarding radionuclide contaminants. Public water systems treating groundwater under the direct influence of surface water must comply with the radionuclide requirements for surface water systems. Public water systems shall comply with the initial monitoring requirements for uranium by December 31, 2007. Public water systems shall comply with the maximum contaminant level (MCL) for uranium starting December 8, 2003.

(b) Maximum contaminant levels. The concentration of radionuclide contaminants in the water entering the distribution system shall not exceed the following MCLs.

(1) MCLs for naturally occurring radionuclides are as follows:

(A) 5 picoCuries per liter (pCi/L) for combined radium-226 and radium-228, as calculated by the summation of the results for radium-226 and radium-228;

(B) 15 pCi/L for gross alpha particle activity (including radium-226 but excluding radon and uranium); and

(C) effective December 8, 2003, 30 micrograms per liter (g/L) for uranium.

(2) MCLs for beta particle and photon radioactivity from man-made radionuclides in drinking water in community water systems are equivalent to the MCLs under 40 Code of Federal Regulations (CFR) §141.66(d), as amended and adopted in the CFR through December 7, 2000 (65 FR 76708), which is adopted by reference.

(c) Monitoring requirements. Public water systems shall measure the concentration of radionuclides at locations and frequencies specified in the system's monitoring plan. All samples must be collected during normal operating conditions.

(1) Monitoring frequency for naturally occurring radionuclides. The monitoring frequency requirements for gross alpha particle activity, combined radium-226 and radium-228, and uranium are as follows.

(A) Initial monitoring frequency. All systems that use a new source of water must begin to conduct initial monitoring of the new source within 90 days after initiating use of the source.

(i) If the initial monitoring results are at or above an MCL, the system must perform quarterly monitoring as described in subparagraph (C) of this paragraph.

(ii) If the initial monitoring results are below all of MCLs given in subsection (b)(1) of this section, the system shall perform routine monitoring as described in subparagraph (B) of this paragraph.

(iii) Systems without acceptable historical data, as defined in subclauses (I) - (III) of this clause, shall collect four consecutive quarterly samples at all entry points before December 31, 2007.

(I) Systems with a single entry point may use entry point or distribution system sample results from the January 1, 2002 through December 31, 2004 compliance period.

(II) Systems with multiple entry points may use entry point sample results from the January 1, 2002 through December 31, 2004 compliance period.

(III) Systems with no entry point sample results from the January 1, 2002 through December 31, 2004 compliance period that have distribution sample results from that compliance period, may request that these samples be used based on documentation from the system establishing that distribution results represent constituent levels at each entry point.

(B) Routine monitoring. The results of samples collected during initial and routine monitoring periods will be used to determine the monitoring frequency for subsequent monitoring periods.

(i) If the results for all contaminants (gross alpha particle activity, combined radium-226 and radium-228, and uranium) are below the detection limits specified in Table A of this clause, the system must collect and analyze at least one sample at that sampling point once every nine years.
Figure: 30 TAC §290.108(c)(1)(B)(i)

(ii) If the result for any contaminant is at or above the detection limit but at or below one-half the MCLs given in subsection (b) of this section, the system must collect and analyze at least one sample at that sampling point every six years.

(iii) If the result for any contaminant is above one-half the MCLs given in subsection (b) of this section but below the MCL, the system must collect and analyze at least one sample at that sampling point every three years.

(iv) If the result for any contaminant is at or above any of the MCLs given in subsection (b) of this section, monitoring must be performed at the frequency given in subparagraph (C) of this paragraph.

(C) Increased monitoring. A system must perform increased monitoring if any results at a sampling point are at or above the MCLs, or at the direction of the executive director.

(i) If the results for any contaminant are at or above any of the MCLs given in subsection (b) of this section, consecutive quarterly monitoring must be performed at that sample point.

(ii) If the average of quarterly monitoring results is less than the MCLs in subsection (b) of this section, the sample point may be returned to the routine sampling frequency given in subparagraph (B) of this paragraph.

(iii) To fulfill quarterly monitoring requirements a system may composite up to four consecutive quarterly samples from a single entry point if analysis is done within a year of the first sample.

(iv) The analytical results from a composite sample will be treated as the annual average to determine compliance with the MCLs and future monitoring frequency requirements.

(v) When required by the executive director, more frequent monitoring must be conducted in the vicinity of mining or other operations that may contribute alpha particle radioactivity to either surface or groundwater sources of drinking water, or when changes in the distribution system or treatment processing occur that may increase the concentration of radionuclide in the finished water.

(vi) Community public water systems shall conduct monitoring when required by the executive director.

(D) Historical data. A system may use historical data to comply with the initial monitoring requirement, if approved by the executive director.

(i) A system having only one entry point to the distribution system may use the monitoring data from the previous entry point or distribution system compliance monitoring to satisfy initial monitoring requirements.

(ii) A system with multiple entry points that has appropriate historical monitoring data for each entry point to the distribution system may use previous compliance monitoring data to satisfy initial monitoring requirements.

(iii) To satisfy initial monitoring requirements, a community water system with appropriate historical data for a representative point in the distribution system may use the monitoring data from the distribution system, provided that the executive director finds that the historical data satisfactorily demonstrates that each entry point to the distribution system is expected to be in compliance based upon the historical data and reasonable assumptions about the variability of contaminant levels between entry points.

(E) Sample invalidation. The executive director may invalidate the results of obvious sampling or analytic errors.

(F) Confirmation samples. The executive director may require more frequent monitoring or may require confirmation samples at the executive director's discretion.

(G) Sampling scheduling. Systems shall monitor at the time designated by the executive director.

(2) Monitoring and compliance for man-made radionuclides. The monitoring and compliance requirements for man-made radionuclide under 40 CFR §141.26(b), as amended and adopted in the CFR through December 7, 2000 (65 FR 76708), are adopted by reference.

(3) Monitoring locations for radionuclide contaminants. Systems must monitor at sample sites described in the system's monitoring plan.

(A) Initial monitoring for a new water source must be conducted at a site representative of the water quality of the new source of water.

(B) Routine compliance monitoring for the radionuclide covered by this section must be performed at sampling points representing each entry point to the distribution system. If results from an entry point exceed one-half the MCL, the executive director may require the system to sample all water sources providing water to that entry point.

(d) Analytical requirements for radionuclide contaminants. Analytical procedures shall be performed in accordance with §290.119 of this title (relating to Analytical Procedures). Testing for radionuclide contaminants shall be performed at a laboratory certified by the executive director.

(e) Reporting requirements. Upon the request of the executive director, the owner or operator of a public water system must provide the executive director with a copy of the results of any test, measurement, or analysis required by this section. The copies must be submitted within ten days of the request or within ten days of their receipt by the public water system, whichever is later. The copies must be mailed to the Texas Commission on Environmental Quality, Water Supply Division, MC 155, P.O. Box 13087, Austin, Texas 78711-3087.

(f) Compliance determination. Compliance with the requirements of this section shall be determined as follows.

(1) If the running average annual MCL for gross alpha particle activity, combined radium-226 and radium-228, or uranium as set forth in subsection (b) of this section is exceeded, based on quarterly monitoring results, the system has committed an MCL violation.

(A) A gross alpha particle activity measurement may be substituted for the required radium-226 and radium-228 analysis provided that the measured gross alpha particle activity does not exceed 5 pCi/L at a confidence level of 95% (1.65 theta where theta is the standard deviation of the net counting rate of the sample).

(B) When the gross alpha particle activity exceeds 5 pCi/L, the same or an equivalent sample shall be analyzed for radium-226 and radium-228.

(C) If a sample result is less than the detection limit, zero will be used to calculate the annual average, unless a gross alpha particle activity is being used in lieu of radium-226 and/or uranium. If the gross alpha particle activity result is less than detection, one-half the detection limit will be used to calculate the annual average.

(D) The results of all samples taken and analyzed under the provisions of this section will be used in determining compliance, even if that number is greater or less than the minimum required.

(E) If a system fails to complete required increased monitoring, the executive director may base compliance on all available sample results.

(F) If the results at one sample site are in violation, the public water system is in violation.

(G) When confirmation samples are collected, the average of an initial sample and its confirmation sample must be averaged for the purposes of determining compliance.

(H) To judge compliance with the MCLs, sample results must be rounded to the same number of significant figures as the MCL for the substance in question.

(2) If the average annual maximum contaminant level for man-made radionuclide set forth in subsection (b) of this section is exceeded, the system has committed an MCL violation.

(3) A public water system that fails to conduct the monitoring tests required by this subsection commits a monitoring violation.

(4) A public water system that fails to report the results of the monitoring tests required by this subsection commits a reporting violation.

(g) Public notification. A public water system that violates the requirements of this section must notify the executive director and the system's customers, as follows.

(1) A public water system that violates the MCL for gross alpha particle activity, combined radium- 226 and radium-228, or uranium shall give notice to the executive director and notify the public as required by §290.122(b) of this title (relating to Public Notification).

(2) The operator of a community water system that violates the MCL for man-made radionuclide shall give notice to the executive director and to the public as required by §290.122(b) of this title.

(3) A public water system that fails to conduct the monitoring required by this subsection must notify its customers of the violation in accordance with the requirements of §290.122(c) of this title.

(h) Best available technology for radionuclides other than radon. Best available technology for treatment of violations of MCLs in subsection (b) of this section are listed in 40 CFR §141.66(g).

(i) Small system compliance technologies (SSCTs) for radionuclides. SSCTs for radionuclides are listed in 40 CFR §141.66(h) and may be utilized with commission approval. When point-of-use or point-of-entry devices are used for compliance, the water system must develop a program for the long-term operation, maintenance, and monitoring of the devices to ensure adequate performance.

(j) Bottled water. In accordance with 40 CFR §141.101, bottled water may be used on a temporary basis only and with approval by the commission in order to avoid unreasonable risk to health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407114
Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: December 23, 2004
Proposal publication date: August 13, 2004
For further information, please call: (512) 239-0348

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30 TAC §290.115

STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the

commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and Texas Health and Safety Code, §341.031, which allows the commission to adopt rules to implement the federal Safe Drinking Water Act, 42 United States Code, §§300 *et seq*.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407115
Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: December 23, 2004
Proposal publication date: August 13, 2004
For further information, please call: (512) 239-0348

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 27. CRIME RECORDS

SUBCHAPTER A. REVIEW OF PERSONAL CRIMINAL HISTORY RECORD

37 TAC §27.1

The Texas Department of Public Safety adopts the repeal of §27.1, concerning the rights of a person with criminal history record information on file with the department to access and review that information, without changes to the proposed text as published in the October 15, 2004, issue of the *Texas Register* (29 TexReg 9624).

Repeal of the section is necessary due to substantial revisions having been made and the simultaneous filing of a new section which creates a procedure for obtaining from the department a copy of criminal history record information that relates to oneself.

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.086, which requires the Texas Department of Public Safety to adopt rules that provide for a uniform method of requesting criminal history record information from the department; and Texas Government Code, §411.083(b)(3), which requires the Texas Department of Public Safety to grant access to criminal history record information to the person who is the subject of the information.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407107
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: December 23, 2004
Proposal publication date: October 15, 2004
For further information, please call: (512) 424-2135

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37 TAC §27.1

The Texas Department of Public Safety adopts new §27.1, concerning the rights of a person with criminal history record information on file with the department to obtain a copy of that information, without changes to the proposed text as published in the October 15, 2004, issue of the *Texas Register* (29 TexReg 9625).

Adoption of the new section is necessary in order to establish a uniform procedure for obtaining from the department a printout of criminal history record information maintained by the department that relates to oneself. The new section allows such a person to obtain a copy of that information regardless of whether there is reason to challenge the accuracy of the information. The new section will also accurately reflect the current practice of the department with regard to the correction of inaccurate or incomplete criminal history record information. The new section will further allow the subject of the record to contact the department's Error Resolution Unit, which will take all necessary steps to correct any inaccurate or incomplete information.

No comments were received regarding adoption of the new section.

The new section is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.086, which requires the Texas Department of Public Safety to adopt rules that provide for a uniform method of requesting criminal history record information from the department; and Texas Government Code, §411.083(b)(3), which requires the Texas Department of Public Safety to grant access to criminal history record information to the person who is the subject of the information.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407106
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: December 23, 2004
Proposal publication date: October 15, 2004
For further information, please call: (512) 424-2135

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CHAPTER 31. STANDARDS FOR AN APPROVED MOTORCYCLE OPERATOR TRAINING COURSE

37 TAC §§31.1, 31.2, 31.6, 31.7, 31.10, 31.12

The Texas Department of Public Safety adopts amendments to §§31.1, 31.2, 31.6, 31.7, 31.10, and 31.12, concerning Standards for an Approved Motorcycle Operator Training Course, without changes to the proposed text as published in the October 15, 2004, issue of the *Texas Register* (29 TexReg 9626).

The amendments to §31.1 and §31.10 are necessary in order to change the word "instructor" to "RiderCoach preparation" in order to align it with the Motorcycle Safety Foundation title change.

The amendments to §31.2 and §31.12 are necessary in order to strengthen the department's ability to deny and suspend RiderCoaches and training site sponsors in accordance with Texas Occupations Code, Chapter 53.

The amendments to §31.6 are necessary in order to adopt the Motorcycle Safety Foundation's recently released Experienced RiderCourse Suite.

The amendments to §31.7 are necessary in order to clarify what motorcycles can and cannot be used in the Basic Motorcycle Operator Training Course.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §662.009.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407105
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: December 23, 2004
Proposal publication date: October 15, 2004
For further information, please call: (512) 424-2135

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CHAPTER 33. ALL-TERRAIN VEHICLE OPERATOR EDUCATION AND CERTIFICATION PROGRAM

37 TAC §§33.1 - 33.5

The Texas Department of Public Safety adopts amendments to §§33.1 - 33.5, concerning All-Terrain Vehicle Operator Education and Certification Program, without changes to the proposed text as published in the October 15, 2004, issue of the *Texas Register* (29 TexReg 9628).

The amendments to §33.1 are necessary in order to update the definition of an All-Terrain Vehicle (ATV) to bring it in line with legislation passed in 2003. The amendment to the section also updates the definition of the All-Terrain Vehicle Safety Institute.

The amendment to §33.2 is necessary in order to update information relating to fees charged by the ATV Safety Institute for courses.

The amendment to §33.3 is necessary in order to correct grammatical errors.

The amendment to §33.4 is necessary in order to strengthen the department's ability to deny and suspend applicants, instructors, or program sponsors in accordance with Texas Occupations Code, Chapter 53.

The amendment to §33.5 is necessary in order to add the allowance for an ATV Coach to apply for Texas approval via e-mail.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §663.018, which states that the "designated division or state agency may adopt rules to administer this chapter." The Governor has designated the Texas Department of Public Safety to administer the all-terrain vehicle operator education and certification program as provided by Texas Transportation Code, §663.011.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407104
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: December 23, 2004
Proposal publication date: October 15, 2004
For further information, please call: (512) 424-2135

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PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 151. GENERAL PROVISIONS

37 TAC §151.53

The Texas Board of Criminal Justice adopts the amendment to §151.53, concerning Multiple Employment with the State without changes to the proposed text as published in the October 8, 2004, issue of the *Texas Register* and will not be republished.

The purpose of the amendment is to clarify policy on multiple employments with the State of Texas.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Government Code, Chapters 574 and 667; and Texas Constitution, Article XVI, Section 40.

Cross Reference to Statutes: Texas Government Code, Chapters 574 and 667; and Texas Constitution, Article XVI, Section 40.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407129
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Effective date: December 23, 2004
Proposal publication date: October 8, 2004
For further information, please call: (512) 463-0422

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CHAPTER 159. SPECIAL PROGRAMS

37 TAC §159.3

The Texas Board of Criminal Justice adopts the amendment to §159.3, concerning Continuity of Care System for Offenders with Mental Impairments/Memorandum of Understanding without changes to the proposed text as published in the October 8, 2004, issue of the *Texas Register* and will not be republished.

The purpose of the amendment is to clarify the Memorandum of Understanding between the Texas Department of Criminal Justice (TDCJ), the Texas Health and Human Services Commission (HHSC), community Mental Health/Mental Retardation Authorities/Centers as the designated Mental Health/Mental Retardation (MHMR) authorities in Texas, and the Community Supervision and Corrections Departments (CSCDs) concerning a continuity of care system for offenders with mental illness or mental retardation.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Health and Safety Code, §614.013.

Cross Reference to Statutes: Texas Health and Safety Code, §614.013.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 3, 2004.

TRD-200407131
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Effective date: December 23, 2004
Proposal publication date: October 8, 2004
For further information, please call: (512) 463-0422

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Department of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the proposal is adopted. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the proposal is adopted. The Administrative Procedure Act, Government Code, Chapters 2001 and 2002, does not apply to department action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Final Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96 ADOPTION OF NEW AND/OR ADJUSTED 2005 MODEL PRIVATE PASSENGER AUTOMOBILE PHYSICAL DAMAGE RATING SYMBOLS FOR THE TEXAS AUTOMOBILE RULES AND RATING MANUAL

The Commissioner of Insurance adopts amendments proposed by Staff to the Texas Automobile Rules and Rating Manual (the Manual). The amendments consist of new and/or adjusted 2005 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-1004-20-I) was published in the October 22, 2004 issue of the *Texas Register* (29 TexReg 9851).

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the 2005 model year of the listed vehicles.

The amendments as adopted by the Commissioner of Insurance are shown in exhibits on file with the Chief Clerk under Ref. No. A-1004-20-I, which are incorporated by reference into Commissioner's Order No. 04-1163.

The Commissioner of Insurance has jurisdiction over this matter pursuant to Insurance Code Articles 5.10, 5.96, 5.98 and 5.101.

This agency hereby certifies that the amendments as adopted have been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the Manual is amended as described herein, and the amendments are adopted to become effective on the 60th day after publication of the notification of the Commissioner's action in the *Texas Register*.

TRD-200407152
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 7, 2004

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Credit Union Department

Title 7, Part 6

The Texas Credit Union Commission will review and consider Chapter 97, §§97.101 (Meetings), 97.102 (Delegation of Duties), 97.103 (Recusal or Disqualification of Commission Members), 97.105 (Frequency of Examination), 97.106 (Complaint Notice), 97.107 (Related Entities), 97.113 (Operating Fees), 97.114 (Charges for Public Records), 97.200 (Employee Training Program), 97.205 (Use of Historically Underutilized Businesses), 97.207 (Contracts for Professional or Personal Service), and 97.300 (Gifts of Money or Property) of Title 7, Part 6 of the Texas Administrative Code in preparation for the Credit Union Commission's Rule Review as required by Section 2001.039, Government Code.

Comments or questions regarding these rules may be submitted in writing to Kerri T. Galvin, Assistant Commissioner, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, TX 78752-1699, kerri.galvin@tcud.state.tx.us.

TRD-200407090
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 2, 2004

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Texas Parks and Wildlife Department

Title 31, Part 2

The Texas Parks and Wildlife Department files this notice of intention to review Texas Administrative Code Title 31, Part 2, as follows:

CHAPTER 57. FISHERIES

Subchapter A. Harmful or Potentially Harmful Exotic Fish, Shellfish, and Exotic Plants

§57.111. Definitions.

§57.112. General Rules.

§57.113. Exceptions.

§57.114. Health Certification of Exotic Shellfish.

§57.115. Transportation of Live Exotic Species.

§57.116. Exotic Species Transport Invoice.

§57.117. Exotic Species Permit: Fee and Application Requirements.

§57.118. Exotic Species Permit Issuance.

§57.119. Exotic Species Permit: Requirements for Permits.

§57.120. Exotic Species Permit: Expiration and Renewal.

§57.121. Exotic Species Permit-Amendment.

§57.122. Appeal.

§57.123. Exotic Species Permit Reports.

§57.124. Triploid Grass Carp; Sale, Purchase.

§57.125. Triploid Grass Carp Permit; Application, Fee.

§57.126. Triploid Grass Carp Permit; Terms of Issuance.

§57.127. Triploid Grass Carp Permit; Denial.

§57.128. Exotic Species Permits, Triploid Grass Carp Permits; Revocation.

§57.129. Exotic Species Permit: Private Facility Criteria.

§57.130. Exotic Species Interstate Transport Permit.

§57.131. Exotic Species Interstate Transport Permit: Application and Issuance.

§57.132. Exotic Species Interstate Transport Permit: Permittee Requirements.

§57.133. Exotic Species Interstate Transport Permit: Expiration and Renewal.

§57.134. Wastewater Discharge Authority.

§57.135. Memorandum of Understanding between the Texas Parks and Wildlife Department, the Texas Natural Resource Conservation Commission, and the Texas Department of Agriculture.

§57.136. Penalties.

Subchapter B. Mussels and Clams

§57.156. Definitions.

§57.157. Mussels and Clams.

§57.158. Penalties.

Subchapter C. Introduction of Fish, Shellfish, and Aquatic Plants

§57.251. Definitions.

§57.252. Prohibited Acts.

§57.253. Permit Exemptions.

§57.254. Permit Application; Validity.

§57.255. Permit Denial.

§57.256. Appeal.

§57.257. Penalties.

Subchapter D. Commercially Protected Finfish

§57.372. Packaging Requirements.

§57.373. Package Labels.

§57.374. Delegation of Authority.

§57.375. Exclusive Economic Zone Regulations.

Subchapter E. Permits to Sell Nongame Fish Taken from Public Fresh Water

§57.377. Definitions.

§57.378. Nongame Fishes Covered by These Rules.

§57.379. Prohibited Acts.

§57.380. Permit Application.

§57.381. Permit Specifications and Requirements.

§57.382. Harvest and Sales Reports.

§57.383. Permit Fee.

§57.384. Permit Denial.

§57.385. Appeal.

§57.386. Penalties.

Subchapter F. Collection of Broodfish from Public Waters

§57.391. Definitions.

§57.392. General Rules.

§57.394. Broodfish Collection; Notification.

§57.395. Broodfish Permits; Fees, Terms of Issuance.

§57.396. Broodfish Permit; Expiration.

§57.397. Broodfish Permit; Revocation.

§57.398. Permit Denial.

§57.399. Appeal.

§57.400. Reports.

§57.401. Restitution for Broodfish.

Subchapter G. Marking of Vehicles

§57.500. Marking of Vehicles.

Subchapter H. Fishery Management Plans

§57.691. Fishery Management Plans.

Subchapter I. Consistency with Federal Regulations in the Exclusive Economic Zone

§57.801. Powers of the Executive Director.

Subchapter J. Fish Pass Proclamation

§57.901. Prohibited Acts.

Subchapter K. Scientific Areas

§57.920. Nine-Mile Hole State Scientific Area.

§57.921. Redfish Bay State Scientific Area.

Subchapter L. Aquatic Vegetation Management

§57.930. Definitions.

§57.931. State Aquatic Vegetation Plan Applicability.

§57.932. State Aquatic Vegetation Plan.

§57.933. Adoption and Applicability of Local Aquatic Vegetation Plans.

§57.934. Local Aquatic Vegetation Plan.

§57.936. Recordkeeping.

This review is pursuant to the Texas Government Code, §2001.039.

The Department will accept comments for 30 days following the publication of this notice in the *Texas Register* as to whether the reasons for adopting the sections under review continue to exist and to determine whether the rules reflect current legal, policy, and procedural considerations. Consideration of publication of amendments or repeals resulting from this rules review is scheduled for the Parks and Wildlife Commission on January 26, 2005.

Any questions or written comments pertaining to this notice of intention to review should be directed to Gene McCarty, Chief of Staff, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, TX , 78744. Any proposed changes to rules as a result of the review will be published in the Proposed Rules Section of the *Texas Register* and will be open for an additional 30-day public comment period prior to final adoption or repeal by the commission.

TRD-200407176
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Filed: December 8, 2004

♦ ♦ ♦

Texas Racing Commission

Title 16, Part 8

The Texas Racing Commission files this notice of intent to review Title 16, Part 8, Texas Administrative Code, Chapter 313, relating to Officials and Rules of Horse Racing. This review and consideration is in accordance with Government Code, §2001.039.

As part of this review process, the Commission is proposing amendments to §§313.1, 313.4, 313.22, 313.41, 313.43, 313.45, 313.53, 313.60, 313.101, 313.108, 313.110, 313.135, 313.136, 313.165, 313.166, 313.303, 313.312, 313.405, 313.505, and 313.507, and the repeal of §313.410. The proposed amendments and repeal are published elsewhere in this issue of the *Texas Register.*

The Commission is proposing the readoption of the following sections without amendment: §§313.2, 313.21, 313.23-313.26, 313.42, 313.44, 313.46-313.52, 313.54-313.59, 313.61, 313.102-313.107, 313.109, 313.111-313.112, 313.131-313.134, 313.161-313.164, 313.167-313.168, 313.301-313.302, 313.304-313.310, 313.313-313-314, 313.401-313.404, 313.406-313.409, 313.411, 313.421-313.425, 313.441-313.450, 313.501-313.504, and 313.506.

The Commission will accept comments on the requirement as to whether the reasons for adopting these sections continue to exist as well as comments on the proposed amendments and repeal published elsewhere in this issue of the *Texas Register.*

All comments or questions regarding this notice of intent to review should be directed to Paula C. Flowerday, Executive Secretary, Texas Racing Commission, by mail to P.O. 12080, Austin, Texas

78711-2080, by fax to 512-833-6907, or by e-mail to paula.flowerday@txrc.state.tx.us.

TRD-200407052
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Filed: December 1, 2004

♦ ♦ ♦

The Texas Racing Commission files this notice of intent to review Title 16, Part 8, Texas Administrative Code, Chapter 315, relating to Officials and Rules of Greyhound Racing. This review and consideration is in accordance with Government Code, §2001.039.

As part of this review process, the Commission is proposing amendments to §§315.1, 315.2, 315.31-315.32, 315.36-315.37, 315.101-315.103, 315.106-315.108, 315.110-315.111, 315.201-315.203, 315.205, and 315.210-315.211. The proposed amendments are published elsewhere in this issue of the *Texas Register*.

The Commission is proposing the readoption of the following sections without amendment: §§315.3-315.5, 315.33-315.35, 315.38-315.42, 315.104-315.105, 315.109, 315.204, 315-206-315.209, and 315.250.

The Commission will accept comments on the requirement as to whether the reasons for adopting these sections continue to exist as well as comments on the proposed amendments published elsewhere in this issue of the *Texas Register*.

All comments or questions regarding this notice of intent to review should be directed to Paula C. Flowerday, Executive Secretary, Texas Racing Commission, by mail to P.O. 12080, Austin, Texas 78711-2080, by fax to 512-833-6907, or by e-mail to paula.flowerday@txrc.state.tx.us.

TRD-200407063
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Filed: December 1, 2004

♦ ♦ ♦

Adopted Rule Review

Public Utility Commission of Texas

Title 16, Part 2

The Public Utility Commission of Texas (commission) has completed the review of Texas Administrative Code, Title 16, Part 2, Chapter 22, Procedural Rules, pursuant to the Texas Government Code §2001.039, *Agency Review of Existing Rules* as noticed in the September 17, 2004 issue of the *Texas Register* (29 TexReg 9027). The text of the rules may be found in the Texas Administrative Code, Title 16, Economic Regulation, Part 2, or through the commission's website at www.puc.state.tx.us. Project Number 30088, *Review of Chapter 22, Procedural Rules, Pursuant to Texas Government Code §2001.039, Fiscal Year 2005*, is assigned to this rule review project.

Texas Government Code §2001.039 requires that each state agency review and readopt, readopt with amendments, or repeal the rules adopted by that agency pursuant to Texas Government Code, Chapter 2001, Subchapter B, Rulemaking. As required by §2001.039(e), this review is to assess whether the reason for adopting or readopting Chapter 22, Procedural Rules, continues to exist. The commission requested specific comments from interested persons on whether the reasons for adopting each section in Chapter 22 continue to exist. In addition, the commission welcomed comments on any modifications interested persons believe would improve the rules. The commission's Procedural Rules, Texas Administrative Code, Title 16, Part 2, Chapter 22 establish procedures for practice before the Public Utility Commission of Texas. Chapter 22 governs the initiation, conduct, and determination of proceedings required or permitted by law, including proceedings referred to the State Office of Administrative Hearings (SOAH), whether instituted by order of the commission or by the filing of an application, complaint, petition or any other pleading.

The commission finds that the reason for adopting Chapter 22 continues to exist and readopts these rules without change in accordance with the requirement of the Texas Government Code. However, the commission also finds that certain sections require amendments. Separate rulemaking proceedings will be initiated to amend certain sections.

The commission received comments on the notice of intention to review from AEP Texas Central Company, AEP Texas North Company, and Southwestern Electric Power Company (AEP Companies), Reliant Energy, Incorporated (Reliant), and Sprint.

Section 22.33, Tariff Filings

A commenter stated that the current version of this section places incumbent local exchange carriers (ILECs) at a disadvantage relative to competitive local exchange carriers (CLECs), in that CLECs have shorter administrative tariff filings processes than ILECs. The commenter proposed that the 35-day waiting period for ILEC administrative tariffs be replaced with a much shorter time period. The commenter stated that changing the rule to reflect a shorter waiting period would ensure that ILECs are better able to meet competitive threats by allowing ILECs to have increased flexibility to meet new product and pricing initiatives by CLECS, as well as a quicker path to get new pricing and products to consumers.

Commission response

The commission disagrees that §22.33 should be amended to shorten the 35-day waiting period. Section 22.33(c) implements the statutory requirements set forth in Public Utility Regulatory Act (PURA) §§53.251, 53.252, 53.301-53.308, and 55.004. These provisions call for a regulatory policy that recognizes differences between large ILECs, and small ILECs, and CLECs in order to facilitate delivery of services to rural areas, and to introduce new technologies. Furthermore, PURA §55.004 requires ILECs to file changes to tariffs at least 35 days before the effective date of the change, and the rule is consistent with the statutory provision. Therefore, the Commission will not initiate any new rulemaking to alter tariff filing requirements.

Section 22.71, Filing of Pleadings, Documents, and Other Materials

A commenter requested that the commission review and amend this section to reduce the number of copies filed with the commission, or eliminate the filing of paper copies altogether. In support of its comment, the commenter identified one recent docket wherein over 2,200 documents have been filed. The commenter suggested that elimination of paper copies could be achieved through the expansion of electric filing of documents, and cited as an example that the Federal Energy Regulatory Commission (FERC) currently accepts and encourages the electronic filing of over 40 qualified documents.

Commission response

The commission agrees with the commenter that this section needs to be reviewed to reduce the number of copies to be filed and to determine whether electronic filing is a feasible solution. New rulemaking projects will be initiated to review the number of copies requirement and to make any necessary changes to the procedural rules in Chapter 22 to address the commission's findings.

Section 22.74(b), Service of Pleadings and Documents and §22.144(b), Requests for Information and Requests for Admission of Facts

A commenter proposed changes to these sections to implement electronic service of documents to parties via electronic mail (e-mail) for the same reasons it gave in support of amending §22.71. The commenter cited a recent docket in which electronic service was used as an effective way to serve information on other parties in a timely manner, as well as reducing the amount of paper between the parties. The commenter believes that this approach should be available in all commission proceedings and could be accomplished through an amendment to these sections of the rules. The commenter also noted that if the commission agrees to open a new rulemaking project to address the issues raised by the commenter in response to these sections and §22.71, that other changes to the procedural rules may be necessary. The commenter cited, as an example, §22.123(a)(2), dealing with methods for service on appeal of interim orders.

Commission response

The commission agrees with this commenter that service by e-mail is an effective means for parties in a contested case to serve one another, and believes that this option should be explored in a separate rulemaking. New rulemaking projects to review available options for service of documents and to make any other necessary changes to the procedural rules in Chapter 22 to address such options will be initiated.

Section 22.246, Administrative Penalties

A commenter suggested that revisions to this section are necessary as the industry makes the transition to a more competitive environment. The commenter stated that it believes the current rule is too rigid as it does not specify a range of penalties that can be assessed. The commenter further stated its belief that only the most serious violations should incur the highest penalty amount of $5,000.

A commenter specifically noted that subsection (c)(3) of this section should specify that all of the listed factors ((c)(3)(A) - (F)) must be considered by Staff. To that end, the commenter suggested that the report required by subsection (e) of the rule should be amended to require a detailed explanation of Staff's findings for each of the factors in subsection (c)(3)(A)-(F).

A commenter suggested that, due to the differing sizes of CTPs operating in Texas, fines should also be tailored to a company's number of customers. The commenter stated that for the rule to be effective, a penalty should be proportionate to the Texas customer base, and that the administrative penalty provision of Public Utility Regulatory Act (PURA) §15.023(c)(6) supports this type of penalty differentiation in the commission's rules.

A commenter suggested that the commission should consider setting base penalties for certain violations, and believes that setting forth a series of violations and the base penalties, or range of penalties, associated with each type of violation makes sense. The commenter noted that a penalty rule that differentiates between classes of violations provides more guidance and certainty than the current system where any violation is subject to a $5,000 fine per occurrence, per day. The commenter advocated a bottom-up approach rather than the existing top-down system of penalties.

Commission response

The commission agrees that more serious violations require more serious penalties. However, the commission disagrees that the current rule is too rigid. The commission also disagrees that the provision fails to contain a range of penalties. The provision recognizes that penalties can be assessed in an amount "not to exceed $5,000 per day." The language therefore provides a range of $0 - $5,000 per penalty per day a violation occurs. The commission believes that the range should remain flexible as this is consistent with the intent of the legislature. Moreover, the facts giving rise to a violation vary, and what may be an appropriate penalty in one case is not a suitable penalty in another merely because they involve the same "class" of violation. Flexibility is needed to allow the commission the opportunity to consider all relevant statutory factors before ordering a penalty against a party.

Although provisions which set base penalties for certain violations may provide certainty and guidance as to the occurrence of a violation, factors giving rise to such violations and other related factors are wholly ignored. The suggested base penalty approach precludes compliance with statutory criteria in PURA §15.023. Furthermore, this base penalty approach would encourage entities to consider the commission's penalty provisions as a factor in deciding whether or not to comply with the commission's rules. In other words, entities within the commission's jurisdiction could come to view penalties simply as a cost of doing business rather than as an incentive for full compliance.

The commission also believes that the current statutory and regulatory factors in subsection (c)(3)(A) - (F) are already considered by Staff in reports of violations to the commission. The commission's website contains penalty matrices for various violations. The matrices explain, in detail, the general procedures that Staff follows when determining an appropriate penalty for a violation. The commission also disagrees that a bottom-up approach to determining penalties should be instituted. The current top-down approach is more appropriate because mitigating factors are given strong weight to reduce penalty amounts. Additionally, the commission points out that just because a top-down approach is described in the on-line penalty matrices does not mean that Staff always starts with the top dollar amount authorized by the legislature for the penalty. In nearly all instances, a penalty significantly less than the full statutory maximum is the starting point from which the penalty is then reduced by taking into account mitigating factors. This approach is fair and consistent in order to avoid arbitrary and capricious penalties.

The commission also disagrees that a change to the rule is necessary to structure penalties based upon a company's customer base as a specific factor in determining the amount of the penalty. Use of customer base as a factor is not appropriate because Staff does not always have access to a company's customer base, and companies in violation of the commission's rules would have an incentive to under-report their customer base in order to reduce their penalty amounts under the approach advocated by the commenter.

Therefore, the commission will not initiate any new rulemakings to address penalty issues at this time.

Section 22.261(a), Proposals for Decision

Three commenters noted that this section of the rule, which governs Proposals for Decision (PFDs), is not sufficient to enable the commission to engage in informed decision-making because the PFD is not required to inform the commission of the parties' arguments or of the evidence presented in the case. The commenters noted that the current rule only requires a PFD to state the reasons supporting the proposed decision. The commenters suggested that the rule be amended to require PFDs to contain: 1) a description of each issue; 2) a description of each party's position on the issue; 3) a description of the evidence supporting each party's position on the issue; 4) a description of the evidence refuting each party's position on the issue; 5) a proposed resolution of the issue; and 6) a statement of the reasons, including evidence, supporting the proposed resolution of the issue. The commenters believe

that including the foregoing elements would better permit the commission to be more fully apprised of the issues and evidence in a case and provide the commission with the necessary tools to reach a reasoned decision.

Commission response

The commission disagrees that §22.261(a) should be amended to require the elements set forth in comments. Section 22.261(a) mirrors the requirements for PFDs as set forth in Texas Government Code §2001.062(c), which requires that a PFD must contain a statement of the reasons for the decision and each finding of fact and conclusion of law necessary to support the proposed decision. PFDs may contain a procedural or factual history of the case, an analysis of the evidence, and a summary of the judge's recommendation, but these are not required. The commission notes that most, if not all PFDs that the State Office of Administrative Hearings (SOAH) issues, already contain many or all of the elements that the commenters identified. In addition, the parties are provided the opportunity to submit exceptions and replies to exceptions to all PFDs as provided in §22.261(d). As such, parties in a contested case may identify those issues that the PFD fails to address, present their position on issues, refute other parties' positions, and cite the relevant evidence that they believe supports their positions. Thus, as the rule currently exists, the commission is able to rely upon all information properly before it to make an informed decision. Therefore, no separate rule-making will be initiated at this time to review the requirements of PFDs.

Section 22.282, Notice and Public Participation in Rulemaking Procedures

A commenter stated that in rulemaking proceedings, parties are not always given an opportunity to comment on Staff's final proposed rule before it is submitted to the commission. The commenter stated that comments by interested parties at this stage are important because they can help accentuate issues, reduce misunderstandings, and clarify the final product. The commenter proposed amending the rule to reflect additional procedural steps and timing changes to permit interested parties to comment on the rule when it is announced that it is going to be considered at open meeting. Specifically, the commenter suggested that subsection (e) of this section be changed to require that when a rule recommendation is finalized it be filed in central records and parties who have filed comments be notified at least 10 working days prior to the date on which the commission is scheduled to consider the matter in open meeting. In addition, the commenter suggested that interested parties must be given the opportunity to file exceptions to the final recommended rule at least five working days before the commission considers the matter.

Commission response

Currently, nearly all rules proposed to be promulgated by Staff are first put into a strawman, allowing for interested parties to file comments and reply comments and to have informal discussions with staff. Staff utilizes comments to the strawman to identify important issues and make necessary changes before a rule is ever formally proposed for publication. Once a rule is published, parties are given an additional opportunity once again to file comments on the proposed rule, as well as respond to other parties' comments, and public hearings are convened in appropriate instances. In some instances, rules are on a short track and require extensive resources and attention from commission Staff to implement them to meet statutory deadlines. An additional rule-making requirement, including a time period for notice before a rule can be considered is not advantageous. The commission believes that current processes which allow for early public participation through comment, informal discussion and public hearings are sufficient to allow the parties to have meaningful and informative input on rules that are adopted by the commission. Therefore, no separate rulemaking will be considered at this time to institute the changes suggested.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052; Texas Government Code §2001.039.

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TRD-200407099
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 2, 2004

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 28 TAC §3.1606(b)(1)(A)

"I, (name), am (title) of (insurance company name) and a member of the American Academy of Actuaries. I was appointed by, or by the authority of, the Board of Directors of said insurer to render this opinion as stated in the letter to the commissioner dated (insert date). I meet the Academy qualification standards for rendering the opinion and am familiar with the valuation requirements applicable to life and health insurance companies."

Figure: 28 TAC §3.1606(b)(1)(B)

"I, (name), a member of the American Academy of Actuaries, am associated with the firm of (name of consulting firm). I have been appointed by, or by the authority of, the Board of Directors of (name of company) to render this opinion as stated in the letter to the commissioner dated (insert date). I meet the Academy qualification standards for rendering the opinion and am familiar with the valuation requirements applicable to life and health insurance companies."

Figure: 28 TAC §3.1606(b)(2)

"I have examined the actuarial assumptions and actuarial methods used in determining reserves and related actuarial items listed below, as shown in the annual statement of the company, as prepared for filing with state regulatory officials, as of December 31, 20( ). Tabulated below are those reserves and related actuarial items which have been subjected to asset adequacy analysis.

Asset Adequacy Tested Amounts--Reserves and Liabilities					
Statement Item	Formula Reserves (1)	Additional Actuarial Reserves (*) (2)	Analysis Method (**)	Other Amount (3)	Total Amount (1)+(2)+(3) (4)
Exhibit 5 Life Insurance					
Annuities					
Supplementary Contracts With Life Contingencies					
Accidental Death Benefits					
Disability - Active Lives					
Disability - Disabled Lives					
Miscellaneous Reserves					
Total Exhibit 5 (Page 3, Line 1)					
Exhibit 6 Active Life Reserve					
Claim Reserve					
Total Exhibit 6 (Page 3, Line 2)					

Exhibit 7 Guaranteed Interest Contracts Column 2, Line 14					
Annuities Certain Column 3, Line 14					
Supplemental Contracts Column 4, Line 14					
Dividend Accumulations or Refunds Column 5, Line 14					
Premium and Other Deposit Funds Column 6, Line 14					
Total Exhibit 7 Column 1, Line 14 (Page 3, Line 3)					
Exhibit 8, Part 1 Life (Page 3, Line 4.1)					
Health (Page 3, Line 4)					
Total Exhibit 8, Part 1 Column 1, Line 4.4					
Separate Accounts (Page 3 of the Annual Statement of the Separate Accounts, Lines 1, 2, 3.1, 3.2, 3.3)					
TOTAL RESERVES					

IMR (General Account, Page Line)	
(Separate Accounts, Page Line)	
AVR (Page Line)	(***)
Net Deferred and Uncollected Premium	

Notes:

(*) The additional actuarial reserves are the reserves established under §3.1605(e)(2) of this title (relating to General Requirements).

(**) The appointed actuary should indicate the method of analysis, determined in accordance with the standards for asset adequacy analysis referred to in §3.1605(d) of this title, by means of symbols that should be defined in footnotes to the table.

(***) Allocated amount of AVR."

Figure: 28 TAC §3.1606 (b)(3)

"I have relied on (name), (title) for (e.g., "anticipated cash flows from currently owned assets, including variations in cash flows according to economic scenarios" or "certain critical aspects of the analysis performed in conjunction with forming my opinion"), as certified in the attached statement. I have reviewed the information relied upon for reasonableness."

A statement of reliance on other experts should be accompanied by a statement by each of the experts with the information prescribed by subsection (e) of this section.

Figure: 28 TAC §3.1606(b)(4)

"My examination included such review of the actuarial assumptions and actuarial methods and of the underlying basic asset and liability records and such tests of the actuarial calculations as I considered necessary. I also reconciled the underlying basic asset and liability records to (exhibits and schedules listed as applicable) of the company's current annual statement."

Figure: 28 TAC §3.1606(b)(5)

"In forming my opinion on (specify types of reserves) I relied upon data prepared by (name and title of company officer certifying in force records or other data) as certified in the attached statements. I evaluated that data for reasonableness and consistency. I also reconciled that data to (exhibits and schedules to be listed as applicable) of the company's current annual statement. In other respects, my examination included review of the actuarial assumptions and actuarial methods used and tests of the calculations I considered necessary."

The reliance paragraph shall be accompanied by a statement by each person relied upon with the information prescribed by subsection (e) of this section.

Figure: 28 TAC §3.1606(b)(6)

"In my opinion the reserves and related actuarial values concerning the statement items identified above:

{a} are computed in accordance with presently accepted actuarial standards consistently applied and are fairly stated, in accordance with sound actuarial principles;

{b} are based on actuarial assumptions that produce reserves at least as great as those called for in any contract provision as to reserve basis and method, and are in accordance with all other contract provisions;

{c} meet the requirements of the insurance law and regulation of the state of (state of domicile); and are at least as great as the minimum aggregate amounts required by the state in which this statement is filed;

{d} are computed on the basis of assumptions consistent with those used in computing the corresponding items in the annual statement of the preceding year-end (with any exceptions noted below); and

{e} include provision for all actuarial reserves and related statement items which ought to be established.

The reserves and related items, when considered in light of the assets held by the company with respect to such reserves and related actuarial items including, but not limited to, the investment earnings on the assets, and the considerations anticipated to be received and retained under the policies and contracts, make adequate provision, according to presently accepted actuarial standards of practice, for the anticipated cash flows required by the contractual obligations and related expenses of the company.

The actuarial methods, considerations and analyses used in forming my opinion conform to the appropriate Standards of Practice as promulgated by the Actuarial Standards Board, which standards form the basis of this statement of opinion.

This opinion is updated annually as required by statute. To the best of my knowledge, there have been no material changes from the applicable date of the annual statement to the date of the rendering of this opinion which should be considered in reviewing this opinion.

or

The following material changes which occurred between the date of the statement for which this opinion is applicable and the date of this opinion should be considered in reviewing this opinion: (Describe the change or changes.)

Choose whichever of the two immediately preceding paragraphs is appropriate.

The impact of unanticipated events subsequent to the date of this opinion is beyond the scope of this opinion. The analysis of asset adequacy portion of this opinion should be viewed recognizing that the company's future experience may not follow all the assumptions used in the analysis.

_____

Signature of Appointed Actuary

_____

Address of Appointed Actuary

_____

Telephone Number of Appointed Actuary

_____

Date"

Figure: 28 TAC §3.1606(f)(1)(C)(ii)

(1) Product Type	(2) Death Benefit or Account Value	(3) Reserves Held	(4) Codification Reserves	(5) Codification Standard

Figure: 30 TAC §101.394(a)(1)

$$S = \frac{LA}{\sum_{i=1}^{n} LAi} \times AC^{1}$$

Where:

S=the greater of 5.0 tons or the allocation for the site.

i=each site located in Harris County and subject to this division.

n=the total number of sites subject to this division.

LA=the level of activity baseline for a site, calculated as the annual level of activity for any 12 consecutive months during the period of 2000 - 2004 for the site, as certified by the executive director.

AC^{1}=3,106.3 tons per year of highly-reactive volatile organic compounds less the total amount allocated to those sites receiving a minimum of 5.0 tons.

Figure: 30 TAC §101.394(a)(2)

$$S = \frac{LA}{\sum_{i=1}^{n} LAi} \times AC$$

Where:

S=the greater of 5.0 tons or the allocation for the site.

i=each site located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties and subject to this division.

n=the total number of sites subject to this division.

LA=the level of activity baseline for a site, calculated as the annual level of activity for any 12 consecutive months during the period of 2000 - 2004 for the site, as certified by the executive director.

AC^2=4,390.8 tons per year of highly-reactive volatile organic compounds less the total amount allocated to those sites receiving a minimum of 5.0 tons.

Figure: 30 TAC §101.399(h)(4)

$$A = \frac{1}{11.57} \sum (R_i \times E_i)$$

Where:

A=yearly allocation of highly-reactive volatile organic compound allowances.

R_i=the reactivity of each speciated volatile organic compound reduced as specified in California Code of Regulations, Title 17, Chapter 1, §94700, concerning *MIR Values for Compounds*, as amended.

E_i=the actual emissions reduced, in tons per year, of each speciated volatile organic compound.

Figure: 30 TAC §115.788(a)(2)(B)

Table 1: Minimum Number of Valves to Sample based on Total Valve Population Count and Company Determined Leaker Rate

Note: Values based on a hypergeometric distribution, alpha=0.05, beta=0.20
Null Hypothesis = company claim leaker rate is correct
Alternate Hypothesis = greater than or equal to company claimed leaker rate plus 2%

Total Valve Population Count	Company Claimed Leaker Rate (number of leaking valves/total population valve count)										
	0.000 up to 0.005	0.006 up to 0.010	0.011 up to 0.015	0.016 up to 0.020	0.021 up to 0.025	0.026 up to 0.030	0.031 up to 0.035	0.036 up to 0.040	0.041 up to 0.045	0.046 up to 0.050	0.051 or greater
100 to 150	87	101	110	110	116	120	124	124	127	129	131
151 to 300	139	159	165	173	193	200	213	218	226	233	236
301 to 400	152	167	183	204	228	265	278	284	290	296	305
401 to 500	155	172	201	234	250	278	280	295	300	312	328
501 to 600	158	207	220	263	281	295	343	349	354	359	362
601 to 700	159	211	238	266	303	319	343	353	370	391	402
701 to 800	161	223	253	268	310	362	386	389	392	408	422
801 to 900	162	234	272	297	331	385	385	392	422	439	462
901 to 1,000	163	245	278	298	337	387	391	411	443	456	481
1,001 to 1,500	165	254	280	330	386	414	451	486	526	551	567
1,501 to 2,000	167	256	316	359	392	460	495	525	565	599	629
2,001 to 2,500	214	258	316	361	416	462	515	562	598	613	671
2,501 to 3,000	216	258	316	390	443	485	557	581	634	660	703
3,001 to 6,000	218	260	320	393	471	532	600	639	704	742	806
6,001 to 10,000	219	261	354	422	472	555	622	676	738	790	850
10,001 to 25,000	219	262	355	423	498	557	643	696	773	823	894
25,001 to 100,000	220	262	356	424	499	579	644	715	790	854	924
100,001 or greater	220	301	356	424	499	579	644	715	791	855	924

Figure: 30 TAC §290.106(b)

Contaminant	**MCL (mg/L)**
Antimony	0.006
Arsenic	0.05 (until January 23, 2006)
Arsenic	0.010 (starting January 23, 2006)
Asbestos	7 million fibers/liter (longer than 10μm)
Barium	2
Beryllium	0.004
Cadmium	0.005
Chromium	0.1
Cyanide	0.2 (as free Cyanide)
Fluoride	4.0
Mercury	0.002
Nitrate	10 (as Nitrogen)
Nitrite	1 (as Nitrogen)
Nitrate & Nitrite (Total)	10 (as Nitrogen)
Selenium	0.05
Thallium	0.002

Figure: 30 TAC §290.108(c)(1)(B)(i)

Table A: Detection Limits for Radionuclides

Contaminant	**Detection limit**
Gross alpha particle activity	3 picoCuries per liter (pCi/L)
Radium 226	1 pCi/L
Radium 228	1 pCi/L
Uranium	1 microgram per liter

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Department of Aging and Disability Services

Open Solicitation #1 for Burleson County

Pursuant to Title 2, Chapters 22 and 32, of the Human Resources Code and 40 Texas Administrative Code (TAC) §19.2324(b), primary selection process, the Department of Aging and Disability Services (DADS) is announcing an open solicitation period of 30 days, effective the date of this public notice, for **Burleson County, County #026**. Medicaid nursing facility occupancy rates in **Burleson County** exceeded the 90% occupancy threshold for six consecutive months during the period of **May 2004 through October 2004**. The county occupancy rates for each month of that period were: **98.9%, 99.0%, 94.6%, 99.0%, 100.0%, 98.7%**. In accordance with the requirements contained in 40 TAC §19.2324(b), current nursing facility licensees or property owners of currently licensed nursing facilities may apply for an additional allocation of Medicaid beds. The allocation of additional Medicaid beds is restricted to nursing facility beds that are currently licensed and may be converted to Medicaid-certified beds. Applicants for additional Medicaid beds must demonstrate a history of quality care as specified in 40 TAC §19.2322(e). Applicants must submit a written reply as described in 40 TAC §19.2324(b)(5) to Joe D. Armstrong, Department of Aging and Disability Services, Licensing and Credentialing Section, Regulatory Services, Mail Code E-342, P.O. Box 149030, Austin, Texas 78714-9030. The written reply must be received by DADS before the close of business January 18, 2005, the published ending date of the open solicitation period. If one or more applicants are eligible for additional Medicaid beds, DADS will allocate Medicaid beds in accordance with 40 TAC §19.2324(b)(6) and (7). If the number of beds allocated under the primary selection process does not reduce the occupancy rate below 90%, DADS will place another public notice in the *Texas Register* in accordance with secondary selection process requirements.

TRD-200407093
Phoebe Knauer
General Counsel
Department of Aging and Disability Services
Filed: December 2, 2004

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Open Solicitation #1 for Terry County

Pursuant to Title 2, Chapters 22 and 32, of the Human Resources Code and 40 Texas Administrative Code (TAC) §19.2324(b), primary selection process, the Department of Aging and Disability Services (DADS) is announcing an open solicitation period of 30 days, effective the date of this public notice, for **Terry County, County #223**. Medicaid nursing facility occupancy rates in **Terry County** exceeded the 90% occupancy threshold for six consecutive months during the period of **May 2004 through October 2004**. The county occupancy rates for each month of that period were: **93.4%, 92.1%, 91.9%, 90.7%, 92.5%, 91.2%**. In accordance with the requirements contained in 40 TAC §19.2324(b), current nursing facility licensees or property owners of currently licensed nursing facilities may apply for an additional allocation of Medicaid beds. The allocation of additional Medicaid beds is restricted to nursing facility beds that are currently licensed and may be converted to Medicaid-certified beds. Applicants for additional Medicaid beds must demonstrate a history of quality care as specified in 40 TAC §19.2322(e). Applicants must submit a written reply as described in 40 TAC §19.2324(b)(5) to Joe D. Armstrong, Department of Aging and Disability Services, Licensing and Credentialing Section, Regulatory Services, Mail Code E-342, P.O. Box 149030, Austin, Texas 78714-9030. The written reply must be received by DADS before the close of business January 18, 2005, the published ending date of the open solicitation period. If one or more applicants are eligible for additional Medicaid beds, DADS will allocate Medicaid beds in accordance with 40 TAC §19.2324(b)(6) and (7). If the number of beds allocated under the primary selection process does not reduce the occupancy rate below 90%, DADS will place another public notice in the *Texas Register* in accordance with secondary selection process requirements.

TRD-200407092
Phoebe Knauer
General Counsel
Department of Aging and Disability Services
Filed: December 2, 2004

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Open Solicitation #2 for Bandera County

Pursuant to Title 2, Chapters 22 and 32, of the Human Resources Code and 40 Texas Administrative Code (TAC) §19.2324(c), secondary selection process, the Department of Aging and Disability Services (DADS) is announcing an open solicitation period of 30 days, effective the date of this public notice, for **Bandera County, County #010**. Medicaid nursing facility occupancy rates in **Bandera County** exceeded the 90% occupancy threshold for six consecutive months during the period of **March 2004 through August 2004**. The county occupancy rates for each month of that period were: **91.5%, 94.0%, 90.7%, 94.3%, 93.2%, 95.8%**. In accordance with the requirements contained in 40 TAC §19.2324(c), DADS will allocate up to **90** Medicaid beds to an eligible applicant that desires to construct a new nursing facility or to construct an addition to an existing nursing facility. Applicants for additional Medicaid beds must demonstrate a history of quality care as specified in 40 TAC §19.2322(e). Applicants must submit a written reply as described in 40 TAC §19.2324(c)(4) to Joe D. Armstrong, Department of Aging and Disability Services, Licensing and Credentialing Section, Regulatory Services, Mail Code E-342, P.O. Box 149030, Austin, Texas 78714-9030. The written reply must be received by DADS before the close of business January 18, 2005, the published ending date of the open solicitation period. If one or more applicants are eligible for additional Medicaid beds, DADS will allocate Medicaid beds in accordance with 40 TAC §19.2324(c)(5). If no application for the secondary selection process is received or if no applicant meets the requirements in §19.2324(c), no further solicitation will occur.

TRD-200407091
Phoebe Knauer
General Counsel
Department of Aging and Disability Services
Filed: December 2, 2004

♦ ♦ ♦

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of November 25, 2004, through December 2, 2004. The public comment period for these projects will close at 5:00 p.m. on January 7, 2005.

FEDERAL AGENCY ACTIONS:

Applicant: Spinnaker Exploration Company, L.L.C.; Location: The project is located approximately 15 miles southeast of the Texas coastline in the Gulf of Mexico Federal Waters, Galveston Block 210, Galveston Anchorage Area, Offshore, Texas. The location for the structure using State Plane Coordinates, South Central Texas Zone, NAD 27 (feet) is: Pipeline begins at Galveston Block 210 Well No. 1 at X=3,402,095.81; Y=498,460.00 and Pipeline ends at Galveston Block 190 "A" Platform at X=3,381,860.48; Y=501,473.90. Project Description: The applicant proposes to install, operate, and maintain an 8-inch gas/condensate pipeline within the Galveston Anchorage Area in Galveston Blocks 210, 191, and 190. The pipeline would be buried a minimum depth of 16 feet below the mudline. The water depth at the site ranges between 58 feet deep (GA210-1) to 70 feet deep (GA190-A). CCC Project No.: 05-0055-F1; Type of Application: U.S.A.C.E. permit application #23607 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Railroad Commission under §401 of the Clean Water Act.

Applicant: Spinnaker Exploration Company, L.L.C.; Location: The project is located approximately 15 miles southeast of the Texas coastline in the Gulf of Mexico Federal Waters, Galveston Block 210, Galveston Anchorage Area, Offshore, Texas. The location of the project using State Plane Coordinates, South Central Texas Zone, NAD 27 (feet) is X=3,402,095.81; Y=498,460.00. Project Description: The applicant proposes to modify Department of the Army Permit Number 23232, issued on January 1, 2004, by adding Well No. 3 to the previously authorized structure. The applicant would drill a third well (No. 3) and install a free-standing caisson, braced caisson or 4-pile well-protector. There are no known structures within a 2-mile radius of the original structure. The water depth at the site is approximately 58 feet deep. CCC Project No.: 05-0056-F1; Type of Application: U.S.A.C.E. permit application #23232(01) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: City of Corpus Christi; Location: The project is located along Pita Channel, across the Gulf Intracoastal Waterway (GIWW) and along the Nueces/Kleberg County line from Bluff Landing near the southern end of Laguna Shores Road in Flour Bluff to Park Road 22 on North Padre Island, Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Pita Island, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Beginning in Flour Bluff at Easting 668112; Northing 3055143 and ending on Padre Island at Easting 675351; Northing 3052817. The pipeline would cross the GIWW (open trenching) perpendicularly beginning on the east side of the GIWW at approximately 671400E; 3052853N and ending at 671576E; 3052800N. Project Description: The applicant proposes to construct approximately five miles of 42-inch (inside diameter) pipeline to begin in Flour Bluff directly south of a private canal at Bluff Landing at the end of Whiteley Road, and end at an existing waterline on the east side of Park Road 22 on North Padre Island. The line would be mechanically trenched within existing channels from the shoreline in Flour Bluff, across the Laguna Madre and across the GIWW to the Dredge Material Placement Island (DMPA 178) directly east of the GIWW. From DMPA 178 to Padre Island, the applicant proposes to directionally drill the pipeline. The directional bore would begin at a temporary drill pad situated at the terminus of a permitted, undeveloped peninsula adjacent to Sea Pines Street to a temporary exit pad located on DMPA 178 adjacent to Pita Channel. The remaining portion of the line will be trenched through uplands from the drill pad (entry point) to the east side of Park Road 22, along an existing street right-of-way.

The pipeline would be constructed by mechanically trenching pipeline segments into place from the beginning point in Flour Bluff to DMPA 178 (sheets 3 through 5 of 11). The trench material would be temporarily sidecast within the existing small-craft channel and used to cover the pipe once it is laid. The width of the trench and slope of its sidewalls, as well as the dimensions of the placement area, will be determined in the field and will depend on the stability of the side-slope and consistency of the sediment. The applicant reports they will keep the trench width the minimum width possible and would not exceed 25 feet wide. The trenched depth of the top of the pipe would be approximately 4 feet below the bottom of the existing small boat channels. The trenching activities would be confined to a corridor no wider than 80 feet. The applicant proposes to use turbidity curtains constructed of impervious material with a flotation collar and a weighted skirt that reaches the bottom of the water column on either side of the work corridor where mechanical trenching would be done (sheet 11 of 11). The turbidity curtains would extend a minimum of 400 feet ahead of and behind construction activities at all times.

Mechanical trenching through the GIWW would be accomplished by one of two methods: hydraulic jetting or the use of cofferdams. The method will be chosen at the time of construction based on existing conditions and other geo-technical data. Hydraulic jetting would involve extensive use of turbidity curtains around construction area and possible need to import fill material to replace that which cannot be recovered to refill the trench. In this scenario, the GIWW would not have to be completely closed and boat traffic could be facilitated on a limited basis. The other option is to install cofferdams, dewater the hole, and mechanically trench the line for installation. This method would minimize the amount of sediment that is suspended during construction activities, but would require closure of the GIWW for several days. Where the pipeline crosses the GIWW, the top of the pipeline would be trenched to a depth 20 feet below the bottom of the channel.

On the east side of the GIWW, between the east edge of the GIWW to DMPA 178, the applicant proposes to dredge a temporary access channel that would be 430 feet long and 80 feet wide to a depth of -4.0 feet MLT (see sheet 9 of 11). The 80- by 430-foot channel would be excavated from an area that contains approximately 34,000 square feet (0.79 acre) of sea grasses. The excavated channel would provide access for the work barge and directional bore equipment as well as the trench into which the pipeline would be laid between the GIWW and DMPA 178. The material excavated from the access channel would

be temporarily placed on DMPA 178. Upon completion of work, the access channel would be restored to pre-construction contours.

The directionally drilled portion of the pipeline installation would begin on Padre Island and work toward DMPA 178. The directional bore would require temporary construction of a drill entry pad situated in a permitted channel at the terminus of an undeveloped peninsula adjacent to Sea Pines Street on Padre Island (sheet 8 of 11). The entry pad would require fill material in 1.6 acres of waters of the United States. The fill material would be removed upon completion of the project, and the area returned to preconstruction contours. The exit pad would be located on DMPA 178. The exit pad would be located entirely on upland portions of DMPA 178. The actual pipeline would be floated along the Pita Island Channel and pulled toward Padre Island underground to the shoreline. The bore entry drill pad will be removed and returned to pre-construction contours once installation is complete. The mechanically trenched and the directionally bored pipeline segments would be joined on DMPA 178. The pipeline would have a minimum of 6 feet of cover where it traverses the DMPA 178.

The applicant has stated that engineering limitations dictate the length that a 42-inch line may be directionally bored and that those limitations prevent the applicant from including the portion of the pipeline under the GIWW in the directional bore. The applicant stated that a 42-inch pipe cannot span the distance from the drill pad site, past DMPA 178 and across the GIWW. CCC Project No.: 05-0057-F1; Type of Application: U.S.A.C.E. permit application #23569 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act.

Applicant: Jerry Gnazzo; Location: The project is located adjacent to Corpus Christi Bay, in the southeast portion of the residential subdivision known as the Island Moorings, in Port Aransas, Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Aransas, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 14; Easting: 688500; Northing: 3076975. Project Description: The applicant proposes to excavate approximately 63,800 cubic yards of material from uplands to construct two basins with 100-foot-wide canals leading from the existing Island Moorings Harbor Basin into the proposed basins. The applicant proposes to construct a bulkhead around the periphery of each basin. The applicant would excavate the basins and construct the bulkheads around the basin's periphery before breaching the existing bulkhead. The applicant intends to use a turbidity curtain with a flotation collar and a weighted skirt constructed of impervious material that reaches the bottom of the water column during breaching activities to minimize impacts to water quality.

The basins would be excavated so that bottom of the basins would slope away from the bulkhead at 5:2 slopes from -4.0 feet MLT to the proposed -6.0 MLT. The same slope and depth would apply to all created waters of the United States. The water depth in the existing harbor is -8.0 feet MLT. The applicant has stated that the excavated material will be removed from the site by a third party and placed entirely in off-site uplands. Situated around the basins would be approximately 50 buildings that would accommodate a total of 250 condominium units. The storm-water drainage system for the condominium buildings would be similar to the existing subdivision's system, and would be routed into the existing Island Moorings Harbor basin. In one basin, labeled "Channel A" in the attached project plans, the applicant proposes to construct 61 boat slips. The boat slips would consist of 4-foot wide walkways in L-shaped configurations. A typical boat slip walkway would have a 4- by 14-foot section adjacent to and parallel with the proposed bulkhead, and a 4-by 35-foot section perpendicular to the proposed bulkhead. The L-shaped walkways would be spaced 28 feet apart and would have two pilings 14 feet from the walkway edges so they form two boat slips (see sheet 5 of 10). Within the basin labeled "Channel A", the applicant proposes to construct four angular wooden decks that would be adjacent to the proposed bulkhead and would be of varying sizes and shapes. The largest of wooden decks would have a trapezoidal configuration that covers 2,212 square feet with average dimensions of 35 by 63 feet.

In the other basin the applicant proposes to construct 80 boat slips. The boat slips would be constructed with the same configuration and dimensions as those in "Channel A" described above. Within the basin labeled "Channel B", the applicant proposes to construct one trapezoidal wooden deck. The base of the trapezoid would be adjacent to the proposed bulkhead and measure 81.4 feet; the non-parallel sides would measure 38.9 feet; and the most waterward edge of the deck would measure 47.6 feet. The entire structure would cover 2,258 square feet.

Additionally, the applicant proposes to construct 226 boat slips in the existing wide canal. The proposed boat slips in the existing harbor would be entirely within the property boundary and would not extend beyond 280 feet from the existing bulkhead into the harbor. Within the existing harbor, the applicant proposes to construct 51 boat slips adjacent to the existing harbor's bulkhead, and three major walkway "trunks" extending from the existing bulkhead to three or four "branch" walkways. The trunk and branch walkways would be 8 feet wide. Attached to the branches would be 4-foot-wide walkways of varied lengths that range from 25 to 35 feet long, spaced 38 feet apart with pilings between them so they form boat slips. The navigable fairway between rows of boat slips would be either 35 feet wide or 50 feet wide. In addition to the boat slips, the applicant proposes to construct five angular wooden decks of varying dimensions; all of which are represented in the project plans. CCC Project No.: 05-0049-F1; Type of Application: U.S.A.C.E. permit application #23556 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Quality Concrete & Materials, Inc.; Location: The project is located on the north bank of Old Cow Bayou, immediately south of State Highway 87 in Bridge City, Orange County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Orangefield, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 421140; Northing: 3324098. Project Description: The applicant proposes to perform commercial hydraulic dredging within a 1,100-foot long channel segment in Old Cow Bayou. An estimated 25,200 cubic yards of material will be dredged from the channel, with 8,900 cubic yards to be placed in an existing upland disposal site located on the applicant's property. The remaining dredge material will be utilized for the applicant's on-site commercial concrete and sand operations. The applicant proposes to dredge from their bulkheaded bankline, outward to mid-channel, approximately 100 feet, at a maximum depth of 16 feet below the mean low tide mark. CCC Project No.: 05-0047-F1; Type of Application: U.S.A.C.E. permit application #23546 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Kenneth Clark; Location: The project is located adjacent to the Gulf Intracoastal Waterway (GIWW), southwest of the intersection of Commerce Street and 7th Street, in Port O'Connor, in Calhoun County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port O'Connor, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 753761; Northing: 3148670. Project Description: The applicant proposes to excavate approximately 5900 cubic yards of material, including a narrow wetland fringe around the existing freshwater pond, to extend a small boat basin. The enlarged

marina will join the small freshwater pond with the existing boat basin and include 16 finger piers with walkways, 15 mooring structures and a boat ramp. The finger piers will have 2-foot-wide by 24-foot-long walkways. The boat ramp will be 24 feet wide by 36 feet long and include a total of 44 cubic yards of shell or limestone below mean high water. A hotel will be constructed on the north side of the existing pond to allow users of the hotel boat access to the marina and GIWW. CCC Project No.: 05-0040-F1; Type of Application: U.S.A.C.E. permit application #20031(03) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Gwen Spriggs, Council Administrative Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or gwen.spriggs@glo.state.tx.us. Comments should be sent to Ms. Spriggs at the above address or by fax at 512/475-0680.

TRD-200407164
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: December 7, 2004

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 12/13/04 - 12/19/04 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 12/13/04 - 12/19/04 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200407150
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 7, 2004

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Texas Commission on Environmental Quality

Correction of Error

The Texas Commission on Environmental Quality (TCEQ) adopted amendments to 30 TAC §§334.46, 334.50, 334.55, and 334.56 in the November 12, 2004, issue of the *Texas Register* (29 TexReg 10532).

Due to an error in the TCEQ's submitted document, on page 10571, first column, §334.50(b)(2)(A)(i)(I) was omitted and subclauses (II) and (III) were incorrectly placed after clause (ii). The text of §334.50(b)(2)(A)(ii) appears again in the second column, followed by the correct subclauses (I) - (III). The text of clauses (i) and (ii) should read as follows:

(i) Each separate pressurized line shall be equipped with an automatic line leak detector meeting the following requirements.

(I) The line leak detector shall be capable of detecting any release from the piping system of three gallons per hour when the piping pressure is at ten pounds per square inch.

(II) The line leak detector shall be capable of alerting the UST system operator of any release within one hour of occurrence either by shutting off the flow of regulated substances, or by substantially restricting the flow of regulated substances.

(III) The line leak detector shall be tested at least once per year for performance and operational reliability and shall be properly calibrated and maintained, in accordance with the manufacturer's specifications and recommended procedures.

(ii) In addition to the required line leak detector prescribed in clause (i) of this subparagraph, each pressurized line shall also be tested or monitored for releases in accordance with at least one of the following methods.

(I) The piping may be tested at least once per year by means of a piping tightness test conducted in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory. Any such piping tightness test shall be capable of detecting any release from the piping system of 0.1 gallons per hour when the piping pressure is at 150% of normal operating pressure.

(II) Except as provided in subsection (d)(9) of this section, the piping may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by using one or more of the release detection methods prescribed in subsection (d)(5) - (10) of this section.

(III) The piping may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by means of an electronic leak monitoring system capable of detecting any release from the piping system of 0.2 gallons per hour at normal operating pressure.

The only intended revision was the change of the word "national" to "nationally" in §334.50(b)(2)(A)(ii)(I). TCEQ proposed and adopted §334.50(b)(2)(A)(i) without changes but inserted the wrong language in the final adoption document. The correct rule language in §334.50(b)(2)(A)(i) and (ii) is the language that existed before the publication of the current rule, except for the change of the word "national" to "nationally" in clause (ii)(I).

TRD-200407190

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Enforcement Orders

An order was entered regarding Frankie E. Porter dba J & L Plating, Inc., Docket No. 2002- 0175-IHW-E on 11/17/2004 assessing $23,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at 713/422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pak Ambrit, Inc. dba Pak-N-Pay, Docket No. 2002-0240- PST-E on 11/12/2004 assessing $12,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Deborah Bynum, Staff Attorney at 512/239-1976, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Tayyab M.Sheikh dba Sandy Center, Docket No. 2003- 0901-PST-E on 11/12/2004 assessing $2,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at 713/422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kayan Food, Inc. dba Delta Food Store, Docket No. 2003-0914-PST-E on 11/12/2004 assessing $2,460 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gitanjali Yadav, Staff Attorney at 512/239-2029, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Hertz Corporation, Docket No. 2003-0625-AIR-E on 11/12/2004 assessing $2,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Erika Fair, Enforcement Coordinator at 512/239-6673, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Houshang Shirazi dba Quality Fuels, Docket No. 2003- 0626-AIR-E on 11/12/2004 assessing $1,020 in administrative penalties with $204 deferred.

Information concerning any aspect of this order may be obtained by contacting Erika Fair, Enforcement Coordinator at 512/239-6673, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jack Vanden Berge dba Vanden Berge Dairy, Docket No. 2004-0025-AGR-E on 11/12/2004 assessing $6,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at 512/239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Binh Tran dba Mini Mart #102, Docket No. 2003-1119- PST-E on 11/12/2004 assessing $2,240 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sarah Utley, Staff Attorney at 210/490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Saint-Gobain Abrasives, Inc., Docket No. 2003-0654- AIR-E on 11/12/2004 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Wendy Cooper, Staff Attorney at 817/588-5867, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Houston Independent School District and Camp Olympia, Inc. and Camp Management, Inc., Docket No. 2003-0024-MWD-E on 11/12/2004 assessing $22,850 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting J. Mac Vilas, Enforcement Coordinator at 512/239-2557, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Agrifos Fertilizer, Inc., Docket No. 2003-1473-AIR-E on 11/12/2004 assessing $25,550 in administrative penalties with $5,110 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at 713/767-3607, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Joe Pacheco dba Joe's Tire Disposal, Docket No. 2003- 0042-MSW-E on 11/12/2004 assessing $4,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at 713/422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Eastern Trust, Ltd. dba Hamilton ET, Docket No. 2003- 1497-PST-E on 11/12/2004 assessing $7,500 in administrative penalties with $1,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at 713/422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Owens Corning, Docket No. 2004-0074-AIR-E on 11/12/2004 assessing $6,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at 713/422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding S.P. Holmes, Inc. dba Georgetown 66, Docket No. 2003- 0992-PST-E on 11/12/2004 assessing $1,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sherry Smith, Enforcement Coordinator at 512/239-0572, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding SJP Holdings, Inc. dba Speed Mart, Docket No. 2003- 0784-PST-E on 11/12/2004 assessing $2,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Petty, Staff Attorney at 512/239-3693, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding West Cedar Creek Municipal Utility District, Docket No. 2003-1183-PWS-E on 11/12/2004 assessing $5,190 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lori Thompson, Enforcement Coordinator at 903/535-5116, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Star Tex Gasoline & Oil Distributors, Inc., Docket No. 2004-0145-PST-E on 11/12/2004 assessing $450 in administrative penalties with $90 deferred.

Information concerning any aspect of this order may be obtained by contacting Sushil Modak, Enforcement Coordinator at 512/239-2142, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Round Rock ISD, Docket No. 2004-0207-EAQ-E on 11/12/2004 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Cari Bing, Enforcement Coordinator at 512/239-1445, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Nauschad Hirani dba Luky Food Store, Docket No. 2004- 0433-PST-E on 11/12/2004 assessing $1,300 in administrative penalties with $260 deferred.

Information concerning any aspect of this order may be obtained by contacting Susan Longenecker, Enforcement Coordinator at 512/239-0968, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Solvay HDPE, L.P., Docket No. 2004-0294-AIR-E on 11/12/2004 assessing $7,900 in administrative penalties with $1,580 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at 713/422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kaneka Texas Corporation, Docket No. 2004-0332-AIR- E on 11/12/2004 assessing $1,975 in administrative penalties with $395 deferred.

Information concerning any aspect of this order may be obtained by contacting Carolyn Lind, Enforcement Coordinator at 903/535-5145, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Steinhagen Oil Co., Inc., Docket No. 2004-0352-PST-E on 11/12/2004 assessing $8,250 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting Sushil Modak, Enforcement Coordinator at 512/239-2142, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Wade Easton dba Cedar Bayour Mobile Home Park, Docket No. 2004-0364-PWS-E on 11/12/2004 assessing $1,815 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sandy VanCleave, Enforcement Coordinator at 512/239-0667, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sarbali Oil, Inc. dba Jasper Fuels Company, Docket No. 2004-0397-PST-E on 11/12/2004 assessing $6,125 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting John Barry, Enforcement Coordinator at 409/899-8781, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Karim Merchant dba Kwik Pik Texaco, Docket No. 2004-0400-PST-E on 11/12/2004 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Cari Bing, Enforcement Coordinator at 512/239-1445, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Moss Lake Water Supply Corporation, Docket No. 2004- 0450-PWS-E on 11/12/2004 assessing $435 in administrative penalties with $10 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at 512/239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chemical Lime, Ltd., Docket No. 2004-0457-AIR-E on 11/12/2004 assessing $1,925 in administrative penalties with $385 deferred.

Information concerning any aspect of this order may be obtained by contacting Ronnie Kramer, Enforcement Coordinator at 806/468-0512, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Magic Valley Concrete, Ltd., Docket No. 2004-0476- AIR-E on 11/12/2004 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Edward Moderow, Enforcement Coordinator at 512/239-2680, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EXXONMOBIL Oil Corporation dba Mobil Chemcial Beaumont Chemcial Plant (BMCP), Docket No. 2004-0491-AIR-E on 11/12/2004 assessing $16,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Barry, Enforcement Coordinator at 409/899-8781, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of San Juan, Docket No. 2004-0500-MLM-E on 11/12/2004 assessing $9,000 in administrative penalties with $1,800 deferred.

Information concerning any aspect of this order may be obtained by contacting Jaime Garza, Enforcement Coordinator at 956/430-6030, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Imtiaz Kahn dba Hawks Pantry 5, Docket No. 2004- 0541-PST-E on 11/12/2004 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting Sandy VanCleave, Enforcement Coordinator at 512/239-0667, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LBC Houston, L.P., Docket No. 2004-0549-AIR-E on 11/12/2004 assessing $3,900 in administrative penalties with $780 deferred.

Information concerning any aspect of this order may be obtained by contacting Lawrence King, Enforcement Coordinator at 512/239-7037, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Magnum Blue Ribbon Feeds, Inc., Docket No. 2004- 0599-AIR-E on 11/12/2004 assessing $1,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Ronnie Kramer, Enforcement Coordinator at 806/468-0512, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Aziz Convenience Stores, LLC dba Aziz Quick Stop 4, Docket No. 2004-0631-PST-E on 11/12/2004 assessing $5,400 in administrative penalties with $1,080 deferred.

Information concerning any aspect of this order may be obtained by contacting Bill Davis, Enforcement Coordinator at 512/239-6793, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mark J. Pike dba Southwest Charter Lines, Docket No. 2004-0652-PST-E on 11/12/2004 assessing $3,150 in administrative penalties with $630 deferred.

Information concerning any aspect of this order may be obtained by contacting Mauricio Olaya, Enforcement Coordinator at 915/834-4967, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Southwest Concrete Products, L.P. dba Southwest San Antonio Plant, Docket No. 2004-0685-IWD-E on 11/12/2004 assessing $14,580 in administrative penalties with $2,916 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at 817/588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Mabank, Docket No. 2004-0772-PWS-E on 11/12/2004 assessing $1,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at 512/239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order to terminate agreed order was entered regarding San Antonio Water System, Docket No. 2004-0312-AIR-E on 11/12/2004.

Information concerning any aspect of this order may be obtained by contacting Becky Petty, Staff Attorney at 512/239-3693, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Debra K. Smith & Terry M. Sinclair dba City Cabinet Shop, Docket No. 2003-1568-WQ-E on 11/12/2004 assessing $6,300 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Van Soest, Enforcement Coordinator at 512/239-0468, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200407089
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 1, 2004

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Notice of Opportunity to Comment on a Default Order of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Order (DO). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 17, 2005**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate a proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 17, 2005**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DO and/or the comment procedure at the listed phone numbers; however, comments on the DO should be submitted to the commission in **writing**.

(1) COMPANY: Dallas Trading Enterprises, Inc. dba Kuick Check; DOCKET NUMBER: 2003- 0848-PST-E; TCEQ ID NUMBERS: 34791 and RN101435360; LOCATION: 201 West Morgan, Meridian, Bosque County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of underground storage tanks; PENALTY: $2,400; STAFF ATTORNEY: Sarah Utley, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710- 7826, (254) 751-0335.

TRD-200407155
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 7, 2004

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 17, 2005**. Section 7.075 also requires that the commission promptly

consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 17, 2005**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO should be submitted to the commission in **writing**.

(1) COMPANY: Burks Mack; DOCKET NUMBER: 2004-0326-MSW-E; TCEQ ID NUMBER: RN102840097; LOCATION: 729 County Road 1602, Linden, Cass County, Texas; TYPE OF FACILITY: unauthorized scrap tire storage; RULES VIOLATED: 30 TAC §328.60(a) and Texas Health and Safety Code (THSC), §361.112(a) and (c), by failing to register a scrap tire storage facility; PENALTY: $0; STAFF ATTORNEY: Alfred Okpohworho, Litigation Division, MC R-12, (713) 422-8918; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701- 3756, (903) 535-5100.

(2) COMPANY: Valero Refining - Texas, L.P.; DOCKET NUMBER: 2000-1100-AIR-E; TCEQ ID NUMBER: NE-0112-G; LOCATION: 5900 Up River Road, Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: petroleum refinery; RULES VIOLATED: 30 TAC §116.115(c) and §101.20(3), TCEQ Air Permit Number 38754/PSD-TX-324M9, and THSC, §382.085(b), by failing to establish the actual pattern and quantities of air contaminants being emitted from all heaters and boilers within 180 days; 30 TAC §101.6(a)(1) and THSC, §382.085(b), by failing to notify the TCEQ of upsets within 24 hours after the discovery; 30 TAC §116.115(b) and §101.20(3), TCEQ Air Permit Number 38754/PSD-TX-324M9, and THSC, §382.085(b), by allowing unauthorized emissions when operational upsets occurred; 30 TAC §101.6(b) and THSC, §382.085(b), by failing to maintain complete records for four upsets; THSC, §382.085(a), by failing to obtain regulatory authority or meet the demonstration requirements; 30 TAC §101.6(a) and THSC, §382.085(b), by failing to report upsets within 24 hours of discovery; 30 TAC §116.715(c)(7) and §101.20(3), TCEQ Air Permit Number 38754/PSD-TX-324M9, and THSC, §382.085(b), by exceeding the emission caps for the main flare and ground flare; 30 TAC §116.715(a) and §101.20(3), TCEQ Air Permit Number 38754/PSD-TX-324M9, Special Condition Number 11, and THSC, §382.085(b), by failing to route emissions from tank truck loading of gasoline to the vapor combustor; and THSC, §370.008, by failing to pay toxic chemical release fees; PENALTY: $75,000; STAFF ATTORNEY: Wendy Cooper, Litigation Division, MC R-4, (817) 588-5867; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

TRD-200407154
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 7, 2004

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapters 39 and 305

The Texas Commission on Environmental Quality will conduct a public hearing to receive testimony concerning revisions to 30 TAC Chapter 39, concerning Public Notice, new §39.510, and Chapter 305, concerning Consolidated Permits, new §305.130 and §305.131, under the requirements of Texas Health and Safety Code, §382.017 and Texas Government Code, Subchapter B, Chapter 2001.

The proposed rulemaking would require notification to the public by municipal solid waste permittees when a facility has not accepted waste within two years of permit issuance or has stopped accepting waste for two consecutive years. The rulemaking would also give the commission the discretion to revoke municipal solid waste permits if periodic notification actions do not commence as required or a permittee has not accepted waste within seven years of permit issuance or has ceased accepting waste for seven consecutive years.

A public hearing on this proposal will be held in Austin on January 11, 2005, at 10:00 a.m. at the Texas Commission on Environmental Quality in Building F, Room 2210, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

Comments may be submitted to Lola Brown, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Project Number 2004-036-305-WS. Comments must be received by 5:00 p.m., January 17, 2005. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tnrcc.state.tx.us/oprd/rules/propadop.html*. For further information, please contact Clifton Wise, Policy and Regulations Division, (512) 239-2263.

TRD-200407109
Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 3, 2004

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Notice of a Public Meeting to Obtain Public Input and Information on the Proposed Remedy for the State Highway 123 PCE Plume Proposed State Superfund Site

The executive director of the Texas Commission on Environmental Quality (TCEQ or commission) is issuing this public notice of a proposed selection of remedy for the State Highway 123 PCE Plume proposed state Superfund site (the site). In accordance with 30 TAC §335.349(a), concerning requirements for the remedial action, and Texas Health and Safety Code (THSC), §361.187, concerning the proposed remedial action, a public meeting will be held regarding the commission's selection of a proposed remedy for the site. The statute

requires that the commission publish a notice of the meeting in the *Texas Register* and in a newspaper of general circulation in the county in which the facility is located at least 30 days before the date of the public meeting. This notice was also published in the *San Marcos Daily Record* on December 17, 2004.

The public meeting is scheduled for Thursday, January 20, 2005, from 7:00 p.m. to 9:00 p.m. at the City of San Marcos Activity Center, 501 East Hopkins, San Marcos, Texas. The public meeting will be legislative in nature and is not a contested case hearing under Texas Government Code, Chapter 2001.

The site was proposed for listing on the state registry of Superfund sites in the January 26, 2001 edition of the *Texas Register* (26 TexReg 1033). The site is located in San Marcos, Hays County, Texas.

The site is the location of a contaminated groundwater plume from an unknown source. The groundwater plume is a volume of shallow groundwater contaminated with perchloroethylene (PCE) (also known as tetrachloroethylene) and PCE-related chemicals. PCE is a chemical used for dry cleaning and metal degreasing. The groundwater plume has been documented to extend from Willow Springs Creek southwest toward State Highway 123 and then southwest toward Parker Street. The shallow groundwater emerges through seeps (springs) that flow into Willow Springs Creek, which is a tributary of the San Marcos River.

On January 26, 2001, legal notices were published in the *Texas Register* and the *San Marcos Daily Record*, describing the site and proposing the site for listing on the state Superfund registry. On February 27, 2001, a public meeting was held in San Marcos to receive community comments on the proposal of the site to be listed on the Superfund registry. On October 31, 2001, the TCEQ issued a work order to initiate the first phase of the field investigation. On April 22, 2002, the TCEQ presented the investigation results at an availability session for interested citizens in San Marcos. The TCEQ has conducted several phases of investigations of soil, groundwater, springs, creek surface water and sediments, and fish tissue from fish in Willow Springs Creek. The findings of the completed investigation activities are presented in the Remedial Investigation Report, dated August 2004.

The TCEQ has determined that the only unacceptable risk associated with the site is potential exposure to the contaminated groundwater. The potential for exposure to this unacceptable risk is very low for the general public since no one currently uses the groundwater. The TCEQ has not found conclusive evidence to identify the original source of the contamination in the groundwater.

The TCEQ has prepared a proposed remedial action document which identifies a long-term plan for mitigating potential risk of exposure to the contaminated groundwater and provides an explanation of how this remedy complies with the relevant clean-up standards and remedy selection criteria. The proposed remedy includes monitored natural attenuation and the placement of a deed notice in the Hays County real property records on each property overlying the groundwater contamination plume. Monitored natural attenuation provides a cost-effective long-term reduction in contamination concentrations while ensuring that the plume does not move to an area of unanticipated exposure. A deed notice warns and advises current and future property owners against installing wells or creating other pathways of exposure to the contamination. This remedy complies with Remedy Standard B established by the Texas Risk Reduction Program rules (30 TAC Chapter 350) and complies with the statutory requirement that the commission select the lowest cost remedy that is protective of public health and the environment.

All persons desiring to make comments may do so prior to or at the public meeting. All comments submitted **prior** to the public meeting must be received by 5:00 p.m., January 19, 2005, **and should be sent in writing** to Ms. Luda Voskov, Project Manager, Texas Commission on Environmental Quality, Remediation Division, MC 143, P. O. Box 13087, Austin, Texas 78711-3087, or facsimile at (512) 239-2450. The public comment period for this action will end at the close of the public meeting on January 20, 2005.

A portion of the record for this site, including documents pertinent to the proposed remedy, is available for review during regular business hours at the San Marcos Public Library, 625 East Hopkins, (512) 393-8200. Copies of the complete public record file may be obtained during business hours at the commission's Records Management Center, Records Customer Service, Building E, First Floor, MC 199, 12100 Park 35 Circle, Austin, Texas 78753, (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

Information about the site is also available on the Web site at *www.tnrcc.state.tx.us/permitting/remed/superfund/statehwy123.html* and general information about the state Superfund program is available at *www.tnrcc.state.tx.us/permitting/remed/superfund/*.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the agency at (800) 633-9363 or (512) 239-5674. Requests should be made as far in advance as possible.

For further information about this site or the public meeting, please call John Flores, TCEQ Community Relations, at (800) 633-9363, extension 5674.

TRD-200407149
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 7, 2004

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Notice of Water Quality Applications

The following notices were issued during the period of November 24, 2004 through December 7, 2004

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P O Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

THE CITY OF ALBANY has applied for a renewal of TPDES Permit No. 10035-002, which authorizes the discharge of filter backwash effluent from a water treatment plant at a daily average flow not to exceed 60,000 gallons per day. The facility is located at 917 Railroad Street at the intersection of Railroad Street and North Avenue C in the City of Albany in Shackelford County, Texas.

AQUA DEVELOPMENT INC. has applied for a renewal of TPDES Permit No. 14147-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 220,000 gallons per day. The facility is located approximately 4,200 feet west of Farm-to-Market Road 3210 and approximately 2,900 feet west of the Brazos River in Hood County, Texas.

BP AMOCO CHEMICAL COMPANY which operates a tank farm and docks facility, has applied for a renewal of TPDES Permit No. WQ0000452-000, which authorizes the discharge of storm water on

an intermittent and flow variable basis via Outfalls 001, 002, 003 and 004. The facility is located on the north bank of the Texas City Barge Canal, approximately 3200 feet east of the termination of the barge canal along Docks 50 through 53, in the City of Texas City, in Galveston County, Texas.

CASTLEWOOD MUNICIPAL UTILITY DISTRICT has applied for a major amendment to TPDES Permit No. 11883-001 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 1,367,000 gallons per day to an annual average flow not to exceed 2,000,000 gallons per day. The applicant also requests authorization to reduce the annual average flow of the existing phase from a volume not to exceed 1,367,000 gallons per day to a volume not to exceed 1,200,000 gallons per day. The facility is located 500 feet north of Interstate Highway 10, 2,600 feet east of where Interstate 10 crosses Mason Creek, and 6,300 feet west of Fry Road in Harris County, Texas.

CITY OF COPPERAS COVE has applied for a renewal of TPDES Permit No. 10045-004, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,500,000 gallons per day. The facility is located in the northeast corner of the city municipal golf course at the intersection of Golf Course Road and Texas Avenue in the City of Copperas Cove in Coryell County, Texas.

DESSAU UTILITIES, INC. has applied for a renewal of TPDES Permit No. 12971-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately 1.4 miles north of the intersection of Dessau Road and Yager Lane, approximately 2.5 miles southeast of the intersection of Interstate Highway 35 and Dessau Road in Travis County, Texas.

THE DEVEREUX FOUNDATION has applied for a major amendment to TPDES Permit No. 14281-001 to authorize an increase in the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility is located approximately 1300 feet northwest of U. S. Highway 59 and approximately 12 miles southwest of downtown Victoria in Victoria County, Texas.

CITY OF ELDORADO has applied for a renewal of TPDES Permit No. 10165-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 385,000 gallons per day. The facility is located approximately 5000 feet northeast of the intersection of U.S. Highway 277 and U.S. Highway 915 in Schleicher County, Texas.

CITY OF GOLIAD has applied for a renewal of TPDES Permit No. 10458-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 350,000 gallons per day. The facility is located at 510 South Mt. Auburn Street, approximately 3,000 feet southwest of the intersection of U.S. Highway 59 and U.S. Highway 183/Alt 77 in the City of Goliad, in Goliad County, Texas.

GUADALUPE-BLANCO RIVER AUTHORITY has applied for a renewal of Permit No. 11751-001, which authorizes the disposal of treated domestic wastewater at a flow not to exceed a daily average volume of 300,000 gallons per day via irrigation of 117 acres at the Northcliffe Country Club golf course. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 1200 feet northeast of the intersection of Farm to Market Road 1103 and Interstate Highway 35 in Comal and Guadalupe Counties, Texas. The facility and disposal site are located in the drainage basin of the Comal River in Segment No. 1811 of the Guadalupe River Basin.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 86 has applied for a major amendment to TPDES Permit No. 12065-001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 425,000 gallons per day to a daily average flow not to exceed 950,000 gallons per day. The facility is located approximately 0.40 mile south of the intersection of Farm-to-Market Road 1960 and Ella Boulevard (formerly Medberry Road) in Harris County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 391 has applied for a renewal of TPDES Permit No. 14327-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 350,000 gallons per day. The facility is located approximately 4,000 feet northwest of the intersection of U.S. Highway 290 and Mueschke Road in Harris County, Texas.

The Texas Commission on Environmental Quality (TCEQ) has initiated a minor modification of the Texas Pollutant Discharge Elimination System (TPDES) permit issued to CITY OF HOUSTON to correct the monitoring frequency for dissolved oxygen on Page 2 of the permit from "once per week/day" to "once per week". The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 488,000 gallons per day. The facility is located at 10545 Tidwell Road on the west bank of Greens Bayou, north of and adjacent to Tidwell Road in Harris County, Texas.

CITY OF JEWETT has applied for a renewal of TPDES Permit No. 11392-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility is located approximately 500 feet southeast of Sugar Street, approximately 4,000 feet east of State Highway 79, on the east side of the City of Jewett in Leon County, Texas.

JIM NED CONSOLIDATED INDEPENDENT SCHOOL DISTRICT has applied for a renewal of Permit No. WQ00011908001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 5,000 gallons per day via evaporation. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located north of the intersection of Avenue E and Fourth Street in Lawn in Taylor County, Texas.

NEW BRAUNFELS UTILITIES has applied for a renewal of TPDES Permit No. 10232-002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,100,000 gallons per day. The facility is located approximately 700 feet southwest of the crossing of Gruene Loop Road over the Guadalupe River, in Comal County, Texas.

NEW ULM WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. 13655-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility is located on Bernard Road, one mile southeast of the intersection of Farm-to-Market Road 109 and Farm-to-Market Road 1094 in Austin County, Texas.

CITY OF NIXON has applied for a renewal of TPDES Permit No. 10234-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 450,000 gallons per day. The facility is located approximately 1.5 miles north of the intersection of U.S. Highway 87 and State Highway 80 on the south bank of the Clear Fork of the Sandies Creek north of the City of Nixon in Gonzales County, Texas.

WALTER EDWIN PIPES has applied for a renewal of TPDES Permit No. 14043-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 45,000 gallons per day. The facility is located southeast of the City of San Antonio on the northeast side of U.S. Highway 181 and approximately 600 feet southeast of the intersection of U.S. Highway 181 and Loop 1604 in Bexar County, Texas.

TOWN OF REFUGIO has applied for a renewal of TPDES Permit No. 10255-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 576,000 gallons per day. The facility is located 1.0 mile east of U.S. Highway 77 and 0.75 mile south of Farm-to-Market Road 774 in Refugio County, Texas.

REFUGIO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1 has applied for a renewal of TPDES Permit No. 10256-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000 gallons per day. The facility is located on Keller road 0.1 mile south of the intersection of Keller road and State Highway 239, and located approximately 0.1 mile west of the intersection of State Highway 239 and State Highway 35 in Refugio County, Texas.

CITY OF SEGUIN has applied for a renewal of TPDES Permit No. WQ0010277001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,900,000 gallons per day. The facility is located at the intersection of East Klein Street and South Austin Street in the City of Seguin in Guadalupe County, Texas.

SOUTHWEST INDEPENDENT SCHOOL DISTRICT has applied for a renewal of Permit No. 13827-001, which authorizes the disposal of treated domestic wastewater at a flow not to exceed a daily average volume of 12,750 gallons per day via drip irrigation of 2.23 acres of land. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located on the west side of Pearsall Road approximately 1,000 feet southwest of the intersection of Pearsall Road and Shepherd Road and south of Barker Lane in Bexar County, Texas. The facility and disposal site are located in the drainage basin of Medina River Below Medina Diversion Lake in Segment No. 1903 of the San Antonio River basin.

SUPPORT TERMINALS OPERATING PARTNERSHIP which operates a bulk liquid storage terminal, has applied for a renewal of TPDES Permit No. WQ0002565000, which authorizes the discharge of storm water associated with industrial activity on an intermittent and flow variable basis via Outfall 001. The facility is located at 159 Levee Road, approximately 2200 feet east of the west end of the Industrial Ship Channel, in the City of Texas City, Galveston County, Texas.

CITY OF TAHOKA has applied for a renewal of Permit No. 10298-002, which authorizes the disposal of treated domestic wastewater at a volume not to exceed a daily average flow of 360,000 gallons per day via surface irrigation of 209 acres of nonpublic access farmland. This permit will not authorize a discharge of pollutants into waters in the State. The domestic wastewater treatment facility is located approximately 2 miles south of Highway 380 and 0.25 mile east of Highway 87. The effluent disposal is located approximately 1,200 feet south of the plant site, between Highway 87 and the Atchison Topeka and Santa Fe Railroad, approximately 2.23 miles south of Highway 380 in Lynn County, Texas.

THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE has applied for a renewal of TPDES Permit No. 12458-002 that authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 0.25 million gallons per day. The plant site is located approximately 1.5 miles southwest of the intersection of Farm-to-Market Road 2 and State Highway 6, approximately 1.0 mile southeast of the City of Courtney in Grimes County, Texas.

TRINITY RIVER AUTHORITY OF TEXAS has applied for a major amendment to TPDES Permit No. 10303-001 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 162,000,000 gallons per day to an annual average flow not to exceed 189,000,000 gallons per day and to authorize a wet weather facility to receive wet weather flows in excess of the wastewater treatment plant hydraulic capacity. The current permit authorizes marketing and distribution and monofill of sewage sludge. The applicant has also applied to the TCEQ for approval of a substantial modification to its pretreatment program under the TPDES program. The facility is located approximately 6,000 feet northwest of the intersection of Interstate Highway 30 and Loop 12, at the confluence of the West Fork Trinity River and Mountain Creek in Dallas County, Texas. The sludge treatment works and the sludge disposal site are on the same site as the wastewater treatment facility.

THE CITY OF VICTORIA & GUADALUPE - BLANCO RIVER AUTHORITY have applied for a renewal of TPDES Permit No. 10466-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,500,000 gallons per day. The facility is located on the east bank of the Guadalupe River, midway between Wharf Street and Peachtree Street, approximately 1.7 miles southwest of the intersection of U.S. Highways 59, 77 and 87, in the City of Victoria, in Victoria County, Texas.

CITY OF WEIMAR has applied for a renewal of TPDES Permit No. 10311-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately 2500 feet east of Farm-to-Market Road 155 between U. S. Highway 90 and Interstate Highway 10 in Colorado County, Texas.

WINDERMERE OAKS WATER SUPPLY CORPORATION has applied for a renewal of Permit No. 11694-001, which authorizes the disposal of treated domestic wastewater at a flow not to exceed a daily average volume of 40,000 gallons per day via surface irrigation of 24 acres of land. The current permit does not authorize land application of sewage sludge for beneficial. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 13 miles east of the intersection of State Highway 71 and U.S. Highway 281 in Burnet County, Texas. The facility and disposal site are located in the drainage basin of Lake Travis in Segment No. 1404 of the Colorado River basin.

Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 30 DAYS OF THE ISSUED DATE OF THIS NOTICE

The TCEQ has initiated a minor amendment of the Texas Pollutant Discharge Elimination System (TPDES) permit issued to HARRIS COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 84, to authorize the use of saltwater species for biomonitoring testing instead of freshwater species incorporated in the existing permit. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,000,000 gallons per day. The facility is located at 16224 Bear Bayou Drive, southwest of the intersection of Bear Bayou Drive and North Avenue in the Old River Subdivision in Harris County, Texas.

The Texas Commission on Environmental Quality (TCEQ) has initiated a minor amendment of the Texas Pollutant Discharge Elimination System (TPDES) permit issued to UPPER LEON RIVER MUNICIPAL WATER DISTRICT to correct the description of the discharge route which was stated as from the plant site to a drainage ditch; thence to an unnamed seasonal creek; thence to the Upper Leon River Below Lake Proctor in Segment No. 1221 of the Brazos River Basin to a more accurate description stated as from the plant site to an on-site holding pond then to a drainage ditch; thence to an unnamed seasonal creek; thence to the Upper Leon River Below Proctor Lake in Segment No. 1221 of the Brazos River Basin. The facility is located on Farm-to-Market Road 2861, 1.8 miles north of the intersection of Farm-to-Market

Road 2861 and U.S. Highway 377, which is located 4.6 miles west of the City of Proctor in Comanche County, Texas.

TRD-200407178
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 8, 2004

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Proposed Enforcement Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075, which requires that the commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 17, 2005**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 17, 2005**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the commission in **writing**.

(1) COMPANY: Abitibi-Consolidated Corporation; DOCKET NUMBER: 2004-1145-AIR-E; IDENTIFIER: Air Account Number AC0017B, Regulated Entity Number (RN) 100220110; LOCATION: Lufkin, Angelina County, Texas; TYPE OF FACILITY: paper mill; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(A) and THSC, §382.085(b), by failing to submit a semi-annual deviation report; PENALTY: $1,980; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(2) COMPANY: Advanced Aromatics, L.P.; DOCKET NUMBER: 2004-1297-AIR-E; IDENTIFIER: Air Account Number HG0132V, RN100214832; LOCATION: Baytown, Harris County, Texas; TYPE OF FACILITY: industrial organic chemical plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F), Permit Number 2321, and THSC, §382.085(b), by failing to meet the permitted limit of 5.64 tons for total emissions of oxides of nitrogen; PENALTY: $840; ENFORCEMENT COORDINATOR: Chad Blevins, (512) 239-6017; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Alamo Concrete Products, Ltd.; DOCKET NUMBER: 2004-1153-WQ-E; IDENTIFIER: Texas Pollutant Discharge Elimination Discharge (TPDES) Stormwater General Permit Number TXR05L526, RN102523123; LOCATION: Georgetown, Williamson County, Texas; TYPE OF FACILITY: crushed and broken limestone mining; RULE VIOLATED: the Code, §26.121(a)(1), by failing to prevent the unauthorized discharge of sediment; and 30 TAC §305.125(1) and TPDES Stormwater General Permit Number TXR05L526, by failing to maintain the management records; PENALTY: $660; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-0739; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758- 5336, (512) 339-2929.

(4) COMPANY: Albemarle Corporation; DOCKET NUMBER: 2004-0941-IHW-E; IDENTIFIER: Solid Waste Registration (SWR) Number 83328, RN100218247; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: speciality chemicals and resins manufacturing; RULE VIOLATED: 30 TAC §335.2(a) and (b), by failing to properly dispose of industrial Class 1 waste; PENALTY: $2,900; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: City of Alpine; DOCKET NUMBER: 2003-0069-MWD-E; IDENTIFIER: TPDES Permit Number 10117-001 (Expired); LOCATION: Alpine, Brewster County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.63(a) and §305.125(2) and the Code, §26.121(a), by failing to apply for permit renewal; PENALTY: $10,472; ENFORCEMENT COORDINATOR: Cari Bing, (512) 239-1445; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(6) COMPANY: AROC (Texas), Inc.; DOCKET NUMBER: 2004-1202-AIR-E; IDENTIFIER: Air Account Numbers BL0216U and BL0026E, RN100912302 and RN100893437; LOCATION: near Danciger, Brazoria County, Texas; TYPE OF FACILITY: natural gas compressor engines; RULE VIOLATED: 30 TAC §101.359 and THSC, §382.085(b), by failing to submit the ECT-1 Forms, annual compliance report; PENALTY: $1,400; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023- 1486, (713) 767-3500.

(7) COMPANY: Ashfaque & Saiqa, Inc. dba Rylie One Stop; DOCKET NUMBER: 2004-1113- PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 29353; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Chad Blevins, (512) 239-6017; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588- 5800.

(8) COMPANY: City of Bartlett; DOCKET NUMBER: 2004-0695-PWS-E; IDENTIFIER: Public Water Supply Number 2460006, RN101375590; LOCATION: Bartlett, Williamson County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.44(f)(3), by failing to sample a new water main for microbiological analysis; 30 TAC §290.46(f)(2) and (3)(A)(iv), (j), (m)(4), (n)(2), and (u), by failing to make the public water system's operating records accessible, by failing to maintain records documenting the monthly flushing of the dead end mains, by failing to complete a customer service inspection certificate, by failing to maintain all water treatment units, storage and pressure maintenance facilities, distribution system lines, and related appurtenances in a watertight condition, by failing to maintain an accurate and up-to-date map of the distribution system, and by failing to plug or test an abandoned pubic water supply well owned by the system; 30 TAC

§290.42(e)(4)(A) and (l), by failing to have a full-face self-contained breathing apparatus and by failing to have a plant operations manual available for review and reference; 30 TAC §290.43(c)(2), by failing to lock the roof hatch access opening on the elevated storage tank; and 30 TAC §290.41(c)(1)(F) and (3)(B), (K), and (O), by failing to secure a sanitary control easement, by failing to provide a well casing, by failing to seal the well head with gaskets or a pliable crack-resistant caulking compound, and by failing to provide an intruder-resistant fence; PENALTY: $6,050; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-4575; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(9) COMPANY: Belco Manufacturing Company, Inc.; DOCKET NUMBER: 2004-1025-AIR-E; IDENTIFIER: Air Account Number BF0104B, RN100215524; LOCATION: near Waco, Bell County, Texas; TYPE OF FACILITY: fiberglass tank and duct manufacturing; RULE VIOLATED: 30 TAC §122.145(2)(C) and §122.146(2), Federal Operating Permit Number O-02192, and THSC, §382.085(b), by failing to submit the annual Title V Compliance certification reports; PENALTY: $6,700; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: Bluebonnet Investors dba Bluebonnet Dairy; DOCKET NUMBER: 2004- 1401-AGR-E; IDENTIFIER: TPDES Permit Number 0003286000, RN102073244; LOCATION: Stephenville, Erath County, Texas; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §321.40(d) and (e) (formerly 30 TAC §321.39(f)(19)(A) and (D)), by failing to maintain tailwater run-off and by failing to conduct irrigation practices so as to reduce or minimize ponding and puddling of wastewater; PENALTY: $1,010; ENFORCEMENT COORDINATOR: Sherry Smith, (512) 239-0572; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Bowie-Sims-Prange, Inc.; DOCKET NUMBER: 2004-0826-PST-E; IDENTIFIER: PST Facility Identification Number 20845, RN100856707; LOCATION: Carrollton, Dallas County, Texas; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.45(e)(2)(D) and the Code, §26.347(b), by failing to replace missing drop tubes; 30 TAC §334.50(d)(1)(B)(ii), (iii)(I), and (e)(1), and the Code, §26.3475(c)(1), by failing to have a release detection method for the underground storage tank (UST) system; and 30 TAC §334.10(b)(2)(B)(v), by failing to maintain records for inspecting the impressed current cathodic protection system; PENALTY: $3,672; ENFORCEMENT COORDINATOR: Bill Davis, (512) 239- 6793; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(12) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2004-0704-AIR-E; IDENTIFIER: Air Account Number BL-0042-G, RN101619179; LOCATION: Old Ocean, Brazoria County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.20(1) and (3) and §116.115(c), Air Permit Numbers 30513 and 5682A/PSD-TX- 103M2, 40 Code of Federal Regulations (CFR) §60.105(a)(4), and THSC, §382.085(b), by failing to conduct successive quarterly cylinder gas audits on the continuous emission monitoring system (CEMS), by failing to calibrate, certify, maintain, and operate a CEMS, and by failing to conduct a valid audit on the CEMS; 30 TAC §111.111(a)(4)(A)(ii) and THSC, §382.085(b), by failing to note daily observations in the flare operation log; 30 TAC §§101.20(3), 115.352(2), and 116.115(c), Air Permit Number 5682A/PSD-TX-103M2 and 30513, and THSC, §382.085(b), by failing to comply with the five- and 15-day requirements for leaking valves; and 30 TAC §101.20(2), 40 CFR §63.120(b)(1)(i), and THSC, §382.085(b), by failing to demonstrate compliance with the required primary seal inspection; PENALTY: $93,380; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2003-0446-AIR-E; IDENTIFIER: Air Account Number BL-0042-G, RN101619179; LOCATION: Old Ocean, Brazoria County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.20(1) and (2) and §116.115(c), 40 CFR §§60.105(a)(4), 60.482-2(a)(1), 60.482- 7(a), 60.487(a) and (c)(2)(vii), and 63.182(d)(2), Air Permit Numbers 21265, 30513, and 5682A, and THSC, §382.085(b), by failing to implement a fugitive monitoring program, by failing to submit the semi-annual reports for the wastewater unit and the copper treater unit, by failing to permit the initial compliance certification test, by failing to perform the initial compliance certification test on the hydrogen sulfide CEMS, by failing to submit semi-annual reports for Unit 35, and by failing to include an explanation for the delay in repairing leaking components; PENALTY: $59,114; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: City of Cuney; DOCKET NUMBER: 2004-0688-MWD-E; IDENTIFIER: TPDES Permit Number 13728-001, RN101609469; LOCATION: Cuney, Cherokee County, Texas; TYPE OF FACILITY: municipal wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 13728-001, and the Code, §26.121(a), by allowing exceedances of total suspended solids (TSS), five-day biochemical oxygen demand (BOD5), chlorine, and dissolved oxygen (DO); and 30 TAC §21.4, by failing to pay water quality fees; PENALTY: $4,860; ENFORCEMENT COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(15) COMPANY: Domco Products Texas, L.P. dba Tarkett Texas; DOCKET NUMBER: 2004- 1186-AIR-E; IDENTIFIER: Air Account Number HG0772C, RN100896729; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: tile manufacturing; RULE VIOLATED: 30 TAC §101.352(b) and THSC, §382.085(b), by failing to hold adequate quantity of allowances in the compliance account; and 30 TAC §101.359 and THSC, §382.085(b), by failing to submit a completed ECT-1 Form, annual compliance report; PENALTY: $2,640; ENFORCEMENT COORDINATOR: Ruben Soto, (512) 239-4571; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: Frost Crushed Stone Company, Inc.; DOCKET NUMBER: 2004-1068-WQ- E; IDENTIFIER: RN104329776; LOCATION: Marlin, Falls County, Texas; TYPE OF FACILITY: surface mining; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(a), by failing to obtain authorization to discharge storm water associated with industrial activity; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(17) COMPANY: Nadir Ali dba Get & Go Food; DOCKET NUMBER: 2004-0162-PST-E; IDENTIFIER: PST Facility Identification Number 28367; LOCATION: Yoakum, De Witt County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.10(b), by failing to maintain copies of all required records pertaining to a UST system in a secure location; 30 TAC §334.50(a)(1)(A) and (b)(2)(A)(i)(III) and the Code, §26.3475, by failing to monitor USTs for releases, by failing to conduct a piping tightness test, and by failing to test a line leak detector; and

30 TAC §334.49(c)(2)(C) and (4) and the Code, §26.3475, by failing to regularly inspect the impressed cathodic protection system and by failing to have the system inspected and tested to determine the adequacy of the cathodic protection by a qualified corrosion specialist; PENALTY: $16,800; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(18) COMPANY: Inayat's, Inc. dba Stop & Shop; DOCKET NUMBER: 2004-1306-PST-E; IDENTIFIER: PST Facility Identification Number 67449, RN101542702; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,520; ENFORCEMENT COORDINATOR: Joseph Daley, (512) 239-3308; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: ISP Synthetic Elastomers, LP; DOCKET NUMBER: 2004-0959-AIR-E; IDENTIFIER: Air Account Number JE0017A, RN100224799; LOCATION: Port Neches, Jefferson County, Texas; TYPE OF FACILITY: styrene-butadiene rubber plant; RULE VIOLATED: THSC, §382.085(a), by allowing the unauthorized emission of an air contaminant; and 30 TAC §113.260, 40 CFR §63.104(a), and THSC, §382.085(b), by failing to properly monitor the heat exchange system of the cooling tower for volatile organic compounds; PENALTY: $13,600; ENFORCEMENT COORDINATOR: Larry King, (512) 239-7037; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(20) COMPANY: Karim Sunesara dba Jacks Grocery 4; DOCKET NUMBER: 2004-1276-PST- E; IDENTIFIER: PST Facility Identification Number 44903, RN102250719; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,520; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767- 3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500.

(21) COMPANY: City of Joaquin; DOCKET NUMBER: 2004-0524-MWD-E; IDENTIFIER: TPDES Permit Number 12718-001; LOCATION: Joaquin, Shelby County, Texas; TYPE OF FACILITY: domestic wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 12718-001, and the Code, §26.121(a), by failing to comply with permitted effluent limitations; PENALTY: $6,848; ENFORCEMENT COORDINATOR: Sherry Smith, (512) 239-0572; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898- 3838.

(22) COMPANY: Jerry Chambers dba Joes Quick Stop 2; DOCKET NUMBER: 2004-1283- PST-E; IDENTIFIER: PST Facility Identification Number 42992, RN102434776; LOCATION: Harlingen, Cameron County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.4(c), by failing to conduct inventory control; 30 TAC §334.50(a)(1)(A), (b)(2)(A)(i)(III) and (ii)(I), and the Code, §26.3475(a) and (c)(1), by failing to monitor tanks for release detection, by failing to test line leak detectors, and by failing to test product piping; 30 TAC §334.8(c)(5)(C), by failing to permanently tag, label, or mark the UST system with an identification number; and 30 TAC §334.10(b), by failing to make records readily accessible and available for inspection; PENALTY: $8,640; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-4575; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(23) COMPANY: Jose Galarza dba Laureles Grocery; DOCKET NUMBER: 2004-1207-PST-E; IDENTIFIER: PST Facility Identification Number 26899, RN101684223; LOCATION: Laureles, Cameron County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239- 0321; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425- 6010.

(24) COMPANY: Maverick Tube, L.P.; DOCKET NUMBER: 2004-0995-IWD-E; IDENTIFIER: TPDES Permit Number WQ0002365000, RN100543131; LOCATION: Conroe, Montgomery County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0002365000, and the Code, §26.121(a), by failing to maintain compliance with permit effluent limits for TSS, BOD5, chemical oxygen demand, and oil and grease; PENALTY: $11,050; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(25) COMPANY: Military Highway Water Supply Corporation; DOCKET NUMBER: 2004- 0758-WQ-E; IDENTIFIER: TPDES Permit Number 13462-005, RN10151287; LOCATION: Los Indios, Cameron County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and §317.4(j)(8), TPDES Permit Number 13462-005, and the Code, §26.121(a)(1), by failing to comply with permit conditions and by failing to ensure that the holding ponds conform to the TCEQ design criteria for sewage systems; PENALTY: $3,300; ENFORCEMENT COORDINATOR: Chris Friesenhahn, (210) 490-3096; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(26) COMPANY: Moffett Twin Oaks Mobile Home Property Trust; DOCKET NUMBER: 2004-1204-MWD-E; IDENTIFIER: TPDES Permit Number WQ0011588001, RN101519064; LOCATION: Lufkin, Angelina County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and the Code, §26.121(a), by failing to comply with the permitted limits for DO, TSS, BOD5, and chlorine; PENALTY: $7,080; ENFORCEMENT COORDINATOR: Brandon Smith, (512) 239-4471; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(27) COMPANY: City of Pittsburg; DOCKET NUMBER: 2004-1228-MWD-E; IDENTIFIER: TPDES Permit Number 10250001; LOCATION: Pittsburg, Camp County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10250001, and the Code, §26.121(a), by failing to comply with the permitted limits for BOD5, TSS, and ammonia nitrogen; PENALTY: $3,180; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701- 3756, (903) 535-5100.

(28) COMPANY: Q & K Construction Co., Inc.; DOCKET NUMBER: 2004-1056-WQ-E; IDENTIFIER: RN104311725; LOCATION: Comfort, Kendall County, Texas; TYPE OF FACILITY: limestone quarry; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(a), by failing to obtain authorization to discharge storm water associated with industrial activity; PENALTY: $8,000; ENFORCEMENT COORDINATOR: Joseph Daley, (512) 239-3308; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(29) COMPANY: Quest Chemical Corporation; DOCKET NUMBER: 2004-1453-IHW-E; IDENTIFIER: SWR Number 74760, RN100657477; LOCATION: Houston, Harris County, Texas; TYPE

OF FACILITY: detergent manufacturing; RULE VIOLATED: 30 TAC §335.69(a)(1)(B) and §335.112(a)(9) and 40 CFR §262.34(a)(1)(ii) and §265.193(a)(1), by failing to provide secondary containment for two new hazardous waste storage tanks; PENALTY: $5,400; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(30) COMPANY: Rock Crushers, Inc.; DOCKET NUMBER: 2004-1070-WQ-E; IDENTIFIER: RN101942761; LOCATION: Burton, Washington County, Texas; TYPE OF FACILITY: quarry; RULE VIOLATED: 30 TAC §281.55 and 40 CFR §122.26(a), by failing to have authorization to discharge storm water from an industrial activity; PENALTY: $3,600; ENFORCEMENT COORDINATOR: David VanSoest, (512) 239-0468; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(31) COMPANY: Salado Quarry, Inc.; DOCKET NUMBER: 2004-1102-WQ-E; IDENTIFIER: RN104327382; LOCATION: near Florence, Bell County, Texas; TYPE OF FACILITY: quarry; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(a), by failing to have authorization to discharge storm water from an industrial activity; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(32) COMPANY: Hedar Elatassi dba South Braeswood Texaco; DOCKET NUMBER: 2004- 1329-PST-E; IDENTIFIER: PST Facility Identification Number 23096, RN102598828; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,850; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239- 2134; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500.

(33) COMPANY: City of Splendora; DOCKET NUMBER: 2004-0812-MWD-E; IDENTIFIER: TPDES Permit Number WQ0013389001, RN102181922; LOCATION: Splendora, Montgomery County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit No. WQ0013389001, and the Code, §26.121(a), by failing to maintain compliance with permitted effluent limits for TSS and flow; PENALTY: $13,100; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(34) COMPANY: Tamminga Family Partnership, Ltd. dba Tamminga Dairy Farm; DOCKET NUMBER: 2004-0916-AGR-E; IDENTIFIER: TPDES Permit Number WQ0002714-000; LOCATION: Waxahachie, Ellis County, Texas; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §321.39(f)(28)(G), by failing to file a detailed nutrient utilization plan; and 30 TAC §321.33(p) and TPDES Permit Number WQ0002714-000, by failing to obtain a permit amendment to reflect usage of all land application sites; PENALTY: $3,360; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(35) COMPANY: Texas Department of Criminal Justice; DOCKET NUMBER: 2004-0596- PWS-E; IDENTIFIER: Public Water Supply Number 0500026, RN102415064; LOCATION: Gatesville, Coryell County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(iii) and (f)(3) and THSC, §341.015(c), by failing to meet the agency's minimum water system capacity requirements and by failing to provide a water purchase contract; and 30 TAC §§205.6, 305.53, 312.9, and 325.5(d), by failing to pay fees; PENALTY: $210; ENFORCEMENT COORDINATOR: David VanSoest, (512) 239-0468; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(36) COMPANY: Texcon Materials, Ltd. dba Texcon Materials Pettibone Plant and S & S Sand Pit; DOCKET NUMBER: 2004-1067-WQ-E; IDENTIFIER: RN104333539 and RN104319678; LOCATION: Cameron, Milam County, Texas; TYPE OF FACILITY: stone quarries; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(a), by failing to obtain authorization to discharge storm water associated with industrial activity; PENALTY: $16,000; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825-3100; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(37) COMPANY: Tony Lama Company; DOCKET NUMBER: 2004-1374-AIR-E; IDENTIFIER: Air Account Number EE0444D, RN100217710; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: boot manufacturing; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit a timely permit compliance certification; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Jill Reed, (915) 570-1359; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(38) COMPANY: TXU Gas Company dba TXU Lone Star Pipeline Company; DOCKET NUMBER: 2004-1215-AIR-E; IDENTIFIER: Air Account Number WB0036F, RN102198819; LOCATION: Katy, Waller County, Texas; TYPE OF FACILITY: natural gas storage; RULE VIOLATED: 30 TAC §101.352(b) and THSC, §382.085(b), by failing to ensure an adequate emission allowance for the 2003 control period; PENALTY: $800; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(39) COMPANY: William Marsh Rice University; DOCKET NUMBER: 2004-0912-AIR-E; IDENTIFIER: Air Account Number HG-1149-U, RN100245968; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: university with turbine generators for supplemental electrical power; RULE VIOLATED: 30 TAC §§122.143(4), 122.145(2)(A), and 122.146(5)(C), Federal Operating Permit Number O-01806, and THSC, §382.085(b), by failing to monitor and record twice monthly the nitrogen and sulfur content of the fuel being fired in a stationary gas-fired turbine; and 30 TAC §101.360(a)(1) and THSC, §382.085(b), by failing to submit a completed ECT- 3, Level of Activity Certification form; PENALTY: $5,014; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200407153
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 7, 2004

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Department of Family and Protective Services

Request for Proposal--Community Based Child Abuse Prevention Training and Technical Assistance

The Texas Department of Family and Protective Services (DFPS), Division of Prevention and Early Intervention, is soliciting proposals to provide Training and Technical Assistance services to Community-Based Child Abuse Prevention (CBCAP) providers. DFPS anticipates funding only one contract as a result of this solicitation. **The Request for**

Proposal (RFP) was released on December 1, 2004. The RFP will be posted on the State Internet Site at http://marketplace.state.tx.us on the date of its release.

Brief Description of Services: The purpose of this RFP is to solicit proposals for a service contract to provide training and technical assistance for CBCAP contractors who are responsible for developing and sustaining Community Partnerships for Strengthening Families (CFPS).

Eligible Applicants: Eligible offerors include private nonprofit and for-profit corporations, cities, counties, state agencies/entities, partnerships, and individuals. Historically Underutilized Business (HUBs), Minority Businesses and Women's Enterprises, and Small Businesses are encouraged to apply.

Limitations: The funding allocated for the contract resulting from this RFP is dependent on Legislative appropriation. Funding is not guaranteed at the maximum level, or at any level. DFPS reserves the right to reject any and all offers received in response to this RFP and to cancel this RFP if it is deemed in the best interest of DFPS. DFPS also reserves the right to re-procure this service.

If no acceptable responses are received, or no contract is entered into as a result of this procurement, DFPS intends to procure by non-competitive means in accordance with the law but without further notice to potential vendors.

Deadline for Proposals, Term of Contract, and Amount of Award: Proposals will be due January 4, 2005, at 3:00 p.m., Central Standard Time. The effective dates of the contract awarded under this RFP will be February 1, 2005, through August 31, 2005. DFPS anticipates that the maximum available funds for services purchased under the procurement will be $70,000.

Contact Person: Potential offerors may obtain a copy of the RFP on or about December 1, 2004. It is preferred that requests for the RFP be submitted in writing (by mail or fax) to: Sundee McKnight: Mail Code Y-956; Texas Department of Protective and Regulatory Services: P.O. Box 149030; Austin, Texas 78714-9030; Fax: 512-821-4767.

TRD-200407133
Gerry Williams
General Counsel
Department of Family and Protective Services
Filed: December 6, 2004

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General Land Office

Notice of Intent to Conduct Restoration Planning

M/V Torm Mary IFO-380 (#6) Fuel Oil Discharge into the Neches River, Jefferson and Orange Counties, August 2, 2004: Notice of Intent to Conduct Restoration Planning Pursuant to 15 C.F.R. §990.44

AGENCIES: Texas General Land Office (Land Office), Texas Parks and Wildlife Department (TPWD), Texas Commission on Environmental Quality (TCEQ), United States Fish and Wildlife Service (USFWS), and National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice of Intent to Conduct Restoration Planning pursuant to the Oil Pollution Act of 1990 (OPA) for impacts to natural resources from the August 2, 2004 M/V Torm Mary fuel oil discharge into the Neches River and the Bessie Heights Marsh within the Nelda Stark Unit of the TPWD Lower Neches Wildlife Management Area (Bessie Heights Marsh). All areas of impact are located within Jefferson and Orange Counties, Texas.

SUMMARY: Natural resource trustees (Trustees) are designated pursuant to OPA, 33 U.S.C. §2706(b), Executive Order 12777, and the National Contingency Plan, 40 C.F.R. §300.600 and 300.605, with responsibility to conduct natural resource damage assessments on behalf of the public when releases of oil affect natural resources and services. On August 2, 2004, the anchored ship M/V Torm Mary released approximately 600 barrels of #6 Fuel Oil (IFO-380) from the starboard number two fuel tank after being struck by a barge attempting to moor alongside. The fuel oil was released into and on navigable waters of the Neches River, Gray's Bayou, Bessie Heights Marsh, and numerous small sloughs that terminate in the Neches River. Observed impacts include shoreline oiling of marsh vegetation along the Neches River , Gray's Bayou, and Bessie Heights Canals. Shoreline oiling was also noted along the southwestern edge of the Bessie Heights Marsh and within the TPWD Lower Neches Wildlife Management Area. The discharge of #6 Fuel Oil impacted open water, shoreline fringing vegetation, sand and shell mud beach, freshwater marsh, and intermediate marsh habitats. The oiling of these habitats ranged from light to heavy, and resulted in bands of fuel oil of varying widths on vegetation and on open water. Aerial survey reports and shoreline survey indicate that sheen of fuel oil was observed in the open water portions of the Bessie Heights Marsh and along the Neches River from the point of collision just below the Reserve Fleet anchorage to the mouth of Sabine Lake. In addition to the impact to wildlife and wildlife habitat, the incident resulted in the loss of use by the public of recreational fishing and boating opportunities.

Trustees for the incident are the Land Office, TCEQ, TPWD, USFWS (representing the United States Department of the Interior), and NOAA (representing the United States Department of Commerce). The Trustees have determined that the incident warrants conducting a natural resource damage assessment (NRDA). This notice serves to inform the public that the Trustees are proceeding with an assessment and restoration planning, and will subsequently seek public input for planning restoration for the injuries resulting from this oil spill. This assessment will be conducted in accordance with the NRDA regulations for oil spills at 15 C.F.R. §§990.10 et seq.

ADDRESSES: A copy of this Notice of Intent and further information relating to the assessment and restoration planning may be obtained by contacting: Keith Tischler, Texas General Land Office, Coastal Resources Division, Natural Resource Trustee Program, P. O. Box 12873, Austin, Texas 78711-2873, Phone: (512) 463-6287, e-mail: keith.tischler@glo.state.tx.us.

SUPPLEMENTARY INFORMATION: In support of their decision to proceed with the assessment and issue this notice, the Trustees have made several determinations as required by 15 C.F.R. §990.41. First, the Trustees have jurisdiction to pursue restoration pursuant to the Oil Pollution Act. The Trustees have determined that the incident resulted in the discharge of approximately 600 bbls of #6 Fuel Oil (IFO-380) into or on navigable waters and shorelines of the United States and Texas and constituted an incident as defined in 15 C.F.R. §990.30. The discharge was from the vessel M/V Torm Mary. The incident is not from a public vessel or from an offshore facility subject to the Trans-Alaska Pipeline Authority Act, 43 U.S.C. 1651, et seq.

Using information gathered during pre-assessment activities, the Trustees have determined that natural resources under their trusteeship have been injured as a result of this incident. The Trustees have conducted initial surveys of the areas where spill impacts were observed in order to document the areas oiled, the degree of oiling, and whether any impacts or mortality could be observed on either the flora or fauna of the area. The Trustees have made the further determination required by 15 C.F.R. §990.42(a), that it is appropriate to proceed with restoration planning for this incident. Restoration

planning is necessary since injuries have resulted from the incident. The Trustees base this determination upon data that demonstrates that natural resources and services have been injured. Natural resources or their services injured as a result of the spill and spill response may include, but are not limited to: wetland and surface waters of Bessie Heights Marsh; shoreline habitat and waters of the Neches River and connected sloughs; and biota which may include benthic communities, fish, birds, and other wildlife species.

During the first 24 hours of the spill the Land Office and the United States Coast Guard (Coast Guard) responded to the spill and coordinated the initial deployment of spill response teams contracted through the M/V Torm Mary vessel interests. Oil collection soft booms and snares were deployed along and across the Neches River and adjacent sloughs leading into wetlands, as well as Bessie Heights Marsh. Numerous small craft and skimmers were deployed in conjunction with the passive measures (booms and snares) and shoreline clean-up activities, to collect residual product. From the date of the incident, the Port Neches Park boat ramp and adjacent infrastructure were used as a staging area for oil spill response activities as designated in the Land Office's Oil Spill Response Plan and were subsequently not available for public use. On August 27, 2004 the Land Office and Coast Guard approved the reopening of the Port Neches Park boat ramp and adjoining facilities for public use. Additional shoreline clean-up continued up through September 7, 2004, concluding at the UNOCAL dock facilities across from the spill location. Response actions were successful in removing a portion of the fuel oil. The response actions described have not adequately addressed, or are not expected to address, the environmental and recreational injuries from the incident, including interim losses. Thus, restoration planning is warranted.

The Trustees are conducting restoration planning since there are feasible primary and/or compensatory restoration actions available to address the potential injuries. There are opportunities available in or near the impacted area to restore or compensate for injury to surface water, wetland habitats, benthic communities, and biota which would include fish, birds, and other wildlife species associated with the impacted areas and the services they provided.

Finally, restoration planning is being undertaken since assessment procedures exist to evaluate the injuries and define the appropriate type and scale of restoration for the injured natural resources and services. The Trustees have determined that appropriate assessment procedures are available for this incident and those procedures meet the applicable standards for such methods set forth in 15 C.F.R. §990.27. The Trustees intend to use the results from monitoring points established within the oiled wetlands and shorelines of the Neches River as well as a selected reference locations in conjunction with Habitat Equivalency Analysis (HEA). The HEA is a method by which the Trustees can apply a resource-to-resource approach, to determine and quantify injury levels as well as scale appropriate ecological restoration actions. Recreational service losses will be evaluated by analyzing historical usage data for the boat ramp located at the Port Neches Park and determining the value of lost recreational opportunity through benefits transfer methods.

Representatives from the M/V Torm Mary vessel interests have participated in the coordination of the spill response as well as initial NRDA pre-assessment efforts. The Land Office identified the responsible party as D/S Torm A/S Dampskibsselskabet TORM, the operator of the vessel from which the oil was discharged, as the responsible party for the spill, pursuant to Tex. Nat. Res. Code, §40.003(20)(A), through a State Letter of Interest dated August 6, 2004. The U.S. Coast Guard also designated D/S TORM A/S Dampskibsselskabet TORM, pursuant to 33 U. S. C. §§2701(32) and 2702. The responsible party has identified the following as their representative: Mr. Alan Sampson, M/V Torm Mary Vessel Interest Representative, Benckenstein & Oxford, L.L.P, Community Bank Building, 3535 Calder St. - 3rd Floor, P. O. Box 150, Beaumont, Texas 77704-0150.

The Trustees have begun compiling applicable documents into an administrative record that explains the assessment and restoration decision-making process for this incident. Information regarding public access to this record or information regarding this notice may be obtained by contacting: Keith Tischler, Texas General Land Office, Coastal Resources Division, Natural Resource Damage Assessment Program, P. O. Box 12873, Austin, Texas 78711-2873, Phone: (512) 463-6287, e-mail: keith.tischler@glo.state.tx.us.

TRD-200407172
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: December 8, 2004

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Office of the Governor

Request for Grant Applications (RFA) for the Safe and Drug-Free Schools and Communities (SDFSC) Act Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that implement drug and violence prevention activities which compliment or support local education agency activities during the state fiscal year 2006 grant cycle.

Purpose: The purpose of the SDFSC Act Fund Program is to support programs that prevent violence in and around schools; that prevent the illegal use of alcohol, tobacco, and drugs; that involve parents and communities; and that are coordinated with related federal, state, school, and community efforts and resources to foster a safe and drug-free learning environment that supports student academic achievement.

Available Funding: Federal funding is authorized under the No Child Left Behind Act of 2001, Public Law 107-110.

Standards: Grantees must comply with the standards applicable to this funding source cited in Texas Administrative Code, Title 1, Part 1, Chapter 3 and the requirements of the federal statutes that authorize this funding.

Prohibitions: Grant funds may not be used to support the following services, activities, or costs:

(1) legal services for adult offenders charged with, given deferred adjudication for, or convicted of violent or other serious crimes including murder, arson, robbery, sexual assault, aggravated sexual assault, burglary, felony drug crimes, crimes against children, kidnapping, aggravated kidnapping, and manslaughter, unless the executive director grants an exception;

(2) admission fees or tickets to any amusement park, recreational activity or sporting event;

(3) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state, or local funds (e.g., supplanting);

(4) any portion of the salary of, or any other compensation for an elected or appointed government official, except in the case of a juvenile court or drug court;

(5) construction;

(6) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement and/or social activities in any way;

(7) fundraising;

(8) lobbying;

(9) medical services;

(10) membership dues for individuals;

(11) overtime pay;

(12) promotional gifts;

(13) proselytizing or sectarian worship;

(14) transportation, lodging, per diem or any related costs for participants, when grant funds are used to develop and conduct training;

(15) vehicles or equipment for government agencies that are for general agency use; and

(16) weapons, ammunition, explosives or military vehicles;

Eligible Applicants:

(1) Councils of governments;

(2) Cities;

(3) Counties;

(4) Universities;

(5) Colleges;

(6) Independent school districts;

(7) Nonprofit corporations;

(8) Crime control and prevention districts;

(9) State agencies;

(10) Native American tribes;

(11) Regional education service centers;

(12) Community supervision and corrections departments;

(13) Juvenile boards; and

(14) Faith-based organizations. Faith-based organizations must be tax-exempt nonprofit entities as certified by the Internal Revenue Service.

Requirements: Grant activities must include:

(1) Activities that complement and support local educational agency activities including developing and implementing activities to prevent and reduce violence associated with prejudice and intolerance;

(2) Dissemination of information about drug and violence prevention; and

(3) Development and implementation of community-wide drug and violence prevention planning and organizing.

(4) All juvenile projects or applications for projects serving delinquent or at-risk youth must address at least one of the following:

(a) Family Stability. Programs or other initiatives designed to strengthen family support systems in an effort to positively impact the lives of youth and divert them from a path of serious, violent, and chronic delinquency.

(b) Substance Abuse Early Intervention and Prevention. Programs or other initiatives designed to address the use and abuse of illegal and other prescription and nonprescription drugs and the use and abuse of alcohol. Programs, research, or other initiatives include control, prevention, and treatment.

(c) Education. Programs or other initiatives designed to prevent truancy, suspension, and expulsion. School safety programs may include support for school resource officers and law-related education.

(d) Disproportionate Minority Contact. Programs or other initiatives designed to address the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system.

(e) Justice System Impact. Programs or other initiatives designed to impact offender accountability and/or improve the practice, policies, or procedures within the juvenile justice system.

(f) Gang Prevention. Programs or other initiatives designed to address issues related to juvenile gang activity, including prevention and intervention efforts directed at reducing gang-related activities.

(g) Rural Access. Programs or other initiatives designed to provide prevention, intervention, and treatment services located outside a metropolitan area.

(h) Training. Programs or other initiatives designed to offer specialized training for staff working directly with at-risk youth or juvenile offenders that can positively impact the quality of the services, staff turnover rates, and program stability.

Project Period: Grant-funded projects must begin on or after September 1, 2005, and will expire on or before August 31, 2006.

Application Process: Eligible applicants can download an application kit from the Office of the Governor's website address located at http://www.governor.state.tx.us/divisions/cjd/formsapps/view.

Preferences: Preferences will be given to:

(1) programs or activities that prevent illegal drug use and violence for:

(a) children and youth who are not normally served by State educational agencies or local educational agencies; and

(b) populations that need special services or additional resources (such as youth in juvenile detention facilities, runaway or homeless children and youth, pregnant and parenting teenagers, and school dropouts).

(2) programs that pursue a comprehensive approach to drug and violence prevention that includes providing and incorporating mental health services related to drug and violence prevention.

Closing Date for Receipt of Applications: All applications must be submitted to the Office of the Governor, Criminal Justice Division (CJD), via email to cjdapps@governor.state.tx.us on or before March 1, 2005.

Selection Process:

(1) All applications will be reviewed for eligibility upon submission to CJD.

(2) For eligible local and regional projects:

(a) Applications are forwarded by CJD to the appropriate regional council of governments (COG).

(b) The COG's criminal justice advisory committees prioritize all eligible applications based on community and/or comprehensive planning, overall cost and program effectiveness.

(c) CJD accepts priority listings that are approved by the COG's executive committee.

(d) CJD will make all final funding decisions based upon approved COG priorities, reasonableness of the project, availability of funding, and cost-effectiveness.

(3) For state discretionary projects, applications are reviewed by CJD staff members or a group selected by the executive director of CJD. CJD will make all final funding decisions based on eligibility, reasonableness of the project, availability of funding, and cost-effectiveness.

Contact Person: If additional information is needed, contact Lori Melcher at lmelcher@governor.state.tx.us or at (512) 463-1919.

TRD-200407175
David Zimmerman
Assistant General Counsel
Office of the Governor
Filed: December 8, 2004

♦ ♦ ♦

Request for Grant Applications (RFA) for the State Criminal Justice Planning (421) Fund Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that reduce crime and improve the criminal or juvenile justice systems during the state fiscal year 2006 grant cycle.

Purpose: The purpose of the Fund 421 Program is to reduce crime and improve the criminal or juvenile justice systems.

Available Funding: State funding is authorized under a biennial appropriation by the Texas Legislature from funds collected through court costs and fees. Sections 102.056 and 102.075 of the Texas Code of Criminal Procedure establish state funding and the Texas Government Code, §772.006, designates CJD as the Fund's administering agency.

Standards: Grantees must comply with the standards applicable to this funding source cited in the Texas Administrative Code, Title 1, Part 1, Chapter 3.

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) admission fees or tickets to any amusement park, recreational activity or sporting event;

(2) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state or local funds (e.g., supplanting);

(3) any portion of the salary of, or any other compensation for an elected or appointed government official, except in the case of a juvenile court or drug court;

(4) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement and/or social activities in any way;

(5) fundraising;

(6) legal services for adult offenders charged with, given deferred adjudication for, or convicted of violent or other serious crimes including murder, arson, robbery, sexual assault, aggravated sexual assault, burglary, felony drug crimes, crimes against children, kidnapping, aggravated kidnapping, and manslaughter, unless the executive director grants an exception;

(7) lobbying;

(8) membership dues for individuals;

(9) overtime pay;

(10) promotional gifts;

(11) proselytizing or sectarian worship;

(12) transportation, lodging, per diem or any related costs for participants, when grant funds are used to develop and conduct training;

(13) vehicles or equipment for government agencies that are for general agency use; and

(14) weapons, ammunition, explosives or military vehicles;

Eligible Applicants:

(1) State agencies;

(2) Units of local government;

(3) Independent school districts;

(4) Nonprofit corporations;

(5) Native American tribes;

(6) Crime control and prevention districts;

(7) Universities;

(8) Colleges;

(9) Hospital districts;

(10) Juvenile boards;

(11) Regional education service centers;

(12) Community supervision and corrections departments;

(13) Councils of governments (COGs); and

(14) Faith-based organizations that provide direct services. Faith-based organizations must be tax-exempt nonprofit entities as certified by the Internal Revenue Service.

Requirements:

(1) Projects must focus on reducing crime and improving the criminal and/or juvenile justice systems;

(2) All juvenile projects or applications for projects serving delinquent or at-risk youth must address at least one of the following:

(a) Family Stability. Programs, research, or other initiatives designed to strengthen family support systems in an effort to positively impact the lives of youth and divert them from a path of serious, violent and chronic delinquency.

(b) Substance Abuse Early Intervention and Prevention. Programs, research, or other initiatives designed to address the use and abuse of illegal and other prescription and nonprescription drugs and the use and abuse of alcohol. Programs, research, or other initiatives include control, prevention, and treatment.

(c) Education. Programs, research, or other initiatives designed to prevent truancy, suspension, and expulsion. School safety programs may include support for school resource officers and law-related education.

(d) Disproportionate Minority Contact. Programs, research, or other initiatives designed to address the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system.

(e) Justice System Impact. Programs, research, or other initiatives designed to impact offender accountability and/or improve the practices, policies, or procedures within the juvenile justice system.

(f) Gang Prevention. Programs, research, or other initiatives designed to address issues related to juvenile gang activity, including prevention and intervention efforts directed at reducing gang-related activities.

(g) Rural Access. Programs, research, or other initiatives designed to provide prevention, intervention, and treatment services located outside a metropolitan area.

(h) Training. Programs, research, or other initiatives designed to offer specialized training for staff working directly with at-risk youth or juvenile offenders that can positively impact the quality of the services, staff turnover rates, and program stability.

Project Period: Grant-funded projects must begin on or after September 1, 2005, and will expire on or before August 31, 2006.

Application Process: Eligible applicants can download an application kit from the Office of the Governor's web site address located at http://www.governor.state.tx.us/divisions/cjd/formsapps/view.

Preferences: Preference will be given to applicants who demonstrate cost effective programs focused on a comprehensive and effective approach to services.

Closing Date for Receipt of Applications: All applications must be submitted electronically to the Office of the Governor, Criminal Justice Division via email at cjdapps@governor.state.tx.us on or before March 1, 2005.

Selection Process:

(1) All applications will be reviewed for eligibility upon submission to CJD.

(2) For eligible local and regional projects:

(a) Applications are forwarded by CJD to the appropriate regional council of governments (COG).

(b) The COG's criminal justice advisory committee prioritizes all eligible applications based on identified community and/or comprehensive planning, cost and program effectiveness.

(c) The executive committee of the COG will approve the "Priority Listing" of recommended grant applications for funding and will forward this list to CJD.

(d) CJD will make all final funding decisions based upon COG priorities, reasonableness, availability of funding, and cost-effectiveness.

(3) For state discretionary projects, applications are reviewed by CJD staff members or a review group selected by the executive director. CJD will make all final funding decisions based on eligibility, reasonableness, availability of funding, and cost-effectiveness.

Contact Person: If additional information is needed, contact Judy Switzer at jswitzer@governor.state.tx.us or (512) 463-1919.

TRD-200407174
David Zimmerman
Assistant General Counsel
Office of the Governor
Filed: December 8, 2004

♦ ♦ ♦

Request for Grant Applications (RFA) for the S.T.O.P. Violence Against Women Act (VAWA) Fund Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that reduce and prevent violence against women during the state fiscal year 2006 grant cycle.

Purpose: The purpose of the VAWA Fund Program is to assist in developing and implementing effective victim-centered law enforcement, prosecution, and court strategies to address violent crimes against women and the development and enhancement of victim services in cases involving crimes against women.

Available Funding: Federal funding is authorized under the Violent Crime Control and Law Enforcement Act of 1994; Omnibus Crime Control and Safe Streets Act of 1968, as amended, §2001-6, 42 U.S.C. 3796gg to 3796gg5, and reauthorized under Division B of the Victims of Trafficking and Violence Protection Act of 2000, §1103.

Funding Levels:

(1) Minimum grant award--$5,000.

(2) Maximum grant award for Violence Against Women Courts--$250,000.

Required Match: Grantees must provide matching funds totaling at least twenty-five percent (25%) of total project expenditures. This requirement may be met through cash and/or in-kind contributions.

Standards: Grantees must comply with the standards applicable to this funding source cited in Texas Administrative Code, Title 1, Part 1, Chapter 3 and the requirements of the federal statutes that authorize this funding.

Prohibitions: Grantees may not use grant funds or program income to support the following services, activities, and costs:

(1) admission fees or tickets to any amusement park, recreational activity, or sporting event;

(2) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state, or local funds (e.g., supplanting), including the Texas Crime Victims Compensation Fund;

(3) any portion of the salary of, or any other compensation for, an elected or appointed government official;

(4) cash payments to victims;

(5) employment agency fees;

(6) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and that event is not related to amusement and/or social activities in any way;

(7) fundraising activities;

(8) legal assistance and representation in civil matters other than protective orders;

(9) legal defense services for perpetrators of violence against women;

(10) liability insurance on buildings;

(11) lobbying activities;

(12) major maintenance on buildings;

(13) membership dues for individuals;

(14) newsletters, including supplies, printing, postage and time;

(15) overtime;

(16) promotional gifts;

(17) property loss. Grant funds may not be used to reimburse victims for expenses incurred as a result of a crime, such as insurance deductibles, replacement of stolen property, funeral expenses, lost wages, and medical bills;

(18) proselytizing or sectarian worship;

(19) services for programs that focus on children and/or men;

(20) sexual assault or domestic violence prevention curricula developed for schools;

(21) transportation, lodging, per diem, or any related costs for participants, when grant funds are used to develop and conduct training;

(22) vehicles or equipment for governmental agencies that are for general agency use; and

(23) weapons, ammunition, explosives, or military vehicles.

Eligible Applicants:

(1) State agencies;

(2) Units of local government;

(3) Nonprofit corporations;

(4) Indian tribal governments;

(5) Councils of governments (COGs);

(6) Universities;

(7) Colleges;

(8) Community supervision and corrections departments;

(9) Crime control and prevention districts; and

(10) Faith-based organizations. Faith-based organizations must be tax-exempt nonprofit entities as certified by the Internal Revenue Service.

Requirements:

(1) All applicants must meet at least one of the following eligible purpose areas established by the federal Office on Violence Against Women and codified by 28 C.F.R. §90:

(a) training law enforcement officers, judges, other court personnel, and prosecutors to more effectively identify and respond to violent crimes against women;

(b) developing, training or expanding units of law enforcement officers, judges, other court personnel, and prosecutors specifically targeting violent crimes against women;

(c) developing more effective police, court, and prosecution policies, protocols, orders, and services devoted to preventing, identifying, and responding to violent crimes against women;

(d) developing, installing, or expanding data collection and communication systems, including computerized systems linking police, prosecutors, and the courts or to identify and track arrests, protection orders, prosecutions, and convictions;

(e) developing, enlarging, or strengthening victim services programs including improving delivery of services to underserved populations and providing specialized domestic violence court advocates;

(f) developing, expanding or strengthening programs addressing stalking;

(g) developing, enlarging, or strengthening programs addressing the needs and circumstances of Indian tribes in dealing with violent crimes against women;

(h) supporting formal and informal statewide, multidisciplinary efforts, to the extent not supported by state funds, to coordinate the response of state law enforcement agencies, prosecutors, courts, victim services agencies, and other state agencies and departments, to violent crimes against women, including the crimes of sexual assault, domestic violence, and dating violence;

(i) training of sexual assault forensic medical personnel examiners in the collection and preservation of evidence, analysis, prevention, and providing expert testimony and treatment of trauma related to sexual assault;

(j) developing, enlarging, or strengthening programs to assist law enforcement, prosecutors, courts, and others to address the needs and circumstances of older and disabled women who are victims of domestic violence or sexual assault, including recognizing, investigating, and prosecuting instances of such violence or assault and targeting outreach and support, counseling, and other victim services to such older and disabled individuals; or

(k) providing assistance to victims of domestic violence and sexual assault in immigration matters.

(2) In addition, projects must address at least one of the following state priorities developed in coordination with the S.T.O.P. Violence Against Women Planning Council:

(a) Priorities for Victim Services Projects:

(i) provide essential services related to family violence, sexual assault, stalking and dating violence;

(ii) promote outreach and services into under-served communities for family violence, sexual assault, stalking and dating violence;

(iii) provide or improve training for victim advocates;

(iv) establish or maintain a family violence, sexual assault, stalking, and/or dating violence taskforce that promotes a coordinated community response, including multi-jurisdictional efforts.

(b) Priorities for Law Enforcement Projects:

(i) promote or improve training for law enforcement agencies related to family violence, sexual assault, stalking and dating violence;

(ii) develop specialized family violence, sexual assault, stalking, dating violence and/or victim service divisions within law enforcement agencies;

(iii) collaborate, plan and initiate unified policies among the different law enforcement and social services agencies for family violence, sexual assault, stalking and dating violence;

(iv) establish or maintain a family violence, sexual assault, stalking and/or dating violence taskforce which promotes a coordinated community response, including multi-jurisdictional efforts.

(c) Priorities for Prosecution Projects:

(i) develop specialized family violence, sexual assault, stalking, dating violence and/or victim service divisions within prosecutors' offices;

(ii) provide or improve training for prosecution agencies related to family violence, sexual assault, stalking and dating violence;

(iii) promote outreach and services into under-served communities for family violence, sexual assault, stalking and dating violence;

(iv) establish or maintain a family violence, sexual assault, stalking and/or dating violence taskforce that promotes a coordinated community response, including multi-jurisdictional efforts.

(d) Priorities for Court Projects:

(i) promote or improve training for judges and court personnel related to family violence, sexual assault, stalking and dating violence;

(ii) provide specialized courts and/or court services aimed at family violence, sexual assault, stalking and/or dating violence;

(iii) provide in-court victims assistance for family violence, sexual assault, stalking and dating violence victims;

(iv) promote outreach and services into under-served communities related to family violence, sexual assault, stalking and dating violence.

Project Period: Grant-funded projects must begin on or after September 1, 2005, and will expire on or before August 31, 2006.

Application Process: Eligible applicants can download an application kit from the Office of the Governor's web site address located at http://www.governor.state.tx.us/divisions/cjd/formsapps/view.

Preferences: Preference will be given to applicants that:

(1) demonstrate cost-effective programs focused on proven or promising approaches to service provision; and

(2) focus on developing and strengthening:

(a) services for violent crimes against women; or

(b) effective law enforcement, prosecution, and court strategies to combat violent crimes against women.

Closing Date for Receipt of Applications: All applications must be submitted electronically to the Office of the Governor, Criminal Justice Division via email at cjdapps@governor.state.tx.us on or before March 1, 2005.

Selection Process:

(1) All applications will be reviewed for eligibility upon submission to CJD.

(2) For eligible local and regional projects:

(a) Applications are forwarded by CJD to the appropriate regional council of governments (COG).

(b) The COG's criminal justice advisory committees prioritize all eligible applications based on community and/or comprehensive planning, overall cost and program effectiveness.

(c) CJD accepts priority listings that are approved by the COG's executive committee.

(d) CJD will make all final funding decisions based upon approved COG priorities, reasonableness of the project, availability of funding, and cost-effectiveness.

(3) For state discretionary projects, applications are reviewed by CJD staff members or a group selected by the executive director of CJD. CJD will make all final funding decisions based on eligibility, reasonableness of the project, availability of funding, and cost-effectiveness.

Contact Person: If additional information is needed, contact Christina Grady at cgrady@governor.state.tx.us or (512) 463-1919.

TRD-200407177
David Zimmerman
Assistant General Counsel
Office of the Governor
Filed: December 8, 2004

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
El Paso	Blood Systems Inc DBA United Blood Services	L05841	El Paso	00	11/23/04
Fort Worth	Urological Surgery Center of Fort Worth	L05754	Fort Worth	00	11/24/04

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	Hendrick Medical Center	L02433	Abilene	85	11/17/04
Austin	Ambion Inc	L04307	Austin	14	11/17/04
Bedford	Columbia North Hills Outpatient Imaging Center Subsidiary LP DBA North Hills Outpatient Imaging Center	L03455	Bedford	38	11/16/04
Carrollton	Tenet Health System Hospitals Dallas Inc DBA Trinity Medical Center	L03765	Carrollton	45	11/17/04
Cleburne	Walls Regional Hospital DBA Harris Methodist Walls Regional Hospital	L02039	Cleburne	31	11/17/04
Cleburne	Walls Regional Hospital DBA Harris Methodist Walls Regional Hospital	L02039	Cleburne	32	11/22/04
Conroe	Drilling Specialties Company	L04825	Conroe	07	11/24/04
El Paso	Desert Imaging	L05626	El Paso	04	11/16/04
El Paso	Pan American General Hospital LLC DBA Pan American Community Hospital	L02338	El Paso	30	11/23/04
Fort Worth	Consultants in Cardiology	L04445	Fort Worth	11	11/18/04
Fort Worth	Physician Reliance LP DBA Texas Oncology at Klabzuba	L05545	Fort Worth	07	11/16/04
Fort Worth	Radiology Associates	L03953	Fort Worth	34	11/15/04
Fort Worth	Consultants in Radiology PA	L05014	Fort Worth	13	11/24/04
Houston	CHCA West Houston LP DBA West Houston Medical Center	L05808	Houston	02	11/19/04
Houston	DETEQ Services	L05778	Houston	01	11/17/04
Houston	Nuclear Imaging Services LLC	L05775	Houston	02	11/19/04
Houston	Columbia/HCA Healthcare Corp DBA Spring Branch Medical Center	L02473	Houston	46	11/18/04
Houston	Nuclear Sources & Services Inc DBA NSSI/Sources & Services Inc	L02991	Houston	27	11/19/04
Houston	Park Plaza Hospital	L02071	Houston	48	11/22/04
Houston	Mallinckrodt Medical Inc	L03008	Houston	67	11/29/04

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Jacksonville	Regional Health Care Center DBA Mother Frances Hospital-Jacksonville	L05362	Jacksonville	18	11/15/04
Jacksonville	Regional Health Care Center DBA Mother Frances Hospital-Jacksonville	L05362	Jacksonville	19	11/17/04
Katy	Memorial City Cardiology Associates DBA Katy Cardiology Associates	L05713	Katy	01	11/18/04
Killeen	George S Rebecca MD FACC DBA Texas Cardiovascular Medicine	L05099	Killeen	04	11/19/04
Killeen	Metroplex Hospital	L03185	Killeen	21	11/22/04
La Porte	Cardiorad Inc	L05755	La Porte	03	11/16/04
La Porte	Total Petrochemicals USA Inc	L04640	La Porte	12	11/18/04
Pampa	Titan Specialists LTD	L04920	Pampa	06	11/16/04
Pasadena	Nuclear Medicine Associates PA	L05712	Pasadena	01	11/16/04
Plano	Columbia Medical Ctr of Plano Subsidiary LP DBA Medical Center of Plano	L02032	Plano	73	11/22/04
Port Arthur	S K Rao MD PA	L05415	Port Arthur	07	11/24/04
San Antonio	Cardiology Clinic of San Antonio PA	L04489	San Antonio	31	11/15/04
San Antonio	Christus Santa Rosa Surgery Center LLP DBA Christus Santa Rosa Surgery Center	L05805	San Antonio	01	11/16/04
San Antonio	South TX Cardiovascular Consultants PLLC	L03833	San Antonio	24	11/19/04
San Antonio	Medi-Physics Inc DBA GE Healthcare	L04764	San Antonio	25	11/29/04
Throughout TX	Team Cooperheat-MQS Inc DBA Cooperheat-MQS	L00087	Alvin	122	11/22/04
Throughout TX	Applied Standards Inspection Inc	L03072	Beaumont	86	11/22/04
Throughout TX	All Tech Inspection	L04974	Corpus Christi	10	11/18/04
Throughout TX	Heflin Testing Services Inc	L04671	Denison	08	11/18/04
Throughout TX	Pavetex Engineering and Testing Inc	L05533	Dripping Springs	02	11/22/04
Throughout TX	Sunbelt Laboratories Inc	L03926	El Paso	12	11/29/04
Throughout TX	Gilbert Texas Construction Corp	L04569	Fort Worth	17	11/23/04
Throughout TX	Mandes Inspection & Testing Services Inc	L05220	Houston	48	11/18/04
Throughout TX	Digirad Imaging Solutions Inc	L05414	Houston	23	11/19/04
Throughout TX	Stork Southwestern Laboratories Inc	L05269	Houston	09	11/23/04
Throughout TX	Services and Compliance Consultants Inc	L03873	Huntsville	17	11/16/04
Throughout TX	Perf-O-Log Inc	L05478	Iowa Colony	08	11/19/04
Throughout TX	MDS Nordion Inc	L00721	Kanata Ontario	47	11/17/04
Throughout TX	Non Destructive Inspection Corporation	L02712	Lake Jackson	116	11/22/04
Throughout TX	Granite Construction Company	L04923	Lewisville	08	11/15/04
Throughout TX	Eagle X-Ray	L03246	Mont Belvieu	84	11/23/04
Throughout TX	Conam Inspection & Engineering Inc	L05010	Pasadena	78	11/15/04
Throughout TX	IHI Southwest Technologies Inc	L05278	San Antonio	06	11/19/04
Throughout TX	Zachry Construction Corporation San Antonio	L05230	San Antonio	12	11/29/04
Throughout TX	H & H X-Ray Services Inc	L02516	Tyler	49	11/18/04
Tyler	Trinity Mother Frances Health System	L01670	Tyler	112	11/15/04

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	ARMC LP DBA Abilene Regional Medical Center	L02126	Abilene	15	11/23/04
Austin	Seton Medical Center	L02896	Austin	77	11/24/04
Commerce	Tyco Healthcare – Kendall LP	L03314	Commerce	21	11/24/04
Denison	Texoma Medical Center	L01624	Denison	56	11/19/04
Harlingen	Valley Baptist Medical Center	L01909	Harlingen	58	11/22/04
Houston	Cardiology Consultants of Houston	L05046	Houston	05	11/24/04
Houston	Delta Tubular International LP	L03083	Houston	24	11/24/04
Houston	Memorial Hermann Hospital System Inc DBA Memorial Hermann Hospital	L00650	Houston	70	11/23/04
Houston	Weatherford US LP	L02756	Houston	19	11/24/04
Midland	Isotech Laboratories Inc	L04283	Midland	16	11/24/04
Port Arthur	Atofina Petrochemicals Inc	L03498	Port Arthur	20	11/24/04
Richardson	Raytheon Company	L04096	Richardson	22	11/24/04
San Antonio	South Texas Cardiovascular Consultants PLLC	L03833	San Antonio	25	11/24/04
San Marcos	Texas State University	L03321	San Marcos	16	11/23/04
Stephenville	Harris Methodist Erath County	L03097	Stephenville	25	11/24/04
Throughout TX	Janik Enterprises Inc	L03319	Arlington	08	11/24/04
Throughout TX	Gessner Engineering LLP	L03733	Brenham	15	11/24/04
Throughout TX	Texas CMT Inc	L04766	Dallas	09	11/17/04
Throughout TX	Century Inspection Inc	L00062	Dallas	99	11/23/04
Throughout TX	Phoenix Surveys Inc	L04108	Graham	12	11/17/04
Throughout TX	Nuclear Scanning Services Inc	L04339	Houston	16	11/24/04
Throughout TX	Rhodes Testing Inc	L04702	Longview	13	11/18/04
Throughout TX	Great Guns Inc	L01990	Sour Lake	25	11/23/04
Vidor	North Star Steel Texas	L02122	Vidor	24	11/23/04

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Arlington	Radiology Associates of Tarrant County PA DBA Six Flags Imaging Center Inc	L05109	Arlington	16	11/15/04
Dallas	U S Vascular Access Center of Dallas	L05691	Dallas	01	11/24/04
Houston	Shaw Fabricators	L05169	Houston	08	11/23/04
Throughout TX	Texaco Inc Houston Research Center	L00247	Houston	73	11/12/04
Throughout TX	Raven Inspection & Testing	L05219	Huffman	07	11/7/04
Throughout TX	XRI Non Destructive Testing	L05275	Pearland	42	11/22/04

In issuing new licenses, amending and renewing existing licenses, or approving exemptions to Title 25 Texas Administrative Code (TAC), Chapter 289, the Department of State Health Services (department), Radiation Control Program, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with 25 TAC, Chapter 289 in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the new, amended, or renewed license (s) or the issuance of the exemption (s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable requirements of 25 TAC, Chapter 289. In granting termination of licenses, the department has determined that the licensee has properly decommissioned its facilities according to the applicable requirements of 25 TAC, Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, P.E.; Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200407185
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 8, 2004

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Notice of Amendment Number 31 to the Radioactive Material License of Waste Control Specialists, LLC

Notice is hereby given by the Department of State Health Services (department), Radiation Safety Licensing Branch, that it has amended Radioactive Material License Number L04971 issued to Waste Control Specialists, LLC (WCS) located in Andrews County, Texas, one mile North of State Highway 176; 250 feet East of the Texas/New Mexico State Line; 30 miles West of Andrews, Texas.

Amendment number 31 allows the licensee to possess a calibration device with two sealed sources and provide trained staff to perform calibrations of portable radiation survey instruments used in the facility.

The department has determined that the amendment of the license and the documentation submitted by the licensee provide reasonable assurance that the licensee's radioactive waste facility is operated in accordance with the requirements of 25 Texas Administrative Code (TAC), Chapter 289; the amendment of the license will not be inimical to the health and safety of the public or the environment; and the activity represented by the amendment of the license will not have a significant effect on the human environment.

This notice affords the opportunity for a public hearing, upon written request, within 30 days of the date of publication of this notice by a person affected as required by Health and Safety Code, §401.116, and as set out in 25 TAC, §289.205(f). A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to a county, in which the radioactive material is or will be located; or (b) doing business or has a legal interest in land in the county or adjacent county.

A person affected may request a hearing by writing Mr. Richard A. Ratliff, P.E., Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas, 78756-3189. Any request for a hearing must contain the name and address of the person who considers himself affected by this action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated. Should no request for a public hearing be timely filed, the agency action will be final.

A public hearing, if requested, shall be conducted in accordance with the provisions of Health and Safety Code, Chapter 401, the Administrative Procedure Act (Chapter 2001, Texas Government Code), the formal hearing procedures of the department (25 TAC, §1.21 et seq.) and the procedures of the State Office of Administrative Hearings (1 TAC, Chapter 155).

A copy of the license amendment and supporting materials are available, by appointment, for public inspection and copying at the office of the Radiation Safety Licensing Branch, Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, 8:00 a.m. to 5:00 p.m., Monday-Friday (except holidays). Information relative to inspection and copying the documents may be obtained by contacting Chrissie Toungate, Custodian of Records, Radiation Safety Licensing Branch.

TRD-200407184
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 8, 2004

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Notice of Emergency Cease and Desist Order on Steve L. Farnsworth, D.C., dba Farnsworth Chiropractic Center

Notice is hereby given that the Department of State Health Services (department) ordered Steve L. Farnsworth, D.C. doing business as Farnsworth Chiropractic Center (registrant-R11446-001) of Waco to cease and desist using the Transworld x-ray unit until the entrance exposure radiation level is within regulatory limits.

A copy of all relevant material is available, by appointment, for public inspection at the Texas Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200407187

Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 8, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Rene Gardea, dba Gardea Dental Equipment and Service

Notice is hereby given that the Department of State Health Services (department) issued a notice of violation and proposal to assess an administrative penalty to Rene Gardea, dba Gardea Dental Equipment and Service (expired registration) of El Paso. A total penalty of $4,000 is proposed to be assessed the company for alleged violations of 25 Texas Administrative Code, Chapter 289.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200407186
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 8, 2004

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Texas Health and Human Services Commission

Correction of Error

The Texas Health and Human Services Commission submitted proposed amendments to 1 TAC §§370.42 - 370.46 and 370.49 for publication in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11213).

Due to a publication error on page 11221, not all of the proposed new language in §370.45 was underlined. The proposed rule should read as follows:

§370.45. Medicaid Eligibility.

(a) HHSC or its designee will review all applications will to determine eligibility for either Medicaid or CHIP.

(1) All children on the Application requesting health care coverage will be tested for Medicaid eligibility. If any child meets Medicaid eligibility criteria, the child will be determined Medicaid eligible.

(2) If a child does not meet Medicaid eligibility, the Application will be tested for CHIP eligibility. If any child meets CHIP eligibility criteria, the child will be determined CHIP eligible.

(b) Once eligibility has been determined, a letter is sent to the Applicant containing the results of the determination, effective dates and enrollment information, where appropriate.

(c) A child who meets all Medicaid eligibility requirements is not eligible for CHIP.

TRD-200407182

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Public Notice

The Health and Human Services Commission, State Medicaid Office, received approval from the Centers for Medicare and Medicaid Services to amend the Title XIX Medical Assistance Program state plan by Transmittal Number 03-20, Amendment Number 655. The state plan amendment is effective as of September 1, 2004.

This amendment revises the state plan in the following manner:

Separates clinical laboratory reimbursements from the physician reimbursement methodology;

Eliminates ambulance reimbursements at a flat rate but continues the reimbursement rate that includes mileage; and

Removes the requirement that clinical laboratory service rates be updated each year in accordance with the Medicare Fee Schedule.

For additional information, please contact Marianna Zolondek, Policy Development Support with the Medicaid/CHIP Division, at (512) 491-1117 or by e-mail at marianna.zolondek@hhsc.state.tx.us.

TRD-200407102
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: December 3, 2004

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Texas Higher Education Coordinating Board

Request for Offers for Consulting Services

The Texas Higher Education Coordinating Board (hereinafter referred to as THECB) is soliciting offers from organizations (hereinafter referred to as Consultant) for consulting services to advise THECB on the Texas Association of Developing Colleges (hereinafter referred to as TADC) Centers for Teacher Education. The ultimate objectives of this Request for Offers (hereinafter referred to as RFO) are to 1) facilitate and coordinate a collaborative strategic planning process to involve TADC college administration in planning for collaborative distance education, upgrading of technology, curriculum development and redesign and improvement of TExES/ExCET preparation; 2) work in collaboration with the Texas Higher Education Coordinating Board and TADC college administration to identify training needs of college faculty in the centers for teacher education in the areas related to distance education, curriculum development and improvement of TExES/ExCET preparation; 3) facilitate and coordinate college administration and faculty professional development workshops to meet areas of need for delivery of distance education, curriculum development and redesign and improvement of TExES/ExCET preparation; and 4) report progress in TADC teacher education enrollment, level of participation in the distance education program, successful student placements, and other evaluative measures.

This Request for Offer is being made pursuant to authority granted under Texas Government Code, Chapter 2254, Subchapter B, §2254.026 (relating to contracts with private consultants).

1. GENERAL BACKGROUND:

The Texas Legislature established the Centers for Teacher Education Program during the 74th Legislative Session. The Texas Higher Education Coordinating Board was given the assignment of managing the program and has provided trusteed funds to support the programs at several historically Black Colleges. These institutions collectively form the Texas Association of Developing Colleges (TADC) and include Jarvis Christian College in Hawkins, Paul Quinn College in Dallas, Texas College in Tyler, Huston-Tillotson College in Austin, and Wiley College in Marshall. These colleges are private, general academic, minority-serving institutions and the funds appropriated are used for the purpose of supporting their centers for teacher education. The purpose of the Centers for Teacher Education at the participating

colleges is to 1) recruit, train and place qualified minorities in the teaching profession; 2) integrate technology into the colleges' teacher preparation programs; and 3) provide or participate in at least one course per semester via distance education technologies.

THECB retains a small percentage of the appropriations made for the teacher education centers for the costs of on-site monitoring and distribution of funds and, uses a portion of the amounts retained to obtain the services of a consultant to facilitate and coordinate the process of curriculum development and program redesign to improve teacher preparation at the participating institutions. The consultant assists with the administrative oversight of the various teacher education activities, coordinates the quarterly meetings that are held in Dallas, and works closely with THECB staff.

2. CONTRACT TERM:

2.1 The contract resulting from this RFO shall commence on the execution date and shall terminate on August 31, 2005 or upon the completion of Consultant's work described herein, whichever occurs first, unless terminated earlier pursuant to terms and conditions of the anticipated contract resulting from this RFO.

3. SCOPE OF WORK:

3.1 Overview

Consultant shall facilitate and coordinate a collaborative strategic planning process to involve TADC college administration in planning for collaborative distance education, upgrading of technology, curriculum development and redesign and improvement of TExES/ExCET preparation; work in collaboration with the Texas Higher Education Coordinating Board and TADC college administration to identify training needs of college faculty in the centers for teacher education in the areas related to distance education, curriculum development and improvement of TExES/ExCET preparation; facilitate and coordinate college administration and faculty professional development workshops to meet areas of need for delivery of distance education, curriculum development and redesign and improvement of TExES/ExCET preparation; and report progress in TADC teacher education enrollment, level of participation in the distance education program, successful student placements and other evaluative measures. Consultant shall be solely responsible and accountable for managing and completing all activities, tasks, milestones and deliverables in accordance with the Scope of Work and the deliverables commitment of this RFO. Assignment of THECB staff to assist Consultant in its responsibility shall in no way release the Consultant from its responsibility for completing any work or delivering any products set forth in this RFO, its Statement of Work or resulting contract.

3.2 Phase I- Proposal

Consultant shall provide to THECB a proposal of services to be performed, a proposed plan of action to be taken to achieve the goals set forth in this agreement, and evaluation of the attainment of the goals and objectives set forth by the agreement. The proposal must include specific objectives and timelines for meeting each phase of the plan. The proposal must also include consultant's travel costs to TADC schools named in § 1 or other sites within Texas, including travel costs of THECB staff to monitor compliance with this contract.

3.2.1 In response to this RFO, the Consultant must:

1. provide a detailed description of Consultant's suggested methodology, approach and alternatives to meeting Phase I objectives;

2. propose a detailed description of the tasks, activities, resources and time lines for performing Phase I objectives (the description should be sufficiently detailed to include in a Statement of Work for the contract);

3. provide a brief description of Consultant's qualifications to perform Phase I objectives;

4. describe Consultant's prior experience in performing Phase I type objectives, with an emphasis on prior experience with public sector contracts and describe how organizations responded to Consultant's recommendations; and

5. provide a list of references where Phase I type objectives were met, including for each reference: the name of the organization, the name, title, address and telephone number of a contact person and a brief description of the services performed.

3.3 Phase II- Progress Reports

3.3.1 Consultant shall submit to THECB a progress report providing information on 1) all records of evidence of expenditure of funds to assist the TADC school's efforts to improve student recruitment and retention; 2) evidence of professional development activities at the TADC schools to date; 3) report on the extent to which library, mathematics, science, technology laboratories and other facilities at the TADC schools have been enhanced; 4) evaluation of changes in curricula to better match TExES/ExCET competencies and outcomes at TADC schools; 5) evaluation of the effectiveness of technology integration to date at TADC schools; 6) summary of expenditures for personnel related to improved educator preparation at TADC schools; and 7) summary evidence that library holdings have been enhanced in the areas of certification at TADC schools.

3.3.2 In response to this RFO, the Consultant must:

1. provide a detailed description of Consultant's suggested methodology, approach and alternatives to meeting Phase II objectives;

2. propose a detailed description of the tasks, activities, resources and time lines for performing Phase II objectives (the description should be sufficiently detailed to include in a Statement of Work for the contract);

3. provide a brief description of Consultant's qualifications to perform the Phase II objectives;

4. describe Consultant's prior experience in performing Phase II type objectives with emphasis on prior experience with public sector contracts; and

5. provide a list of references where Phase II type objectives were met, including for each reference: the name of the organization, the name, title, address and telephone number of a contact person and a brief description of the services performed.

3.4 Phase III- Final Report

3.4.1 Consultant shall submit a final report to THECB evaluating the effectiveness of the funds for improving teaching education at the TADC schools and detailing their progress to date in achieving the following: 1) improving the TExES/ExCET pass rate for TADC first-time test-takers and retake pass rates; 2) increasing the number of students enrolled in the teacher preparation program at TADC schools; 3) increasing the graduation rate of teacher preparation candidates at TADC schools; 4) integrating existing technology into teacher preparation at TADC schools; and 5) summary evidence that courses are sent per semester via distance education technologies at TADC schools.

3.4.2 In response to this RFO, the Consultant must:

1. provide a detailed description of Consultant's suggested methodology, approach and alternatives to meeting Phase III objectives;

2. propose a detailed description of the tasks, activities, resources and time lines for performing Phase III objectives (the description should be sufficiently detailed to include in a Statement of Work for the contract);

3. provide a brief description of Consultant's qualifications to perform the Phase III objectives;

4. describe Consultant's prior experience in performing Phase III type objectives; and

5. provide a list of references where Phase III objectives were met, include for each reference: the name of the organization, the name, title, address and telephone number of a contact person and a brief description of the services performed.

3.5 Audit

Consultant understands that acceptance of state funds under this contract acts as acceptance of the authority of the State Auditor's Office, or any successor agency, to audit or investigate the expenditure of state funds under this contract. Consultant further agrees to cooperate fully with the State Auditor's Office or its successor, including providing all records requested. Consultant will ensure that this clause concerning authority to audit state funds received indirectly by subcontractors through the Consultant and the requirement to cooperate is included in any subcontract it awards.

3.6 Contract Deliverables

3.6.1 Consultant shall, in a good and satisfactory manner, carry out the tasks necessary to provide analysis, advice, recommendations, performances and Deliverables as called for in this RFO and in accordance with the Scope of Work. Such performances shall be rendered at schools named in § 1 or other sites within Texas as hereinafter named by THECB or its designee, unless THECB, or its designee, shall otherwise specify in writing.

3.6.2 Substantive Outlines. As an interim deliverable, Consultant shall produce and present to THECB, for review and approval, a substantive outline for the work and content for: Phase I, Phase II, and Phase III. The substantive content of each outline shall include at a minimum a proposed final report format and a substantive discussion of the approach and methodology for the work to be performed. THECB and Consultant shall adjust or revise the scope of each outline to more clearly define the Scope of Work.

3.6.3 Draft Reports. As an interim deliverable, Consultant shall produce and present to THECB, for review and approval, an interim draft report for: Phase I, Phase II, and Phase III. This deliverable shall include: appendices with statistical data supporting findings, conclusions and recommendations. Consultant shall also include: charts, graphs, and other visual representations of core findings, conclusions and recommendations. The Consultant shall make such corrections to substance and content as identified by THECB. The Consultant shall make such adjustments and modifications to draft report as identified by THECB.

3.6.4 Final Reports. As a final contract Deliverable, Consultant shall produce a written report for: Phase I, Phase II, and Phase III. The specific organization and substantive content of each report shall be resolved throughout the project, with emphasis during the interim deliverable stages. Each report shall include the following topics and such other topics, which are specifically agreed upon between THECB and Consultant and the report must thoroughly resolve the particular issues unique to each deliverable:

• Table of Contents

• Executive Summary

• Scope and Objectives

• Summary of Significant observations and Conclusions

• Overall Conclusions and Recommendations

• Background

• Detailed Scope and Objectives

• Methodology

• Assumptions

• Detailed Findings and Observations

• Analysis

• Recommendations

• Conclusion

• Appendices

3.6.5 Status Reporting. During scheduled bi-weekly meetings, Consultant shall provide oral reports on Project progress and schedule, and a schedule of the next period's activities. Consultant shall document by written minutes of the meetings. Details of the period's activities shall include:

• planned schedule versus actual schedule;

• any problems encountered and status;

• any failures to meet deadlines and proposed solutions; and

• any deviations from the Scope of Work;

The Consultant shall disclose at the meeting the impact that any problems, failures or deviations have on the scheduled completion of tasks and work segments, the Phase, and the entire Project. Bi-weekly meetings may be by telephone conference call.

The Consultant shall submit to THECB a written report of schedule and/or content variances from the Scope of Work for each Phase, at the deliverable, task and activity levels, within five (5) working days from the time of their occurrence.

The Consultant shall submit monthly written reports to THECB that shall encompass:

• the overall status of the Project, including unanticipated problems and delays and the impact on Project completion;

• the prior month's accomplishments;

• any outstanding problems and/or issues and proposed solutions; and

• upcoming activities.

At a minimum, Consultant shall illustrate all upcoming activities using work plans specifically identifying tasks, personnel and begin and end dates.

3.6.6 Consultant and THECB shall develop a tentative schedule for periodic meetings with THECB. The meetings shall be for the purpose of providing information and additional guidance to Consultant in the performance of the Scope of Work. THECB may request interim advice from Consultant at such meetings. If appropriate, such meetings may coincide with regularly scheduled meetings to report status.

3.6.7 THECB shall have thirty (30) business days following delivery of the interim or final products, Deliverables or Services ("Acceptance Period"), to accept or reject any products, Deliverables or Services ("Deliverable") tendered by Consultant in performance under this RFO or resulting contract. Tendering to THECB a Deliverable for Acceptance constitutes a certification by the Consultant that the Deliverable fully meets all of the requirements in the RFO, Scope of Work and any resulting contract. In the event THECB elects to reject a Deliverable during the Acceptance Period, THECB shall notify Consultant in writing of such rejection. THECB shall assist Consultant in identifying the error, type of error or inadequacy of the Deliverable, to permit Consultant to

understand the cause of the error or inadequacy and correct the error or inadequacy. Upon Consultant's resolution of any errors or inadequacies, identified during the Acceptance Period, the Deliverable shall be resubmitted to THECB for acceptance or rejection as stated above. Acceptance of the Deliverable(s) shall be in writing by an authorized representative of THECB ("Acceptance").

3.6.8 Time is of the essence in completing the Deliverables Phases I-III Deliverables. Completion for the Deliverables for Phases I-III is required no later than July 29, 2005. Consultant should provide proposed completion dates in the format below in order to meet the project completion date of August 31, 2005.

Phase I:

Substantive Outline: tendered to THECB on or before January 12, 2005;

Interim Draft Report: tendered to THECB on or before January 26, 2005;

Final Report: tendered to THECB on or before February 2, 2005;

Status Reports, according to the schedule;

In-person-report(s).

Phase II:

Substantive Outline: tendered to THECB on or before February 9, 2005;

Interim Draft Report: tendered to THECB on or before February 23, 2005;

Final Report: tendered to THECB on or before March 18, 2005;

Status Reports, according to the schedule;

In-person-report(s).

Phase III:

Substantive Outline: tendered to THECB on or before May 13, 2005;

Interim Draft Report: tendered to THECB on or before June 17, 2005;

Final Report: tendered to THECB on or before July 29, 2005

Status Reports, according to the schedule;

In-person-report(s).

3.6.9 As an additional Deliverable, Consultant shall make "in person" presentations of its findings, analysis, conclusions and recommendations on such dates, times, and places in Austin, Travis County, Texas as requested by THECB. Such presentations may include audiences internal or external to THECB. THECB anticipates that no more than two or three such presentations shall be required. These presentations may occur, within an 18-month time frame following the Acceptance of the final report(s).

4. OFFER PROCESS

4.1. Questions relating to the RFO. Consultant is expected to examine this Request for Offers (RFO) carefully, understand the terms and conditions for providing the pertinent services, and respond completely. Failure to respond completely may result in disqualification. Questions about this RFO shall be directed, in writing only, to the address provided below, on company letterhead or via e-mail. Verbal questions and explanations are not permitted. Electronic submissions by facsimile shall be accepted. THECB reserves the right to provide or not to provide additional clarification in response to Consultant's questions. To be eligible to receive Consultant questions and responses to this RFO, if any, the Consultant, must file a written letter of interest with THECB no later than 2:00 p.m. on Tuesday, December 28, 2004. No inquiries or questions shall be answered after 2:00 p.m. on Tuesday, December 28, 2004 to allow ample distribution time for any changes. Any questions or letters of interest regarding this RFO may be directed to:

Dr. Susan Hetzler, Program Director for Educator Preparation

Division of Universities and Health-Related Institutions

Texas Higher Education Coordinating Board

P. O. Box 12788

Austin TX 78711

4.2 Delivery of Offer. A signed original and five (5) copies of the offer must be received by THECB, no later than 5:00 p.m., Central Time, January 4, 2005. Any offer received after the specified time and date shall not be considered. Conditioned on THECB's receipt of the requisite finding of fact from the Governor's Budget and Planning Office pursuant to Texas Government Code § 2254.028, THECB anticipates entering into the resultant contract on or about January 5, 2005. The Consultant's offers shall be delivered to:

Dr. Susan Hetzler, Program Director for Educator Preparation

Division of Universities and Health-Related Institutions

Texas Higher Education Coordinating Board

1200 East Anderson Lane

Austin TX 78752

P.O. Box 12788, Austin TX 78711

4.3 THECB Reservation of Rights. THECB has sole discretion and the absolute right to reject any and all offers, terminate this Request for Offers or amend, delay or re-issue this Request for Offers. THECB reserves the right to remedy technical errors in the RFO process, waive any informalities and irregularities relating to any or all Offers submitted in response to this request and to negotiate modifications necessary to improve the quality or cost effectiveness of any Offer to THECB. THECB further reserves the right to accept one or more offers and contract for any grouping or individual Deliverables described in this RFO. The issuance of this Request for Offers does not constitute a commitment by THECB to award any contract. THECB intends any material provided in this Request for Offers only and solely as a means of identifying the scope of services and qualifications sought.

4.4 Expenses for Preparing Offer. THECB shall not pay any cost incurred by a prospective Consultant in the preparation of a response to this Request for Offers and such costs shall not be included in the budget of the prospective Consultant submitted pursuant to this Request for Offers. The State of Texas assumes no responsibility for expenses incurred in the preparation of responses to this Request for Offers. In the event that the prospective Consultant is engaged to provide the services contemplated by this Request for Offers, any expenses incurred by the prospective Consultant associated with the negotiation and execution of the contract for the engagement shall remain the obligation of the Consultant.

4.5 Non-responsive Offers. Failure to respond to all required portions of this RFO may result in the Consultant's response being deemed non-responsive. If a Consultant's response is deemed non-responsive by THECB, the response shall be disqualified. Offers must be signed by an officer or principal of the Consultant, however, they may be signed by an agent if accompanied by written evidence of authority.

4.6 Duration of Offer. All provisions in Consultant's Offer, including any estimated or projected costs, shall remain valid for ninety (90) days following the deadline date for submissions or if an Offer is selected,

throughout the entire term of the Contract. Offers may be withdrawn in writing prior to the date and time set for receipt of Offers.

4.7 Negotiation with Consultant. Preliminary and final negotiations with top-ranked prospective Consultants may be held at the discretion of THECB. THECB may decide, at its sole option and in its sole discretion, to negotiate with one, several, or none of the prospective Consultants submitting Offers pursuant to this request. During the negotiation process, THECB and any prospective Consultant(s) with whom THECB chooses to negotiate, may adjust the scope of the services, alter the method of providing the services, and/or alter the costs of the services so long as the changes are mutually agreed upon and are in the best interest of THECB. Statements made by a prospective Consultant in the Offer packet or in other appropriate written form shall be binding unless specifically changed by the Consultant, in writing, during final negotiations. A contract award may be made by THECB without negotiations if THECB determines that such an award is in THECB's best interest.

4.8 Selection Criteria. THECB shall conduct an evaluation of all offers that conform to the requirements of this RFO. In selecting a consultant, THECB shall: (1) base its choice on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services; and (2) if other considerations are equal, give preference to a consultant whose principal place of business is in the State of Texas or who shall manage the consulting contract wholly from an office in the State of Texas. Conforming offers shall be reviewed by a Selection Committee consisting of THECB staff members.

4.9 Award/Contract Subject to Available Appropriations. This Request for Offers and any contract which may result from it are subject to appropriation of State funds and the Request for Offers and/or contract may be terminated at any time if such funds are not available.

4.10 Public Information. All offers are considered to be public information subsequent to an award of the contract. All information relating to Offers shall be subject to the Public Information Act, Texas Government Code Annotated, Chapter 552, after the award of the contract. All documents shall be presumed to be public unless a specific exception in that Act applies. Prospective Consultants are requested to avoid providing information which is proprietary, but if it is necessary to do so, offers must specify the specific information which the prospective Consultant considers to be exempted from disclosure under the Act and those pages or portions of pages which contain the protected information must be clearly marked. The specific exemption that the prospective Consultant believes protects that information must be cited. THECB shall assume that an Offer submitted to THECB contains no proprietary or confidential information if the prospective Consultant has not marked or otherwise identified such information in the offer at the time of its submission to THECB.

4.11 Negotiation of Contract Terms and Conditions. At any time after the offers are opened, THECB may negotiate contract terms and conditions with one or more of the Consultants. An award of a contract is expressly conditioned upon THECB and Consultant reaching an agreement on contract terms and conditions. THECB reserves the sole right, in its discretion, to determine if contract terms and conditions are acceptable. If the Consultant and THECB are unable to reach an agreement on the contract terms and conditions, THECB shall disqualify that Consultant, and then THECB shall negotiate contract terms and conditions with the next best Consultant.

4.12 Return of Offers After Selection Process. All offers become property of THECB upon receipt and shall not be returned.

4.13 Ethics Standards. No person shall participate or assume a responsibility in the implementation and execution of this RFO process including, but not limited to, the evaluation of offers and selections of Consultant's, when such participation constitutes a conflict of interest as defined by state law or executive order. After the RFO is published, THECB or any employee shall not furnish any technical information, or solicit offers and/or prices for its requirements or take any type of action which would or could be construed to give a direct or indirect advantage or disadvantage to any potential Consultant.

4.14 Restrictions on Communication. After the RFO has been issued, Consultant is prohibited from communicating with THECB staff regarding the RFO or offers, with the following exceptions:

• Dr. Susan Hetzler, in writing;

• The Committee, if interviews are conducted;

• THECB reserves the right to contact any Consultant for clarification after responses are opened and/or to further negotiate with any Consultant if such is deemed desirable by THECB.

THECB shall not schedule meetings with representatives of any Consultant to discuss offers, and Consultant should not contact THECB employees to explain, clarify or discuss their Offers before an award has been made except as set out in this section. Violation of this provision may lead to disqualification from this process.

5. CONTENT OF OFFERS

5.1 All Offers must be typed, double spaced, on 8 1/2" x 11" paper, clearly legible, with all pages sequentially numbered and bound or stapled together. The name of the prospective Consultant must be typed at the top of each page. Do not attach covers, binders, pamphlets, or other items not specifically requested.

5.2 A Table of Contents must be included with respective page numbers opposite each topic. The Offer must contain the following completed items in the following sequence:

• Transmittal Letter: A letter addressed to Dr. Susan Hetzler, Program Director for Educator Preparation, Division of Universities and Health-Related Institutions, Texas Higher Education Coordinating Board, PO Box 12788, Austin, TX 78711 that identifies the person or entity submitting the Offer and includes a commitment by that person or entity to provide the services required by THECB. The letter must specifically identify that this Offer is in reference to THECB Texas Association of Developing Colleges-Centers for Teacher Education RFO. The letter must include "full acceptance of the terms and conditions of the contract resulting from this Request for Offers." Any exceptions must be specifically noted in the letter. However, any exceptions may disqualify the Offer from further consideration at THECB's discretion. The letter must state, "The Offer enclosed is binding and valid at the discretion of THECB."

• Executive Summary: The Offer must include a summary of the contents of the Offer, excluding cost information. Address services that are offered beyond those specifically requested as well as those offered within specified deliverables. Explain any missing or other requirements not met, realizing that failure to provide necessary information or offer required service deliverables may result in disqualification of the Offer.

• Project Offer: The Offer must track and reference each section number in § 3 Scope of Work. Consultant should provide a substantive description of how Consultant proposes to satisfy each item. If Consultant cannot satisfy a particular item or requirement, then Consultant must clearly identify the items or requirements it cannot satisfy. If Consultant believes it can best meet the needs of THECB by suggesting a modification to the Scope of Work, please suggest alternatives. If an alternative is proposed, please include a separate section identified as "Alternative Offer to § X.X." THECB reserves the right to not consider alternative Offers. If a response requires Consultant to assume facts not

presented in the RFO, Consultant must clearly identify such assumed facts. If a section requests specific information, please include the requested information.

• Cost Offer: THECB is interested in awarding a fixed fee contract. Because THECB may enter into a contract for all or some of the deliverables, please identify each deliverable and the corresponding fee and include a proposed schedule of payments. Consultant is welcome to suggest alternative fee Offers, but if an alternative is offered, please clearly identify that the fee Offer is an alternative. The THECB reserves the right to not consider alternative Offers.

• Qualifications: While THECB is interested in the experience and qualifications of Consultant's firm or company, THECB is particularly interested in the experience of the individual staff Consultant intends to apply to this engagement. Therefore, please include information relating to the firm's or company's experience and qualification and please attach detailed resumes for each staff that Consultant intends to apply to this engagement. The resumes should identify the specific experience, projects and assignments for each staff offered. Emphasis should be placed on similar projects within the public sector and/or higher education.

• References: Prospective Consultants shall provide the names of at least three (3) different references meeting the following criteria:

1. The reference company or entity must have engaged the prospective Consultant for the same or similar services as those to be provided in accordance with the terms of this Request for Offers.

2. The services must have been provided by the prospective Consultant to the reference company or entity within the five (5) years preceding the issuance of this Request for Offers.

3. The reference company or entity must not be affiliated with the prospective Consultant in any ownership or joint venture arrangement.

4. References must include the company or entity name, address, contact name, and telephone number for each reference. THECB may not be used as a reference. The contact name must be the name of a senior representative of the reference company or entity who was directly responsible for interacting with the prospective Consultant throughout the performance of the engagement and who can address questions about the performance of the prospective Consultant from personal experience. References shall accompany the Offer.

5. For each such reference, the prospective Consultant shall provide a signed release from liability in the form of a letter addressed to the reference company or individual signed by Consultant for each reference provided in response to this requirement. The release from liability shall absolve the specified reference company or entity from liability for information provided to THECB concerning the prospective Consultant's performance of its engagement with the reference.

• Financial Condition: As part of any Offer submission, the prospective Consultant must include information regarding financial condition, including income statements, balance sheets, and any other information which accurately shows the prospective Consultant's current financial condition. All offers shall include the Consultant's State of Texas vendor identification number or federal tax identification number. THECB reserves the right to request such additional financial information as it deems necessary to evaluate the prospective Consultant, and by submission of an Offer, the prospective Consultant agrees to provide same. The prospective Consultant must disclose if and when it has filed for bankruptcy within the last seven (7) years. For prospective Consultants conducting business as a corporation, partnership, limited liability partnership, or other form of artificial person, the prospective Consultant must disclose whether any of its principals, partners, or officers have filed for bankruptcy within the last seven (7) years.

• Certifications/Affirmations/Disclosures: By signing the transmittal letter and submitting an Offer, Consultant makes and agrees to make the following certifications, affirmations and disclosures. If any explanation or qualification is required for any certification, affirmation or disclosure, you must include such explanation or qualification in your transmittal letter. A false statement or misleading statement in this section is a material breach of contract and shall void the submitted Offer or any resulting contracts. Please restate each of the following certifications, affirmations or disclosures in this section of your Offer.

1. The Consultant has not given, nor intends to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted Offer.

2. The Consultant is not currently delinquent in the payment of any franchise tax owed the State of Texas.

3. Neither the Consultant nor the firm, corporation or partnership or institution represented by the Consultant or anyone acting for such firm, corporation or institution has violated the antitrust laws of this State, the Federal antitrust laws nor communicated directly or indirectly the Offer made to any competitor or any other person engaged in such line of business.

4. The Consultant has not received compensation for participation in the preparation of the specification for this Offer.

5. Pursuant to Texas Family Code, § 231.006 (relating to delinquent child support), the Consultant certifies that the individual or business entity named in this Offer is not ineligible to receive a specified payment and acknowledge that this contract may be terminated and payment may be withheld if this certification is inaccurate.

6. An Offer must include the names and Social Security Numbers of each person with at least a 25% ownership of the business entity submitting this Offer.

7. Pursuant to § 2155.004 Government Code (relating to issuance of warrants to persons indebted to the State or who owe delinquent taxes to the State) the Consultant certifies that the individual or business entity named in this Offer is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate.

8. Consultant acknowledges and agrees that, to the extent Consultant owes any debt or delinquent taxes to the State of Texas, in accordance with § 403.055(h), Government Code, any payments Consultant is owed under this Agreement shall be applied by the Comptroller of Public Accounts toward any debt or delinquent taxes Consultant owes the State of Texas until the debt or delinquent taxes are paid in full.

9. Pursuant to Article 2.45 of the Texas Business Corporation Act, Consultant must certify that it is not delinquent in a tax owed to the State under Chapter 171 of the Texas Tax Code. Any Consultant who is delinquent may not be awarded a contract by the State.

10. With respect to all services, if any, purchased pursuant to this RFO, Consultant represents and warrants that it shall buy Texas products and materials for use in providing the services authorized herein when such products and materials are available at a comparable price and in a comparable period of time when compared to non-Texas products and materials.

11. Consultant certifies that if a Texas address is shown as the address of the vendor, Vendor qualifies as a Texas Resident Bidder as defined in Rule 1 TAC 111.2.

12. If the consultant is an individual not residing in Texas or a business entity not incorporated in or whose principal domicile is not in Texas,

the consultant certifies that it either: (a) holds a permit issued by the Texas comptroller to collect or remit all state and local sales and use taxes that become due and owing as a result of the consultant's business in Texas; or (b) does not sell tangible personal property or services that are subject to the state and local sales and use tax.

13. If the Consultant is an individual who has previously been employed by THECB or any other Texas state agency at any time during the two years preceding their Offer, the Consultant must disclose the following:

• the nature of the previous employment with THECB or any other state agency;

• the date the employment was terminated;

• the annual rate of compensation for the employment at the time of the Consultant's termination.

If a Consultant is subject to this disclosure and fails to make such a disclosure, the Offer shall be disqualified.

TRD-200407147
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Filed: December 6, 2004

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Texas Department of Insurance

Company Licensing

Application to change the name of OVERSEAS PARTNERS US REINSURANCE COMPANY to CLEARWATER SELECT INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Wilmington, Delaware.

Application to change the name of RANGER INSURANCE COMPANY to FAIRMONT SPECIALTY INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Wilmington, Delaware.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas, 78701, within 20 days after this notice is published in the *Texas Register*.

TRD-200407179
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 8, 2004

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of COMMONWEALTH CLAIMS MANAGEMENT ASSOCIATES, INC., a foreign third party administrator. The home office is BOSTON, MASSACHUSETTS.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200407180
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 8, 2004

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Texas Lottery Commission

Instant Game Number 448 "Weekly Grand"

1.0 Name and Style of Game.

A. The name of Instant Game No. 448 is 'WEEKLY GRAND". The play style for Game 1 is "yours beats theirs"; the play style for Game 2 is "key symbol match"; and the play style for Game 3 is "key symbol match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 448 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 448.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol- The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, $1.00, $2.00, $4.00, $5.00, $10.00, $40.00, $100, $300, GRAND SYMBOL, CLOVER SYMBOL, DIAMOND SYMBOL, GOLD BAR SYMBOL, POT OF GOLD SYMBOL, MONEY BAG SYMBOL and TOP HAT SYMBOL.

D. Play Symbol Caption- the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 448 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
GRAND SYMBOL	WEEK
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$40.00	FORTY
$100	ONE HUND
$300	THR HUND
CLOVER SYMBOL	CLVR
DIAMOND SYMBOL	DIAMD
GOLD BAR SYMBOL	GOLD
POT OF GOLD SYMBOL	POTGLD
MONEY BAG SYMBOL	MBAG
TOP HAT SYMBOL	TPHAT

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 448 - 1.2E

CODE	PRIZE
TWO	$2.00
FOR	$4.00
FIV	$5.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

H. Mid-Tier Prize - A prize of $40.00 or $300.

I. High-Tier Prize- A prize of $1,000 per week, for 52 weeks each year, for 20 years.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (448), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 250 within each pack. The format will be: 448-0000001-001.

L. Pack - A pack of 'WEEKLY GRAND" Instant Game tickets contains 250 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). Tickets 001 and 002 will be on the top page; tickets 003 and 004 on the next page; etc.; and tickets 249 and 250 will be on the last page. Please note the books will be in a A- B configuration.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery 'WEEKLY GRAND" Instant Game No. 448 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "WEEKLY GRAND" Instant Game is determined once the latex on the ticket is scratched off to expose 15 (fifteen) play symbols. In Game 1, if the player's YOUR NUMBER beats THEIR NUMBER, in any one row across, the player will win the prize for that row. If the player reveals the GRAND symbol, the player will win $1,000 per week for 20 years. In Game 2, if the player matches 3 identical amounts, the player will win that amount. If the player reveals 3 GRAND symbols, the player will win $1,000 per week for 20 years. In Game 3, if the player matches 2 out of 3 symbols, the player will win $20 automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 15 (fifteen) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 15 (fifteen) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 15 (fifteen) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 15 (fifteen) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No three or more like non-winning prize symbols on a ticket.

C. Non-winning prize symbols will not match a winning prize symbol on a ticket.

D. The GRAND symbol may only be used in Games 1 and 2.

E. Game 1: No ties between Yours and Theirs in a row.

F. Game 1: No duplicate games on a ticket.

G. Game 1: No duplicate non-winning prize symbols on a ticket.

H. Game 2: No 4 or more of a kind.

2.3 Procedure for Claiming Prizes.

A. To claim a 'WEEKLY GRAND" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $40.00 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $40.00 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. When claiming a "WEEKLY GRAND" Instant Game prize of $1,000 per week for 20 years, the claimant must choose one of four (4) payment options for receiving his prize:

1. Weekly via direct deposit to the winner's account. With this plan, upon validation of the prize, 52 weekly payments of $1,000, less any taxes and/or other offsets or mandatory withholdings required by law, will be made each Wednesday up to $52,000 per year. Some years may have 53 weeks per year, however, only 52 weeks per year will be paid. In years with 53 weeks, no payment will be made on the last Wednesday in December. Weekly payments will be made for a period of 20 years or a total of 1,040 weekly payments.

2. Monthly via direct deposit to the winner's account. With this plan, upon validation of the prize, one payment of $4,337, less any taxes and/or other offsets or mandatory withholdings required by law, will be made each year on the first business day of the month of the claim. A payment of $4,333, less any taxes and/or other offsets or mandatory withholdings required by law, will be made on the first business day for the remaining eleven months of each year for a combined total of $52,000 per year. Monthly payments will be made for a period of 20 years or a total of 240 monthly payments.

3. Quarterly via direct deposit to the winner's account. With this plan, upon validation of the prize, a payment of $13,000, less any taxes and/or other offsets or mandatory withholdings required by law, will be made four times a year on the first business day of the first month of each calendar quarter (January, April, July, October) for a total of $52,000 per year. Quarterly payments will be made for a period of 20 years or a total of 80 quarterly payments.

4. Annually via direct deposit to the winner's account. With this plan, upon validation of the prize, a payment of $52,000, less any taxes and/or other offsets or mandatory withholdings required by law, will be made once a year on the first business day of the anniversary month of the claim. Annual payments will be made for a period of 20 years or a total of 20 annual payments.

C. As an alternative method of claiming a "WEEKLY GRAND" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, or $300, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the 'WEEKLY GRAND" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the 'WEEKLY GRAND" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose

signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 25,200,000 tickets in the Instant Game No. 448. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 448 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$2	2,620,800	9.62
$4	2,066,400	12.20
$5	100,800	250.00
$10	352,800	71.43
$20	226,800	111.11
$40	151,200	166.67
$300	8,295	3,037.97
$1,000/WK	3	8,400,000.00

* The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.56. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 448 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 448, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200407108
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: December 3, 2004

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Instant Game Number 525 "Mystery Money"

1.0 Name and Style of Game.

A. The name of Instant Game No. 525 is "MYSTERY MONEY". The play style is "key symbol match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 525 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 525.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: THREAD SYMBOL, SCARF SYMBOL, BOOT SYMBOL, NAIL SYMBOL, GLOVE SYMBOL, RING SYMBOL, TROPHY SYMBOL, BRUSH SYMBOL, BELL SYMBOL, ANCHOR SYMBOL, CUP SYMBOL, HUBCAP SYMBOL, HAT SYMBOL, NECKLACE SYMBOL, KEY SYMBOL, HORSESHOE SYMBOL, APPLE SYMBOL, SAFTEY PIN SYMBOL, MATCH SYMBOL, PAIL SYMBOL, FRYPAN SYMBOL, LEAF SYMBOL, HOOK SYMBOL, PADDLE SYMBOL, BOW SYMBOL, SAW SYMBOL, CLOVER SYMBOL, THIMBLE SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $12.00, $15.00, $20.00, $50.00, $100, $500, $1,000, $5,000 and $10,000.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 525 - 1.2D

PLAY SYMBOL	CAPTION
THREAD SYMBOL	THREAD
SCARF SYMBOL	SCARF
BOOT SYMBOL	BOOT
NAIL SYMBOL	NAIL
GLOVE SYMBOL	GLOVE
RING SYMBOL	RING
TROPHY SYMBOL	TROPHY
BRUSH SYMBOL	BRUSH
BELL SYMBOL	BELL
ANCHOR SYMBOL	ANCHOR
CUP SYMBOL	CUP
HUBCAP SYMBOL	HUBCAP
HAT SYMBOL	HAT
NECKLACE SYMBOL	NECKLCE
KEY SYMBOL	KEY
HORSESHOE SYMBOL	HRSHOE
APPLE SYMBOL	APPLE
SAFETY PIN SYMBOL	PIN
MATCH SYMBOL	MATCH
PAIL SYMBOL	PAIL
FRYPAN SYMBOL	FRYPAN
LEAF SYMBOL	LEAF
HOOK SYMBOL	HOOK
PADDLE SYMBOL	PADDLE
BOW SYMBOL	BOW
SAW SYMBOL	SAW
CLOVER SYMBOL	CLOVER
THIMBLE SYMBOL	THIMBLE
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$12.00	TWELVE$
$15.00	FIFTN
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$5,000	FIV THOU
$10,000	10 THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 525 - 1.2E

CODE	PRIZE
ONE	$1.00
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100 or $500.

I. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (525), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 525-0000001-001.

L. Pack - A pack of "MYSTERY MONEY" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MYSTERY MONEY" Instant Game No. 525 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MYSTERY MONEY" Instant Game is determined once the latex on the ticket is scratched off to expose 36 (thirty-six) Play Symbols. If a player matches any of YOUR ITEMS play symbols to any of the NEEDED ITEMS play symbols the player wins prize indicated for that item indicated. If a player matches all 12 (twelve) items the player wins $50,000. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 36 (thirty-six) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 36 (thirty-six) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 36 (thirty-six) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 36 (thirty-six) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning YOUR ITEMS on a ticket.

C. No duplicate NEEDED ITEMS on a ticket.

D. No duplicate non-winning prize symbols on a ticket.

E. The occurrence of a ticket winning all 12 locations will only appear as dictated by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "MYSTERY MONEY" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "MYSTERY MONEY" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MYSTERY MONEY" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MYSTERY MONEY" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "MYSTERY MONEY" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 525. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 525 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	960,000	6.25
$10	440,000	13.64
$15	160,000	37.50
$20	120,000	50.00
$50	80,000	75.00
$100	10,500	571.43
$500	700	8,571.43
$1,000	450	13,333.33
$5,000	50	120,000.00
$50,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 3.39. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 525 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 525, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200407173
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: December 8, 2004

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North Central Texas Council of Governments

Request for Proposals for the Development of the Dallas/Fort Worth International Airport Intelligent Transportation System (ITS) Master Plan

This request by the North Central Texas Council of Governments (NCTCOG) for consultant services is filed under the provisions of Government Code, Chapter 2254.

The North Central Texas Council of Governments (NCTCOG) is requesting written proposals from consultant firms to undertake the development of the Dallas/Fort Worth International Airport (DFW Airport) Intelligent Transportation System (ITS) Master Plan. The project will be funded with Surface Transportation Program - Metropolitan Mobility funds. It is anticipated that this project will require engineering services. The ITS Plan should include the following components: 1) a Strategic Plan to identify how ITS fits into the Airport's objectives, 2) an Airport System Architecture to identify how ITS could be designed in accordance with the regional and national architecture, and 3) an ITS Implementation Plan that will provide a strategy for implementation by breaking the system into projects and identifying timelines and costs for each of the projects. Potential funding sources and planning-level benefits should also be identified as part of the ITS Plan.

Due Date

Proposals must be submitted no later than 5 p.m. Central Daylight Time on Monday, January 24, 2005, to Natalie Bettger, Principal Transportation Planner, North Central Texas Council of Governments, 616 Six Flags Drive, Arlington, Texas 76011 or P.O. Box 5888, Arlington, Texas 76005-5888. For copies of the Request for Proposals, contact Therese Bergeon, (817) 695-9267.

Contract Award Procedures

The firm or individual selected to perform this study will be recommended by a Consultant Selection Committee (CSC). The CSC will use evaluation criteria and methodology consistent with the scope of services contained in the Request for Proposals. The NCTCOG Executive Board will review the CSC's recommendations and, if found acceptable, will issue a contract award.

Regulations

NCTCOG, in accordance with Title VI of the Civil Rights Act of 1964, 78 Statute 252, 41 United States Code 2000d to 2000d-4; and Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 1, Nondiscrimination in Federally Assisted Programs of the Department of Transportation issued pursuant to such act, hereby notifies all proposers that it will affirmatively assure that in regard to any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full opportunity to submit proposals in response to this invitation and will not be discriminated against on the grounds of race, color, sex, age, national origin, or disability in consideration of an award.

TRD-200407145
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: December 6, 2004

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Public Utility Commission of Texas

Notice of Application for Relinquishment of a Service Provider Certificate of Operating Authority

On December 2, 2004, Choctaw Communications Inc. filed an application with the Public Utility Commission of Texas (commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60052. Applicant intends to relinquish its certification.

The Application: Application of Choctaw Communications Inc. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 30487.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than December 22, 2004. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 30487.

TRD-200407162
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 7, 2004

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on December 2, 2004, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of CallFree for a Service Provider Certificate of Operating Authority, Docket Number 30486 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, long distance, and wireless services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than December 22, 2004. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 30486.

TRD-200407163
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 7, 2004

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Notice of Application for Waiver from Requirements

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on December 2, 2004, for waiver from the requirements in P.U.C. Substantive Rule §26.54(b)(3) and (b)(4)(C). A summary of the application follows.

Docket Title and Number: Application of Southwest Texas Telephone Company for an Extension of Waiver From Requirements in P.U.C. Substantive Rule §26.54(b)(3) and P.U.C. Substantive Rule §26.54(b)(4)(C). Docket Number 30490.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735- 2989. All comments should reference Docket Number 30490.

TRD-200407181
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 8, 2004

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Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on December 1, 2004, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Brownsville Public Utilities Board (BPUB) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Cameron County (Woods End Subdivision). Docket Number 30476.

The Application: The application encompasses an area of land which is singly certificated to American Electric Power Company (AEP), formerly known as Central Power & Light (CP&L), and is within the corporate limits of the City of Brownsville. BPUB received a letter request to provide electric utility service to a proposed subdivision called Woods End Subdivision consisting of 85.58 acres of land located on the north side of FM 3248. The estimated cost to BPUB to provide service to this proposed area is $395,828.57. If the application is granted the area would be dually certificated for electric service.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than December 22, 2004, by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 30476.

TRD-200407097
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 2, 2004

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Notice of Training Workshop Relating to Submitting Retail Electric Provider Reports and Confidential Materials

The Public Utility Commission of Texas (PUC or commission) will hold a Training Workshop Relating to the Submission of Retail Electric Provider (REP) Reports and Confidential Materials. This free workshop will be held on January 10, 2005, from 1:00 p.m. until 3:00 p.m. in the Commissioners' Hearing Room, 7th Floor, at 1701 North Congress Avenue, Austin, Texas.

This workshop is being conducted for the benefit of the REPs who file annual or quarterly reports with the PUC to help them better understand the process of submitting these reports.

Although the workshop is being conducted mainly to assist the REPs, this workshop is open to anyone who wishes a better understanding of the filing procedures of the PUC. While all are encouraged and invited to attend, this workshop will be most beneficial to those persons who actually prepare reports and confidential materials for submission to the commission.

PUC staff will explain how to file the quarterly and annual reports, the commission's procedural rule on confidential materials, how the materials are handled while in the custody of the commission, and how the materials are returned to parties after a case is closed. Staff will also discuss how the PUC processes Open Records requests.

Those attending are asked to bring a copy of PUC Procedural Rule §22.71 with them. A copy of the procedural rule is available at: http://www.puc.state.tx.us/rules/procrules/pr-e/22.71/22.71.pdf.

To register for the workshop contact Carol Milner, Confidential Documents Manager, at carol.milner@puc.state.tx.us, no later than January 3, 2005, with the name of your company and the number of persons attending.

TRD-200407096
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 2, 2004

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Texas Workers' Compensation Commission

Invitation to Apply to the Medical Advisory Committee (MAC)

The Texas Workers' Compensation Commission seeks to have a diverse representation on the MAC and invites qualified individuals from all regions of Texas to apply for openings on the MAC in accordance with the eligibility requirements of the *Procedures and Standards for the Medical Advisory Committee*. The Medical Review Division is currently accepting applications for the following Medical Advisory Committee representative vacancies:

Primary

* Public Health Care Facility

Alternate

* Public Health Care Facility

* Dentist

* Pharmacist

* Podiatrist

* Employer

* Employee

* General Public Representative 1

* General Public Representative 2

Commissioners for the Texas Workers' Compensation Commission appoint the Medical Advisory Committee members who are composed of 18 primary and 18 alternate members representing health care providers, employees, employers, insurance carriers, and the general public. Primary members are required to attend all Medical Advisory Committee meetings, subcommittee meetings, and work group meetings to which they are appointed. The alternate member may attend all meetings, however during a primary member's absence, the alternate member must attend meetings to which the primary member is appointed. Requirements and responsibilities of members are established in the Procedures and Standards for the Medical Advisory Committee as adopted by the Commission.

The Medical Advisory Committee meetings must be held at least quarterly each fiscal year during regular Commission working hours. Members are not reimbursed for travel, per diem, or other expenses associated with Committee activities and meetings. Voluntary service on the Medical Advisory Committee is greatly appreciated by the TWCC Commissioners and the TWCC Staff.

The purpose and task of the Medical Advisory Committee, which includes advising the Commission's Medical Review Division on the development and administration of medical policies, rules and guidelines, are outlined in the Texas Workers' Compensation Act, §413.005.

Applications and other relevant Medical Advisory Committee information may be viewed and downloaded from the Commission's web site at *http://www/twcc.state.tx.us.* Click on 'Commission Meetings', then 'Medical Advisory Committee'. Applications may also be obtained by calling Jane McChesney, MAC Coordinator, at 512-804-4855 or Ruth Richardson, Manager of Monitoring, Analysis and Education, Medical Review Division at 512-804-4850 .

The qualifications as well as the terms of appointment for all positions are listed in the Procedures and Standards for the Medical Advisory Committee. These Procedures and Standards are as follows:

LEGAL AUTHORITY The Medical Advisory Committee for the Texas Workers' Compensation Commission, Medical Review Division is established under the Texas Workers' Compensation Act, (the Act) §413.005.

PURPOSE AND ROLE The purpose of the Medical Advisory Committee (MAC) is to bring together representatives of health care specialties and representatives of labor, business, insurance and the general public to advise the Medical Review Division in developing and administering the medical policies, fee guidelines, and the utilization guidelines established under §413.011 of the Act.

COMPOSITION Membership. The composition of the committee is governed by the Act, as it may be amended. Members of the committee are appointed by the Commissioners and must be knowledgeable and qualified regarding work-related injuries and diseases.

Members of the committee shall represent specific health care provider groups and other groups or interests as required by the Act, as it may be amended. As of September 1, 2001, these members include a public health care facility, a private health care facility, a doctor of medicine, a doctor of osteopathic medicine, a chiropractor, a dentist, a physical therapist, a podiatrist, an occupational therapist, a medical equipment supplier, a registered nurse, and an acupuncturist. Appointees must have at least six (6) years of professional experience in the medical profession they are representing and engage in an active practice in their field.

The Commissioners shall also appoint the other members of the committee as required by the Act, as it may be amended. An insurance carrier representative may be employed by: an insurance company; a certified self-insurer for workers' compensation insurance; or a governmental entity that self-insures, either individually or collectively. An insurance carrier member may be a medical director for the carrier but may not be a utilization review agent or a third party administrator for the carrier.

A health care provider member, or a business the member is associated with, may not derive more than 40% of its revenues from workers compensation patients. This fact must be certified in their application to the MAC.

The representative of employers, representative of employees, and representatives of the general public shall not hold a license in the health care field and may not derive their income directly from the provision of health care services.

The Commissioners may appoint one alternate representative for each primary member appointed to the MAC, each of whom shall meet the qualifications of an appointed member.

Terms of Appointment: Members serve at the pleasure of the Commissioners, and individuals are required to submit the appropriate application form and documents for the position. The term of appointment for any primary or alternate member will be two years, except for unusual circumstances (such as a resignation, abandonment or removal from the position prior to the termination date) or unless otherwise directed by the Commissioners. A member may serve a maximum of two terms as a primary, alternate or a combination of primary and alternate member. Terms of appointment will terminate August 31 of the second year following appointment to the position, except for those positions that were initially created with a three-year term. For those members who are appointed to serve a part of a term that lasts six (6) months or less, this partial appointment will not count as a full term.

Abandonment will be deemed to occur if any primary member is absent from more than two (2) consecutive meetings without an excuse accepted by the Medical Review Division Director. Abandonment will be deemed to occur if any alternate member is absent from more than two (2) consecutive meetings which the alternate is required to attend because of the primary member's absence without an excuse accepted by the Medical Review Division Director.

The Commission will stagger the August 31st end dates of the terms of appointment between odd and even numbered years to provide sufficient continuity on the MAC.

In the case of a vacancy, the Commissioners will appoint an individual who meets the qualifications for the position to fill the vacancy. The Commissioners may re-appoint the same individual to fill either a primary or alternate position as long as the term limit is not exceeded. Due to the absence of other qualified, acceptable candidates, the Commissioners may grant an exception to its membership criteria, which are not required by statute.

RESPONSIBILITY OF MAC MEMBERS Primary Members. Make recommendations on medical issues as required by the Medical Review Division.

Attend the MAC meetings, subcommittee meetings, and work group meetings to which they are appointed.

Ensure attendance by the alternate member at meetings when the primary member cannot attend.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies.

Alternate Members. Attend the MAC meetings, subcommittee meetings, and work group meetings to which the primary member is appointed during the primary member's absence.

Maintain knowledge of MAC proceedings.

Make recommendations on medical issues as requested by the Medical Review Division when the primary member is absent at a MAC meeting.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies when the primary member is absent from a MAC meeting.

Committee Officers. The TWCC Commissioners designate the chairman of the MAC. The MAC will elect a vice chairman. A member shall be nominated and elected as vice chairman when he/she receives a majority of the votes from the membership in attendance at a meeting at which nine (9) or more primary or alternate members are present.

Responsibilities of the Chairman: Preside at MAC meetings and ensure the orderly and efficient consideration of matters requested by the Medical Review Division; prior to meetings, confer with the Medical Review Division Director, and when appropriate, the TWCC Executive Director to receive information and coordinate:

a. Preparation of a suitable agenda.

b. Planning MAC activities.

c. Establishing meeting dates and calling meetings.

d. Establishing subcommittees.

e. Recommending MAC members to serve on subcommittees.

If requested by the Commission, appear before the Commissioners to report on MAC meetings.

COMMITTEE SUPPORT STAFF The Director of Medical Review will provide coordination and reasonable support for all MAC activities. In addition, the Director will serve as a liaison between the MAC and the Medical Review Division staff of TWCC, and other Commission staff if necessary.

The Medical Review Director will coordinate and provide direction for the following activities of the MAC and its subcommittees and work groups:

Preparing agenda and support materials for each meeting.

Preparing and distributing information and materials for MAC use.

Maintaining MAC records.

Preparing minutes of meetings.

Arranging meetings and meeting sites.

Maintaining tracking reports of actions taken and issues addressed by the MAC.

Maintaining attendance records.

SUBCOMMITTEES The chairman shall appoint the members of a subcommittee from the membership of the MAC. If other expertise is needed to support subcommittees, the Commissioners or the Director of Medical Review may appoint appropriate individuals.

WORK GROUPS When deemed necessary by the Director of Medical Review or the Commissioners, work groups will be formed by the Director. At least one member of the work group must also be a member of the MAC.

WORK PRODUCT No member of the MAC, a subcommittee, or a work group may claim or is entitled to an intellectual property right in work performed by the MAC, a subcommittee, or a work group.

MEETINGS Frequency of Meetings. Regular meetings of the MAC shall be held at least quarterly each fiscal year during regular Commission working hours.

CONDUCT AS A MAC MEMBER Special trust has been placed in members of the Medical Advisory Committee. Members act and serve on behalf of the disciplines and segments of the community they represent and provide valuable advice to the Medical Review Division and the Commission. Members, including alternate members, shall observe the following conduct code and will be required to sign a statement attesting to that intent.

Comportment Requirements for MAC Members:

Learn their duties and perform them in a responsible manner;

Conduct themselves at all times in a manner that promotes cooperation and effective discussion of issues among MAC members;

Accurately represent their affiliations and notify the MAC chairman and Medical Review Director of changes in their affiliation status;

Not use their memberships on the MAC: a. in advertising to promote themselves or their business. b. to gain financial advantage either for themselves or for those they represent; however, members may list MAC membership in their resumes;

Provide accurate information to the Medical Review Division and the Commission;

Consider the goals and standards of the workers' compensation system as a whole in advising the Commission;

Explain, in concise and understandable terms, their positions and/or recommendations together with any supporting facts and the sources of those facts;

Strive to attend all meetings and provide as much advance notice to the Texas Workers' Compensation Commission staff, attn: Medical Review Director, as soon as possible if they will not be able to attend a meeting; and

Conduct themselves in accordance with the MAC Procedures and Standards, the standards of conduct required by their profession, and the guidance provided by the Commissioners, Medical Review Division or other TWCC staff.

TRD-200407148
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: December 7, 2004

♦ ♦ ♦

Workforce Resource, Inc.

Workforce Investment Act (WIA) Providers of Training Services

Workforce Resource, Inc., and the Texas Workforce Commission are seeking training provider applicants for possible placement on the statewide list of approved training facilities in support of the Workforce Investment Act (WIA).

WIA conducts Federal job training programs with a comprehensive workforce investment system to help Americans access tools they need to manage their careers through information and high quality services, and to help U.S. companies find skilled workers.

Workforce Resource is the administrative entity for WIA programs within the North Texas Workforce delivery area, including: Archer, Baylor, Clay, Cottle, Foard, Hardeman, Jack, Montague, Wichita, Wilbarger, and Young counties.

Eligible training providers are: post-secondary educational institutions, entities that carry out programs under the National Apprenticeship Act, and other public or private providers of a program of training services.

Obtain additional information by contacting Joe Winkcompleck at Workforce Resource, Inc., 901 Indiana Avenue Suite 180, Wichita Falls, Texas 76301, (940) 767-1432, FAX (940) 322-2683, or e-mail at joe.winkcompleck@twc.state.tx.us.

TRD-200407095
Mona Williams Statser
Executive Director
Workforce Resource, Inc.
Filed: December 2, 2004

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 29 (2004) is cited as follows: 29 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "29 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 29 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TA***C) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TA***C.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TA***C, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 16, April 9, July 9, and October 8, 2004). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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