PROPOSED RULES

Proposal 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 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 2. RESIDENTIAL MORTGAGE LOAN ORIGINATORS REGULATED BY THE OFFICE OF CONSUMER CREDIT COMMISSIONER

SUBCHAPTER A. APPLICATION PROCEDURES

7 TAC §2.104, §2.106

The Finance Commission of Texas (commission) proposes amendments to §2.104 (relating to Application and Renewal Fees) and §2.106 (relating to Denial, Suspension, or Revocation Based on Criminal History), in 7 TAC, Chapter 2, concerning Residential Mortgage Loan Originators Regulated by the Office of Consumer Credit Commissioner.

In general, the purpose of the proposed amendments to 7 TAC Chapter 2 is to implement changes resulting from the commission’s review of the chapter under Texas Government Code, §2001.039. Notice of the review of 7 TAC Chapter 2 was published in the Texas Register on December 27, 2019, (44 TexReg 8343). The commission received no comments in response to that notice.

The OCCC distributed an early precomment draft of proposed changes to interested stakeholders for review, and then held a stakeholder meeting and webinar regarding the rule changes. The OCCC did not receive any informal precomments on the rule text draft.

The proposed amendments are intended to reduce costs for individual residential mortgage loan originators (RMLOs), to ensure consistency with current licensing procedures and processes, and to make technical corrections.

The proposed amendments to §2.104 would lower the RMLO application and annual renewal fees from $300 to $200, resulting in lower costs to individual RMLOs. These amendments are intended to reduce barriers for individuals to engage in the licensed occupation of being an RMLO regulated by the OCCC.

The proposed amendments to §2.106 relate to the OCCC’s review of the criminal history of an RMLO applicant or licensee. The OCCC is authorized to review criminal history of RMLO applicants and licensees under Texas Occupations Code, Chapter 53, and Texas Finance Code, Chapter 180 (the Texas SAFE Act). Proposed amendments to subsection (c)(1) list the types of crimes that directly relate to the duties and responsibilities of being a regulated lender, as provided by Texas Occupations Code, §53.025(a). Other proposed amendments to §2.106 would ensure consistency with HB 1342, which the Texas Legislature enacted in 2019. HB 1342 included the following changes in Texas Occupations Code, Chapter 53: (1) the bill repealed a provision that generally allowed denial, suspension, or revocation for any offense occurring in the five years preceding the application, (2) the bill added provisions requiring an agency to consider correlation between element of a crime and the duties and responsibilities of the licensed occupation, as well as compliance with conditions of community supervision, parole, or mandatory supervision, and (3) the bill removed previous language specifying who could provide a letter of recommendation on behalf of an applicant. Proposed amendments throughout subsections (c) and (f) of §2.106 would implement these statutory changes from HB 1342. Other proposed amendments to §2.106 include technical corrections, clarifying changes, and updates to citations.

Christina Cuellar Hoke, Manager of Accounting, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for state or local government as a result of administering the rule amendments. The amendments to §2.104 may reduce the revenue coming to the OCCC as a result of application and renewal fees from RMLOs. However, the OCCC intends to offset any reduction in revenue by adjusting discounts associated with annual license assessments for businesses holding regulated lender licenses.

Huffman Lewis, Director of Consumer Protection, has determined that for each year of the first five years the amendments are in effect, the public benefits anticipated as a result of the changes will be that the commission’s rules will be more easily understood by licensees required to comply with the rules, and will be consistent with legislation recently passed by the legislature. In addition, each individual RMLO will pay $100 less at the time of application and with each annual renewal. This will reduce barriers for individuals to engage in the licensed occupation.

There is no anticipated cost to individual RMLOs who are required to comply with the rule amendments as proposed. The OCCC intends to offset any reduction in revenue by adjusting discounts associated with annual license assessments for businesses holding regulated lender licenses. The OCCC anticipates that any effect on these business licensees will be minimal, due to the relatively small number of individual RMLOs that the OCCC licenses.

The OCCC is not aware of any adverse economic effect on small businesses, micro-businesses, or rural communities resulting from this proposal. But in order to obtain more complete information concerning the economic effect of these rule changes, the OCCC invites comments from interested stakeholders and
the public on any economic impacts on small businesses, micro-businesses, and rural communities, as well as any alternative methods of achieving the purpose of the proposal while minimizing adverse impacts.

During the first five years the proposed rule changes will be in effect, the rules will not create or eliminate a government program. Implementation of the rule changes will not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the rule changes will not require an increase or decrease in future legislative appropriations to the OCCC, because the OCCC is a self-directed, semi-independent agency that does not receive legislative appropriations. The proposed rule changes will provide a decrease in fees paid to the agency for RMLOs, although the OCCC intends to offset any reduction in revenue by adjusting discounts associated with annual license assessments for businesses holding regulated lender licenses. The proposed rule changes do not create a new regulation. The proposal would limit existing regulations by reducing fees and amending grounds on which the OCCC may deny, suspend, or revoke a license on grounds of criminal history. The proposed rule changes do not expand or repeal an existing regulation. The proposed rule changes do not increase or decrease the number of individuals subject to the rule’s applicability. The agency does not anticipate that the proposed rule changes will have an effect on the state’s economy.

Comments on the proposal may be submitted in writing to Matthew Nance, Deputy General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705 or by email to rule.comments@occc.texas.gov. To be considered, a written comment must be received on or before 5:00 p.m. central time on the 31st day after the date the proposal is published in the Texas Register. At the conclusion of business on the 31st day after the proposal is published in the Texas Register, no further written comments will be considered or accepted by the commission.

The rule amendments are proposed under Texas Finance Code, §180.061, which authorizes the commission to adopt rules relating to criminal background checks for RMLOs, as well as rules relating to payment of RMLO application and renewal fees. In addition, Texas Finance Code, §180.004(b) authorizes the commission to implement rules to comply with Texas Finance Code, Chapter 180. The amendments to §2.106 are also proposed under Texas Occupations Code, §53.025, which requires each state licensing authority to issue guidelines relating to review of criminal history.

The statutory provisions affected by the proposal are contained in Texas Occupations Code, Chapter 53 and Texas Finance Code, Chapter 180.

§2.104. Application and Renewal Fees.

(a) Required submission to NMLS. To become an RMLO, an OCCC applicant must submit the required fees to NMLS. A fee is required to be submitted at the time of application and at the time of renewal. All fees are nonrefundable and nontransferable. However, upon review of individual circumstances, the OCCC may refund or transfer the state fees.

(b) Fingerprint processing fees. Fingerprint processing fees must also be paid in the amount necessary to recover the costs of investigating the OCCC applicant’s fingerprint record (amount required by third party).

(c) OCCC application and renewal fees. The Finance Commission of Texas sets the RMLO application fee at an amount not to exceed $200 [$300] and the RMLO annual renewal fee not to exceed $200 [$300] for applications filed with the OCCC. Annual renewal fees are due to NMLS by December 31 of each year. A third party operates NMLS and that third-party operator sets the amount of the required system fees. Applicants and RMLOs must pay all required application and renewal fees, fingerprint processing fees, and any additional amounts required by the third-party operator.

(d) OCCC reinstatement period and fee. The Finance Commission of Texas sets the RMLO reinstatement fee at $50 for applications filed with the OCCC. The reinstatement period for OCCC applicants runs from January 1 through the last day of February each year.

§2.106. Denial, Suspension, or Revocation Based on Criminal History.

(a) Criminal history record information. After an applicant submits a complete application to NMLS, including a set of fingerprints, and pays the fees required under §2.104 of this title (relating to Application and Renewal Fees), the OCCC will investigate the applicant. The OCCC will obtain criminal history record information from the Texas Department of Public Safety and the Federal Bureau of Investigation based on the applicant’s fingerprint submission. The OCCC will continue to receive information on new criminal activity reported after the fingerprint information has been initially processed.

(b) Disclosure of criminal history by applicant. The applicant must disclose all criminal history information required to file a complete application with NMLS. Failure to provide any information required by NMLS or requested by the OCCC reflects negatively on the applicant’s character and general fitness to hold a license. The OCCC may request additional criminal history information from the applicant, including the following:

1. information about arrests, charges, indictments, and convictions;
2. reliable documents or testimony necessary to make a determination under subsection (c), including letters of recommendation from prosecution, law enforcement, and correctional authorities;
3. proof that the applicant has maintained a record of steady employment, has supported the applicant’s dependents, and has otherwise maintained a record of good conduct; and
4. proof that all outstanding court costs, supervision fees, fines, and restitution as may have been ordered have been paid.

(c) Crimes directly related to licensed occupation. The OCCC may deny a license application, or suspend or revoke a license, if the applicant or licensee has been convicted of an offense that directly relates to the duties and responsibilities of a licensed residential mortgage loan originator, as provided by Texas Occupations Code, §53.021(a)(1).

1. Originating residential mortgage loans involves making representations to borrowers regarding the terms of the loan and collecting charges in a legal manner. Consequently, the following crimes involving the misrepresentation of costs or benefits of a product or service, the improper handling of money or property entrusted to the person, failure to file a governmental report or filing a false report, or the use or threat of force against another person are directly related to the duties and responsibilities of a licensee and may be grounds for denial, suspension, or revocation: [•]

   (A) theft;
   (B) assault;
   (C) any offense that involves the misrepresentation, deceptive practices, or making a false or misleading statement (including fraud or forgery);
(D) any offense that involves breach of trust or other fiduciary duty;
(E) any criminal violation of a statute governing credit transactions or debt collection;
(F) failure to file a government report, filing a false government report, or tampering with a government record;
(G) any greater offense that includes an offense described in subparagraphs (A) - (F) of this paragraph as a lesser included offense; and
(H) any offense that involves intent, attempt, aiding, solicitation, or conspiracy to commit an offense described in subparagraphs (A) - (G) of this paragraph.

(2) In determining whether a criminal offense directly relates to the duties and responsibilities of holding a license, the OCCC will consider the following factors, as specified in Texas Occupations Code, §53.022:

(A) the nature and seriousness of the crime;
(B) the relationship of the crime to the purposes for requiring a license to engage in the occupation;
(C) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; [and]
(D) the relationship of the crime to the ability or [ ] capacity[ or fitness] required to perform the duties and discharge the responsibilities of a licensee; and [ ]
(E) any correlation between the elements of the crime and the duties and responsibilities of the licensed occupation.

(3) If a criminal conviction directly relates to the duties and responsibilities of the license [in determining whether a conviction for a crime renders an applicant or a licensee unfit to hold a license], the OCCC will consider the following factors in determining whether to deny a license application, or suspend or revoke a license, as specified in Texas Occupations Code, §53.023:

(A) the extent and nature of the person's past criminal activity;
(B) the extent and nature of the person's past criminal activity;
(C) the age of the person when the crime was committed;
(D) the amount of time that has elapsed since the person's last criminal activity;
(E) the conduct and work activity of the person before and after the criminal activity;
(F) evidence of the person's compliance with any conditions of community supervision, parole, or mandatory supervision;

(G) [ ] evidence of the person's current circumstances relating to fitness to hold a license, which may include letters of recommendation, [from one or more of the following:

(44) prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;]

(4) The OCCC may deny a license application, or suspend or revoke a license, if the applicant or licensee has been convicted of an offense that relates to financial responsibility, character, or general fitness to hold a license, as provided by Texas Occupations Code, §180.055(a)(3) and §180.201(2)(A). If the applicant or licensee has been convicted of an offense described by subsections (c)(1), (f)(1), or (f)(2) of this section, this reflects negatively on the applicant or licensee's character and fitness. The OCCC may deny a license application based on other criminal history of the applicant if, when the application is considered as a whole, the agency does not find that the financial responsibility, character, and general fitness of the applicant are sufficient to command the confidence of the public and warrant the belief that the applicant will operate lawfully and fairly. The OCCC will consider the factors identified in subsection (c)(2) - (3) of this section in its review of character and fitness. [Crimes that relate to financial responsibility, character, or general fitness include the following:]

(1) fraud, misrepresentation, deception, or forgery;]
(2) breach of trust or other fiduciary duty;]
(3) dishonesty or theft;]
(4) money laundering;]
(5) assault;]
(6) violation of a statute governing lending of this or any other state;]
(7) failure to file a report with a governmental body, or filing a false report; or]
(8) attempt, preparation, or conspiracy to commit one of the preceding crimes.

(e) Revocation on imprisonment. A license will be revoked on the licensee's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision, as provided by Texas Occupations Code, §53.021(b).

(f) Other grounds for denial, suspension, or revocation. The OCCC may deny a license application, or suspend or revoke a license, based on any other ground authorized by statute, including the following:

(1) [2] a conviction for an offense that does not directly relate to the duties and responsibilities of the licensed occupation and that was committed less than five years before the date of application, as provided by Texas Occupations Code, §53.021(a)(2);]
(2) [2] a conviction for an offense listed in Texas Code of Criminal Procedure, art. 42A.054 [art. 42A.12, §2b], or art. 62.001(6), as provided by Texas Occupations Code, §53.021(a)(3) - (3) §§53.021(a)(3) - (4)];
(3) [4] a conviction for a felony during the preceding seven years or a felony involving an act of fraud, dishonesty, breach of trust, or money laundering, as provided by Texas Occupations Code, §180.055(a)(2) and §180.201(2)(A); and

(3) [4] a material misstatement or failure to provide information in a license application, as provided by Texas Finance Code, §180.201(2); and

PROPOSED RULES   February 28, 2020  45 TexReg 1285
The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2020.
TRD-202000676
Matthew Nance
Deputy General Counsel, Office of Consumer Credit Commissioner
Finance Commission of Texas
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 936-7660

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 25. PREPAID FUNERAL CONTRACTS

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes to amend §§25.7, 25.10, 25.11, 25.13, 25.17, 25.19, 25.24, 25.25, and 25.31 concerning contract forms and regulation of licensees.

Texas Government Code (Government Code) §2001.039 requires a state agency to review each of its rules every four years and either readopt, readopt with amendments, or repeal rules based upon the agency's review and determination as to whether the reasons for initially adopting the rules continue to exist. On June 21, 2019, Chapter 25 was readopted without amendments pursuant to Government Code §2001.039. At the time it was presented to the commission, staff stated that certain amendments which were necessary would be proposed at a later date.

On August 19, 2019, Chapter 25 was amended in response to a legislative directive that the commission by rule prescribe the term of a permit to sell prepaid funeral benefits. As a result of the amendments, permits are no longer renewed, but are effective until revoked by the department or surrendered by the permit holder. However, §§25.17, 25.19, 25.24, 25.25, and 25.31 still refer to the “renewal” of the permits. Thus, amendments to these sections are now proposed to eliminate all remaining references to the requirement that these permits be renewed.

Amendments to §§25.7, 25.10, 25.11, and 25.13 are proposed to update citations, correct typographical errors and eliminate outdated language.

Russell Reese, Assistant Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rules.

Mr. Reese has also determined that, for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing the rules is improved accuracy and clarity for persons required to comply with the rules.

For each year of the first five years that the rules will be in effect, there will be no economic costs to persons required to comply with the rules as proposed.

For each year of the first five years that the rules will be in effect, the rules will not:

-- create or eliminate a government program;
-- require the creation of new employee positions or the elimination of existing employee positions;
-- require an increase or decrease in future legislative appropriations to the agency;
-- require an increase or decrease in fees paid to the agency;
-- create a new regulation;
-- expand, limit or repeal an existing regulation;
-- increase or decrease the number of individuals subject to the rule's applicability; or
-- positively or adversely affect this state's economy.

There will be no adverse economic effect on small businesses, micro-businesses or rural communities. There will be no difference in the cost of compliance for these entities.

To be considered, comments on the proposed amendments must be submitted no later than 5:00 p.m. on Monday, March 30, 2020. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@dob.texas.gov.

SUBCHAPTER A. CONTRACT FORMS

7 TAC §25.7

Amendments to Chapter 25, Subchapter A, §25.7 are proposed under Texas Finance Code (Finance Code), §154.051, which provides that the commission may adopt rules necessary or reasonable to supervise and regulate prepaid funeral services.

Finance Code, Chapter 154, Subchapters C and H are affected by the proposed amendments to Chapter 25, Subchapter A.

§25.7. Casket and Outer-Burial Containers.

(a) (No change.)

(b) Descriptions.

(1) (No change.)

(2) Description content.

(A) Caskets. The description of a casket under this section must, at a minimum, include the following specifications:

(i) (No change.)

(ii) The type of sealing feature, e.g., sealer, non-sealer, gasketed, or non-gasketed, if specified on the permit holder's price list; and

(iii) (No change.)

(B) Urns. The description of an urn under this section must, at a minimum, include the type of material predominately used
in its construction. Bronze urns must be described as sheet bronze or cast bronze, whichever is applicable.

   (C) - (E)  (No change.)

   (c)  (No change.)

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

Filed with the Office of the Secretary of State on February 14, 2020.
TRD-202000686
Catherine Reyer
General Counsel
Texas Department of Banking

Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 475-1301

SUBCHAPTER B. REGULATION OF LICENSES


Amendments to Chapter 25, Subchapter B, §§25.10, 25.11, 25.13, 25.17, 25.19, 25.24, 25.25, and 25.31 are proposed under Texas Finance Code (Finance Code), §154.051, which provides that the commission may adopt rules necessary or reasonable to supervise and regulate prepaid funeral services.

Finance Code, Chapter 154, Subchapters C and H are affected by the proposed amendments to Chapter 25, Subchapter B.

§25.10. Recordkeeping Requirements for Insurance-Funded Contracts.

(a) Application and general requirements. This section applies to a permit holder that sells or maintains insurance-funded prepaid funeral benefit contracts (prepaid contracts). Unless the commissioner grants an exception as provided for in subsections (f)(3) and (g) of this section, a permit holder must maintain and produce for examination the records as specified in this section. The permit holder:

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

   (3) must maintain the records either in hard-copy form, in an electronic database, or on another form of media [hard copy form or stored on microfiche or in an electronic database] from which the record can be retrieved and printed in hard copy in a manner that does not impede the efficient completion of the examination.

   (b) - (i)  (No change.)

   (e) Other records. A permit holder subject to this section must maintain the following records regarding its prepaid funeral benefits operations in hard-copy form, in an electronic database, or on another form of media [or on microfiche or in an electronic database] from which they may be reasonably retrieved in hard-copy form:

   (1) - (5)  (No change.)

   (f) - (i)  (No change.)


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

(c) Contents of filing. The Annual Report filing must be sworn to by an authorized agent or corporate officer of the permit holder before a notary and must provide:

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

   (5) an explanation for any material variances between the ending balances in the recapitulation described in subsection (c)(3) [No (c)(3)] of this section, and those in the in-force policy run or control ledger described in subsection (c)(4) [(b)(4)] of this section;

   (6) - (7)  (No change.)


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

(c) Assessments. The department shall make and collect assessments from all sellers of prepaid funeral benefits pursuant to Finance Code Chapter 154, Subchapter H. Each seller shall remit the amount of its calculated assessment to the department each year with its Renewal or Annual Report filing.

   (d) - (e)  (No change.)


(a) Claims not eligible. In addition to claims excluded under Finance Code §154.359, the following claims are not eligible for payment from the Prepaid Funeral Guaranty Fund:

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

   (4) a claim under an insurance-funded prepaid funeral contract for a loss arising from or relating to the occurrence of one of the following events:

      (A) - (B)  (No change.)

      (C) the suspension or revocation of [renewal or refusal to renew] a permit under Chapter 154 of the Finance Code prior to September 1, 2009; or

      (D)  (No change.)

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

§25.24 What Fees Must I Pay for an Examination?

(a)  (No change.)

(b) As a prepaid funeral benefits seller, what fees must I pay for department examinations?

   (1) An annual assessment must be paid as an examination fee [and as a renewal fee] to the department to defray the cost of administering Chapter 154 of the Finance Code. The amount of your annual assessment is based on the number of outstanding contracts as reflected
§25.25. Conversion from Trust-Funded to Insurance-Funded Benefits.

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

(c) Contents of application. An application for conversion must respond to each paragraph of this subsection by number. Overlapping or duplicate responses may be cross-referenced for brevity.

(1) - (6) (No change.)

(7) Commitment of insurance company. If the post-conversion permit holder is not the insurance company and is unable to independently demonstrate that it has the organizational and financial resources to discharge its permit holder responsibilities, or otherwise intends to rely on the insurance company to provide such resources, the insurance company or its insurance holding company must commit to the department in writing to take all necessary steps to maintain the existence of the current or a successor post-conversion permit holder, cause such permit holder to maintain a permit, [annually renew its permit if renewal is required by Finance Code, §154.107.] and provide adequate resources to such post-conversion permit holder to enable it to maintain the financial condition and general fitness necessary to discharge the post-conversion permit holder’s responsibilities under Finance Code, Chapter 154, and this chapter.

(8) Commitment of applicant. The applicant must commit to the department in writing to obtain and maintain [annually renew] a permit under Chapter 154 and assume the post-conversion permit holder’s responsibilities with respect to each converted contract for any year in which any converted contract remains outstanding[and the post-conversion permit holder or a duly licensed successor fails to renew its permit as required with respect to the converted contracts, as evidenced by a final order revoking the permit]. The commitment must obligate the applicant to submit its completed application with all required fees not later than the 31st day after the date the department notifies the applicant in writing of the facts that require licensure under the commitment.

(9) - (18) (No change.)

(19) Application fee. In connection with an application submitted under this section, the applicant must submit the conversion application fee required by §25.23 of this title (relating to Application [and Renewal] Fees).

(20) (No change.)

(d) - (e) (No change.)


(a) (No change.)

(b) Effect of criminal conviction on proposed or existing permit. The commissioner may deny an application for a permit, or cancel a permit, [suspend, cancel or refuse to renew] a permit if an official has been convicted of a crime which directly relates to the duties and responsibilities of a seller or servicer of prepaid funeral benefits contracts. Adverse action by the commissioner in response to a conviction of a crime specified in subsection (c) of this section is subject to mitigating circumstances and rights of the applicant or permit holder as specified in subsections (d) - (h) of this section.

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

(f) Notification of adverse action. If a permit application is denied, or if a permit is canceled [suspend, or not renewed] because of the criminal conviction of an official, the commissioner will so notify the applicant or permit holder in writing. The notification must include a statement of the reasons for the action and a description of the procedure for administrative or judicial review of the action.

(g) Administrative hearing. An applicant whose permit application is denied, or a permit holder whose permit is canceled [suspend, or not renewed] may request a hearing. A hearing on an order of suspension or cancellation [cancellation, or non-renewal] must be requested not later than the 15th day after the date the order is mailed. A hearing is subject to the provisions of the Administrative Procedure Act, Chapter 2001, Government Code and the provisions of Chapter 9, Subchapter D of this title (relating to Contested Case Hearings).

(h) Judicial review. An applicant whose permit application has been denied, or a permit holder whose permit has been suspended or canceled [suspended, or not renewed] because of the criminal conviction of an official may appeal a final order as set forth in Government Code, Chapter 2001, Subchapter G.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000687
Catherine Reyer
General Counsel
Texas Department of Banking

Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 475-1301

PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 86. RETAIL CREDITORS

SUBCHAPTER B. RETAIL INSTALLMENT CONTRACT

7 TAC §86.201

The Finance Commission of Texas (commission) proposes amendments to §86.201 (relating to Documentary Fee) in 7 TAC, Chapter 86, concerning Retail Creditors.

In general, the purpose of the proposed amendments to §86.201 is to implement changes resulting from the commission’s review of 7 TAC Chapter 86 under Texas Government Code, §2001.039. Notice of the review of 7 TAC Chapter 86 was published in the Texas Register on December 27, 2019 (44 TexReg 8343). The commission received no comments in response to that notice.

The OCCC distributed an early precomment draft of proposed changes to interested stakeholders for review, and then held a stakeholder meeting and webinar regarding the rule changes. The OCCC did not receive any informal precomments on the rule text draft.
The proposed amendments to §86.201 are intended to provide clarity and to update a statutory citation. Proposed new subsection (a) would add a purpose statement to specify which vehicles the rule applies to. A proposed amendment at subsection (b)(1) would amend a citation to the statutory definition of “all-terrain vehicle” in the Texas Transportation Code. This definition was moved to Texas Transportation Code, §551A.001(1) by HB 1548, which the Texas Legislature enacted during the 2019 legislative session.

Christina Cuellar Hoke, Manager of Accounting, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for state or local government as a result of administering the rule amendments.

Huffman Lewis, Director of Consumer Protection, has determined that for each year of the first five years the amendments are in effect, the public benefits anticipated as a result of the changes will be that the commission’s rules will be more easily understood by persons required to comply with the rules, and will be consistent with legislation recently passed by the legislature.

There is no anticipated cost to persons who are required to comply with the amended rule as proposed. There will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

During the first five years the proposed rule changes will be in effect, the rules will not create or eliminate a government program. Implementation of the rule changes will not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the rule changes will not require an increase or decrease in future legislative appropriations to the OCCC, because the OCCC is a self-directed, semi-independent agency that does not receive legislative appropriations. The proposed rule changes will not require an increase or decrease in fees paid to the agency. The proposed rule changes do not create a new regulation. The proposed rule changes do not limit, expand, or repeal an existing regulation. The proposed rule changes do not increase or decrease the number of individuals subject to the rule’s applicability. The agency does not anticipate that the proposed rule changes will have an effect on the state’s economy.

Comments on the proposal may be submitted in writing to Matthew Nance, Deputy General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705 or by email to rule.comments@occc.texas.gov. To be considered, a written comment must be received on or before 5:00 p.m. central time on the 31st day after the date the proposal is published in the Texas Register. At the conclusion of business on the 31st day after the proposal is published in the Texas Register, no further written comments will be considered or accepted by the commission.

These amendments are proposed under Texas Finance Code, §345.251(e), which authorizes the commission to adopt rules to implement and enforce the statutory provision authorizing a documentary fee for certain retail installment transactions under Texas Finance Code, Chapter 345. In addition, Texas Finance Code, §11.304 authorizes the commission to adopt rules to ensure compliance with Title 4 of the Texas Finance Code.

The statutory provisions affected by the proposal are contained in Texas Finance Code, Chapter 345.

§86.201. Documentary Fee.

(a) Purpose. The purpose of this section is to specify the maximum documentary fee in a retail installment transaction for the sale of a motorcycle, moped, all-terrain vehicle, boat, boat motor, boat trailer, or towable recreational vehicle, as provided by Texas Finance Code, §345.251.

(b) Definitions.

(1) All-terrain vehicle--Has the meaning provided by Texas Transportation Code, §§551A.001(1) (§502.001(a)).

(2) Boat--A vessel, as described by Texas Parks and Wildlife Code, §31.003(2).

(3) Boat motor--An outboard motor, as described by Texas Parks and Wildlife Code, §31.003(13).

(4) Covered land vehicle--A motorcycle, moped, all-terrain vehicle, boat trailer, or towable recreational vehicle.

(5) Covered watercraft--A boat or boat motor.

(6) Moped--Has the meaning provided by Texas Transportation Code, §541.201(8).

(7) Motorcycle--Has the meaning provided by Texas Transportation Code, §541.201(9).

(8) Retail installment contract--Has the meaning provided by Texas Finance Code, §345.001(6) and refers to one or more instruments entered into that evidence a secured or unsecured retail installment transaction for the sale of goods under Texas Finance Code, Chapter 345.

(9) Towable recreational vehicle--Has the meaning provided by Texas Finance Code, §348.001(10-a).

(c) [deleted] Contract for covered land vehicles only. For a retail installment contract for the purchase of one or more covered land vehicles, the reasonable maximum amount of the documentary fee is $125.

(d) [deleted] Contract for covered watercraft only. For a retail installment contract for the purchase of one or more covered watercraft, the reasonable maximum amount of the documentary fee is $125.

(e) [deleted] Contract for both covered land vehicles and covered watercraft. For a retail installment contract for the purchase of one or more covered land vehicles and one or more covered watercraft, the reasonable maximum amount of the documentary fee is $175.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000677
Matthew Nance
Deputy General Counsel
Office of Consumer Credit Commissioner
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 936-7660

PART 7. STATE SECURITIES BOARD

CHAPTER 109. TRANSACTIONS EXEMPT FROM REGISTRATION
The Texas State Securities Board proposes an amendment to §109.7, concerning Secondary Trading Exemption under the Texas Securities Act, §5.0. The proposal would update the "manual exemption" contained in §5.0 of the Act. Included in §5.0 is the requirement that certain information about the issuer appear in either a recognized securities manual or on a form (133.5 or 133.6) filed with the Securities Commissioner. The definition of "recognized securities manual" in subsection (e) would be amended to remove S&P Capital IQ Standard Corporations Descriptions. S&P ceased publication of its manual as of May 2, 2016. At this time, all the time-sensitive information appearing in this publication has become outdated and would no longer serve to meet the requirements of §5.0.

Clint Edgar, Deputy Securities Commissioner, and Emily Diaz and Shaun Yarroll, Assistant Directors, Registration Division, have determined that for the first five-year period the proposed amendment is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the proposed amendment.

Mr. Edgar, Ms. Diaz, and Mr. Yarroll have also determined that for each year of the first five years the proposed amendment is in effect the public benefit expected as a result of adoption of the proposed amendment will be that registered dealers relying upon the securities exemption contained in §5.0 for secondary market sales will have been apprised of the manuals recognized by the Board for purposes of the exemption. There will be no adverse economic effect on micro- or small businesses or rural communities. Since the proposed amendment will have no adverse economic effect on micro- or small businesses or rural communities, preparation of an economic impact statement and a regulatory flexibility analysis is not required. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed. There is no anticipated impact on local employment.

Mr. Edgar, Ms. Diaz, and Mr. Yarroll have also determined that for the first five-year period the proposed amendment is in effect: it does not create or eliminate a government program; it does not require the creation or elimination of existing employee positions; it does not require an increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to this agency; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or negatively affect the state's economy. Additionally, the proposed amendment does not create a new regulation, or expand, limit, or repeal an existing regulation.

Comments on the proposal must be in writing and will be accepted for 30 days following publication of the proposed section in the Texas Register. Written comments should be submitted to Marlene K. Sparkman, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167 or faxed to (512) 305-8336. Comments may also be submitted electronically to proposal@ssb.texas.gov. In order to be considered by the Board at adoption, comments must be received no later than 30 days following publication.

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

The proposal affects Texas Civil Statutes, Article 581-5.O.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000608

Travis J. Iles
Securities Commissioner
State Securities Board

Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 305-8303

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.30

The Railroad Commission of Texas proposes amendments to §3.30, relating to Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ). The amendments are proposed to implement changes made by House Bill 2230 and House Bill 2771 from the 84th and 86th Texas Legislative Sessions, respectively. The proposed amendments also update the definition of underground source of drinking water.

The memorandum of understanding (MOU) between the TCEQ and the RRC was last amended in May 2012. Proposed amendments in subsection (a)(4) and subsection (g) update the applicable dates of MOU amendments. The proposed effective date of May 11, 2020, in subsection (g) may change depending on the date of RRC adoption of the proposed amendments.
House Bill 2230 (84th Legislature, 2015) enacted Texas Water Code, Section 27.026, to allow dual authorization of Class II and Class V injection wells for the disposal of nonhazardous brine from a desalination operation, or nonhazardous drinking water treatment residuals (DWTR), under the jurisdiction of the TCEQ, into a Class II injection well permitted by the RRC. House Bill 2230 allows the TCEQ to authorize by individual permit, by general permit, or by rule, a Class V injection well for the disposal of such brine or DWTR in a Class II well permitted by the RRC. Proposed new subsection (e)(4)(E) implements the dual authority granted by House Bill 2230.

House Bill 2771 (86th Legislature, 2019) amended Texas Water Code, Section 26.131, to transfer to TCEQ the RRC’s responsibilities relating to regulation of discharges into surface water in the state, as defined in 30 TAC §307.3(70) (relating to Definitions and Abbreviations), of produced water, hydrostatic test water, and gas plant effluent resulting from the exploration, production and development of oil, natural gas, or geothermal resources. House Bill 2771 authorizes the transfer of responsibilities from the RRC to the TCEQ after TCEQ receives approval from the United States Environmental Protection Agency (EPA) to supplement or amend TCEQ’s Texas Pollutant Discharge Elimination System (TPDES) program to include authority over these discharges. House Bill 2771 also establishes September 1, 2021, as the deadline for TCEQ to submit its request to the EPA to supplement or amend the TPDES program to include delegation of National Pollutant Discharge Elimination System (NPDES) permit authority for discharges of produced water, hydrostatic test water, and gas plant effluent.

Amendments proposed to implement House Bill 2771 are found in subsection (b)(1)(B), (b)(2)(B), and (d)(12)(A). The definition of "produced water" proposed in subsection (b)(1)(B)(i) is based on TCEQ’s proposed definition of that term as published in the January 10, 2020, issue of the Texas Register in proposed amendments to 30 TAC §305.541.

Amendments proposed in subsection (e)(1) correct references to the TCEQ Small Business and Environmental Assistance (SBEA) Division, which is now the TCEQ External Relations Division.

Finally, proposed amendments in §3.30(e)(7)(B)(i) update the definition of "underground source of drinking water" to reference the definition in 40 Code of Federal Regulations §146.3.

The RRC notes that the proposed amendments to the MOU merely clarify the respective jurisdictions of the RRC and TCEQ and the amendments do not have a direct fiscal impact. However, the statutory changes that prompted the proposed amendments modify the authority of each agency, and the fiscal effect of these modifications is described in the following paragraphs.

Leslie Savage, Chief Geologist, Oil and Gas Division, has determined that for each year of the first five years after TCEQ receives approval to supplement or amend its TPDES program and assumes responsibility for discharges of produced water, hydrostatic test water, and gas plant effluent and the amendments as proposed are in full effect, the RRC’s Oil and Gas Regulation and Cleanup Fund would have revenue decreases of $225,000 from revenue currently collected by the RRC for processing applications that will be now be processed by the TCEQ under House Bill 2771. Also, transferring responsibilities from the RRC to TCEQ would result in a decrease of RRC salary and operating expenses of $188,178 each year. There will be no fiscal effect on local government.

Ms. Savage has determined that for the first five years the proposed amendments are in full effect, the primary public benefit will be a better understanding of the responsibilities of the RRC and the TCEQ, as well as compliance with applicable state law.

Ms. Savage has determined that for each year of the first five years that the amendments will be in full effect, there will be no economic costs for persons required to comply as a result of adoption of the proposed amendments. The proposed amendments update the MOU between the RRC and the TCEQ, and do not impose any new requirements on the regulated industry.

The RRC has determined that the proposed amendments to §3.30 will not have an adverse economic effect on rural communities, small businesses or micro businesses. As noted above, there is no anticipated additional cost for any person required to comply with the proposed amendments. Therefore, the RRC has not prepared the economic impact statement or the regulatory flexibility analysis pursuant to Texas Government Code §2006.002.

The RRC has also determined that the proposed amendments will not affect a local economy. Therefore, the RRC has not prepared a local employment impact statement pursuant to Texas Government Code §2001.022.

The RRC has determined that the amendments do not meet the statutory definition of a major environmental rule as set forth in Texas Government Code, §2001.0225(a); therefore, a regulatory analysis conducted pursuant to that section is not required.

During the first five years that the rules would be in full effect, the proposed amendments would not: create or eliminate a government program; require an increase or decrease in future legislative appropriations; create a new regulation; increase or decrease the number of individuals subject to the rule's applicability; expand, limit, or repeal an existing regulation; or affect the state's economy. As noted above, the proposed amendments to the MOU merely clarify the respective jurisdictions of the RRC and TCEQ and the amendments do not have a direct fiscal impact. However, the statutory changes from House Bill 2771 create positions at the TCEQ and eliminate approximately 2.5 FTEs at the RRC. Also pursuant to House Bill 2771, application processing fees currently collected by the RRC will be collected by the TCEQ.

The proposed rulemaking is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§§33.201 et seq., and therefore must be consistent with all applicable CMP goals and policies. In accordance with the Coastal Coordination Act implementation rules, 31 TAC §505.22, the RRC reviewed the proposed rules and has determined that the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rule include protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs) and ensuring sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the proposed rule include policies for discharges of wastewater from oil and gas exploration and production.

The proposed rulemaking is consistent with the above goals and policies by requiring wastewater discharges from oil and gas exploration and production facilities to comply with federal effluent limitation guidelines to protect water resources.
Promulgation and enforcement of the rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule is consistent with these CMP goals and policies and the rule does not create or have a direct or significant adverse effect on any CNRAs.

Written comments on the consistency of this rulemaking with CMP goals may be submitted according the comment procedure addressed below.

Comments on the proposed amendments may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.texas.gov/general-counsel/rules/comment-form-for-proposed-rulemakings; or by electronic mail to rulescoordinator@rrc.texas.gov. The RRC will accept comments until 12:00 noon on Monday, March 30, 2020. The RRC finds that this comment period is reasonable because the proposal and an online comment form will be available on the RRC’s website more than two weeks prior to Texas Register publication of the proposal, giving interested persons additional time to review, analyze, draft, and submit comments. The RRC cannot guarantee that comments submitted after the deadline will be considered. For further information, call Ms. Savage at (512) 463-7308. The status of RRC rulemakings in progress is available at www.rrc.texas.gov/general-counsel/rules/proposed-rules. Once received, all comments are posted on the RRC’s website at https://rrc.texas.gov/general-counsel/rules/proposed-rules. If you submit a comment and do not see the comment posted at this link within three business days of submittal, please call the Office of General Counsel at (512) 463-7149. The RRC has safeguards to prevent emailed comments from getting lost; however, your operating system’s or email server’s settings may delay or prevent receipt.

The RRC proposes the amendments to 16 TAC §3.30 under: (1) Texas Water Code §26.131, which transfers the responsibilities relating to regulation of discharges of produced water, hydrostatic test water and gas plant effluent into surface water in the state from the RRC to the TCEQ; (2) Texas Water Code Chapter 27, which authorizes the RRC to adopt and enforce rules relating to injunctive wells and, specifically, Texas Water Code §27.026, as amended by House Bill 2230, which requires the RRC and TCEQ by rule to amend the MOU to implement the statutory changes related to disposal of nonhazardous brine from a desalination operation or nonhazardous drinking water treatment residuals (DWTR); (3) Texas Natural Resources Code, §81.052, which authorizes the RRC to adopt all necessary rules for governing persons and their operations under the jurisdiction of the RRC; and (4) Texas Natural Resources Code, §85.201, which authorizes the RRC to make and enforce rules for the conservation of oil and gas and prevention of waste of oil and gas. Statutory authority: Water Code §§26.131 and 27.026, and Natural Resources Code §§81.052 and 85.201. Cross reference to statute: Water Code Chapters 26 and 27; Natural Resources Code Chapters 81 and 85.

§3.30. Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ).

(a) Need for agreement. Several statutes cover persons and activities where the respective jurisdictions of the RRC and the TCEQ may intersect. This rule is a statement of how the agencies implement the division of jurisdiction.

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

(4) The original MOU between the agencies adopted pursuant to House Bill 1407 (67th Legislature, 1981) became effective January 1, 1982. The MOU was revised effective December 1, 1987, May 31, 1998, August 30, 2010, and again on May 1, 2012 [August 30, 2010], to reflect legislative clarification of the Railroad Commission's jurisdiction over oil and gas wastes and the Texas Natural Resource Conservation Commission's (the combination of the Texas Water Commission, the Texas Air Control Board, and portions of the Texas Department of Health) jurisdiction over industrial and hazardous wastes.

(5) The agencies have determined that the revised MOU that became effective on May 1, 2012 [August 30, 2010], should again be revised to further clarify jurisdictional boundaries and to reflect legislative changes in agency responsibility.

(b) General agency jurisdictions.

(1) Texas Commission on Environmental Quality (TCEQ) (the successor agency to the Texas Natural Resource Conservation Commission).

(A) (No change.)

(B) Water quality.

(i) Discharges under Texas Water Code, Chapter 26. Under the Texas Water Code, Chapter 26, the TCEQ has jurisdiction over discharges into or adjacent to water in the state, except for discharges regulated by the RRC. Upon delegation from the United States Environmental Protection Agency to the TCEQ of authority to issue permits for discharges into surface water in the state of produced water, hydrostatic test water, and gas plant effluent resulting from the activities described in Texas Water Code §26.131(a), the TCEQ has sole authority to issue permits for those discharges. For the purposes of TCEQ’s implementation of Texas Water Code, §26.131, “produced water” is defined as all wastewater associated with oil and gas exploration, development, and production activities, except hydrostatic test water and gas plant effluent, that is discharged into water in the state, including waste streams regulated by 40 CFR Part 435.

(ii) Discharge permits existing on the effective date of EPA’s delegation to TCEQ of NPDES permit authority for discharges of produced water, hydrostatic test water, and gas plant effluent. RRC permits issued prior to TCEQ delegation of NPDES authority shall remain effective until revoked or expired. Amendment or renewal of such permits on or after the effective date of delegation shall be pursuant to TCEQ’s NPDES authority. The NPDES permit will supersede and replace the RRC permit. For facilities that have both an RRC permit and an EPA permit, TCEQ will issue the NPDES permit upon amendment or renewal of the RRC or EPA permit, whichever occurs first.

(iii) Discharge applications pending on the effective date of EPA’s delegation to TCEQ of NPDES permit authority for discharges of produced water, hydrostatic test water, and gas plant effluent. TCEQ shall assume authority for discharge applications pending at the time TCEQ receives delegation from EPA. The RRC will provide TCEQ the permit application and any other relevant information necessary to administratively and technically review and process the applications. TCEQ will review and process these pending applications in accordance with NPDES requirements.

(iv) Storm water. TCEQ has jurisdiction over storm water discharges that are required to be permitted pursuant to Title 40 Code of Federal Regulations (CFR) Part 122.26, except for discharges regulated by the RRC. Discharge of storm water regulated by TCEQ may be authorized by an individual Texas Pollutant Discharge Elimination System (TPDES) permit or by a general TPDES permit.
These storm water permits may also include authorizations for certain minor types of non-storm water discharges.

(I) Storm water associated with industrial activities. The TCEQ regulates storm water discharges associated with certain industrial activities under individual TPDES permits and under the TPDES Multi-Sector General Permit, except for discharges associated with industrial activities within the jurisdiction of the RRC.

(II) Storm water associated with construction activities. The TCEQ regulates storm water discharges associated with construction activities, except for discharges from construction activities under the jurisdiction of the RRC.

(III) Municipal storm water discharges. The TCEQ has jurisdiction over discharges from regulated municipal storm sewer systems (MS4s).

(IV) Combined storm water. Except with regard to storage of oil, when a portion of a site is regulated by the TCEQ, and a portion of a site is regulated by the EPA and RRC, storm water authorization must be obtained from the TCEQ for the portion(s) of the site regulated by the TCEQ, and from the EPA and the RRC, as applicable, for the RRC regulated portion(s) of the site. Discharge of storm water from a facility that stores both refined products intended for off-site use and crude oil in aboveground tanks is regulated by the TCEQ.

(v) [No text available]

(vi) [No text available]

(vii) [No text available]

(i) Discharges. Under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 26, the RRC regulates discharges from activities associated with the exploration, development, or production of oil, gas, or geothermal resources, including transportation of crude oil and natural gas by pipeline, and from solution brine mining activities, except that on delegation to the TCEQ of NPDES authority for discharges into surface water in the state of produced water, hydrostatic test water, and gas plant effluent resulting from the activities described in Texas Water Code §26.131(a), the TCEQ has sole authority to issue permits for those discharges. Discharges regulated by the RRC into or adjacent to water in the state shall not cause a violation of the water quality standards. While water quality standards are established by the TCEQ, the RRC has the responsibility for enforcing any violation of such standards resulting from activities regulated by the RRC. Texas Water Code, Chapter 26, does not require that discharges regulated by the RRC comply with regulations of the TCEQ that are not water quality standards. The TCEQ and the RRC may consult as necessary regarding application and interpretation of Texas Surface Water Quality Standards.

(ii) - (iii) (No change.)

(c) (No change.)

(d) Jurisdiction over waste from specific activities.

(1) (No change.)

(2) Mobile offshore drilling units (MODUs). MODUs are vessels capable of engaging in drilling operations for exploring or exploiting subsea oil, gas, or mineral resources.

(A) The RRC and, where applicable, the EPA, the U.S. Coast Guard, or the Texas General Land Office (GLO), have jurisdiction over discharges from an MODU when the unit is being used in connection with activities associated with the exploration, development, or production of oil or gas or geothermal resources, except that upon delegation to the TCEQ of NPDES authority for discharges into surface water in the state of produced water, hydrostatic test water, and gas plant effluent resulting from the activities described in Texas Water Code, §26.131(a), the TCEQ shall assume RRC's authority under this subsection.

(B) - (C) (No change.)

(e) Interagency activities.

(1) Recycling and pollution prevention.

(A) The TCEQ and the RRC encourage generators to eliminate pollution at the source and recycle whenever possible to avoid disposal of [solid] wastes. Questions regarding source reduction and recycling may be directed to the TCEQ External Relations [Small Business and Environmental Assistance (SB&EA)] Division, or to the RRC. The TCEQ may require generators to explore source reduction and recycling alternatives prior to authorizing disposal of any waste under the jurisdiction of the RRC at a facility regulated by the TCEQ; similarly, the RRC may explore source reduction and recycling alternatives prior to authorizing disposal of any waste under the jurisdiction of the TCEQ at a facility regulated by the RRC.

(B) The TCEQ External Relations [SB&EA] Division and the RRC will coordinate as necessary to maintain a working relationship to enhance the efforts to share information and use resources more efficiently. The TCEQ External Relations [SB&EA] Division will make the proper TCEQ personnel aware of the services offered by the RRC, share information with the RRC to maximize services to oil and gas operators, and advise oil and gas operators of RRC services. The RRC will make the proper RRC personnel aware of the services offered by the TCEQ External Relations [SB&EA] Division, share information with the TCEQ External Relations [SB&EA] Division to maximize services to industrial operators, and advise industrial operators of the TCEQ External Relations [SB&EA] Division services.

(2) - (3) (No change.)

(4) Management of nonhazardous wastes under TCEQ jurisdiction at facilities regulated by the RRC.

(A) - (D) (No change.)

(E) Under Texas Water Code, §27.026, by individual permit, general permit, or rule, the TCEQ may designate a Class II disposal well that has an RRC permit as a Class V disposal well authorized to dispose by injection nonhazardous brine from a desalination and nonhazardous drinking water treatment residuals under the jurisdiction of the TCEQ. The operator of a permitted Class II disposal well seeking a Class V authorization must apply to TCEQ and obtain a Class V authorization prior to disposal of nonhazardous brine from a desalination operation or nonhazardous drinking water treatment residuals. A permitted Class II disposal well that has obtained a
DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.227

The Public Utility Commission of Texas (commission) proposes the repeal of 16 Texas Administrative Code (TAC) §25.227, relating to Electric Utility Service for Public Retail Customers. The proposed repeal will implement amendments to the Public Utility Regulatory Act (PURA) enacted in House Bill (HB) 2263 during the 86th Legislative Session. HB 2263 removed provisions in PURA which authorized the commissioner of the General Land Office to make electricity sales directly to public retail customers.

Growth Impact Statement

The agency provides the following governmental growth impact statement for the proposed rule repeal, as required by Texas Government Code §2001.0221. The agency has determined that for each year of the first five years that the proposed rule repeal is in effect, the following statements will apply:

(1) the proposed rule repeal will not create a government program and will not eliminate a government program, but will eliminate provisions in the commission’s rules related to a program eliminated by HB 2263;

(2) implementation of the proposed rule repeal will not require the creation of new employee positions and will not require the elimination of existing employee positions;

(3) implementation of the proposed rule repeal will not require an increase and will not require a decrease in future legislative appropriations to the agency;

(4) the proposed rule repeal will not require an increase and will not require a decrease in fees paid to the agency;

(5) the proposed rule repeal will not create a new regulation;

(6) the proposed rule will repeal an existing regulation;

(7) the proposed rule repeal will not change the number of individuals subject to the rule’s applicability; and

(8) the proposed rule repeal will not affect this state’s economy.

Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

Takings Impact Analysis

The commission has determined that the proposed rule repeal will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

Fiscal Impact on State and Local Government

Paula Mueller, Rules Director, has determined that for the first five-year period the proposed rule repeal is in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the sections.

Public Benefits
Paula Mueller, Rules Director, has also determined that for each year of the first five years the proposed rule repeal is in effect, the anticipated public benefits expected as a result of the adoption of the proposed rule repeal will be conforming the commission’s rules to the requirements of PURA. There will be no probable economic cost to persons required to comply with the rule repeal under Texas Government Code §2001.024(a)(5).

Local Employment Impact Statement
For each year of the first five years the proposed rule repeal is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

Costs to Regulated Persons
Texas Government Code §2001.0045(b) does not apply to this rulemaking because the Public Utility Commission is expressly excluded under subsection §2001.0045(c)(7).

Public Hearing
The commission staff will conduct a public hearing on this rulemaking, if requested in accordance with Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on April 16, 2020, at 9:00 a.m. The request for a public hearing must be received by March 30, 2020. If no request for hearing is filed, Commission staff will cancel the public hearing and make a filing in this project.

Public Comments
Comments on the proposed repeal may be filed with the commission's filing clerk at 1701 North Congress Avenue, Austin, Texas or mailed to P.O. Box 13326, Austin, TX 78711-3326, by March 30, 2020. Sixteen copies of comments to the proposed amendment are required to be filed by §22.71(c) of 16 Texas Administrative Code. All comments should refer to project number 50293.

Statutory Authority
This repeal is proposed under §14.002 of the Public Utility Regulatory Act, Tex. Util. Code Ann. (West 2016 and Supp. 2017) (PURA), which provides with the commission the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

§25.227  Electric Utility Service for Public Retail Customers.

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

Filed with the Office of the Secretary of State on February 14, 2020.
TRD-202000675
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 936-7244

19 TAC §101.1003

The Texas Education Agency (TEA) proposes an amendment to §101.1003, concerning English language proficiency assessments. The proposed amendment would modify the rule to provide clarification for the assessment of English learners (ELs) with significant cognitive disabilities.

BACKGROUND INFORMATION AND JUSTIFICATION: Section 101.1003 clarifies the requirements for ELs to be tested for English language proficiency. Federal education policy now includes a requirement that all ELs, including those students with significant cognitive disabilities, be tested for English language proficiency. As a result, the TEA has developed the Texas English Language Proficiency Assessment System (TELPAS) Alternate.

The proposed amendment would add subsection (b)(1) to ensure that all ELs are tested for English language proficiency, including those students with significant cognitive disabilities.

The proposed amendment would also update references to ELs to align with current agency practice and adjust references to English language proficiency assessments to account for the inclusion of an alternative English language proficiency assessment for those with significant cognitive disabilities.

FISCAL IMPACT: Lily Laux, deputy commissioner for school programs, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.
GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would expand an existing regulation by providing a language proficiency assessment for ELs with significant cognitive disabilities.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not limit or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state’s economy.

PUBLIC BENEFIT AND COST TO PERSONS: Ms. Laux has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enacting the proposal would be ensuring that assessment procedures for ELs with significant cognitive disabilities are clear. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no new data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: The TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins February 28, 2020, and ends March 30, 2020. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the Texas Register on February 28, 2020. A form for submitting public comments is available on the TEA website at: https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/. Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

STATUTORY AUTHORITY: The amendment is proposed under Texas Education Code, §39.027(e), which authorizes the commissioner of education to develop an assessment system to evaluate the English language proficiency of all students of limited English proficiency; Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, §1111(b)(2)(G), which requires states to provide an annual assessment of English language proficiency to all English learners; and 34 Code of Federal Regulations, §200.6(h), which requires states to provide for an alternate English language proficiency assessment for English learners with significant cognitive disabilities.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §39.027, the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, §1111(b)(2)(G), and 34 Code of Federal Regulations, §200.6(h).

§101.1003. English Language Proficiency Assessments.

(a) In Kindergarten-Grade 12, an English [language] learner (EL) [ELL], as defined by the Texas Education Code (TEC), Chapter 29, Subchapter B, as a student of limited English proficiency, shall be administered state-identified English language proficiency assessments annually in listening, speaking, reading, and writing to fulfill state requirements under the TEC, Chapter 39, Subchapter B, and federal requirements.

(b) In rare cases, the admission, review, and dismissal (ARD) committee in conjunction with the language proficiency assessment committee (LPAC) may determine that it is not appropriate for an EL [ELL] who receives special education services to participate in the general [an] English language proficiency assessment required by subsection (a) of this section for reasons associated with the student’s particular disability.

(1) Students with the most significant cognitive disabilities who cannot participate in the general English language proficiency assessment, even with allowable accommodations, shall participate in the alternate English language proficiency assessment to meet federal requirements.

(2) The ARD committee shall document the decisions and justifications in the student’s individualized education program, and the LPAC shall document the decisions and justifications in the student’s permanent record file.

(c) In the case of an EL [ELL] who receives special education services, the ARD committee in conjunction with the LPAC shall determine and document the need for allowable testing accommodations in accordance with administrative procedures established by the Texas Education Agency.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000688
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. GENERAL PROVISIONS

SUBCHAPTER G. REQUIREMENTS FOR CONTINUING EDUCATION PROVIDERS, COURSES AND INSTRUCTORS

22 TAC §§535.72, 535.73, 535.75

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §535.72, Approval of Non-elective Continuing Education Courses; §535.73, Approval of Elective Continuing Education Courses; and §535.75, Responsibilities and Operations of Continuing Education Providers.
The proposed amendments to §535.72 streamline the requirements of non-elective continuing education courses between classroom delivery and distance education delivery, so that no matter the delivery method, the requirements are the same. Specifically, the rule is amended to allow the examination at the end of a distance education course to be conducted within the course instruction time rather than after course completion and removes the requirement to grade the examination and receive a passing score of 70%. The proposed amendments to §535.73 adds a requirement for education providers to submit a timely course outline when applying for approval of an elective continuing education course. Adding this requirement removes the subjectivity and variability in how a course is described and explained by a provider in an application for course approval and allows providers to have a clear understanding in what is required for course approval. The proposed changes to §535.75 further streamline the requirements for continuing education providers by only requiring end of course examinations for non-elective continuing education courses, regardless of course delivery (classroom or distance).

The proposed amendments were recommended by the Education Standards Advisory Committee.

Chelsea Buchholtz, Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no adverse economic effect anticipated for small businesses, micro-businesses, rural communities, or local or state employment as a result of implementing the proposed amendments. There is no significant economic cost anticipated for persons who are required to comply with the proposed amendments. Accordingly, no Economic Impact Statement or Regulatory Flexibility Analysis is required.

Ms. Buchholtz also has determined that for each year of the first five years the sections as proposed are in effect, the public benefits anticipated as a result of enforcing the sections as proposed will be simplified requirements for education providers.

For each year of the first five years the proposed amendments are in effect the amendments will not:

--create or eliminate a government program;
--require the creation of new employee positions or the elimination of existing employee positions;
--require an increase or decrease in future legislative appropriations to the agency;
--require an increase or decrease in fees paid to the agency;
--create a new regulation;
--expand, limit or repeal an existing regulation;
--increase or decrease the number of individuals subject to the rule’s applicability; and
--positively or adversely affect the state's economy.

Comments on the proposal may be submitted to Chelsea Buchholtz, Executive Director, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to general.counsel@trec.texas.gov. The deadline for comments is 30 days after publication in the Texas Register.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statutes affected by this proposal are Texas Occupations Code, Chapters 1101 and 1102. No other statute, code or article is affected by the proposed amendments.

§535.72. Approval of Non-elective Continuing Education Courses.

(a) --require

(f) Except as provided in this section, non-elective CE courses must meet the presentation requirements of §535.65(g) of this title (relating to Responsibilities and Operations of Providers of Qualifying Courses).

[II] [Classroom Delivery.] The provider must submit a course completion roster in accordance with §535.75(d) of this subchapter (relating to Responsibilities and Operations of Continuing Education Providers).

[II] [Distance Education Delivery.]

[(A)] Non-elective real estate courses are designed by the Commission for interactive classroom delivery. Acceptable demonstration of methods [a method] to engage [distance education delivery] students in interactive discussions and [group] activities [as well as additional material] to meet the course objectives and time requirements are required for approval.

[(B)] The provider must submit a course completion roster in accordance with §535.75(d) of this subchapter.

[g] Course examinations.

[(H)] A provider must administer a final examination promulgated by the Commission for non-elective CE courses. [as follows:]

[(A)] The [for classroom delivery, the] examination will be included in course [given as a part of class] instruction time. [with] Each [each] student will complete [answering] the examination [questions] independently followed by a review of the correct answers by the instructor. There is no minimum passing grade required to receive credit.

[(B)] For distance education delivery, the examination will be given after completion of regular course work and must be:

[(i)] proctored by a member of the provider faculty or staff; or third party proctor set out in §§535.65(h)(5) of this title, who is present at the test site and has positively identified that the student taking the examination is the student who registered for and took the course; or

[(ii)] administered using a computer under conditions that satisfy the Commission that the student taking the examination is the student who registered for and took the course;

[(iii)] graded with a pass rate of 70% in order for a student to receive credit for the course; and

[(iv)] kept confidential.

[(2)] A provider may not give credit to a student who fails a final examination and subsequent final examination as provided for in subsection (b) of this section.

[(H)] Subsequent final course examination.

[(L)] If a student fails a final course examination, a provider may permit the student to take one subsequent final examination.
[42] A student shall complete the subsequent final examination no later than the 30th day after the date the original class concludes. The subsequent final examination must be different from the first examination.

[43] A student who fails the subsequent final course examination is required to retake the course and the final course examination.

(h) Approval of currently approved courses by a secondary provider.

(1) If a CE provider wants to offer a course currently approved for another provider, that secondary provider must:

(A) submit the CE course application supplement form(s);

(B) submit written authorization to the Commission from the author or provider for whom the course was initially approved granting permission for the subsequent provider to offer the course; and

(C) pay the fee required by §535.101 (relating to Fees) or §535.210 of this title (relating to Fees).

(2) If approved to offer the currently approved course, the secondary provider is required to:

(A) offer the course as originally approved, assume the original expiration date, include any approved revisions, use all materials required for the course; and

(B) meet the requirements of §535.75 of this subchapter.

(i) Approval notice. A CE Provider shall not offer non-elective continuing education courses until the provider has received written notice of the approval from the Commission.

(ii) Required revision of a currently approved non-elective CE course. Providers are responsible for keeping current on changes to the Act and Commission Rules and must supplement materials for approved non-elective CE courses to present the current version of all applicable statutes and rules on or before the effective date of those statutes or rules.

§535.73. Approval of Elective Continuing Education Courses.

(a) (No change.)

(b) Application for approval of an elective CE course.

(1) For each continuing education course an applicant intends to offer, the applicant must:

(A) submit the appropriate CE Course Application form; [and]

(B) pay the fee required by §535.101 (relating to Fees) and §535.210 of this title (relating to Fees); and[ ]

(C) submit a timed course outline that includes:

(ii) course topics;

(ii) assignments and activities, if applicable;

(iii) topic or unit quizzes, if applicable; and

(iv) the amount of time dedicated for each item listed in clauses (i) - (iii) of this subparagraph.

(2) A provider may file a single application for a CE course offered through multiple delivery methods. A fee is required for content review of each CE course and for each distinct delivery method utilized by a provider for that course.

(3) A provider who seeks approval of a new delivery method for a currently approved CE course must submit a new application and pay all required fees, including a fee for content review.

(4) The Commission may:

(A) request additional information be provided to the Commission relating to an application; and

(B) terminate an application without further notice if the applicant fails to provide the additional information not later than the 60th day after the Commission mails the request.

(c) - (f) (No change.)

§535.75. Responsibilities and Operations of Continuing Education Providers.

(a) Except as provided by this section [Section], CE providers must comply with the responsibilities and operations requirements of §535.65 of this title (relating to Responsibilities and Operations of Providers of Qualifying Courses).

(b) Use of Qualified Instructor.

(1) Except as provided by this subsection, a CE provider must use an instructor that:

(A) is currently qualified under §535.74 of this title (relating to Qualifications for Continuing Education Instructors); and

(B) (No change.)

(2) - (3) (No change.)

(4) A CE provider may use the services of a guest instructor who is not qualified under §535.74 of this title for 100% of a real estate or inspector elective CE courses provided that:

(A) The CE provider is:

(i) (No change.)

(ii) a professional trade association that is approved by the Commission as a CE provider under §535.71 of this subchapter (relating to Approval of Continuing Education Providers); or

(iii) (No change.)

(B) (No change.)

(c) CE course examinations. Examinations are only required for non-elective CE courses [offered through distance education delivery] and must comply with the requirements in §535.72(g) [§535.72(b)(1)(B)] of this subchapter (relating to Approval of Non-elective Continuing Education Courses) and have a minimum of four questions per course credit hour.

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

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

Filed with the Office of the Secretary of State on February 13, 2020.

TRD-2020000603
Chelsea Buchholtz
Executive Director
Texas Real Estate Commission
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 936-3284

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SUBCHAPTER I. LICENSE RENEWAL

22 TAC §535.92

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §535.92, Continuing Education Requirements, in Chapter 535, General Provisions. The proposed amendments to §535.92 add three hours of required continuing education (CE) to real estate sales agents or broker license renewals, the subject matter of which must be real estate contracts. The proposed amendments additionally clarifies which license holders must take the broker responsibility course and updates the professional designations available through CE credit.

The proposed amendments are recommended by the Education Standards Advisory Committee.

Chelsea Buchholtz, Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no adverse economic effect anticipated for small businesses, micro-businesses, rural communities, or local or state employment as a result of implementing the proposed amendments. Accordingly, no Economic Impact Statement or Regulatory Flexibility Analysis is required.

Ms. Buchholtz also has determined that for each year of the first five years the sections as proposed are in effect, the public benefits anticipated as a result of enforcing this section as proposed will be greater protection of consumers by the increased knowledge and aptitude of license holders.

For each year of the first five years the proposed amendments are in effect the amendments will not:

--create or eliminate a government program;
--require the creation of new employee positions or the elimination of existing employee positions;
--require an increase or decrease in future legislative appropriations to the agency;
--require an increase or decrease in fees paid to the agency;
--expand, limit or repeal an existing regulation;
--increase or decrease the number of individuals subject to the rule's applicability; and
--positively or adversely affect the state's economy.

For each year of the first five years the proposed amendments are in effect the amendments will, however, create a new regulation, in that sales agent and broker license holders will be required to take additional hours of continuing education to renew their license.

Comments on the proposal may be submitted to Chelsea Buchholtz, Executive Director, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to general.counsel@trec.texas.gov. The deadline for comments is 30 days after publication in the Texas Register.

The amendments are proposed under Texas Occupations Code §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statute affected by this proposal is Texas Occupations Code, Chapters 1101. No other statute, code or article is affected by the proposed amendments.

§535.92. Continuing Education Requirements.
(a) Required continuing education. 18 hours of continuing education are required for each renewal of a real estate sales agent or broker license and must include:

(1) a four hour Legal Update I: Laws, Rules and Forms course;
(2) a four hour Legal Update II: Agency, Ethics and Hot Topics course; [and]
(3) three hours on the subject of real estate contracts from one or more Commission approved courses; and
(4) [6] a six hour broker responsibility course, if the license holder:
   (A) sponsors one or more sales agent at any time during the current license period;
   (B) is a designated broker of a business entity that sponsors one or more sales agent at any time during the designated broker's current license period; or
   (C) is a delegated supervisor under §535.2(e) of this title [of one or more license holders for a period of six months or more during the supervisor's current license period].

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

(f) Continuing education credit for courses required for a professional designation. A course taken by a license holder to obtain any of the following professional designations, or any other real estate related professional designation course deemed worthy by the Commission, may be approved on an individual basis for continuing education elective credit if the license holder files for credit for the course using Individual Elective Credit Request for Professional Designation Course and provides the Commission with a copy of the course completion certificate.

(1) ABR--Accredited Buyer Representative
(2) ACoM--Accredited Commercial Manager [CRE--Counselor in Real Estate]
(3) ARM--Accredited Residential Manager [CPM--Certified Property Manager]
(4) CCIM--Certified Commercial-Investment Member
(5) CPM--Certified Property Manager
(6) [6] CRB--Certified Residential Broker
(7) CRE--Counselor in Real Estate
(8) [6] CRS--Certified Residential Specialist
(9) [7] GRI--Graduate, Realtor Institute
(10) MPM--Master Property Manager
[8]
(11) [6] IREM--Institute of Real Estate Management
(12) SRS--Soldier Representative Specialist

(g) - (i) (No change.)

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

22 TAC §535.210, §535.215

The Texas Real Estate Commission (TREC) proposes amendments to §535.210, Fees, and §535.215, Inactive Inspector Status in Subchapter R of Chapter 535, General Provisions. The proposed amendments to §535.210 eliminate the fee for inspectors for preparing certificates of active licensure or sponsorship. Eliminating the fee limits fund growth and provides more straightforward fee setting. The proposed amendments also removes the amount of the fee assessed for licensing examinations, which is established by the third-party examination vendor. The proposed amendments to §535.215 removes a provision that places a license on inactive status when an inspector applies to renew a license and pays the applicable fee, but who fails to complete the required continuing education as a condition for renewal. The provision is proposed for removal because it is no longer necessary. Previously it was needed to avoid a license holder who failed to complete required continuing education by the license expiration date from having to reapply for the license. Subsequently, a rule was added that allows license holders to pay a late renewal fee up to 180 days after license expiration. These proposed amendments are recommended by the Texas Real Estate Inspector Committee.

Chelsea Buchholtz, Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no adverse economic effect anticipated for small businesses, micro-businesses, rural communities, or local or state employment as a result of implementing the proposed amendments. Specifically, while the reduction in required hours in coursework may affect education provider businesses, a recent change in rule to reduce some class sizes may offset this potential impact to providers. In addition, the lower overall hour requirement could attract more students to take inspector licensure courses. As such, no adverse economic effect is anticipated.

There is no significant economic cost anticipated for persons who are required to comply with the proposed amendments. Accordingly, no Economic Impact Statement or Regulatory Flexibility Analysis is required.

Ms. Buchholtz also has determined that for each year of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of the changes is reduced costs, increased flexibility, improved clarity and a simplified licensing process without redundancies that existed previously for license holders and seekers.

For each year of the first five years the proposed amendments are in effect the amendments will not:

--create or eliminate a government program;
--require the creation of new employee positions or the elimination of existing employee positions;
--require an increase or decrease in future legislative appropriations to the agency;
--create a new regulation;
--expand, limit or repeal an existing regulation;
--increase or decrease the number of individuals subject to the rule's applicability; or
--positively or adversely affect the state's economy.

For each year of the first five years the proposed amendments are in effect the amendments will, however, decrease fees paid to the agency.

Comments on the proposal may be submitted by mail to Chelsea Buchholtz, Executive Director, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to general.counsel@trecregister.com. The deadline for comments is 30 days after publication in the Texas Register.

The amendments are proposed under Texas Occupations Code §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102.

The statute affected by this proposal is Chapter 1102, Texas Occupations Code. No other statute, code or article is affected by the proposed amendments.


(a) The Commission shall charge and collect the following fees:

(1) a fee of $60 for filing an original or reinstatement application for a license as an apprentice inspector;
(2) a fee of $100 for filing an original or reinstatement application for a license as a real estate inspector, which includes a fee for transcript evaluation;
(3) a fee of $120 for filing an original or reinstatement application for a license as a professional inspector, which includes a fee for transcript evaluation;
(4) a fee of $30 for the timely renewal of the license of an apprentice inspector;
(5) a fee of $50 for the timely renewal of the license of a real estate inspector;
(6) a fee of $60 for the timely renewal of the license of a professional inspector;
(7) a fee equal to 1-1/2 times the timely renewal fee for the late renewal of a license within 90 days of expiration;
(8) a fee equal to 2 times the timely renewal fee for the late renewal of a license more than 90 days but less than six months after expiration;
(9) a fee of $220 for taking a license examination consisting of a national portion and a state portion or retaking the national part of the license examination;
(10) a fee [of $60] for taking a license examination without a national portion or retaking the state part of the license examination;

(11) a fee of $50 to request an inactive professional inspector license be returned to active status;

(12) [143] a fee of $50 for the filing of a fitness determination;

(13) [14] the fee required by the Department of Information Resources as a subscription or convenience fee for use of an online payment system;

(14) [15] a fee of $400 for filing an application for accreditation of a qualifying inspector education program for a period of four years;

(15) [16] after initial approval of accreditation, a fee of $200 a year for operation of a qualifying inspector education program;

(16) [(17)] a fee of $50 plus the following fees per class-
room hour approved by the Commission for each qualifying inspector education course for a period of four years:

(A) $5 for content and examination review;

(B) $5 for classroom delivery design and presentation review; and

(C) $10 for distance education delivery design and presentation review.

(17) [(18)] a fee of $400 for filing an application for accreditation as a continuing inspector education provider for a period of two years;

(18) [19] a fee of $50 plus the following fees per class-
room hour approved by the Commission for each continuing inspector education course for a period of two years:

(A) $2.50 for content and examination review;

(B) $2.50 for classroom delivery design and presentation review; and

(C) $5 for distance education delivery design and presentation review.

(19) [(20)] the fee required under paragraphs (16)(C) [(17)(C)] and (18)(C) [(19)(C)] of this subsection will be waived if the course has already been certified by a distance learning certification center acceptable to the Commission.

(20) [(21)] a fee of $10 for deposit in the real estate inspection recovery fund upon an applicant's successful completion of an examination; and

(21) [(22)] the fee charged by the Federal Bureau of Investigation and Texas Department of Public Safety for fingerprinting or other service for a national or state criminal history check in connection with a license application.

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


(a) - (e) (No change.)

[f] An inspector who applies to renew a license and pays the applicable fee, but who fails to complete any continuing education required by the Act as a condition of license renewal, shall be placed on inactive status by the Commission. The inspector must comply with the requirements of this section in order to return to active status.

(g) [(h)] If a professional inspector terminates the sponsorship of an apprentice inspector or real estate inspector, the license of the apprentice inspector or real estate inspector immediately becomes inactive.

(h) Inactive inspectors may not perform inspections. Performance of inspections while on inactive status is grounds for disciplinary action against the inactive license holder. A professional inspector who has been placed on inactive status may not return to practice or sponsor apprentices or inspectors until the professional inspector has met the requirements to be returned to active status under this section. It is a violation of this section and grounds for disciplinary action against a professional inspector for the professional inspector to permit an inactive apprentice inspector or an inactive real estate inspector to perform inspections in association with, or on behalf of, the professional inspector.

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

Filed with the Office of the Secretary of State on February 13, 2020.

TRD-202000605
Chelsea Buchholtz
Executive Director
Texas Real Estate Commission
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 936-3284

CHAPTER 539. RULES RELATING TO THE RESIDENTIAL SERVICE COMPANY ACT

SUBCHAPTER O. ADMINISTRATIVE PENALTIES

22 TAC §539.140

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §539.140, Schedule of Administrative Penalties, in Chapter 539, Rules Relating to the Residential Service Company Act. The proposed amendments to §539.140 correct a reference within the rules.

Chelsea Buchholtz, Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no adverse economic effect anticipated for small businesses, micro-businesses, rural communities, or local or state employment as a result of implementing the proposed amendments. There is no significant economic cost anticipated for persons who are required to comply with the proposed amendments. Accordingly, no Economic Impact Statement or Regulatory Flexibility Analysis is required.

Ms. Buchholtz also has determined that for each year of the first five years the sections as proposed are in effect, the public benefits anticipated as a result of enforcing the sections as proposed will be improved clarity and precision of rule references for members of the public and license holders.

For each year of the first five years the proposed amendments are in effect the amendments will not:
--create or eliminate a government program;
--require the creation of new employee positions or the elimination of existing employee positions;
--require an increase or decrease in future legislative appropriations to the agency;
--require an increase or decrease in fees paid to the agency;
--create a new regulation;
--expand, limit or repeal an existing regulation;
--increase or decrease the number of individuals subject to the rule's applicability; or
--positively or adversely affect the state's economy.

Comments on the proposal may be submitted to Chelsea Buchholtz, Executive Director, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to general.counsel@trec.texas.gov. The deadline for comments is 30 days after publication in the Texas Register.

The amendments are proposed under Texas Occupations Code, §1303.051, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1303.

The statute affected by this proposal is Texas Occupations Code, Chapter 1303. No other statute, code or article is affected by the proposed amendments.

§339.140. Schedule of Administrative Penalties.

(a) The administrative penalties set forth in this section take into consideration all of the criteria listed in §1303.355(c) of the Act.

(b) An administrative penalty range of $100 - $1,500 per violation per day may be assessed for violations of the following sections of the Texas Occupations and Administrative Codes:

(1) 22 TAC §539.91(b) [§539.127(b)];
(2) §1303.352(a)(1);
(3) §1303.352(a)(7);
(4) 22 TAC §539.64;
(5) 22 TAC §539.65;
(6) 22 TAC §539.66; and
(7) 22 TAC §539.82.

(c) An administrative penalty range of $500 - $5,000 per violation per day may be assessed for the following violations of the Texas Occupations and Administrative Codes:

(1) §1303.052
(2) §1303.101;
(3) §1303.151;
(4) §1303.153;
(5) §1303.352(a)(2) - (6);
(6) §1303.202(a);
(7) §1303.202(b);
(8) §1303.052; and
(9) 22 TAC §539.81.

(d) The Commission may assess an additional administrative penalty of up to two times that assessed under subsections (b) and (c) of this section if the residential service company has a history of previous violations.

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

Filed with the Office of the Secretary of State on February 13, 2020.
TRD-202000606
Chelsea Buchholtz
Executive Director
Texas Real Estate Commission
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 936-3284

TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 7. MEMORANDA OF UNDERSTANDING

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to repeal §7.117 and adopt new §7.117.

Background and Summary of the Factual Basis for the Proposed Rules

This rulemaking would implement House Bill (HB) 2230 (84th Texas Legislature, 2015) which enacted Texas Water Code (TWC), §27.026, and HB 2771 (86th Texas Legislature, 2019) which amended TWC, §26.131.

This rulemaking proposes to repeal §7.117, which adopts by reference the Memorandum of Understanding (MOU) between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ) as codified in the RRC Oil and Gas Division rules at 16 TAC §3.30. This rulemaking would also adopt the current text of the MOU under new §7.117 and amend the text of the current MOU (in 16 TAC §3.30) to implement HB 2230 and HB 2771.

Historically, the text of the MOU has been codified in the RRC Oil and Gas Division rules at 16 TAC §3.30 and the TCEQ has adopted the MOU by reference at §7.117. The TCEQ and the RRC have collaborated on proposed changes to the current MOU which are required by HB 2230 and HB 2771. The TCEQ understands that the RRC intends to conduct simultaneous rulemaking to amend the MOU at 16 TAC §3.30.

The RRC and the TCEQ agree that both agencies intend that the MOU at 16 TAC §3.30, once amended, and the MOU proposed at §7.117 would include the same substantive explanations of jurisdiction and requirements. The TCEQ acknowledges that there will be some minor stylistic differences.

The MOU is the result of collaboration between TCEQ and the RRC. The current MOU described in 16 TAC §3.30 has been in effect since 1982 and has been amended several times. The
current MOU describes the general jurisdiction of the TCEQ and the RRC regarding water quality and waste. Several statutes cover persons and activities where respective jurisdiction of the RRC and the TCEQ may intersect. The current MOU is a statement of how the TCEQ and RRC implement the division of jurisdiction. The MOU delineates general agency jurisdictions regarding: solid waste; water quality; oil and gas waste; injection wells; hazardous waste; interagency activities, and radioactive material.

In addition to current language, as required by HB 2771, the amended MOU would describe the transfer of RRC's responsibilities to TCEQ relating to regulation of discharges into surface water in the state of produced water, hydrostatic test water, and gas plant effluent resulting from the exploration, production and development of oil, natural gas, or geothermal resources. This transfer of responsibilities would occur upon the United States Environmental Protection Agency (EPA) approval of TCEQ's request to amend or supplement its Texas Pollutant Discharge Elimination System (TPDES) program.

HB 2230 allows the TCEQ to authorize by individual permit, by general permit, or by rule, a Class V injection well for the disposal of nonhazardous brine or drinking water residuals in a Class II well permitted by the RRC. The proposed MOU would implement the dual authority granted by HB 2230. The proposed MOU would allow the TCEQ to authorize by individual permit, general permit, or rule, a Class V injection well for the disposal of nonhazardous brine from a desalination operation, or nonhazardous drinking water treatment residuals (DWTR), under the jurisdiction of the TCEQ, into a Class II injection well permitted by the RRC.

Section Discussion

§7.117, Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality

The commission proposes to repeal the current language in §7.117 and simultaneously proposes to adopt new MOU language regarding the division of jurisdiction between the RRC and the TCEQ. The proposed rulemaking would incorporate the MOU as it currently exists in 16 TAC §3.50, with the amendments required by HB 2771 and HB 2230. The TCEQ is proposing to repeal and adopt new language to ensure TCEQ has completed all necessary requirements for the delegation package before requesting approval from the EPA for delegation of National Pollutant Discharge Elimination System (NPDES) permit authority for discharge of produced water, hydrostatic test water, and gas plant effluent.

Throughout this rule the reference to Small Business and Environmental Assistance (SBEA) has been replaced with TCEQ External Relations Division.

Proposed new subsection (a) would provide for the reason the MOU is needed. Additionally, subsection (a)(4) would amend the reference to effective dates of the MOU and subsection (a)(5) would amend the reference to the current MOU.

Proposed new subsection (b) would provide for the general agency jurisdictions. Additionally, proposed new subsection (b)(1)(B)(i) - (iii) and (f)(2)(B)(i) would amend current language to reflect the transfer of the RRC's responsibilities to the TCEQ relating to regulation of discharges into surface water in the state of produced water, hydrostatic test water, and gas plant effluent resulting from the exploration, production and development of oil, natural gas, or geothermal resources. This transfer of responsibilities would occur upon the EPA approval of the TCEQ's request to amend or supplement its TPDES program.

Proposed new subsection (c) would provide the definition of hazardous waste and identify exemptions from classifications as hazardous waste for certain oil and gas waste.

Proposed new subsection (d) would describe the jurisdiction over waste from specific activities including: drilling, operation, and plugging of wells associated with the exploration, development or production of oil, gas, or geothermal resources; field treatment of produced fluids; storage of oil; underground hydrocarbon storage; underground natural gas storage; transportation of crude oil or natural gas; reclamation plants; refining of oil; natural gas or natural gas liquids processing plants (including gas fractionation facilities) and pressure maintenance or repressurizing plants; manufacturing processes; commercial service company facilities and training facilities; and mobile offshore drilling units.

Additionally, proposed new subsection (d)(12)(A) and (C) would amend current language to reflect the transfer of the RRC's responsibilities to the TCEQ relating to regulation of discharges into surface water in the state of produced water resulting from the exploration, production and development of oil, natural gas, or geothermal resources. This transfer of responsibilities would occur upon the EPA approval of the TCEQ's request to amend or supplement its TPDES program.

Proposed new subsection (e) would describe interagency activities including: recycling and pollution prevention; treatment of waste under RRC jurisdiction at facilities authorized by the TCEQ under 30 TAC Chapter 334, Subchapter K; processing, treatment, and disposal of wastes under RRC jurisdiction at facilities authorized by the TCEQ; management of nonhazardous waste under TCEQ jurisdiction at facilities regulated by the RRC; drilling at landfills; coordination of actions and cooperative sharing of information; groundwater; emergency and spill response; and anthropogenic carbon dioxide storage.

Proposed new subsection (e)(1)(A) would amend current MOU language to delete the term "solid" as a modifier of the term "waste" to clarify that generators of solid waste and oil and gas waste are encouraged to recycle whenever possible to avoid disposal. Additionally, proposed new subsection (e)(4)(E) would amend current MOU language to reflect the TCEQ's authority to authorize by individual permit, general permit, or rule, a Class V injection well for the disposal of nonhazardous brine from a desalination operation, or nonhazardous DWTR, under the jurisdiction of the TCEQ, by injection in a Class II injection well permitted by the RRC. Additionally, subsection (e)(7)(B)(ii) would add the citation to the Code of Federal Regulations for the definition of "underground source of drinking water."

Proposed new subsection (f) would describe the jurisdiction of TCEQ and RRC to regulate and license various types of radioactive materials.

Proposed new subsection (g) reflects the effective date of the MOU and would amend current language to reflect the new effective date.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period after the proposed rulemaking is in effect, fiscal implications are anticipated for the agency and other state governmental entities as a result of ad-
ministration or enforcement of the proposed rule. After TCEQ receives approval to assume responsibility for discharges of produced water, hydrostatic test water, and gas plant effluent, the Legislative Budget Board estimated a revenue decrease to the RRC's Oil and Gas Regulation Account of $225,000 each year from the revenue that was collected through the processing of applications.

With the implementation of the program at TCEQ, oil and gas facilities that discharge produced water, hydrostatic test water, or gas plant effluent would become subject to TCEQ's state authority to issue discharge permits and would become subject to TCEQ's existing authority to collect application fees and annual water quality fees. TCEQ has identified 529 facilities would be subject to this program. The application fee for these state permits range from $1,250 for minor facilities to $2,050 for major facilities. However, for the purpose of this analysis, all are considered minor facilities. These permits last five years. The total estimated revenue in permit application fees is $661,250 on a five-year cycle.

The annual water quality fee for these permits varies depending on the discharge flow and the pollutant concentrations. For general permits, the fee is $100 per year. The average annual water quality fee for an industrial wastewater permit is $8,435. The agency estimates the total revenue from these facilities for the water quality fees would be $336,290 per year.

The General Appropriations Act (86th Texas Legislature, 2019) authorized funding to cover the costs upon delegation of the program as detailed in HB 2771. Article IX, Section 18.28, reduces the employers at the RRC by 2.5 full-time employees for a decrease in salary and operating expenses of $188,178 per year. The rider authorizes nine new employees at TCEQ to implement the program and conduct investigations to determine compliance with wastewater permits. The rider authorizes funding up to $431,406. The agency estimates the costs would continue annually in future years.

The agency does not expect any significant fiscal implications from the adoption of the proposed rulemaking to implement HB 2330.

No fiscal implications are anticipated for units of local government.

This rulemaking addresses necessary changes in order to implement HB 2230 and HB 2771.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated will be a better understanding of the responsibilities of TCEQ and the RRC and compliance with state law. The proposed rulemaking is not anticipated to result in additional significant fiscal implications for businesses or individuals.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking is in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rulemaking is in effect. The rulemaking would apply statewide and have the same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rulemaking for the first five-year period the proposed rulemaking is in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rulemaking does not adversely affect a small or micro-business in a material way for the first five years the proposed rulemaking is in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create a government program but does transfer of duties as authorized by state law. This transfer will affect the future legislative appropriations to each agency; however, there will be a decrease in costs to the RRC and an increase to the TCEQ. As authorized in the General Appropriations Act, the proposed rulemaking does require the creation of new employee positions at TCEQ and reduces employee positions at RRC. The proposed rulemaking will increase fees paid to the TCEQ and reduce fees paid to RRC. The proposed rulemaking does not expand existing regulation, nor does it increase the number of individuals subject to its applicability. During the first five years, the proposed rulemaking should not impact positively or negatively the state's economy.

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 action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute. "Major environmental rule" is defined as 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. This rulemaking does 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.

The proposed MOU is the result of collaboration between TCEQ and the RRC. The current MOU described in 16 TAC §3.30 has been in effect since 1982 and has been amended several times. The current MOU also describes the general jurisdiction of the TCEQ and the RRC regarding water quality and waste.

This rulemaking would implement HB 2230 (84th Texas Legislature, 2015) which enacted TWC, §27.026, and HB 2771 (86th Texas Legislature, 2019) which amended TWC, §26.131.

The proposed MOU would also describe the transfer of RRC's responsibilities to TCEQ relating to regulation of discharges into surface water in the state of produced water, hydrostatic test water, and gas plant effluent resulting from the exploration, pro-
duction and development of oil, natural gas, or geothermal resources. This transfer of responsibilities would occur upon the EPA’s approval of TCEQ’s request to amend or supplement its TPDES program. The proposed MOU would also reflect the TCEQ’s authority to authorize by individual permit, general permit, or rule, a Class V injection well for the disposal of nonhazardous brine from a desalination operation, or nonhazardous DWTR, under the jurisdiction of the TCEQ, into a Class II injection well permitted by the RRC.

Therefore, the commission finds that this rulemaking is not a "Major environmental rule."

Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, only applies to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law.

Specifically, the rulemaking does not exceed a standard set by federal law, rather it implements state law. Also, the rulemaking does not exceed an express requirement of state law nor a requirement of a delegation agreement. Finally, the rulemaking was not developed solely under the general powers of the agency; but under HB 2230, which enacted TWC, §27.026, and HB 2771, which amended TWC, §26.131. Under Texas Government Code, §2001.0225, only a "Major environmental rule" requires a regulatory impact analysis. Because the proposed rulemaking does not constitute a "Major environmental rule," a regulatory impact analysis is not required.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission performed an assessment of this rule in accordance with Texas Government Code, §2007.043. The proposed MOU is the result of collaboration between TCEQ and the RRC. The current MOU described in 16 TAC §3.30 has been in effect since 1982 and has been amended several times. The current MOU also describes the general jurisdiction of the TCEQ and the RRC regarding water quality and waste.

This rulemaking would implement HB 2230 (84th Texas Legislature, 2015) which enacted TWC, §27.026, and HB 2771 (86th Texas Legislature, 2019) which amended TWC, §26.131. The specific purpose of this rulemaking is to repeal §7.117 and adopt new §7.117 incorporating the current MOU codified in 16 TAC §3.30 and the changes required by HB 2771 and HB 2230. HB 2771 relates to regulation of discharges into surface water in the state of produced water; hydrostatic test water, and gas plant effluent resulting from the exploration, production, and development of oil, natural gas, or geothermal resources. This transfer of responsibility will occur upon the EPA’s approval of TCEQ’s request to amend or supplement its TPDES program.

HB 2230 describes how the TCEQ may authorize by individual permit, general permit, or rule, a Class V injection well for the disposal of nonhazardous brine from a desalination operation, or nonhazardous drinking water residuals, under the jurisdiction of the TCEQ, into a Class II injection well permitted by the RRC. This rulemaking will impose no burdens on private real property because the proposed rulemaking neither relates to, nor has any impact on the use or enjoyment of private real property, and there is no reduction in the value of private real property as a result of this rulemaking.

Consistency with the Coastal Management Program

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

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on March 23, 2020, at 10:00 a.m., Building E, Room 201S, at the commission’s central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments on this rule may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: https://www6.tceq.texas.gov/rules/ecomments/. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2020-016-007-LS. The comment period closes on March 30, 2020. Copies of the proposed rulemaking can be obtained from the commission’s website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Kathy Humphreys, Environmental Law Division, (512) 239-3417.

30 TAC §7.117

Statutory Authority

The repeal is proposed under Texas Water Code (TWC), §5.102, which establishes the general authority of the commission necessary to carry out its jurisdiction; TWC, §5.103, which establishes that the commission, by rule, shall establish and approve all general policy of the commission; TWC, §5.104, which establishes the authority of the commission to enter memoranda of understanding with any other state agency and adopt by rule the memoranda of understanding; TWC, §5.105, which establishes
the general authority of the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of this state; TWC, §26.011, which establishes that the commission shall establish the level of quality to be maintained in and control the quality of the water in the state; TWC, §26.121, which establishes the authority of the commission to issue discharge permits; TWC, §26.131 which establishes the duties of the Railroad Commission of Texas (RRC); TWC, §27.011, which establishes the commission's authority to issue permits for injection wells; TWC, §27.019, which establishes the commission's authority to adopt rules under TWC, Chapter 27; TWC, §27.026, which establishes the authority of the RRC and the TCEQ to enter an MOU by rule to implement House Bill (HB) 2230; TWC, §27.049, which establishes the authority of the RRC and the TCEQ to comply with TWC, Chapter 27 by entering MOU by amending or entering new MOU by rule; Texas Health and Safety Code (THSC), §401.001, which establishes the TCEQ's jurisdiction over regulation and licensing of radioactive materials and substances; and THSC, §401.069, which establishes the authority for the TCEQ to enter Memoranda of Understanding with state agencies by rule.

This rulemaking would implement HB 2230 (84th Texas Legislature, 2015), which enacted TWC, §27.026, and HB 2771 (86th Texas Legislature, 2019), which amended TWC, §26.131.

§7.117. Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ).

(a) Need for agreement. Several statutes cover persons and activities where the respective jurisdictions of the RRC and the TCEQ may intersect. This rule is a statement of how the agencies implement the division of jurisdiction.

(1) Section 10 of House Bill 1407, 67th Legislature, 1981, which appeared as a footnote to the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-2, provides as follows: On or before January 1, 1982, the Texas Department of Water Resources, the Texas Department of Health, and the Railroad Commission of Texas shall execute a memorandum of understanding that specifies in detail these agencies’ interpretation of the division of jurisdiction among the agencies over waste materials that result from or are related to activities associated with the exploration for and the development, production, and refining of oil or gas. The agencies shall amend the memorandum of understanding at any time that the agencies find it to be necessary.

(2) Texas Health and Safety Code, §401.414, relating to Memorandum of Understanding, requires the Railroad Commission of Texas and the Texas Commission on Environmental Quality to adopt a memorandum of understanding (MOU) defining the agencies’ respective duties under Texas Health and Safety Code, Chapter 401, relating to radioactive materials and other sources of radiation. Texas Health and Safety Code, §401.415, relating to oil and gas naturally occurring radioactive material (NORM) waste, provides that the Railroad Commission of Texas shall issue rules on the management of oil and gas NORM waste, and in doing so shall consult with the Texas Natural Resource Conservation Commission (now TCEQ) and the Department of Health (now Department of State Health Services) regarding protection of the public health and the environment.

(3) Texas Water Code, Chapters 26 and 27, provide that the Railroad Commission and TCEQ collaborate on matters related to discharges, surface water quality, groundwater protection, underground injection control and geologic storage of carbon dioxide. Texas Water Code, §27.049, relating to Memorandum of Understanding, requires the RRC and TCEQ to adopt a new MOU or amend the existing MOU to reflect the agencies’ respective duties under Texas Water Code, Chapter 27, Subchapter C-1 (relating to Geologic Storage and Associated Injection of Anthropogenic Carbon Dioxide).

(4) The original MOU between the agencies adopted pursuant to HB 1407 (67th Legislature, 1981) became effective January 1, 1982. The MOU was revised effective December 1, 1987, May 31, 1998, August 30, 2010, and again on May 1, 2012, to reflect legislative clarification of the Railroad Commission's jurisdiction over oil and gas wastes and the Texas Natural Resource Conservation Commission's (the combination of the Texas Water Commission, the Texas Air Con-
trol Board, and portions of the Texas Department of Health) jurisdiction over industrial and hazardous wastes.

(5) The agencies have determined that the revised MOU that became effective on May 1, 2012, should again be revised to further clarify jurisdictional boundaries and to reflect legislative changes in agency responsibility.

(b) General agency jurisdictions.

(1) Texas Commission on Environmental Quality (TCEQ) (the successor agency to the Texas Natural Resource Conservation Commission).

(A) Solid waste. Under Texas Health and Safety Code, Chapter 361, §§361.001 - 361.754, the TCEQ has jurisdiction over solid waste. The TCEQ's jurisdiction encompasses hazardous and nonhazardous, industrial and municipal, solid wastes.

(B) Water quality.

(i) Discharges under Texas Water Code, Chapter 26. Under the Texas Water Code, Chapter 26, the TCEQ has jurisdiction over discharges into or adjacent to water in the state, except for discharges regulated by the RRC. Upon delegation from the United States Environmental Protection Agency to the TCEQ of authority to issue permits for discharges into surface water in the state of produced water, hydrostatic test water, and gas plant effluent resulting from the activities described in Texas Water Code, §26.131(a), the TCEQ has sole authority to issue permits for those discharges. For purposes of TCEQ's implementation of Texas Water Code, §26.131, "produced water" is defined as all wastewater associated with oil and gas exploration, development, and production activities, except hydrostatic test water and gas plant effluent, that is discharged into water in the state, including waste streams regulated by 40 CFR Part 435.

(ii) Discharge permits existing on the effective date of EPA's delegation to TCEQ of NPDES permit authority for discharges of produced water, hydrostatic test water, and gas plant effluent. RRC permits issued prior to TCEQ delegation of NPDES authority shall remain effective until revoked or expired. Amendment or renewal of such permits on or after the effective date of delegation shall be pursuant to TCEQ's TPDES authority. The TPDES permit will supersede and replace the RRC permit. For facilities that have both an RRC permit and an EPA permit, TCEQ will issue the TPDES permit upon amendment or renewal of the RRC or EPA permit, whichever occurs first.

(iii) Discharge applications pending on the effective date of EPA's delegation to TCEQ of NPDES permit authority for discharges of produced water, hydrostatic test water, and gas plant effluent. TCEQ shall assume authority for discharge applications pending at the time TCEQ receives delegation from EPA. The RRC will provide TCEQ the permit application and any other relevant information necessary to administratively and technically review and process the applications. TCEQ will review and process these pending applications in accordance with TPDES requirements.

(iv) Storm water. TCEQ has jurisdiction over stormwater discharges that are required to be permitted pursuant to Title 40 Code of Federal Regulations (CFR) Part 122.26, except for discharges regulated by the RRC. Discharge of storm water regulated by TCEQ may be authorized by an individual Texas Pollutant Discharge Elimination System (TPDES) permit or by a general TPDES permit. These storm water permits may also include authorizations for certain minor types of non-storm water discharges.

(l) Storm water associated with industrial activities. The TCEQ regulates storm water discharges associated with certain industrial activities under individual TPDES permits and under the TPDES Multi-Sector General Permit, except for discharges associated with industrial activities under the jurisdiction of the RRC.

(II) Storm water associated with construction activities. The TCEQ regulates storm water discharges associated with construction activities, except for discharges from construction activities under the jurisdiction of the RRC.

(III) Municipal storm water discharges. The TCEQ has jurisdiction over discharges from regulated municipal storm sewer systems (MS4s).

(IV) Combined storm water. Except with regard to storage of oil, when a portion of a site is regulated by the TCEQ, and a portion of a site is regulated by the EPA and RRC, storm water authorization must be obtained from the TCEQ for the portion(s) of the site regulated by the TCEQ, and from the EPA and the RRC, as applicable, for the RRC regulated portion(s) of the site. Discharge of storm water from a facility that stores both refined products intended for off-site use and crude oil in aboveground tanks is regulated by the TCEQ.

(v) State water quality certification. Under the Clean Water Act (CWA) Section 401 (33 U.S.C. Section 1341), the TCEQ performs state water quality certifications for activities that require a federal license or permit and that may result in a discharge to waters of the United States, except for those activities regulated by the RRC.

(vi) Commercial brine extraction and evaporation. Under Texas Water Code, §26.132, the TCEQ has jurisdiction over evaporation pits operated for the commercial production of brine water, minerals, salts, or other substances that naturally occur in groundwater and that are not regulated by the RRC.

(C) Injection wells. Under the Texas Water Code, Chapter 27, the TCEQ has jurisdiction to regulate and authorize the drilling, construction, operation, and closure of injection wells unless the activity is subject to the jurisdiction of the RRC. Injection wells under TCEQ's jurisdiction are identified in §331.11 of this title (relating to Classification of Injection Wells) and include:

(i) Class I injection wells for the disposal of hazardous, radioactive, industrial or municipal waste that inject fluids below the lower-most formation which within 1/4 mile of the wellbore contains an underground source of drinking water;

(ii) Class III injection wells for the extraction of minerals including solution mining of sodium sulfate, sulfur, potash, phosphate, copper, uranium and the mining of sulfur by the Frasch process;

(iii) Class IV injection wells for the disposal of hazardous or radioactive waste which inject fluids into or above formations that contain an underground source of drinking water; and

(iv) Class V injection wells that are not under the jurisdiction of the RRC, such as aquifer remediation wells, aquifer recharge wells, aquifer storage wells, large capacity septic systems, storm water drainage wells, salt water intrusion barrier wells, and closed loop geothermal wells.

(2) Railroad Commission of Texas (RRC).

(A) Oil and gas waste.

(i) Under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 26, wastes (both hazardous and nonhazardous) resulting from activities associated with the exploration, development, or production of oil or gas or geothermal resources, includ-
ing storage, handling, reclamation, gathering, transportation, or distribution of crude oil or natural gas by pipeline, prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel, are under the jurisdiction of the RRC, except as noted in clause (ii) of this subparagraph. These wastes are termed "oil and gas wastes." In compliance with Texas Health and Safety Code, §361.025 (relating to exempt activities), a list of activities that generate wastes that are subject to the jurisdiction of the RRC is found at 16 TAC §3.8(a)(30) (relating to Water Protection) and at §335.1 of this title (relating to Definitions), which contains a definition of "activities associated with the exploration, development, and production of oil or gas or geothermal resources." Under Texas Health and Safety Code, §401.415, the RRC has jurisdiction over the disposal of oil and gas naturally occurring radioactive material (NORM) waste that constitutes, is contained in, or has contaminated oil and gas waste.

(ii) Hazardous wastes arising out of or incidental to activities associated with gasoline plants, natural gas or natural gas liquids processing plants or reservoir pressure maintenance or repressurizing plants are subject to the jurisdiction of the TCEQ until the RRC is authorized by EPA to administer RCRA. When the RRC is authorized by EPA to administer RCRA, jurisdiction over such hazardous wastes will transfer from the TCEQ to the RRC.

(B) Water quality.

(i) Discharges. Under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 26, the RRC regulates discharges from activities associated with the exploration, development, or production of oil, gas, or geothermal resources, including transportation of crude oil and natural gas by pipeline, and from solution brine mining activities, except that on delegation to the TCEQ of NPDES authority for discharges into surface water in the state of produced water, hydrostatic test water, and gas plant effluent resulting from the activities described in Texas Water Code, §26.131(a), the TCEQ has sole authority to issue permits for those discharges. Discharges regulated by the RRC into or adjacent to water in the state shall not cause a violation of the water quality standards. While water quality standards are established by the TCEQ, the RRC has the responsibility for enforcing any violation of such standards resulting from activities regulated by the RRC. Texas Water Code, Chapter 26, does not require that discharges regulated by the RRC comply with regulations of the TCEQ that are not water quality standards. The TCEQ and the RRC may consult as necessary regarding application and interpretation of Texas Surface Water Quality Standards.

(ii) Storm water. When required by federal law, authorization for storm water discharges that are under the jurisdiction of the RRC must be obtained through application for a National Pollutant Discharge Elimination System (NPDES) permit with the EPA and authorization from the RRC, as applicable.

(I) Storm water associated with industrial activities. Where required by federal law, discharges of storm water associated with facilities and activities under the RRC's jurisdiction must be authorized by the EPA and the RRC, as applicable. Under 33 U.S.C. §1342(1)(2) and §1362(24), EPA cannot require a permit for discharges of storm water from "field activities or operations associated with [oil and gas] exploration, production, processing, or treatment operations, or transmission facilities" unless the discharge is contaminated by contact with any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of the facility. Under 16 TAC §3.8 (relating to Water Protection), the RRC prohibits operators from causing or allowing pollution of surface or subsurface water. Operators are encouraged to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water to help ensure protection of surface water quality during storm events.

(II) Storm water associated with construction activities. Where required by federal law, discharges of storm water associated with construction activities under the RRC's jurisdiction must be authorized by the EPA and the RRC, as applicable. Activities under RRC jurisdiction include construction of a facility that, when completed, would be associated with the exploration, development, or production of oil or gas or geothermal resources, such as a well site; treatment or storage facility; underground hydrocarbon or natural gas storage facility; reclamation plant; gas processing facility; compressor station; terminal facility where crude oil is stored prior to refining and at which refined products are stored solely for use at the facility; a carbon dioxide geologic storage facility under the jurisdiction of the RRC; and a gathering, transmission, or distribution pipeline that will transport crude oil or natural gas, including natural gas liquids, prior to refining of such oil or the use of the natural gas in any manufacturing process or as a residential or industrial fuel. The RRC also has jurisdiction over storm water from land disturbance associated with a site survey that is conducted prior to construction of a facility that would be regulated by the RRC. Under 33 U.S.C. §1342(1)(2) and §1362(24), EPA cannot require a permit for discharges of storm water from "field activities or operations associated with [oil and gas] exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities" unless the discharge is contaminated by contact with any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of the facility. Under 16 TAC §3.8 (relating to Water Protection), the RRC prohibits operators from causing or allowing pollution of surface or subsurface water. Operators are encouraged to implement and maintain BMPs to minimize discharges of pollutants, including sediment, in storm water during construction activities to help ensure protection of surface water quality during storm events.

(III) Municipal storm water discharges. Storm water discharges from facilities regulated by the RRC located within an MS4 are not regulated by the TCEQ. However, a municipality may regulate storm water discharges from RRC sites into their MS4.

(IV) Combined storm water. Except with regard to storage of oil, when a portion of a site is regulated by the RRC and the EPA, and a portion of a site is regulated by the TCEQ, storm water authorization must be obtained from the EPA and the RRC, as applicable, for the portion(s) of the site under RRC jurisdiction and from the TCEQ for the TCEQ regulated portion(s) of the site. Discharge of storm water from a terminal facility where crude oil is stored prior to refining and at which refined products are stored solely for use at the facility is under the jurisdiction of the RRC.

(iii) State water quality certification. The RRC performs state water quality certifications, as authorized by the Clean Water Act (CWA) Section 401 (33 U.S.C. Section 1341) for activities that require a federal license or permit and that may result in any discharge to waters of the United States for those activities regulated by the RRC.

(C) Injection wells. The RRC has jurisdiction over the drilling, construction, operation, and closure of the following injection wells.

(i) Disposal wells. The RRC has jurisdiction under Texas Water Code, Chapter 27, over injection wells used to dispose of oil and gas waste. Texas Water Code, Chapter 27, defines "oil and gas waste" to mean "waste arising out of or incidental to drilling for or
producing of oil, gas, or geothermal resources, waste arising out of or incidental to the underground storage of hydrocarbons other than storage in artificial tanks or containers, or waste arising out of or incidental to the operation of gasoline plants, natural gas processing plants, or pressure maintenance or repressurizing plants. The term includes but is not limited to salt water, brine, sludge, drilling mud, and other liquid or semi-liquid waste material." The term "waste arising out of or incidental to drilling for or producing of oil, gas, or geothermal resources" includes waste associated with transportation of crude oil or natural gas by pipeline pursuant to Texas Natural Resources Code, §91.101.

(ii) Enhanced recovery wells. The RRC has jurisdiction over wells into which fluids are injected for enhanced recovery of oil or natural gas.

(iii) Brine mining. Under Texas Water Code, §27.036, the RRC has jurisdiction over brine mining and may issue permits for injection wells.

(iv) Geologic storage of carbon dioxide. Under Texas Water Code, §27.031 and §27.041, and subject to the review of the legislature based on the recommendations made in the preliminary report described by Section 10, Senate Bill No. 1387, Acts of the 81st Legislature, Regular Session (2009), the RRC has jurisdiction over geologic storage of carbon dioxide in, and the injection of carbon dioxide into, a reservoir that is initially or may be producive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir and over a well used for such injection purposes regardless of whether the well was initially completed for that purpose or was initially completed for another purpose and converted.

(v) Hydrocarbon storage. The RRC has jurisdiction over wells into which fluids are injected for storage of hydrocarbons that are liquid at standard temperature and pressure.

(vi) Geothermal energy. Under Texas Natural Resources Code, Chapter 141, the RRC has jurisdiction over injection wells for the exploration, development, and production of geothermal energy and associated resources.

(vii) In-situ tar sands. Under Texas Water Code, §27.035, the RRC has jurisdiction over the in situ recovery of tar sands and may issue permits for injection wells used for the in situ recovery of tar sands.

(c) Definition of hazardous waste.

(1) Under the Texas Health and Safety Code, §361.003(12), a "hazardous waste" subject to the jurisdiction of the TCEQ is defined as "solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. §6901, et seq.)." Similarly, under Texas Natural Resources Code, §91.601(1), "oil and gas hazardous waste" subject to the jurisdiction of the RRC is defined as "oil and gas waste that is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §§6901, et seq.)."

(2) Federal regulations adopted under authority of the federal Solid Waste Disposal Act, as amended by RCRA, exempt from regulation hazardous waste certain oil and gas wastes. Under 40 Code of Federal Regulations (CFR) §261.4(b)(5), "drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy" are described as wastes that are exempt from federal hazardous waste regulations.

(3) A partial list of wastes associated with oil, gas, and geothermal exploration, development, and production that are considered exempt from hazardous waste regulation under RCRA can be found in EPA's "Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes," 53 FedReg 25,446 (July 6, 1988). A further explanation of the exemption can be found in the "Clarification of the Regulatory Determination for Wastes from the Exploration, Development and Production of Crude Oil, Natural Gas and Geothermal Energy," 58 FedReg 15,284 (March 22, 1993). The exemption codified at 40 CFR §261.4(b)(5) and discussed in the Regulatory Determination has been, and may continue to be, clarified in subsequent guidance issued by the EPA.

(d) Jurisdiction over waste from specific activities.

(1) Drilling, operation, and plugging of wells associated with the exploration, development, or production of oil, gas, or geothermal resources. Wells associated with the exploration, development, or production of oil, gas, or geothermal resources include exploratory wells, cathodic protection holes, core holes, oil wells, gas wells, geothermal resource wells, fluid injection wells used for secondary or enhanced recovery of oil or gas, oil and gas waste disposal wells, and injection water source wells. Several types of waste materials can be generated during the drilling, operation, and plugging of these wells. These waste materials include drilling fluids (including water-based and oil-based fluids), cuttings, produced water, produced sand, waste hydrocarbons (including used oil), fracturing fluids, spent acid, workover fluids, treating chemicals (including scale inhibitors, emulsion breakers, paraffin inhibitors, and surfactants), waste cement, filters (including used oil filters), domestic sewage (including waterborne human waste and waste from activities such as bathing and food preparation), and trash (including inert waste, barrels, dope cans, oily rags, mud sacks, and garbage). Generally, these wastes, whether disposed of by discharge, landfill, land fill, evaporation, or injection, are subject to the jurisdiction of the RRC. Wastes from oil, gas, and geothermal exploration activities subject to regulation by the RRC when those wastes are to be processed, treated, or disposed of at a solid waste management facility authorized by the TCEQ under Chapter 330 of this title (relating to Municipal Solid Waste) are, as defined in §330.3(148) of this title (relating to Definitions), "special wastes."

(2) Field treatment of produced fluids. Oil, gas, and water produced from oil, gas, or geothermal resource wells may be treated in the field in facilities such as separators, skimmers, heater treaters, dehydrators, and sweetening units. Waste that results from the field treatment of oil and gas include waste hydrocarbons (including used oil), produced water, hydrogen sulfide scavengers, dehydration wastes, treating and cleaning chemicals, filters (including used oil filters), asbestos insulation, domestic sewage, and trash are subject to the jurisdiction of the RRC.

(3) Storage of oil. (A) Tank bottoms and other wastes from the storage of crude oil (whether foreign or domestic) before it enters the refinery are under the jurisdiction of the RRC. In addition, waste resulting from storage of crude oil at refineries is subject to the jurisdiction of the TCEQ.

(B) Wastes generated from storage tanks that are part of the refinery and wastes resulting from the wholesale and retail marketing of refined products are subject to the jurisdiction of the TCEQ.

(4) Underground hydrocarbon storage. The disposal of wastes, including saltwater, resulting from the construction, creation, operation, maintenance, closure, or abandonment of an "underground hydrocarbon storage facility" is subject to the jurisdiction of the RRC.
provided the terms "hydrocarbons" and "underground hydrocarbon storage facility" have the meanings set out in Texas Natural Resources Code, §91.201.

(5) Underground natural gas storage. The disposal of wastes resulting from the construction, operation, or abandonment of an "underground natural gas storage facility" is subject to the jurisdiction of the RRC, provided that the terms "natural gas" and "storage facility" have the meanings set out in Texas Natural Resources Code, §91.173.

(6) Transportation of crude oil or natural gas.

(A) Jurisdiction over pipeline-related activities. The RRC has jurisdiction over matters related to pipeline safety for pipelines in Texas, as referenced in 16 TAC §8.1 (relating to General Applicability and Standards) pursuant to Chapter 121 of the Texas Utilities Code and Chapter 117 of the Texas Natural Resources Code. The RRC has jurisdiction over spill response and remediation of releases from pipelines transporting crude oil, natural gas, and condensate that originate from exploration and production facilities to the refinery gate. The RRC has jurisdiction over waste generated by construction and operation of pipelines used to transport crude oil, natural gas, and condensate on an oil and gas lease, and from exploration and production facilities to the refinery gate. The RRC is responsible for water quality certification issues related to construction and operation of pipelines used to transport crude oil, natural gas, and condensate on an oil and gas lease, and from exploration and production facilities to the refinery gate. The RRC has jurisdiction over waste generated by construction and operation of pipelines transporting carbon dioxide.

(B) Crude oil and natural gas are transported by railcars, tank trucks, barges, tankers, and pipelines. The RRC has jurisdiction over waste from the transportation of crude oil by pipeline, regardless of the crude oil source (foreign or domestic) prior to arrival at a refinery. The RRC also has jurisdiction over waste from the transportation by pipeline of natural gas, including natural gas liquids, prior to the use of the natural gas in any manufacturing process or as a residential or industrial fuel. The transportation wastes subject to the jurisdiction of the RRC include wastes from pipeline compressor or pressure stations and wastes from pipeline hydrostatic pressure tests and other pipeline operations. These wastes include waste hydrocarbons (including used oil), treating and cleaning chemicals, filters (including used oil filters), scraper trap sludge, trash, domestic sewage, wastes contaminated with polychlorinated biphenyls (PCBs) (including transformers, capacitors, ballasts, and soils), soils contaminated with mercury from leaking mercury meters, asbestos insulation, transite pipe, and hydrostatic test waters.

(C) The TCEQ has jurisdiction over waste from transportation of refined products by pipeline.

(D) The TCEQ also has jurisdiction over wastes associated with transportation of crude oil and natural gas, including natural gas liquids, by railcar, tank truck, barge, or tanker.

(7) Reclamation plants.

(A) The RRC has jurisdiction over wastes from reclamation plants that process wastes from activities associated with the exploration, development, or production of oil, gas, or geothermal resources, such as lease tank bottoms. Waste management activities of reclamation plants for other wastes are subject to the jurisdiction of the TCEQ.

(B) The RRC has jurisdiction over the conservation and prevention of waste of crude oil and therefore must approve all movements of crude oil-containing materials to reclamation plants. The applicable statute and regulations consist primarily of reporting requirements for accounting purposes.

(8) Refining of oil.

(A) The management of wastes resulting from oil refining operations, including spent caustics, spent catalysts, still bottoms or tars, and American Petroleum Institute (API) separator sludges, is subject to the jurisdiction of the TCEQ. The processing of light ends from the distillation and cracking of crude oil or crude oil products is considered to be a refining operation. The term "refining" does not include the processing of natural gas or natural gas liquids.

(B) The RRC has jurisdiction over refining activities for the conservation and the prevention of waste of crude oil. The RRC requires that all crude oil streams into or out of a refinery be reported for accounting purposes. In addition, the RRC requires that materials recycled and used as a fuel, such as still bottoms or waste crude oil, be reported.

(9) Natural gas or natural gas liquids processing plants (including gas fractionation facilities) and pressure maintenance or repressurizing plants. Wastes resulting from activities associated with these facilities include produced water, cooling tower water, sulfur bead, sulfides, spent caustics, sweetening agents, spent catalyst, waste hydrocarbons (including used oil), asbestos insulation, wastes contaminated with PCBs (including transformers, capacitors, ballasts, and soils), treating and cleaning chemicals, filters, trash, domestic sewage, and dehydration materials. These wastes are subject to the jurisdiction of the RRC under Texas Natural Resources Code, §1.101. Disposal of waste from activities associated with natural gas or natural gas liquids processing plants (including gas fractionation facilities), and pressure maintenance or repressurizing plants by injection is subject to the jurisdiction of the RRC under Texas Water Code, Chapter 27. However, until delegation of authority under RCRA to the RRC, the TCEQ shall have jurisdiction over wastes resulting from these activities that are not exempt from federal hazardous waste regulation under RCRA and that are considered hazardous under applicable federal rules.

(10) Manufacturing processes.

(A) Wastes that result from the use of natural gas, natural gas liquids, or products refined from crude oil in any manufacturing process, such as the production of petrochemicals or plastics, or from the manufacture of carbon black, are industrial wastes subject to the jurisdiction of the TCEQ. The term "manufacturing process" does not include the processing (including fractionation) of natural gas or natural gas liquids at natural gas or natural gas liquids processing plants.

(B) The RRC has jurisdiction under Texas Natural Resources Code, Chapter 87, to regulate the use of natural gas in the production of carbon black.

(C) Biofuels. The TCEQ has jurisdiction over wastes associated with the manufacturing of biofuels and biodiesel. TCEQ Regulatory Guidance Document RG-462 contains additional information regarding biodiesel manufacturing in the state of Texas.

(11) Commercial service company facilities and training facilities.

(A) The TCEQ has jurisdiction over wastes generated at facilities, other than actual exploration, development, or production sites (field sites), where oil and gas industry workers are trained. In addition, the TCEQ has jurisdiction over wastes generated at facilities where materials, processes, and equipment associated with oil and gas industry operations are researched, developed, designed, and manufactured. However, wastes generated from tests of materials, processes, and equipment at field sites are under the jurisdiction of the RRC.
(B) The TCEQ also has jurisdiction over waste generated at commercial service company facilities operated by persons providing equipment, materials, or services (such as drilling and work over rig rental and tank rental; equipment repair; drilling fluid supply; and acidizing, fracturing, and cementing services) to the oil and gas industry. These wastes include the following wastes when they are generated at commercial service company facilities: empty sacks, containers, and drums; drum, tank, and truck rinsate; sandblast media; painting wastes; spent solvents; spilled chemicals; waste motor oil; and unused fracturing and acidizing fluids.

(C) The term "commercial service company facility" does not include a station facility such as a warehouse, pipeyard, or equipment storage facility belonging to an oil and gas operator and used solely for the support of that operator's own activities associated with the exploration, development, or production activities.

(D) Notwithstanding subparagraphs (A) - (C) of this paragraph, the RRC has jurisdiction over disposal of oil and gas wastes, such as waste drilling fluids and NORM-contaminated pipe scale, in volumes greater than the incidental volumes usually received at such facilities, that are managed at commercial service company facilities.

(E) The RRC also has jurisdiction over wastes such as vacuum truck rinsate and tank rinsate generated at facilities operated by oil and gas waste haulers permitted by the RRC pursuant to 16 TAC §3.8(f) (relating to Water Protection).

(12) Mobile offshore drilling units (MODUs). MODUs are vessels capable of engaging in drilling operations for exploring or exploiting subsea oil, gas, or mineral resources.

(A) The RRC and, where applicable, the EPA, the U.S. Coast Guard, or the Texas General Land Office (GLO), have jurisdiction over discharges from an MODU when the unit is being used in connection with activities associated with the exploration, development, or production of oil or gas or geothermal resources, except that upon delegation to the TCEQ of NPDES authority for discharges into surface water in the state of produced water, hydrostatic test water, and gas plant effluent resulting from the activities described in Texas Water Code, §26.131(a), the TCEQ shall assume RRC's authority under this subsection.

(B) The TCEQ and, where applicable, the EPA, the U.S. Coast Guard, or the GLO, have jurisdiction over discharges from an MODU when the unit is being serviced at a maintenance facility.

(C) Where applicable, the EPA, the U.S. Coast Guard, or the GLO has jurisdiction over discharges from an MODU during transportation from shore to exploration, development or production site, transportation between sites, and transportation to a maintenance facility.

(e) Interagency activities.

(1) Recycling and pollution prevention.

(A) The TCEQ and the RRC encourage generators to eliminate pollution at the source and recycle whenever possible to avoid disposal of wastes. Questions regarding source reduction and recycling may be directed to the TCEQ External Relations Division, or to the RRC. The TCEQ may require generators to explore source reduction and recycling alternatives prior to authorizing disposal of any waste under the jurisdiction of the RRC at a facility regulated by the TCEQ; similarly, the RRC may explore source reduction and recycling alternatives prior to authorizing disposal of any waste under the jurisdiction of the TCEQ at a facility regulated by the RRC.

(B) The TCEQ External Relations Division and the RRC will coordinate as necessary to maintain a working relationship to enhance the efforts to share information and use resources more efficiently. The TCEQ External Relations Division will make the proper TCEQ personnel aware of the services offered by the RRC, share information with the RRC to maximize services to oil and gas operators, and advise oil and gas operators of RRC services. The RRC will make the proper RRC personnel aware of the services offered by the TCEQ External Relations Division, share information with the TCEQ External Relations Division to maximize services to industrial operators, and advise industrial operators of the TCEQ External Relations Division services.

(2) Treatment of wastes under RRC jurisdiction at facilities authorized by the TCEQ under Chapter 334, Subchapter K of this title (relating to Storage, Treatment, and Reuse Procedures for Petroleum-Substance Contaminated Soil).

(A) Soils contaminated with constituents that are physically and chemically similar to those normally found in soils at leaking underground petroleum storage tanks from generators under the jurisdiction of the RRC are eligible for treatment at TCEQ regulated soil treatment facilities once alternatives for recycling and source reduction have been explored. For the purpose of this provision, soils containing petroleum substance(s) as defined in §334.481 of this title (relating to Definitions) are considered to be similar, but drilling muds, acids, or other chemicals used in oil and gas activities are not considered similar. Generators under the jurisdiction of the RRC must meet the same requirements as generators under the jurisdiction of the TCEQ when sending their petroleum contaminated soils to soil treatment facilities under TCEQ jurisdiction. Those requirements are in §334.496 of this title (relating to Shipping Procedures Applicable to Generators of Petroleum-Substance Waste), except subsection (c) is which is not applicable, and §334.497 of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators). RRC generators with questions on these requirements should contact the TCEQ.

(B) Generators under RRC jurisdiction should also be aware that TCEQ regulated soil treatment facilities are required by §334.499 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Storage, Treatment, or Disposal Facilities) to maintain documentation on the soil sampling and analytical methods, chain-of-custody, and all analytical results for the soil received at the facility and transported off-site or reused on-site.

(C) The RRC must specifically authorize management of contaminated soils under its jurisdiction at facilities authorized by the TCEQ under Chapter 334, Subchapter K of this title (relating to Storage, Treatment, and Reuse Procedures for Petroleum-Substance Contaminated Soil). The RRC may grant such authorizations by rule, or on an individual basis through permits or other written authorizations.

(D) All waste, including treated waste, subject to the jurisdiction of the RRC and managed at facilities authorized by the TCEQ under Chapter 334, Subchapter K of this title will remain subject to the jurisdiction of the RRC. Such materials will be subject to RRC regulations regarding final reuse, recycling, or disposal.

(E) TCEQ waste codes and registration numbers are not required for management of wastes under the jurisdiction of the RRC at facilities authorized by the TCEQ under Chapter 334, Subchapter K of this title.

(3) Processing, treatment, and disposal of wastes under RRC jurisdiction at facilities authorized by the TCEQ.

(A) As provided in this paragraph, waste materials subject to the jurisdiction of the RRC may be managed at solid waste facilities under the jurisdiction of the TCEQ once alternatives for recycling
and source reduction have been explored. The RRC must specifically authorize management of wastes under its jurisdiction at facilities regulated by the TCEQ. The RRC may grant such authorizations by rule, or on an individual basis through permits or other written authorizations. In addition, except as provided in subparagraph (B) of this paragraph, the concurrence of the TCEQ is required to manage "special waste" under the jurisdiction of the RRC at a facility regulated by the TCEQ. The TCEQ's concurrence may be subject to specified conditions.

(B) A facility under the jurisdiction of the TCEQ may accept, without further individual concurrence, waste under the jurisdiction of the RRC if that facility is permitted or otherwise authorized to accept that particular type of waste. The phrase "that type of waste" does not specifically refer to waste under the jurisdiction of the RRC, but rather to the waste's physical and chemical characteristics. Management and disposal of waste under the jurisdiction of the RRC is subject to TCEQ's rules governing both special waste and industrial waste.

(C) If the TCEQ regulated facility receiving the waste does not have approval to accept the waste included in its permit or other authorization, individual written concurrences from the TCEQ shall be required to manage wastes under the jurisdiction of the RRC at TCEQ regulated facilities. Recommendations for the management of special wastes associated with the exploration, development, or production of oil, gas, or geothermal resources are found in TCEQ Regulatory Guidance document RG-3. (This is required only if the TCEQ regulated facility receiving the waste does not have approval to accept the waste included in its permit or other authorization provided by the TCEQ.) To obtain an individual concurrence, the waste generator must provide to the TCEQ sufficient information to allow the concurrence determination to be made, including the identity of the proposed waste management facility, the process generating the waste, the quantity of waste, and the physical and chemical nature of the waste involved (using process knowledge and/or laboratory analysis as defined in Chapter 335, Subchapter R of this title (relating to Waste Classification)). In obtaining TCEQ approval, generators may use their existing knowledge about the process or materials entering it to characterize their wastes. Material Safety Data Sheets, manufacturer's literature, and other documentation generated in conjunction with a particular process may be used. Process knowledge must be documented and submitted with the request for approval.

(D) Domestic septage collected from portable toilets at facilities subject to RRC jurisdiction that is not mixed with other waste materials may be managed at a facility permitted by the TCEQ for disposal, incineration, or land application for beneficial use of such domestic septage waste without specific authorization from the TCEQ or the RRC. Waste sludge subject to the jurisdiction of the RRC may not be applied to the land at a facility permitted by the TCEQ for the beneficial use of sewage sludge or water treatment sludge.

(E) TCEQ waste codes and registration numbers are not required for management of wastes under the jurisdiction of the RRC at facilities under the jurisdiction of the TCEQ. If a receiving facility requires a TCEQ waste code for waste under the jurisdiction of the RRC, a code consisting of the following may be provided:

(i) the sequence number "RRC";
(ii) the appropriate form code, as specified in Chapter 335, Subchapter R, §335.521, Appendix 3 of this title (relating to Appendices); and
(iii) the waste classification code "H" if the waste is a hazardous oil and gas waste, or "R" if the waste is a nonhazardous oil and gas waste.

(F) If a facility requests or requires a TCEQ waste generator registration number for wastes under the jurisdiction of the RRC, the registration number "XXXRC" may be provided.

(G) Wastes that are under the jurisdiction of the RRC need not be reported to the TCEQ.

(4) Management of nonhazardous wastes under TCEQ jurisdiction at facilities regulated by the RRC.

(A) Once alternatives for recycling and source reduction have been explored, and with prior authorization from the RRC, the following nonhazardous wastes subject to the jurisdiction of the TCEQ may be disposed of, other than by injection into a Class II well, at a facility regulated by the RRC; bioremediated at a facility regulated by the RRC (prior to reuse, recycling, or disposal); or reclaimed at a crude oil reclamation facility regulated by the RRC: nonhazardous wastes that are chemically and physically similar to oil and gas wastes, but excluding soils, media, debris, sorbent pads, and other clean-up materials that are contaminated with refined petroleum products.

(B) To obtain an individual authorization from the RRC, the waste generator must provide the following information, in writing, to the RRC: the identity of the proposed waste management facility; the quantity of waste involved; a hazardous waste determination that addresses the process generating the waste and the physical and chemical nature of the waste; and any other information that the RRC may require. As appropriate, the RRC shall reevaluate any authorization issued pursuant to this paragraph.

(C) Once alternatives for recycling and source reduction have been explored, and subject to the RRC's individual authorization, the following wastes under the jurisdiction of the TCEQ are authorized without further TCEQ approval to be disposed of at a facility regulated by the RRC, bioremediated at a facility regulated by the RRC, or reclaimed at a crude oil reclamation facility regulated by the RRC: nonhazardous bottoms from tanks used only for crude oil storage; unused and/or reconditioned drilling and completion/workover wastes from commercial service company facilities; used and/or unused drilling and completion/workover wastes generated at facilities where workers in the oil and gas exploration, development, and production industry are trained; used and/or unused drilling and completion/workover wastes generated at facilities where materials, processes, and equipment associated with oil and gas exploration, development, and production operations are researched, developed, designed, and manufactured; unless other provisions are made in the underground injection well permit used and/or unused drilling and completion wastes (but not workover wastes) generated in connection with the drilling and completion of Class I, III, and V injection wells; wastes (such as contaminated soils, media, debris, sorbent pads, and other cleanup materials) associated with spills of crude oil and natural gas liquids if such wastes are under the jurisdiction of the TCEQ; and slurges from washout pits at commercial service company facilities.

(D) Under Texas Water Code, §27.0511(g), a TCEQ permit is required for injection of industrial or municipal waste as an injection fluid for enhanced recovery purposes. However, under Texas Water Code, §27.0511(h), the RRC may authorize a person to use non-hazardous brine from a desalination operation or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes without obtaining a permit from the TCEQ. The use or disposal of radioactive material under this subparagraph is subject to the applicable requirements of Texas Health and Safety Code, Chapter 401.

(E) Under Texas Water Code, §27.026, by individual permit, general permit, or rule, the TCEQ may designate a Class II disposal well that has an RRC permit as a Class V disposal well autho-
rized to dispose by injection nonhazardous brine from a desalination operation and nonhazardous drinking water treatment residuals under the jurisdiction of the TCEQ. The operator of a permitted Class II disposal well seeking a Class V authorization must apply to TCEQ and obtain a Class V authorization prior to disposal of nonhazardous brine from a desalination operation or nonhazardous drinking water treatment residuals. A permitted Class II disposal well that has obtained a Class V authorization from TCEQ under Texas Water Code, §27.026, remains subject to the regulatory requirements of both the RRC and the TCEQ. Nonhazardous brine from a desalination operation and nonhazardous drinking water treatment residuals to be disposed by injection in a permitted Class II disposal well authorized by TCEQ as a Class V injection well remain subject to the requirements of the Texas Health and Safety Code, the Texas Water Code, and the TCEQ’s rules. The RRC and the TCEQ may impose additional requirements or conditions to address the dual injection activity under Texas Water Code, §27.026.

(5) Drilling in landfills. The TCEQ will notify the Oil and Gas Division of the RRC and the landfill owner at the time a drilling application is submitted if an operator proposes to drill a well through a landfill regulated by the TCEQ. The RRC and the TCEQ will cooperate and coordinate with one another in advising the appropriate parties of measures necessary to reduce the potential for the landfill contents to cause groundwater contamination as a result of landfill disturbance associated with drilling operations. The TCEQ requires prior written approval before drilling of any test borings through previously deposited municipal solid waste under §330.15 of this title (relating to General Prohibitions), and before borings or other penetration of the final cover of a closed municipal solid waste landfill under §330.955 of this title (relating to Miscellaneous). The installation of landfill gas recovery wells for the recovery and beneficial reuse of landfill gas is under the jurisdiction of the TCEQ in accordance with Chapter 330, Subchapter I of this title (relating to Landfill Gas Management). Modification of an active or a closed solid waste management unit, corrective action management unit, hazardous waste landfill cell, or industrial waste landfill cell by drilling or penetrating into or through deposited waste may require prior written approval from TCEQ. Such approval may require a new authorization from TCEQ or modification or amendment of an existing TCEQ authorization.

(6) Coordination of actions and cooperative sharing of information.

(A) In the event that a generator or transporter disposes, without proper authorization, of wastes regulated by the TCEQ at a facility permitted by the RRC, the TCEQ is responsible for enforcement actions against the generator or transporter, and the RRC is responsible for enforcement actions against the disposal facility. In the event that a generator or transporter disposes, without proper authorization, of wastes regulated by the RRC at a facility permitted by the TCEQ, the RRC is responsible for enforcement actions against the generator or transporter, and the TCEQ is responsible for enforcement actions against the disposal facility.

(B) The TCEQ and the RRC agree to cooperate with one another by sharing information. Employees of either agency who receive a complaint or discover, in the course of their official duties, information that indicates a violation of a statute, regulation, order, or permit pertaining to wastes under the jurisdiction of the other agency, will notify the other agency. In addition, to facilitate enforcement actions, each agency will share information in its possession with the other agency if requested by the other agency to do so.

(C) The TCEQ and the RRC agree to work together at allocating respective responsibilities. To the extent that jurisdiction is indeterminate or has yet to be determined, the TCEQ and the RRC agree to share information and take appropriate investigative steps to assess jurisdiction.

(D) For items not covered by statute or rule, the TCEQ and the RRC will collaborate to determine respective responsibilities for each issue, project, or project type.

(E) The staff of the RRC and the TCEQ shall coordinate as necessary to attempt to resolve any disputes regarding interpretation of this MOU and disputes regarding definitions and terms of art.

(7) Groundwater.

(A) Notice of groundwater contamination. Under Texas Water Code, §26.408, effective September 1, 2003, the RRC must submit a written notice to the TCEQ of any documented cases of groundwater contamination that may affect a drinking water well.

(B) Groundwater protection letters. The RRC provides letters of recommendation concerning groundwater protection.

(i) For recommendations related to normal drilling operations, shot holes for seismic surveys, and cathodic protection wells, the RRC provides geologic interpretation and identifies fresh water zones, base of usable-quality water (generally less than 3,000 mg/L total dissolved solids, but may include higher levels of total dissolved solids if identified as currently being used or identified by the Texas Water Development Board as a source of water for desalination), and include protection depths recommended by the RRC. The geological interpretation may include groundwater protection based on potential hydrological connectivity to usable-quality water.

(ii) For recommendations related to injection, the RRC provides geologic interpretation of the base of the underground source of drinking water. The term “underground source of drinking water” is defined in 40 Code of Federal Regulations §146.3 (Federal Register, Volume 46, June 24, 1980).

(8) Emergency and spill response.

(A) The TCEQ and the RRC are members of the state’s Emergency Management Council. The TCEQ is the state’s primary agency for emergency support during response to hazardous materials and oil spill incidents. The RRC is responsible for state-level coordination of assets and services, and will identify and coordinate staffing requirements appropriate to the incident to include investigative assignments for the primary and support agencies.

(B) Contaminated soil and other wastes that result from a spill must be managed in accordance with the governing statutes and regulations adopted by the agency responsible for the activity that resulted in the spill. Coordination of issues of spill notification, prevention, and response shall be addressed in the State of Texas Oil and Hazardous Substance Spill Contingency Plan and may be addressed further in a separate Memorandum of Understanding among these agencies and other appropriate state agencies.

(C) The agency (TCEQ or RRC) that has jurisdiction over the activity that resulted in the spill incident will be responsible for measures necessary to monitor, document, and remediate the incident.

(i) The TCEQ has jurisdiction over certain inland oil spills, all hazardous-substance spills, and spills of other substances that may cause pollution.

(ii) The RRC has jurisdiction over spills or discharges from activities associated with the exploration, development, or production of crude oil, gas, and geothermal resources, and discharges from brine mining or surface mining.
(D) If TCEQ or RRC field personnel receive spill notifications or reports documenting improperly managed waste or contaminated environmental media resulting from a spill or discharge that is under the jurisdiction of the other agency, they shall refer the issue to the other agency. The agency that has jurisdiction over the activity that resulted in the improperly managed waste, spill, discharge, or contaminated environmental media will be responsible for measures necessary to monitor, document, and remediate the incident.

(9) Anthropogenic carbon dioxide storage. In determining the proper permitting agency in regard to a particular permit application for a carbon dioxide geologic storage project, the TCEQ and the RRC will coordinate by any appropriate means to review proposed locations, geologic settings, reservoir data, and other jurisdictional criteria specified in Texas Water Code, §27.041.

(f) Radioactive material.

(1) Radioactive substances. Under the Texas Health and Safety Code, §401.011, the TCEQ has jurisdiction to regulate and license:

(A) the disposal of radioactive substances;
(B) the processing or storage of low-level radioactive waste or NORM waste from other persons, except oil and gas NORM waste;
(C) the recovery or processing of source material;
(D) the processing of by-product material as defined by Texas Health and Safety Code, §401.003(3)(B); and
(E) sites for the disposal of low-level radioactive waste, by-product material, or NORM waste.

(2) NORM waste.

(A) Under Texas Health and Safety Code, §401.415, the RRC has jurisdiction over the disposal of NORM that constitutes, is contained in, or has contaminated oil and gas waste. This waste material is called "oil and gas NORM waste." Oil and gas NORM waste may be generated in connection with the exploration, development, or production of oil or gas.

(B) Under Texas Health and Safety Code, §401.412, the TCEQ has jurisdiction over the disposal of NORM that is not oil and gas NORM waste.

(C) The term "disposal" does not include receipt, possession, use, processing, transfer, transport, storage, or commercial distribution of radioactive materials, including NORM. These non-disposal activities are under the jurisdiction of the Texas Department of State Health Services under Texas Health and Safety Code, §401.011(a).

(3) Drinking water residuals. A person licensed for the commercial disposal of NORM waste from public water systems may dispose of NORM waste only by injection into a Class I injection well permitted under Chapter 331 of this title (relating to Underground Infiltration) that is specifically permitted for the disposal of NORM waste.

(4) Management of radioactive tracer material.

(A) Radioactive tracer material is subject to the definition of low-level radioactive waste under Texas Health and Safety Code, §401.004, and must be handled and disposed of in accordance with the rules of the TCEQ and the Department of State Health Services.

(B) Exemption. Under Texas Health and Safety Code, §401.106, the TCEQ may grant an exemption by rule from a licensing requirement if the TCEQ finds that the exemption will not constitute a significant risk to the public health and safety and the environment.

(5) Coordination with the Texas Radiation Advisory Board. The RRC and the TCEQ will consider recommendations and advice provided by the Texas Radiation Advisory Board that concern either agency's policies or programs related to the development, use, or regulation of a source of radiation. Both agencies will provide written response to the recommendations or advice provided by the advisory board.

(6) Uranium exploration and mining.

(A) Under Texas Natural Resources Code, Chapter 131, the RRC has jurisdiction over uranium exploration activities.

(B) Under Texas Natural Resources Code, Chapter 131, the RRC has jurisdiction over uranium mining, except for in situ recovery processes.

(C) Under Texas Water Code, §27.0513, the TCEQ has jurisdiction over injection wells used for uranium mining.

(D) Under Texas Health and Safety Code, §401.2625, the TCEQ has jurisdiction over the licensing of source material recovery and processing or for storage, processing, or disposal of by-product material.

(g) Effective date. This Memorandum of Understanding, as of its May 11, 2020, effective date, shall supersede the prior Memorandum of Understanding among the agencies, dated May 1, 2012.

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

Filed with the Office of the Secretary of State on February 13, 2020.
TRD-202000597
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 239-6087

CHAPTER 342. REGULATION OF CERTAIN AGGREGATE PRODUCTION OPERATIONS SUBCHAPTER B. REGISTRATION AND FEES 30 TAC §342.26

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §342.26.

Background and Summary of the Factual Basis for the Proposed Rule

House Bill 907 (HB 907 or bill), 86th Texas Legislature, 2019, amends Texas Water Code (TWC), Chapter 28A, relating to Aggregate Production Operations (APOs) by requiring the TCEQ to investigate APOs every two years during the first six years in which the APO is registered, and at least once every three years thereafter. The TCEQ may also conduct unannounced periodic inspections at APOs that were issued notices of violations during
the preceding three-year period. The bill also requires investigations to be conducted by one or more inspectors trained in the regulatory requirements under the jurisdiction of the TCEQ that are applicable to an active APO.

Additionally, HB 907 increases the maximum annual registration fee for APOs from $1,000 to $1,500, as well as, increases the maximum penalty assessed to an unregistered APO from $10,000 to $20,000 for each year the APO operates without a registration. HB 907 also increases the maximum total penalty assessed to an APO that is operated three or more years without being registered from $25,000 to $40,000.

This proposed rulemaking would amend §342.26 by revising the APO annual registration fee in accordance with HB 907.

Section Discussion
§342.26, Registration Fees
The commission proposes to amend §342.26(b) to replace the monetary amount of "$1,000" with the phrase, "the amount specified in Texas Water Code, Chapter 28A" in order to implement TWC, §28A.101(b), as amended by HB 907. The commission proposes that a dollar amount not be stated in §342.26(b), but instead, refer to the amount provided in TWC, Chapter 28A. The proposed language would implement the increased maximum annual registration fee and offer flexibility to the commission when determining the tier-based fee structure. Additionally, referencing the governing TWC chapter instead of specifying the monetary amount would provide consistency between Chapter 342 and TWC, Chapter 28A, as well as, maintain compliance with future legislation.

Fiscal Note: Costs to State and Local Government
Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule would be in effect, fiscal implications are anticipated for the agency and the state.

Recent changes to state law increased the maximum fee from $1,000 to $1,500. This proposed rulemaking would remove the maximum fee listed in the Texas Administrative Code (TAC) and instead would reference the maximum fee in state law. The exact fee structure is determined by the executive director, and a tiered system is currently in place. As of November 8, 2019, the agency had 1,011 active APOs. Because a new tiered system has not been developed, the exact amount of additional revenue cannot be projected. Using the current number of registrants, the maximum amount the fee increase could generate would be $505,500 per year.

The agency does not anticipate that units of local government would experience a fiscal implication in the next five years as a result of administration or enforcement of the proposed rule. However, if a unit of local government required registration for an APO, then they would be impacted by the required fee.

Public Benefits and Costs
Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated would be compliance with state law.

The proposed rulemaking is anticipated to result in fiscal implications for businesses or individuals if they own or operate certain APOs. Recent changes to state law increased the maximum fee from $1,000 to $1,500. This proposed rulemaking would remove the maximum fee listed in the TAC and instead would reference the maximum fee in state law. The exact fee structure is determined by the executive director, and a tiered system is currently in place. As of November 8, 2019, the agency had 1,011 active APOs. There is the potential for a maximum fee increase of $500 per APO per year.

Local Employment Impact Statement
The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking would not adversely affect a local economy in a material way for the first five years that the proposed rule would be in effect.

Rural Community Impact Statement
The commission reviewed this proposed rulemaking and determined that the proposed rulemaking would not adversely affect rural communities in a material way for the first five years that the proposed rule would be in effect. The amendment would apply statewide and have the same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment
No significant adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule would be in effect. The agency uses a tiered fee structure to set the fee for certain APOs. The fee is based on the number of acres of land. It is estimated that the agency regulates over 138 APOs that are less than ten acres. These APOs currently pay the lowest level in the tiered structure.

Small Business Regulatory Flexibility Analysis
The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule would not adversely affect a small or micro-business in a material way for the first five years the proposed rule would be in effect.

Government Growth Impact Statement
The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would not create or eliminate a government program and would not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking would not require the creation of new employee positions, eliminate current employee positions, but it does have the potential to increase the fees paid to the agency. The limit on the fees is removed from TAC and state law is referenced instead. The proposed rulemaking would not create, expand, repeal or limit an existing regulation, nor would the proposed rulemaking increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination
The commission reviewed the proposed rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225(a), because it does not meet the definition of a "Major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). The following is a summary of that review.
Texas Government Code, §2001.0225, applies to a "Major environmental rule" adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and the federal government to implement a state and federal program, or adopt a rule solely under the general powers of the agency instead of under a specific state law. A "Major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, the proposed rulemaking does not fit the Texas Government Code, §2001.0225 definition of "Major environmental rule."

Even if this rulemaking were a "Major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather conforms TCEQ rules to adopted and effective state laws. Third, it does not occur under a delegation agreement or contract with a federal program, and finally, it is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under specific state statutes enacted in HB 907. Because this proposal does not constitute a major environmental rule, a regulatory impact analysis is not required. 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. Written comments may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that analysis.

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution, Article I, Section 17 or 19; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The specific purpose of the proposed rulemaking is to implement the legislative amendments in HB 907 by increasing the APO registration fee, which the legislature deemed an effective avenue to strengthen the regulation of APOs. The proposed rulemaking would substantially advance this stated purpose by adopting rule language that increases the registration fee from $1,000 to $1,500.

Promulgation and enforcement of the proposed rule would not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, Texas Government Code, Chapter 2007 does not apply to this proposed rule because the rule does not impact private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. Specifically, the proposed rulemaking would not apply to or affect any landowner's rights in any private real property because it would not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's
value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The proposed rule is administrative and would not impose any new regulatory requirements. The primary purpose of the proposed rule is to implement HB 907 by increasing the maximum APO registration fee from $1,000 to $1,500. The proposed rulemaking is reasonably taken to fulfill requirements of state law. Therefore, the proposed rulemaking would not cause a taking under Texas Government Code, Chapter 2007.

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

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing
The commission will hold a public hearing on this proposal in Austin on March 24, 2020, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or (800) RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments
Written comments may be submitted to Andreea Vasile, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: https://www6.tceq.texas.gov/rules/ecomments/. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2019-130-342-OW. The comment period closes on March 30, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Shelby Williams, Water Quality Assessment Section, (512) 239-4968.

Statutory Authority
The amendment is proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §§5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §§5.120, which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state.

The amendment implements House Bill 907, 86th Texas Legislature (2019), TWC, §§5.013, 5.102, 5.103, and 5.120.

§342.26. Registration Fees.
(a) Any person who submits a registration for an aggregate production operation shall remit, at the time of registration, a fee to the commission.
(b) The executive director shall determine the costs to administer this chapter and the requirements in Texas Water Code, Chapter 28A [§28A], and establish fees annually to recover the executive director's actual costs. The fees established by the executive director shall not exceed the amount specified in the Texas Water Code, Chapter 28A [§1.000]. The executive director may implement a tier-based registration fee structure.

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

Filed with the Office of the Secretary of State on February 13, 2020.
TRD-202000598
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 293-1806

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 357. REGIONAL WATER PLANNING

The Texas Water Development Board ("TWDB" or "board") proposes amendments to §§357.10, 357.11, 357.21, 357.31, 357.33, 357.34, 357.42, 357.43, 357.45, relating to regional water planning.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT.

The purpose of the amendments is to implement changes from House Bill (HB) 807, 86th (R) Legislative Session, and to clarify rules to make them more understandable and uniformly applied by regional water planning groups (RWPGs). The specific provisions being amended or added and the reasons for the amendments are addressed in more detail below.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Subchapter A. General Information.
Section 357.10. Definitions and Acronyms.
The definition of Regional Water Planning Gallons Per Capita Per Day is added to clarify the term as used in regional water planning. This definition aligns with the Texas Water Develop-
ment Board and Texas Commission on Environmental Quality guidance document "Guidance and Methodology for Reporting on Water Conservation and Water Use."

The remaining sections in §357.10 are renumbered to accommodate the addition of §357.10(25).

Section 357.11. Designations.

Section 357.11(d)(7) is revised to expand the eligible participation of the small businesses interest category. The updated ranges are based on information collected by the U.S. Small Business Administration.

Section 357.11(d)(9) is revised to remove Palo Duro River Authority from the required river authority interest category. The authority of the Palo Duro River Authority was revised by HB 1920 during the 85th Legislative Session by the reclassification of the river authority to a local water district.

New section 357.11(k) is added to implement a change to Texas Water Code (TWC) §16.052 made by HB 807, 86th Legislative Session (relating to an Interregional Planning Council). The change requires that the Board appoint an Interregional Planning Council during each state water planning cycle. The Interregional Planning Council is to be considered a Governmental Body in accordance with Texas Government Code §551.001 and must conduct business in accordance with the Texas Open Meetings Act. The Interregional Planning Council is also considered a Governmental Body under Texas Government Code §552.003 and must follow the Texas Public Information Act.

Due to the timing of the current planning cycle, the deliverable date for the Council's report is proposed to coincide with the deliverable date of the adopted 2021 regional water plans (RWP). For state water plan cycles beginning with the 2027 State Water Plan, a deliverable date for the Council's report is proposed to occur in advance of the Initially Prepared Plans to allow for consideration of recommendations by the RWPGs during development of their plans. In future planning cycles, each RWPG will be required to submit an alternate along with their nomination(s). Alternates may assume all responsibilities of the appointed Council member, should the Council member not be able to serve during their term, without additional Board action.

Subchapter B. Guidance Principles and Notice Requirements.

Section 357.21. Notice and Public Participation.

Section 357.21(a) is revised to specify that the collection of certain information related to existing major water infrastructure facilities is exempted from the Public Information Act, Texas Government Code, Chapter 552.

Subchapter C. Planning Activities For Needs Analysis And Strategy Recommendations.

Section 357.31. Projected Population and Water Demands.

Section 357.31(f) is revised to clarify that Population and Water Demand projections shall be presented for each Planning Decade for Water User Groups (WUG) and Water Demand projections associated with Major Water Providers will be presented for each Planning Decade by category of water use.

Section 357.33. Needs Analysis: Comparison of Water Supplies and Demands.

Section 357.33(d) is revised to clarify that the reporting requirements for the social and economic impacts of not meeting Water Needs are only required for WUGs.

Section 357.34. Identification and Evaluation of Potentially Feasible Water Management Strategies and Water Management Strategy Projects.

Section 357.34(e)(3)(A) is revised to correct a typographical error.

Section 357.34(g) is added to specify the RWPGs must document in their RWP why certain water management strategies were not recommended, a task that is already required of RWPGs by the contract scopes of work. These strategies include aquifer storage and recovery, seawater desalination, and brackish groundwater desalination.

Section 357.34(h) is added to implement a change to TWC §16.053(e)(10) made by HB 807 (relating to Aquifer Storage and Recovery). The change requires that RWPGs assess the potential for aquifer storage and recovery to meet significant water needs in the planning area, as identified by the RWPG.

Previous sections (g) and (h) are renumbered to (i) and (j), respectively.

Section 357.34(i)(3) is added to implement a change to TWC §16.053(e)(11) made by HB 807 (relating to Gallons Per Capita Per Day Goals). The change requires that RWPGs set specific gallons per capita per day goals for municipal WUGs in the planning region. The use of a drought water use condition (rather than an average water use condition) is proposed to align with the drought condition requirements under which RWPs are developed.


Section 357.42. Drought Response Information, Activities, and Recommendations.

Section 357.42(b) is revised to clarify language of drought assessments.

A new section 357.42(b)(1) is added to clarify considerations drought assessments should include.

A new section 357.42(b)(2) is added to implement a change to TWC §16.053(e)(3)(E) made by HB 807 (relating to Drought Response Strategies). The change requires that RWPGs identify unnecessary or counterproductive variations in drought response strategies in the planning region that may confuse the public or impede drought response efforts.

Section 357.42(d) is revised to remove the requirement that the collection of information related to existing major water infrastructure facilities be collected in a closed meeting, to comply with Texas Open Meeting Act requirements and to clarify the minimum content required to be presented in the RWPs.

Section 357.43. Regulatory, Administrative, or Legislative Recommendations.

Section 357.43(b)(2) is revised to clarify that the RWPG shall assess the impact of the RWP on unique stream segments that have been designated by the legislature during a session that ends not less than one year before the required date of submittal of an adopted RWP to the Board, by any previous legislative session, or recommended as a unique river or stream segment in the RWP.

Section 357.43(d) is revised to implement a change to TWC §16.053(i) made by HB 807 (relating to Recommendations to Improve the Water Planning Process). The change specifies that
RWP may include recommendations the RWPG believes would improve the planning process.

Section 357.45. Implementation and Comparison to Previous Regional Water Plan.

Section 357.45(b) is added to implement a change to TWC §16.053(e)(12) made by HB 807 (relating to Regionalization). The change requires that the RWPGs assess the progress of regionalization in the planning area.

Previous section 357.34(b) is renumbered to (c).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments. There may be a change in costs for RWPGs, which are funded by the TWDB. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments’ costs or revenue resulting from these rules. The legislation that this rulemaking seeks to implement did impose additional requirements on the RWPGs. The cost for funding the regional water planning process is provided by the TWDB. These rules do not impose any additional requirements that are not imposed by statute.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code §2001.0045 to repeal a rule does not apply. Furthermore, the requirement in §2001.0045 does not apply because these rules are necessary to protect water resources of this state as authorized by the Water Code and are necessary to implement legislation.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it implements legislation to improve the state water planning process.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has 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 because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board 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 Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or 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 intent of the rulemaking is to implement legislative changes and provide greater clarity regarding the TWDB’s rules related to regional water planning.

Even if the proposed rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (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 a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather Texas Water Code §16.053. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to implement legislative changes and clarify existing rules to make them more understandable. The proposed rule would substantially advance this stated purpose by adding language related to legislative changes and clarifying existing language related to regional water planning.

The board’s analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that administers the regional water planning process in order to develop a state water plan.

Nevertheless, the board further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and
enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rule requires compliance with state law regarding the state water planning process. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

The legislation implemented through this rulemaking may necessitate an increase in future legislative appropriations to the agency to provide funds to the RWPGs to include additional information in the RWPs. The agency received feedback from RWPG stakeholders following the 86th Legislative Session regarding the potential need for additional funding to address the new requirements.

SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication in the Texas Register. Include reference to Chapter 357 in the subject line of any comments submitted.

SUBCHAPTER A. GENERAL INFORMATION

31 TAC §357.10, §357.11

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of TWC §§16.052 and 16.053.

Chapter 16 of the TWC is affected by this rulemaking.

§357.10. Definitions and Acronyms.

The following words, used in this chapter, have the following meanings:

(1) Agricultural Water Conservation--Defined in §363.1302 of this title (relating to Definition of Terms).

(2) Alternative Water Management Strategy--A fully evaluated Water Management Strategy that may be substituted into a Regional Water Plan in the event that a recommended Water Management Strategy is no longer recommended.

(3) Availability--Maximum amount of raw water that could be produced by a source during a repeat of the Drought of Record, regardless of whether the supply is physically connected to or legally accessible by Water User Groups.

(4) Board--The Texas Water Development Board.

(5) Collective Reporting Unit--A grouping of utilities located in the Regional Water Planning Area. Utilities within a Collective Reporting Unit must have a logical relationship, such as being served by common Wholesale Water Providers, having common sources, or other appropriate associations.

(6) Commission--The Texas Commission on Environmental Quality.

(7) County-Other--An aggregation of utilities and individual water users within a county and not included in paragraph (43)(A) - (D) [(42)(A) - (D)] of this section.

(8) Drought Contingency Plan--A plan required from wholesale and retail public water suppliers and irrigation districts pursuant to Texas Water Code §11.1272 (relating to Drought Contingency Plans for Certain Applicants and Water Right Holders). The plan may consist of one or more strategies for temporary supply and demand management and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies as required by the Commission.

(9) Drought Management Measures--Demand management activities to be implemented during drought that may be evaluated and included as Water Management Strategies.

(10) Drought Management Water Management Strategy--A drought management measure or measures evaluated and/or recommended in a State or Regional Water Plan that quantifies temporary reductions in demand during drought conditions.

(11) Drought of Record--The period of time when historical records indicate that natural hydrological conditions would have provided the least amount of water supply.

(12) Executive Administrator (EA)--The Executive Administrator of the Board or a designated representative.

(13) Existing Water Supply--Maximum amount of water that is physically and legally accessible from existing sources for immediate use by a Water User Group under a repeat of Drought of Record conditions.

(14) Firm Yield--Maximum water volume a reservoir can provide each year under a repeat of the Drought of Record using anticipated sedimentation rates and assuming that all senior water rights will be totally utilized and all applicable permit conditions met.

(15) Interbasin Transfer of Surface Water--Defined and governed in Texas Water Code §11.085 (relating to Interbasin Transfers) as the diverting of any state water from a river basin and transfer of that water to any other river basin.

(16) Interregional Conflict--An interregional conflict exists when:

(A) more than one Regional Water Plan includes the same source of water supply for identified and quantified recommended Water Management Strategies and there is insufficient water available to implement such Water Management Strategies; or

(B) in the instance of a recommended Water Management Strategy proposed to be supplied from a different Regional Water Planning Area, the Regional Water Planning Group with the location of the strategy has studied the impacts of the recommended Water Management Strategy on its economic, agricultural, and natural resources.
and demonstrates to the Board that there is a potential for a substantial adverse effect on the region as a result of those impacts.

(17) Intragrandial Conflict—A conflict between two or more identified, quantified, and recommended Water Management Strategies in the same Initially Prepared Plan that rely upon the same water source, so that there is not sufficient water available to fully implement all Water Management Strategies and thereby creating an over-allocation of that source.

(18) Initially Prepared Plan (IPP)—Draft Regional Water Plan that is presented at a public hearing in accordance with §357.21(d) of this title (relating to Notice and Public Participation) and submitted for Board review and comment.

(19) Major Water Provider (MWP)—A Water User Group or a Wholesale Water Provider of particular significance to the region’s water supply as determined by the Regional Water Planning Group. This may include public or private entities that provide water for any water use category.

(20) Modeled Available Groundwater (MAG) Peak Factor—A percentage (e.g., greater than 100 percent) that is applied to a modeled available groundwater value reflecting the annual groundwater availability that, for planning purposes, shall be considered temporarily available for pumping consistent with desired future conditions. The approval of a MAG Peak Factor is not intended as a limit to permits or as guaranteed approval or pre-approval of any future permit application.

(21) Planning Decades—Temporal snapshots of conditions anticipated to occur and presented at even intervals over the planning horizon used to present simultaneous demands, supplies, needs, and strategy volume data. A Water Management Strategy that is shown as providing a supply in the 2040 decade, for example, is assumed to come online in or prior to the year 2040.

(22) Political Subdivision—City, county, district, or authority created under the Texas Constitution, Article III, §52, or Article XVI, §59, any other Political Subdivision of the state, any interstate compact commission to which the state is a party, and any nonprofit water supply corporation created and operating under Texas Water Code Chapter 67 (relating to Nonprofit Water Supply or Sewer Service Corporations).

(23) Regional Water Plan (RWP)—The plan adopted or amended by a Regional Water Planning Group pursuant to Texas Water Code §16.053 (relating to Regional Water Plans) and this chapter.

(24) Regional Water Planning Area (RWPA)—Area designated pursuant to Texas Water Code §16.053.

(25) Regional Water Planning Gallons Per Capita Per Day—For Regional Water Planning purposes, Gallons Per Capita Per Day is the annual volume of water pumped, diverted, or purchased minus the volume exported (sold) to other water systems or large industrial facilities divided by 365 and divided by the permanent resident population of the Municipal Water User Group in the regional water planning process. Coastal saline and reused/recycled water is not included in this volume.

(26) Regional Water Planning Group (RWPG) Group designated pursuant to Texas Water Code §16.053.

(27) RWPG—Estimated Groundwater Availability—The groundwater availability used for planning purposes as determined by RWPGs to which §357.32(d)(2) of this title (relating to Water Supply Analysis) is applicable or where no desired future condition has been adopted.

(28) [222] Retail Public Utility—Defined in Texas Water Code §13.002 (relating to Water Rates and Services) as "any person, corporation, public utility, water supply or sewer service corporation, municipality, Political Subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation."

(29) [223] Reuse—Defined in §363.1302 of this title (relating to Definition of Terms).


(31) [225] State Drought Response Plan—A plan prepared and directed by the chief of the Texas Division of Emergency Management for the purpose of managing and coordinating the drought response component of the State Water Plan and the State Drought Preparedness Plan pursuant to Texas Water Code §16.055 (relating to Drought Response Plan).

(32) [226] State Water Plan—The most recent state water plan adopted by the Board under the Texas Water Code §16.051 (relating to Water Sources and Availability).

(33) [227] State Water Planning Database—Database maintained by TWDB that stores data related to population and Water Demand projections, water Availability, Existing Water Supplies, Water Management Strategy supplies, and Water Management Strategy Projects. It is used to collect, analyze, and disseminate regional and statewide water planning data.

(34) [228] Technical Memorandum—Documentation of the RWPGs preliminary analysis of Water Demand projections, water Availability, Existing Water Supplies, and Water Needs and declaration of the RWPG’s intent of whether or not to pursue simplified planning.

(35) [229] Unmet Water Need—The portion of an identified Water Need that is not met by recommended Water Management Strategies.

(36) Water Conservation Measures—Practices, techniques, programs, and technologies that will protect water resources, reduce the consumption of water, reduce the loss or waste of water, or improve the efficiency in the use of water that may be presented as Water Management Strategies, so that a water supply is made available for future or alternative uses. For planning purposes, Water Conservation Measures do not include reservoirs, aquifer storage and recovery, or other types of projects that develop new water supplies.

(37) Water Conservation Plan—The most current plan required by Texas Water Code §11.1271 (relating to Water Conservation Plans) from an applicant for a new or amended water rights permit and from any holder of a permit, certificate, etc. who is authorized to appropriate 1,000 acre-feet per year or more for municipal, industrial, and other non-irrigation uses and for those who are authorized to appropriate 10,000 acre-feet per year or more for irrigation, and the most current plan required by Texas Water Code §13.146 from a Retail Public Utility that provides potable water service to 3,300 or more connections. These plans must include specific, quantified 5-year and 10-year targets for water savings.

(39) [438] Water Demand--Volume of water required to carry out the anticipated domestic, public, and/or economic activities of a Water User Group during drought conditions.

(40) [439] Water Management Strategy (WMS)--A plan to meet a need for additional water by a discrete Water User Group, which can mean increasing the total water supply or maximizing an existing supply, including through reducing demands. A Water Management Strategy may or may not require associated Water Management Strategy Projects to be implemented.

(41) [440] Water Management Strategy Project (WMSP)-Water project that has a non-zero capital costs and that when implemented, would develop, deliver, or treat additional water supply volumes, or conserve water for Water User Groups or Wholesale Water Providers. One WMSP may be associated with multiple WMSs.

(42) [441] Water Need--A potential water supply shortage based on the difference projected between Water Demands and Existing Water Supplies.

(43) [442] Water User Group (WUG)--Identified user or group of users for which Water Demands and Existing Water Supplies have been identified and analyzed and plans developed to meet Water Needs. These include:

(A) Privately-owned utilities that provide an average of more than 100 acre-feet per year for municipal use for all owned water systems;

(B) Water systems serving institutions or facilities owned by the state or federal government that provide more than 100 acre-feet per year for municipal use;

(C) All other Retail Public Utilities not covered in subparagraphs (A) and (B) of this paragraph that provide more than 100 acre-feet per year for municipal use;

(D) Collective Reporting Units, or groups of Retail Public Utilities that have a common association and are requested for inclusion by the RWPG;

(E) Municipal and domestic water use, referred to as County-Other, not included in subparagraphs (A) - (D) of this paragraph; and

(F) Non-municipal water use including manufacturing, irrigation, steam electric power generation, mining, and livestock watering for each county or portion of a county in an RWPA.

(44) [443] Wholesale Water Provider (WWP)--Any person or entity, including river authorities and irrigation districts, that delivers or sells water wholesale (treated or raw) to WUGs or other WWPs or that the RWPG expects or recommends to deliver or sell water wholesale to WUGs or other WWPs during the period covered by the plan. The RWPGs shall identify the WWPs within each region to be evaluated for plan development.

§357.11. Designations.

(a) The Board shall review and update the designations of RW- PAs as necessary but at least every five years, on its own initiative or upon recommendation of the EA. The Board shall provide 30 days notice of its intent to amend the designations of RWPAs by publication of the proposed change in the Texas Register and by mailing the notice to each mayor of a municipality with a population of 1,000 or more or which is a county seat that is located in whole or in part in the RW- PAs proposed to be impacted, to each water district or river authority located in whole or in part in the RWPA based upon lists of such water districts and river authorities obtained from the Commission, and to each county judge of a county located in whole or in part in the RW- PAs proposed to be impacted. After the 30 day notice period, the Board shall hold a public hearing at a location to be determined by the Board before making any changes to the designation of an RWPA.

(b) If upon boundary review the Board determines that revisions to the boundaries are necessary, the Board shall designate areas for which WWPs shall be developed, taking into consideration factors such as:

1. River basin and aquifer delineations;
2. Water utility development patterns;
3. Socioeconomic characteristics;
4. Existing RWPs;
5. Political Subdivision boundaries;
6. Public comment; and
7. Other factors the Board deems relevant.

(c) After an initial coordinating body for a RWPG is named by the Board, the RWPG shall adopt, by two-thirds vote, bylaws that are consistent with provisions of this chapter. Within 30 days after the Board names members of the initial coordinating body, the EA shall provide to each member of the initial coordinating body a set of model bylaws which the RWPG shall consider. The RWPG shall provide copies of its bylaws and any revisions thereto to the EA. The bylaws adopted by the RWPG shall at a minimum address the following elements:

1. Definition of a quorum necessary to conduct business;
2. Method to be used to approve items of business including adoption of RWPs or amendments thereto;
3. Methods to be used to name additional members;
4. Terms and conditions of membership;
5. Methods to record minutes and where minutes will be archived as part of the public record; and
6. Methods to resolve disputes between RWPG members on matters coming before the RWPG.

(d) RWPGs shall maintain at least one representative of each of the following interest categories as voting members of the RWPG. However, if an RWPA does not have an interest category below, then the RWPG shall so advise the EA and no membership designation is required.

1. Public, defined as those persons or entities having no economic interest in the interests represented by paragraphs (2) - (12) of this subsection other than as a normal consumer;
2. Counties, defined as the county governments for the 254 counties in Texas;
3. Municipalities, defined as governments of cities created or organized under the general, home-rule, or special laws of the state;
4. Industries, defined as corporations, partnerships, sole proprietorships, or other legal entities that are formed for the purpose of making a profit and which produce or manufacture goods or services and which are not small businesses;
5. Agricultural interests, defined as those persons or entities associated with production or processing of plant or animal products;
(6) Environmental interests, defined as those persons or groups advocating the conservation of the state's natural resources, including but not limited to soil, water, air, and living resources;

(7) Small businesses, defined as corporations, partnerships, sole proprietorships, or other legal entities that are formed for the purpose of making a profit, are independently owned and operated, and have fewer than 500 [100] employees or less than $10 [$1] million in gross annual receipts;

(8) Electric generating utilities, defined as any persons, corporations, cooperative corporations, or any combination thereof, meeting each of the following three criteria: own or operate for compensation equipment or facilities which produce or generate electricity; produce or generate electricity for either wholesale or retail sale to others; and are neither a municipal corporation nor a river authority;

(9) River authorities, defined as any districts or authorities created by the legislature which contain areas within their boundaries of one or more counties and which are governed by boards of directors appointed or designated in whole or part by the governor or board, including, without limitation, San Antonio River Authority [and Palo Duro River Authority];

(10) Water districts, defined as any districts or authorities, created under authority of either Texas Constitution, Article III, §52(b)(1) and (2), or Article XVI, §59 including districts having the authority to regulate the spacing of or production from water wells, but not including river authorities;

(11) Water utilities, defined as any persons, corporations, cooperative corporations, or any combination thereof that provide water supplies for compensation except for municipalities, river authorities, or water districts; and

(12) Groundwater management areas, defined as a single representative for each groundwater management area that is at least partially located within an RWPA. Defined as a representative from a groundwater conservation district that is appointed by the groundwater conservation districts within the associated groundwater management area.

(e) The RWPGs shall add the following non-voting members, who shall receive meeting notifications and information in the same manner as voting members:

(1) Staff member of the Board to be designated by the EA;

(2) Staff member of the Texas Parks and Wildlife Department designated by its executive director;

(3) Member designated by each adjacent RWPG to serve as a liaison;

(4) One or more persons to represent those entities with headquarters located in another RWPA and which holds surface water rights authorizing a diversion of 1,000 acre-feet a year or more in the RWPA, which supplies water under contract in the amount of 1,000 acre-feet a year or more to entities in the RWPA, or which receives water under contract in the amount of 1,000 acre-feet a year or more from the RWPA;

(5) Staff member of the Texas Department of Agriculture designated by its commissioner; and

(6) Staff member of the State Soil and Water Conservation Board designated by its executive director.

(f) Each RWPG shall provide a current list of its members to the EA; the list shall identify the interest represented by each member including interests required in subsection (d) of this section.

(g) Each RWPG, at its discretion, may at any time add additional voting and non-voting representatives to serve on the RWPG for any new interest category, including additional representatives of those interests already listed in subsection (d) of this section that the RWPG considers appropriate for water planning.

(h) Each RWPG, at its discretion, may remove individual voting or non-voting members or eliminate RWPG representative positions in accordance with the RWPG bylaws as long as minimum requirements of RWPG membership are maintained in accordance with subsection (d) of this section.

(i) RWPGs may enter into formal and informal agreements to coordinate, avoid conflicts, and share information with other RWPGs or any other interests within any RWPA for any purpose the RWPGs consider appropriate including expediting or making more efficient water planning efforts. These efforts may involve any portion of the RWPG membership. Any plans or information developed through these efforts by RWPGs or by committees may be included in an RWP only upon approval of the RWPG.

(j) Upon request, the EA will provide technical assistance to RWPGs, including on water supply and demand analysis, methods to evaluate the social and economic impacts of not meeting needs, and regarding Drought Management Measures and water conservation practices.

(k) The Board shall appoint an Interregional Planning Council during each state water planning cycle. The Interregional Planning Council will be subject to the following provisions:

(1) The Interregional Planning Council consists of one voting member from each RWPG, as appointed by the Board.

(2) Upon request by the EA, each RWPG shall submit at least one nomination for appointment, including a designated alternate for each nomination.

(3) Interregional Planning Council members will serve until adoption of the State Water Plan.

(4) The Interregional Planning Council, during each planning cycle to develop the State Water Plan, shall hold at least one public meeting and deliver a report to the Board. The report format may be determined by the Council. The report at a minimum shall include a summary of the dates the Council convened, the actions taken, minutes of the meetings, and any recommendations for the Board's consideration, based on the Council’s work. Meeting frequency, location, and additional report content shall be determined by the Council.

(5) For the planning cycle of the 2022 State Water Plan, the Council's report shall be delivered to the Board by the 2021 adopted RWP deliverable date as set in regional water planning contracts. Beginning with the planning cycle for the 2027 State Water Plan and each planning cycle thereafter, the report shall be delivered to the Board no later than six (6) months prior to the IPP deliverable date for the corresponding State Water Plan cycle, as set in regional water planning contracts.

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

Filed with the Office of the Secretary of State on February 14, 2020.
31 TAC §357.21

STATUTORY AUTHORITY
This rulemaking is proposed under the authority of TWC §§16.052 and 16.053.
Chapter 16 of the TWC is affected by this rulemaking.

§357.21. Notice and Public Participation.

(a) Each RWPG and any committee or subcommittee of an RWPG are subject to Chapters 551 and 552, Government Code. A copy of all materials presented or discussed at an open meeting shall be made available for public inspection prior to and following the meetings and shall meet the additional notice requirements when specifically referenced as required under other subsections. In accordance with Texas Water Code §16.053(r), certain information regarding water infrastructure facilities is excepted from the Public Information Act, Texas Government Code, Chapter 552. In addition to the notice requirements of Chapter 551, Government Code, the following requirements apply to RWPGs.

(b) All public notices required by this subsection shall comply with this section and shall meet the following requirements:

1. These notice requirements apply to the following RWPG actions: regular RWPG meetings; amendments to the regional water planning scope of work or budget; population projection and Water Demand projection revision requests to the EA regarding draft projections; process of identifying potentially feasible WMSs for plans during the 2026 RWPs; meetings to replace RWPG members or addition of new RWPG members; submittal of request to EA for approval of an Alternative WMS substitution; declaration of implementation of simplified planning following public hearing on intent to pursue simplified planning; adoption of RWPs; and RWPG committee and subcommittee meetings.

2. Published 72 hours prior to the meeting.

3. Notice shall include:
   (A) a date, time, and location of the meeting;
   (B) a summary of the proposed action to be taken; and
   (C) the name, telephone number, and address of the person to whom questions or requests for additional information may be submitted.

4. Entities to be notified in writing include:
   (A) all voting and non-voting RWPG members; and
   (B) any person or entity who has requested notice of RWPG activities.

5. Notice and agenda to be posted:
   (A) On the website of the RWPG or host Political Subdivision. In lieu of posting the meeting notice and agenda on the website of the RWPG or host Political Subdivision, the notice and agenda may be provided, in writing, to the County Clerk of each county in the RWPA; and
   (B) Texas Secretary of State website.

6. Documents to be made available on the internet or in hard copy for public inspection prior to and following meeting include:
   (A) Agenda of meeting; and
   (B) Copies of all materials, reports, plans presented or discussed at the meeting.
(7) Public comments to be accepted as follows:

(A) Written comments for 14 days prior to meeting with comments considered by RWPG members prior to action;
(B) Oral and written public comment during meeting; and
(C) Written comments must also be accepted for 14 days following the meeting and all comments received during the comment period must be submitted to the Board by the RWPG.

(d) Notice under this subsection shall meet the following requirements:

(1) These notice requirements apply to the following RWPG actions: holding a preplanning public meeting to obtain public input on development of the next RWP; public hearings on declarations to pursue simplified planning, major amendments to RWPs; and holding hearings for IPPs.

(2) Notice shall be published in a newspaper of general circulation in each county located in whole or in part in the RWPA before the 30th day preceding the date of the public meeting or hearing.

(3) Notice of the public meetings and public hearings shall include:

(A) a date, time, and location of the public meeting or hearing;
(B) a summary of the proposed action to be taken;
(C) the name, telephone number, and address of the person to whom questions or requests for additional information may be submitted; and
(D) information that the RWPG will accept written and oral comments at the hearings and information on how the public may submit written comments separate from such hearings. The RWPG shall specify a deadline for submission of public written comments as specified in paragraph (9)(A) of this subsection.

(4) RWPGs shall make copies of the IPP available for public inspection at least 30 days before a public hearing required or held by providing a copy of the IPP in at least one public library in each county and either the county courthouse's law library, the county clerk's office, or some other accessible place within the county courthouse or library and include locations of such copies in the notice for public hearing. For distribution of the IPP and adopted RWP, the RWPG may consult and coordinate with county and local officials in determining the most appropriate location in the county courthouse to ensure maximum accessibility to the public during business hours. Additionally, the RWPG may consult with local and county officials in determining which public library in the county can provide maximum accessibility to the public. According to the capabilities of the facility, the RWPG may provide the copy electronically, on electronic media, through an internet web link, or in hard copy. The RWPG shall make an effort to ensure access to the public, including where feasible, posting the IPP on websites and providing notice of such posting. The public inspection requirement in this subsection applies only to IPPs; adopted RWPs are only required to be submitted to the Board pursuant to Texas Water Code, §16.053(i).

(5) Notice shall be mailed to, at a minimum, the following:

(A) Notification of all entities that are to be notified under subsection (c)(4) of this section;
(B) Each mayor of a municipality, located in whole or in part in the RWPA, with a population of 1,000 or more which is a county seat;
(C) Each county judge of a county located in whole or in part in the RWPA;
(D) Each special or general law district or river authority with responsibility to manage or supply water in the RWPA based upon lists of such water districts and river authorities obtained from the Commission; [and]
(E) Each [each] Retail Public Utility, defined as a community water system, that serves any part of the RWPA or receives water from the RWPA based upon lists of such entities obtained from the Commission;
(F) Each [each] holder of record of a water right for the use of surface water the diversion of which occurs in the RWPA based upon lists of such water rights holders obtained from the Commission;
(G) For [for] declarations of intent to pursue simplified planning, RWPGs with water supply sources, WMSs, or WMSPs shared with the RWPG declaring intent to pursue simplified planning; and
(H) For [for] amendments associated with infeasible WMSs or WMSPs, each project sponsor of a WMS or WMSP identified as infeasible.

(6) Notice and associated hearing and meeting agenda shall also be posted:

(A) On the website of the RWPG or host Political Subdivision. In lieu of posting the meeting notice and agenda on the website of the RWPG or host Political Subdivision, the notice and agenda may be provided, in writing, to the County Clerk of each county in the RWPA;
(B) Texas Secretary of State website; and
(C) In the Texas Register.

(7) Documents to be made available on the internet or in hard copy for public inspection prior to and following meeting include:

(A) Agenda of meeting; and
(B) Copies of all materials presented or discussed at the meeting.

(8) The public hearing for the IPP shall be conducted at a central location readily accessible to the public within the regional water planning area.

(9) Public comments to be accepted as follows:

(A) Written comments submitted immediately following 30-day public notice posting and prior to and during meeting or hearing; and

(i) Until not earlier than 30-days following the date of the public hearing on a major amendment to an RWP or declaration of intent to pursue simplified planning.

(ii) Until not earlier than 60 days following the date of the public hearing on an IPP.

(B) Oral public comments at the noticed meeting or hearing;

(C) Comments received must be considered as follows:

(i) Comments associated with hearings must be considered by RWPG members when declaring implementation of simplified planning, adopting an RWP or adopting a major amendment to an RWP.
RECOMMENDATIONS

Chapter 16 of the TWC is affected by this rulemaking.

SUBCHAPTER C. PLANNING ACTIVITIES FOR NEEDS ANALYSIS AND STRATEGY RECOMMENDATIONS.

§357.31. Projected Population and Water Demands.

(a) RWPs shall present projected population and Water Demands by WUG as defined in §357.10 of this title (relating to Definitions and Acronyms). If a WUG lies in one or more counties or RWPA or river basins, data shall be reported for each river basin, RWPA, and county split.

(b) RWPs shall present projected Water Demands associated with MWPs by category of water use, including municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock for the RWPA.

(c) RWPs shall evaluate the current contractual obligations of WUGs and WWP to supply water in addition to any demands projected for the WUG or WWP. Information regarding obligations to supply water to other users must also be incorporated into the water supply analysis in §357.32 of this title (relating to Water Supply Analysis) to determine net existing water supplies available for each WUG’s own use. The evaluation of contractual obligations under this subsection is limited to determining the amount of water secured by the contract and the duration of the contract.

(d) Municipal demands shall be adjusted to reflect water savings due to plumbing fixture requirements identified in the Texas Health and Safety Code, Chapter 372. RWPGs shall report how changes in plumbing fixtures would affect projected municipal Water Demands using projections with plumbing code savings provided by the Board or by methods approved by the EA.

(e) Source of population and Water Demands. In developing RWPs, RWPGs shall use:

(1) Population and Water Demand projections developed by the EA that shall be contained in the next State Water Plan and adopted by the Board after consultation with the RWPG, Commission, Texas Department of Agriculture, and the Texas Parks and Wildlife Department.

(2) RWPGs may request revisions of Board adopted population or Water Demand projections if the request demonstrates that population or Water Demand projections no longer represent a reasonable estimate of anticipated conditions based on changed conditions and or new information. Before requesting a revision to population and Water Demand projections, the RWPG shall discuss the proposed revisions at a public meeting for which notice has been posted in accordance with §357.21(c) of this title (relating to Notice and Public Participation). The RWPG shall summarize public comments received on the proposed request for projection revisions. The EA shall consult with the requesting RWPG and respond to their request within 45 days after receipt of a request from an RWPG for revision of population or Water Demand projections.

(f) Population and Water Demand projections shall be presented for each Planning Decade for WUG in accordance with subsection (a) of this section and MWPs in accordance with subsection (b) of this section [WUGs and MWPs].

§357.33. Needs Analysis: Comparison of Water Supplies and Demands.

(a) RWPs shall include comparisons of existing water supplies and projected Water Demands to identify Water Needs.

(b) RWPGs shall compare projected Water Demands, developed in accordance with §357.31 of this title (relating to Projected Population and Water Demands), with existing water supplies available to
WUGs and WWPs in a planning area, as developed in accordance with §357.32 of this title (relating to Water Supply Analysis), to determine whether WUGs will experience water surpluses or needs for additional supplies. Results shall be reported for WUGs by categories of use including municipal, manufacturing, irrigation, steam electric, mining, and livestock watering for each county or portion of a county in an RWPA. Results shall be reported for WWPs by categories of use including municipal, manufacturing, irrigation, steam electric, mining, and livestock watering for the RWPA.

(c) The social and economic impacts of not meeting Water Needs shall be evaluated by RWPGs and reported for each RWPA.

(d) Results of evaluations shall be reported by WUG in accordance with §357.31(a) of this title [and MWP in accordance with §357.31(b) of this title].

(e) RWPGs shall perform a secondary water needs analysis for all WUGs and WWPs for which conservation WMSs or direct Reuse WMSs are recommended. This secondary water needs analysis shall calculate the Water Needs that would remain after assuming all recommended conservation and direct Reuse WMSs are fully implemented. The resulting secondary water needs volumes shall be presented in the RWP by WUG and MWP and decade.

§357.34. Identification and Evaluation of Potentially Feasible Water Management Strategies and Water Management Project Strategies.

(a) RWPGs shall identify and evaluate potentially feasible WMSs and the WMSPs required to implement those strategies for all WUGs and WWPs with identified Water Needs.

(b) RWPGs shall identify potentially feasible WMSs to meet water supply needs identified in §357.33 of this title (relating to Needs Analysis: Comparison of Water Supplies and Demands) in accordance with the process in §357.12(b) of this title (relating to General Regional Water Planning Group Responsibilities and Procedures). Strategies shall be developed for WUGs and WWPs. The strategies shall meet new water supply obligations necessary to implement recommended WMSs of WWPs and WUGs. RWPGs shall plan for water supply during Drought of Record conditions. In developing RWPs, RWPGs shall provide WMSs to be used during a Drought of Record.

(c) Potentially feasible WMSs may include, but are not limited to:

1. Expanded use of existing supplies including system optimization and conjunctive use of water resources, reallocation of reservoir storage to new uses, voluntary redistribution of water resources including contracts, water marketing, regional water banks, sales, leases, options, subordination agreements, and financing agreements, subordination of existing water rights through voluntary agreements, enhancements of yields of existing sources, and improvement of water quality including control of naturally occurring chlorides.

2. New supply development including construction and improvement of surface water and groundwater resources, brush control, precipitation enhancement, seawater desalination, brackish groundwater desalination, water supply that could be made available by cancellation of water rights based on data provided by the Commission, rainwater harvesting, and aquifer storage and recovery.


4. Reuse of wastewater.

5. Interbasin Transfers of Surface Water.

6. Emergency transfers of surface water including a determination of the part of each water right for non-municipal use in the RWPA that may be transferred without causing unreasonable damage to the property of the non-municipal water rights holder in accordance with Texas Water Code §11.139 (relating to Emergency Authorizations).

(d) All recommended WMSs and WMSPs that are entered into the State Water Planning Database and prioritized by RWPGs shall be designed to reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or develop, deliver or treat additional water supply volumes to WUGs or WWPs in at least one planning decade such that additional water is available during Drought of Record conditions. Any other RWPG recommendations regarding permit modifications, operational changes, and/or other infrastructure that are not designed to reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or develop, deliver or treat additional water supply volumes to WUGs or WWPs in at least one Planning Decade such that additional water is available during Drought of Record conditions shall be indicated as such and presented separately in the RWP and shall not be eligible for funding from the State Water Implementation Fund for Texas.

(e) Evaluations of potentially feasible WMSs and associated WMSPs shall include the following analyses:

1. For the purpose of evaluating potentially feasible WMSs, the Commission's most current Water Availability Model with assumptions of no return flows and full utilization of senior water rights, is to be used. Alternative assumptions may be used with written approval from the EA who shall consider a written request from an RWPG to use assumptions other than no return flows and full utilization of senior water rights.

2. An equitable comparison between and consistent evaluation and application of all WMSs the RWPGs determine to be potentially feasible for each water supply need.

3. A quantitative reporting of:

A. The net quantity, reliability, and cost of water delivered and treated for the end user's requirements during drought of record conditions, taking into account and reporting anticipated strategy water losses, incorporating factors used in calculating infrastructure debt payments and may include present costs and discounted present value costs. Costs do not include distribution of water within a WUG after treatment.

B. Environmental factors including effects on environmental water needs, wildlife habitat, cultural resources, and effects of upstream development on bays, estuaries, and arms of the Gulf of Mexico. Evaluations of effects on environmental flows shall include consideration of the Commission's adopted environmental flow standards under 30 Texas Administrative Code Chapter 298 (relating to Environmental Flow Standards for Surface Water). If environmental flow standards have not been established, then environmental information from existing site-specific studies, or in the absence of such information, state environmental planning criteria adopted by the Board for inclusion in the State Water Plan after coordinating with staff of the Commission and the Texas Parks and Wildlife Department to ensure that WMSs are adjusted to provide for environmental water needs including instream flows and bays and estuaries inflows.

C. Impacts to agricultural resources.

D. Discussion of the plan's impact on other water resources of the state including other WMSs and groundwater and surface water interrelationships.

E. A discussion of each threat to agricultural or natural resources identified pursuant to §357.30(7) of this title (relating to De-
scription of the Regional Water Planning Area) including how that threat will be addressed or affected by the WMSs evaluated.

(6) If applicable, consideration and discussion of the provisions in Texas Water Code §11.085(k)(1) for Interbasin Transfers of Surface Water. At minimum, this consideration shall include a summation of Water Needs in the basin of origin and in the receiving basin.

(7) Consideration of third-party social and economic impacts resulting from voluntary redistributions of water including analysis of third-party impacts of moving water from rural and agricultural areas.

(8) A description of the major impacts of recommended WMSs on key parameters of water quality identified by RWPGs as important to the use of a water resource and comparing conditions with the recommended WMSs to current conditions using best available data.

(9) Consideration of water pipelines and other facilities that are currently used for water conveyance as described in §357.22(a)(3) of this title (relating to General Considerations for Development of Regional Water Plans).

(10) Other factors as deemed relevant by the RWPG including recreational impacts.

(f) RWPGs shall evaluate and present potentially feasible WMSs and WMSPs with sufficient specificity to allow state agencies to make financial or regulatory decisions to determine consistency of the proposed action before the state agency with an approved RWP.

(g) If an RWPG does not recommend aquifer storage and recovery strategies, seawater desalination strategies, or brackish groundwater desalination strategies it must document the reason(s) in the RWP.

(h) In instances where an RWPG has determined there are significant identified Water Needs in the RWPA, the RWP shall include an assessment of the potential for aquifer storage and recovery to meet those Water Needs. Each RWPG shall define the threshold to determine whether it has significant identified Water Needs. Each RWP shall include, at a minimum, a description of the methodology used to determine the threshold of significant needs. If a specific assessment is conducted, the assessment may be based on information from existing studies and shall include minimum parameters as defined in contract guidance.

(i) [ง] Conservation, Drought Management Measures, and Drought Contingency Plans shall be considered by RWPGs when developing the regional plans, particularly during the process of identifying, evaluating, and recommending WMSs. RWPs shall incorporate water conservation planning and drought contingency planning in the RWPA.

(1) Drought Management Measures including water demand management. RWPGs shall consider Drought Management Measures for each need identified in §357.33 of this title and shall include such measures for each user group to which Texas Water Code §11.1272 (relating to Drought Contingency Plans for Certain Applicants and Water Right Holders) applies. Impacts of the Drought Management Measures on Water Needs must be consistent with guidance provided by the Commission in its administrative rules implementing Texas Water Code §11.1272. If an RWPG does not adopt a drought management strategy for a need it must document the reason in the RWP. Nothing in this paragraph shall be construed as limiting the use of voluntary arrangements by water users to forgo water usage during drought periods.
SUBCHAPTER D. IMPACTS, DROUGHT RESPONSE, POLICY RECOMMENDATIONS, AND IMPLEMENTATION

31 TAC §§357.42, 357.43, 357.45

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of TWC §§16.052 and 16.053.

Chapter 16 of the TWC is affected by this rulemaking.

§357.42. Drought Response Information, Activities, and Recommendations.

(a) RWPs shall consolidate and present information on current and planned preparations for, and responses to, drought conditions in the region including, but not limited to, Drought of Record conditions based on the following subsections.

(b) RWPGs shall conduct an [overall] assessment of current preparations for drought within the RWPA [including a description of how water suppliers in the RWPA identify and respond to the onset of drought]. This may include information from local Drought Contingency Plans. The assessment shall include:

(1) A description of how water suppliers in the RWPA identify and respond to the onset of drought; and

(2) Identification of unnecessary or counterproductive variations in drought response strategies among water suppliers that may confuse the public or impede drought response efforts. At a minimum, RWPGs shall review and summarize drought response efforts for neighboring communities including the differences in the implementation of outdoor watering restrictions.

(c) RWPGs shall develop drought response recommendations regarding the management of existing groundwater and surface water sources in the RWPA designated in accordance with §357.32 of this title (relating to Water Supply Analysis), including:

(1) Factors specific to each source of water supply to be considered in determining whether to initiate a drought response for each water source including specific recommended drought response triggers;

(2) Actions to be taken as part of the drought response by the manager of each water source and the entities relying on each source, including the number of drought stages; and

(3) Triggers and actions developed in paragraphs (1) and (2) of this subsection may consider existing triggers and actions associated with existing Drought Contingency Plans.

(d) RWPGs shall collect information on existing major water infrastructure facilities that may be used for interconnections in event of an emergency shortage of water. At a minimum, the RWP shall include a general description of the methodology used to collect the information, the number of existing and potential emergency interconnects in the RWPA, and a list of which entities are connected to each other. In accordance with Texas Water Code §16.053(r), certain information regarding water infrastructure facilities is excepted from the

Public Information Act, Texas Government Code, Chapter 552. [this information is CONFIDENTIAL INFORMATION and cannot be disseminated to the public. The associated information is to be collected by a subgroup of RWPG members in a closed meeting and] Any excepted information collected shall be submitted separately to the EA in accordance with guidance to be provided by EA.

(e) RWPGs shall provide general descriptions of local Drought Contingency Plans that involve making emergency connections between water systems or WWP systems that do not include locations or descriptions of facilities that are disallowed under subsection (d) of this section.

(f) RWPGs may designate recommended and alternative Drought Management Water Management Strategies and other recommended drought measures in the RWP including:

(1) List and description of the recommended Drought Management Water Management Strategies and associated WUGs and WWPs, if any, that are recommended by the RWPG. Information to include associated triggers to initiate each of the recommended Drought Management WMSs;

(2) List and description of alternative Drought Management WMSs and associated WUGs and WWPs, if any, that are included in the plan. Information to include associated triggers to initiate each of the alternative Drought Management WMSs;

(3) List of all potentially feasible Drought Management WMSs that were considered or evaluated by the RWPG but not recommended; and

(4) List and summary of any other recommended Drought Management Measures, if any, that are included in the RWP, including associated triggers if applicable.

(g) The RWPGs shall evaluate potential emergency responses to local drought conditions or loss of existing water supplies; the evaluation shall include identification of potential alternative water sources that may be considered for temporary emergency use by WUGs and WWPs in the event that the Existing Water Supply sources become temporarily unavailable to the WUGs and WWPs due to unforeseeable hydrologic conditions such as emergency water right curtailment, unanticipated loss of reservoir conservation storage, or other localized drought impacts. RWPGs shall evaluate, at a minimum, municipal WUGs that:

(1) have existing populations less than 7,500;

(2) rely on a sole source for its water supply regardless of whether the water is provided by a WWP; and

(3) all County-Other WUGs.

(h) RWPGs shall consider any relevant recommendations from the Drought Preparedness Council.

(i) RWPGs shall make drought preparation and response recommendations regarding:

(1) Development of, content contained within, and implementation of local Drought Contingency Plans required by the Commission;

(2) Current drought management preparations in the RWPA including:

A. drought response triggers; and

B. responses to drought conditions;

(3) The Drought Preparedness Council and the State Drought Preparedness Plan; and
(4) Any other general recommendations regarding drought management in the region or state.

(i) The RWPGs shall develop region-specific model Drought Contingency Plans.

§357.43. Regulatory, Administrative, or Legislative Recommendations

(a) The RWPs shall contain any regulatory, administrative, or legislative recommendations developed by the RWPGs.

(b) Ecologically Unique River and Stream Segments. RWPGs may include in adopted RWPs recommendations for all or parts of river and stream segments of unique ecological value located within the RWPA by preparing a recommendation package consisting of a physical description giving the location of the stream segment, maps, and photographs of the stream segment and a site characterization of the stream segment documented by supporting literature and data. The recommendation package shall address each of the criteria for designation of river and stream segments of ecological value found in this subsection. The RWPG shall forward the recommendation package to the Texas Parks and Wildlife Department and allow the Texas Parks and Wildlife Department 30 days for its written evaluation of the recommendation. The adopted RWP shall include, if available, Texas Parks and Wildlife Department's written evaluation of each river and stream segment recommended as a river or stream segment of unique ecological value.

(1) An RWP may recommend a river or stream segment as being of unique ecological value based upon the criteria set forth in §358.2 of this title (relating to Definitions).

(2) For every river and stream segment that has been designated as a unique river or stream segment by the legislature, including during a session that ends not less than one year before the required date of submittal of an adopted RWP to the Board, or recommended as a unique river or stream segment in the RWP, the RWPG shall assess the impact of the RWP on these segments. The assessment shall be a quantitative analysis of the impact of the plan on the flows important to the river or stream segment, as determined by the RWPG, comparing current conditions to conditions with implementation of all recommended WMSs. The assessment shall also describe the impact of the plan on the unique features cited in the region's recommendation of that segment.

(c) Unique Sites for Reservoir Construction. An RWP may recommend sites of unique value for construction of reservoirs by including descriptions of the sites, reasons for the unique designation and expected beneficiaries of the water supply to be developed at the site. The criteria at §358.2 of this title shall be used to determine if a site is unique for reservoir construction.

(d) Any other recommendations that the RWPG believes are needed and desirable to achieve the stated goals of state and regional water planning including to facilitate the orderly development, management, and conservation of water resources and prepare for and respond to drought conditions. This may include recommendations that the RWPG believes would improve the state and regional water planning process.

(e) RWPGs may develop information as to the potential impacts of any proposed changes in law prior to or after changes are enacted.

(f) RWPGs should consider making legislative recommendations to facilitate more voluntary water transfers in the region.

§357.45. Implementation and Comparison to Previous Regional Water Plan.

(a) RWPGs shall describe the level of implementation of previously recommended WMSs and associated impediments to implementation in accordance with guidance provided by the board. Information on the progress of implementation of all WMSs that were recommended in the previous RWP, including conservation and Drought Management WMSs; and the implementation of WMSPs that have affected progress in meeting the state’s future water needs.

(b) RWPGs shall assess the progress of the RWPA in encouraging cooperation between WUGs for the purpose of achieving economies of scale and otherwise incentivizing WMSs that benefit the entire RWPA. This assessment of regionalization shall include:

(1) The number of recommended WMSs in the previously adopted and current RWPs that serve more than one WUG;

(2) The number of implemented WMSs since the previously adopted RWP that serve more than one WUG; and

(3) A description of efforts the RWPG has made to encourage WMSs and WMSPs that serve more than one WUG, and that benefit the entire region.

(c) [d] RWPGs shall provide a brief summary of how the RWP differs from the previously adopted RWP with regards to:

(1) Water Demand projections;

(2) Draft of Record and hydrologic and modeling assumptions used in planning for the region;

(3) Groundwater and surface water Availability, Existing Water Supplies, and identified Water Needs for WUGs and WWPs; and

(4) Recommended and Alternative WMSs and WMSPs.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000641

Todd Chenoweth

General Counsel

Texas Water Development Board

Earliest possible date of adoption: March 29, 2020

For further information, please call: (512) 463-7686

CHAPTER 371. DRINKING WATER STATE REVOLVING FUND


BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED ADDITIONS AND AMENDMENTS.

The purpose of the additions and amendments is to implement legislative changes from House Bill 3339, 86th (R) Legislative Session and from America’s Water Infrastructure Act of 2018 (AWIA), and to implement changes in program management, including addition of remedies for non-compliance. The spe-
cific provisions being amended or added and the reasons for the
amendments are addressed in more detail below.

SECTION BY SECTION DISCUSSION OF THE PROPOSED
ADDITIONS AND AMENDMENTS.

31 TAC §371.1 Definitions

Section 371.1 is amended to define the term "water conservation
plan" as a plan in compliance with Texas Water Code §16.4021,
as required by H.B. 3339, 86th (R) Legislative Session, and to
include definitions for equivalency projects and non-equivalency
projects.

31 TAC §371.4 Federal Requirements

Section 371.4 is amended to comport with revised statutory ref-
ences in AWIA.

31 TAC §371.14 Lending Rates

Section 371.14 is amended to make the procedure for setting
fixed interest rates consistent with the Intended Use Plan (IUP).

31 TAC §371.15 Fees of Financial Assistance

Section 371.15 is amended to clarify the origination fee.

31 TAC §371.16 Terms of Financial Assistance

Section 371.16 is amended to remove mention of specific loan
time periods and to provide the terms in the IUP. The AWIA
amended the Federal Safe Drinking Water Act to allow loans of
up to 30 years for planning, acquisition, design, and/or construc-
tion, and up to 40 years for a disadvantaged community.

31 TAC §371.17 Principal Forgiveness

Section 371.17 is amended to clarify that total principal forgive-
ness may not exceed the percentages established by federal
law, appropriations acts, or the terms of the capitalization grant.

31 TAC §371.31 Timeliness of Application and Required Ap-
lication Information

Section 371.31 is amended to add the requirement that a prelimi-
nary engineering feasibility report signed and sealed by a pro-
fessional engineer be submitted as part of an application, and
detailing the information to be included in the report.

31 TAC §371.34 Required Water Conservation Plan and Water
Loss Audit

Section 371.34 is amended to require that the water conserva-
tion plan comply with Texas Water Code §16.4021, as enacted
by H.B. 3339, 86th (R) Legislative Session, and to make other
language in the rule consistent with the Clean Water State Re-
volving Fund statute and rules.

31 TAC §371.36 Multi-Year Commitments

Section 371.36 is amended to tie the terms to the IUP, increasing
flexibility for financial assistance recipients and for the agency.

31 TAC §371.41 Environmental Review Process

Section 371.41 is amended to add language stating that for
equivalency projects, the Board will inform the Environmental
Protection Agency (EPA) when it is necessary for EPA to coor-
dinate with other federal agencies regarding compliance with
applicable federal authority.

31 TAC §371.60 Applicability

Section 371.60 is added to outline applicability of the subchap-
ter on engineering review and approval. The existing §371.60 is
published for repeal elsewhere in this issue of the Texas Regis-
ter.

31 TAC §371.61 Engineering Feasibility Report

Section 371.61 is added to replace the rule previously numbered
as 371.60. The existing §371.61 is published for repeal else-
where in this issue of the Texas Register.

31 TAC §371.62 Contract Documents: Review and Approval

Section 371.62 is added to replace the rule previously numbered
as 371.61, and amended to include a requirement that Applic-
ants submit an electronic copy of applications and reduce the
number of paper copies required unless the Applicant is directed
otherwise. The existing §371.62 is published for repeal else-
where in this issue of the Texas Register.

31 TAC §371.63 Advertising and Awarding Construction Con-
tracts

Section 371.63 is added to replace the rule previously numbered
as 371.62. The existing §371.63 is published for repeal else-
where in this issue of the Texas Register.

31 TAC §371.70 Applicability

Section 371.70 is added to outline applicability of the subchapter
on loan closings and availability of funds. The existing §371.70
is published for repeal elsewhere in this issue of the Texas Reg-
ister.

31 TAC §371.71 Financial Assistance Secured by Bonds or
Other Authorized Securities

Section 371.71 is added to replace the rule previously numbered
as 371.70. The existing §371.71 is published for repeal else-
where in this issue of the Texas Register.

31 TAC §371.72 Financial Assistance Secured by Promissory
Notes and Deeds of Trust

Section 371.72 is added to replace the rule previously numbered
as 371.71. The existing §371.72 is published for repeal else-
where in this issue of the Texas Register.

31 TAC §371.73 Disbursement of Funds

Section 371.73 is added to replace the rule previously numbered
as 371.72. The existing §371.73 is published for repeal else-
where in this issue of the Texas Register.

31 TAC §371.74 Remaining Unused Funds

Section 371.74 is added to replace the rule previously numbered
as 371.73 and to clarify the disposition of remaining project
funds. The existing §371.74 is published for repeal elsewhere
in this issue of the Texas Register.

31 TAC §371.75 Surcharge

Section 371.75 is added to replace the rule previously numbered
as 371.74. The existing §371.75 is published for repeal else-
where in this issue of the Texas Register.

31 TAC §371.80 Applicability

Section 371.80 is added to outline applicability of the subchapter
on construction and post-construction requirements. The exist-
ing §371.80 is published for repeal elsewhere in this issue of the
Texas Register.

31 TAC §371.81 Inspection During Construction
Section 371.81 is added to replace the rule previously numbered as 371.80, to change the term "inspection" to "site visits", and to review compliance with EPA's American Iron and Steel requirements. The existing §371.81 is published for repeal elsewhere in this issue of the Texas Register.

31 TAC §371.82 Alterations During Construction
Section 371.82 is added to replace the rule previously numbered as 371.81. The existing §371.82 is published for repeal elsewhere in this issue of the Texas Register.

31 TAC §371.83 Force Account
Section 371.83 is added to replace the rule previously numbered as 371.82. The existing §371.83 is published for repeal elsewhere in this issue of the Texas Register.

31 TAC §371.84 As Built Plans
Section 371.84 is added to replace the rule previously numbered as 371.83. The existing §371.84 is published for repeal elsewhere in this issue of the Texas Register.

31 TAC §371.85 Certificate of Approval and Project Completion
Section 371.85 is added to replace the rule previously numbered as 371.84. The existing §371.85 is published for repeal elsewhere in this issue of the Texas Register.

31 TAC §371.86 Final Accounting
Section 371.86 is added to replace the rule previously numbered as 371.85. The existing §371.86 is published for repeal elsewhere in this issue of the Texas Register.

31 TAC §371.87 Records Retention
Section 371.87 is added to replace the rule previously numbered as 371.86. The existing §371.87 is published for repeal elsewhere in this issue of the Texas Register.

31 TAC §371.88 Release of Retainage
Section 371.88 is added to replace the rule previously numbered as 371.87. The existing §371.88 is published for repeal elsewhere in this issue of the Texas Register.

31 TAC §371.89 Responsibilities of Applicant
Section 371.89 is added to replace the rule previously numbered as 371.88 and changes the term "water conservation program" to "water conservation plan," the term used in Texas Water Code §16.4021. The existing §371.89 is published for repeal elsewhere in this issue of the Texas Register.

31 TAC §371.90 Authority of the Executive Administrator
Section 371.90 is added to replace the rule previously numbered as 371.89. The existing §371.90 is published for repeal elsewhere in this issue of the Texas Register.

31 TAC §371.91 Disallowance of Project Costs and Remedies for Noncompliance
Section 371.91 is added to provide remedies for noncompliance with project rules and financial assistance documents.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS
Rebecca Treviño, Chief Financial Officer, has determined that there will be no significant fiscal implications for state or local governments resulting from the proposed rulemaking. For the first five years these rules and amendments are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for state and local governments because the proposed additions and amendments implement statutory requirements and clarify the language in the rules. These rules are not expected to have any impact on state or local revenues. The rules and their administration will not require any increase in expenditures for state or local governments. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are necessary to receive a source of federal funds and are necessary to comply with federal and state law.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS
Ms. Treviño also has determined that for each year of the first five years the proposed rulemaking is in effect, there will be no additional cost to the public, and the public will benefit from the rulemaking as it is intended to comply with state law and implement changes in program management, including addition of remedies for non-compliance.

LOCAL EMPLOYMENT IMPACT STATEMENT
The board has 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, they will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities from enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION
The board 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 Texas Government Code §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, or a rule that may adversely affect in a material way the economy or 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 intent of the rulemaking is to implement new requirements in state and federal law and changes in program management within the current framework of the drinking water state revolving fund.

Even if the proposed amendments and rules were major environmental rules, Texas Government Code §2001.0225 still would
not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (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 a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather is proposed under the authority of Texas Water Code §§15.604, 15.605, and 16.093. Therefore, the proposed amendments do not fall under any of the applicability criteria in Texas Government Code §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT
The board evaluated the proposed rules and amendments and performed an analysis of whether they constitute a taking under Texas Government Code Chapter 2007. The specific purpose of the rules is to implement new requirements in state and federal law and changes in program management within the current framework of the drinking water state revolving fund.

The board's analysis indicates that Texas Government Code Chapter 2007 does not apply to the proposed rules because this is an action that is reasonably taken to fulfill an obligation mandated by state and federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that provides financial assistance for the construction of water, wastewater, flood control, and other related projects.

Nevertheless, the board further evaluated the proposed rules and performed an assessment of whether they constitute a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, these rules require compliance with state and federal laws regarding financial assistance under the state revolving funds without burdening or restricting or limiting an owner's right to property and reducing its value by 25% or more. Therefore, the proposed rulemaking does not constitute a taking under Texas Government Code Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT
The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined that for the first five years the proposed rules would be in effect, the proposed rules will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy. The proposed rules implement new requirements in state and federal law and changes in program management within the current framework of the drinking water state revolving fund.

SUBMISSION OF COMMENTS
Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231; by email to rules.comments@twdb.texas.gov, or by fax to (512) 475-2053. Include reference to Chapter 371 in the subject line. Comments will be accepted until 5:00 p.m. of the 31st day following publication in the Texas Register.

SUBCHAPTER A. GENERAL PROGRAM REQUIREMENTS
31 TAC §371.1, §371.4

STATUTORY AUTHORITY
This rulemaking is proposed under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

§371.1. Definitions.
The following words and terms, when used in this chapter shall have the following meanings when used in this chapter, unless the context clearly indicates otherwise. Words defined in Chapter 15 of the Texas Water Code and not defined here shall have the meanings provided by Chapter 15.

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

(21) - (28) (No change.)
(29) Equivalency projects--Those funded projects that must follow all federal cross-cutter requirements.

(30) (Escrow account--A separate account maintained by an escrow agent until such funds are eligible for release to the construction account.
(31) (Escrow agent--Any of the following:

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(A) a state or national bank designated by the comptroller as a state depository institution in accordance with Texas Government Code[4] Chapter 404, Subchapter C;

(B) a custodian of collateral as designated in accordance with Texas Government Code[4] Chapter 404, Subchapter D; or

(C) a municipal official responsible for managing the fiscal affairs of a home-rule municipality in accordance with Texas Local Government Code[4] Chapter 104.


Expiration date--The date on which the Board's offer of financial assistance is no longer open or valid and by which a Closing must occur.

Financial assistance--Funding made available to eligible Applicants as authorized in 40 CFR §35.3525, including principal forgiveness.

Force majeure--Acts of god, strikes, lockouts, or other industrial disturbances, acts of the public enemy, war, blockades, insurrections, riots, epidemics, landslides, lightnings, earthquakes, fires, storms, floods, washouts, droughts, tornadoes, hurricanes, arrests and restraints of government and people, explosions, breakage or damage to machinery, pipelines or canals, and any other inabilities of either party, whether similar to those enumerated or otherwise, and not within the control of the party claiming such inability, which by the exercise of due diligence and care such party could not have avoided.

Green project--A project or components of a project that, when implemented, will result in energy efficiency, water efficiency, green infrastructure, or environmental innovation that is characterized as a green project either categorically or by utilizing a business case as approved by the executive administrator.

Green project reserve--A federal directive requiring a specified portion of the capitalization grant to be used for green projects.

Initial Invited Projects List--That portion of the Project Priority List listing the eligible projects ranked according to their rating that will initially be invited to submit applications in accordance with procedures and deadlines as detailed in the applicable IUP.

Intended Use Plan (IUP)--A document prepared annually by the Board, after public review and comment, which identifies the intended uses of all DWSRF program funds and describes how those uses support the overall goals of the DWSRF program.

Lending rate--The rate of interest applicable to financial assistance that must be repaid.

Market interest rates--Interest rates comparable to those attained for securities in an open market offering.

Municipality--A city, town, or other public body created by or pursuant to state law.

Non-equivalency projects--All projects other than Equivalency projects.

Nonprofit organization--Any legal entity that is recognized as a tax-exempt [tax exempt] organization by the Texas Comptroller of Public Accounts pursuant to 34 Texas Administrative Code, Part I, Chapter 3, Subchapter O (relating to State and Local Sales and Use Taxes).

Nonprofit noncommunity (NPNC) water system--A public water system that is not operated for profit, is owned by a political subdivision or nonprofit entity, and is not a community water system.

Outlay report--The Board's form used to report costs incurred on the project.

Permit--Any permit, license, registration, or other legal document required from any local, regional, state, or federal government for construction of the project.

Person--An individual, corporation, partnership, association, State, municipality, commission, or political subdivision of the State, or any interstate body, as defined by 33 U.S.C. §1362, including a political subdivision as defined by Chapter 15, Subchapter J, of the Texas Water Code, if the person is eligible for financial assistance under the Act.

Planning--The project phase during which the Applicant identifies and evaluates potential alternatives to meet the needs of the proposed project. It includes the environmental review described in Subchapter E of this Chapter and preparation of the engineering feasibility report as described in Subchapter F of this Chapter.

Political subdivision--A municipality, intermunicipal, interstate, or state agency, any other public entity eligible for assistance, or a nonprofit water supply corporation created and operating under Texas Water Code Chapter 67.

Population--The number of people who reside within the territorial boundaries of or receive wholesale or retail water service from the Applicant based upon data that is acceptable to the executive administrator and which includes the following:

(A) acceptable demographic projections or other information in the engineering feasibility report or the latest official data available from the U.S. Census Bureau for an incorporated city; or

(B) information on the population for which the project is designed, where the Applicant is not an incorporated city or town.

Primary drinking water regulation--Regulations promulgated by the EPA which:

(A) apply to public and private water systems;

(B) specify contaminants which, in the judgment of the EPA, may have any adverse effect on the health of persons;

(C) specify for each such contaminant either:

(i) a maximum contaminant level if, in the judgment of the EPA, it is economically and technologically feasible to ascertain the level of such contaminant in water in public water systems; or

(ii) if, in the judgment of the EPA, it is not economically or technologically feasible to ascertain the level of such contaminant, each treatment technique known to the EPA which leads to a reduction in the level of such contaminant sufficient to satisfy the requirements of the Act; and

(D) contain criteria and procedures to assure a supply of drinking water which dependably complies with such maximum contaminant levels including quality control and testing procedures to insure compliance with such levels and to ensure the proper operation and maintenance of the system, and requirements to:

(i) the minimum quality of water which may be taken into the system; and

(ii) the siting of new facilities for public water systems.
(53) [53] Principal forgiveness--A type of additional subsidization authorized by 42 U.S.C. §300j-12(d) or federal appropriations acts, as detailed in the Intended Use Plan and principal forgiveness agreement or bond applicable to the project.

(54) [54] Private Placement Memorandum (PPM)--A document functionally similar to an "official statement" used in connection with an offering of municipal securities in a private placement.

(55) [55] Project--The planning, acquisition, environmental review, design, construction, and other activities designed to accomplish the objectives, goals, and policies of the Act.

(56) [56] Project engineer--The engineer retained by the Applicant to provide professional engineering services during any phase of a project.

(57) [57] Project Information Form (PIF)--The form that the executive administrator determines must be submitted by Applicants for rating and ranking on an IUP.

(58) [58] Project Priority List--A listing found in the IUP of projects eligible for funding, ranked according to their rating criteria score and that may be further prioritized as described in the applicable IUP.

(59) [59] Public water system--

(A) In General. A system that provides water to the public for human consumption through pipes or other constructed conveyances, if such system has at least 15 service connections or regularly serves at least 25 individuals. Such term includes:

(i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system; and

(ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

(B) Connections. A connection to a system that delivers water by a constructed conveyance other than a pipe shall not be considered a connection, if:

(i) the water is used exclusively for purposes other than residential use (consisting of drinking, bathing, cooking, or other similar uses);

(ii) the EPA or the Commission determines that alternative water to achieve the equivalent level of public health protection provided by the applicable national primary drinking water regulation is provided for residential or similar uses for drinking and cooking; or

(iii) the EPA or the Commission determines that the water provided for residential or similar uses for drinking, cooking, and bathing is centrally treated or treated at the point of entry by the provider, a pass-through entity, or the user to achieve the equivalent level of protection provided by the applicable national primary drinking water regulations.

(C) Irrigation districts. An irrigation district in existence prior to May 18, 1994, that provides primarily agricultural service through a piped water system with only incidental residential or similar uses shall not be considered to be a public water system if the system or the residential or similar users of the system comply with subparagraph (B)(ii) and (iii) of this paragraph.

(D) Transition period. A water supplier that would be a public water system only as a result of modifications made shall not be considered a public water system until two years after August 6, 1996.

If a water supplier does not serve 15 service connections or 25 people at any time after the conclusion of the two-year period, the water supplier shall not be considered a public water system.

(60) [60] Ready to proceed--A project for which available information indicates that there are no significant permitting, land acquisition, social, contractual, environmental, engineering, or financial issues that would keep the project from proceeding in a timely manner to the construction phase of the project.

(61) [61] Release of funds--The sequence and timing for Applicant's release of financial assistance funds from the escrow account to the construction account.

(62) [62] Secondary drinking water regulation--Regulations promulgated by EPA which apply to public water systems and which specify the maximum contaminant levels which, in the judgment of the EPA, are necessary to protect the public welfare. Such regulations may vary according to geographic and other circumstances and may apply to any contaminant in drinking water:

(A) which may adversely affect the odor or appearance of such water and consequently may cause a substantial number of the persons served by the public water system providing such water to discontinue its use; or

(B) which may otherwise adversely affect the public welfare.

(63) [63] Small water system--A system that serves ten thousand persons or fewer.

(64) [64] State--The State of Texas.

(65) [65] Subsidy--A reduction in the interest rate from the market interest rate.

(66) [66] Utility Commission--The Public Utility Commission of Texas.

(67) [67] Water conservation plan--A plan that complies with the requirements of Texas Water Code §16.4021. [report outlining the methods and means by which water conservation may be achieved within a particular facilities planning area.]

(68) Water conservation program--A comprehensive description and schedule of the methods and means to implement and enforce a water conservation plan.

§371.4. Federal Requirements.

(a) Davis-Bacon Act Prevailing Wage Provision. The applicant must comply with the requirements of section 1452(a)(5) [1450(c)] of the Act (42 U.S.C. §300j-12(a)(5)) [42 U.S.C. §300j-12(a)] in all procurement contracts and sub-grants, and require that loan recipients, procurement contractors, and sub-grantees include such a term and condition in subcontracts and other lower tiered transactions. The Davis-Bacon prevailing wage requirements, as provided in 40 U.S.C. §§3141 - 3148 [et seq.], and the Department of Labor's implementing regulations, apply to any construction project funded by the DWSRF.

(b) (No change.)

(c) Signage. Equivalency projects [Projects] must comply with the EPA signage requirements implemented to enhance public awareness of DWSRF projects.

(d) - (e) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.
SUBCHAPTER B. FINANCIAL ASSISTANCE
31 TAC §§371.14 - 371.17

STATUTORY AUTHORITY
This rulemaking is proposed under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

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

(1) - (8) (No change.)

(b) Procedure for setting fixed interest rates.

(1) The executive administrator will set fixed interest rates as described in the IUP and further determined in this section, on a date that is:

(A) no earlier than five business days prior to the adoption of the political subdivision's bond ordinance or resolution or the borrower's execution of a loan agreement, but may be based on interest rate levels determined as of an earlier date; and

(B) (No change.)

(2) (No change.)

(c) - (f) (No change.)

§371.15. Fees of Financial Assistance.
(a) General. The Applicant will be assessed charges for [ the purpose of] recovering administrative costs of all projects receiving DWSRF financial assistance. However, no fees or costs will [shall] be assessed on the portion of the project that receives principal forgiveness as detailed in the IUP.

(b) Origination fee. An administrative fee not to exceed 2 2/25 percent of the project costs will be assessed[ shall] as a one-time non-refundable charge. Project costs on [ upon] which the fee will be assessed do not include the origination fee or those project costs that are funded through principal forgiveness. The fee is due and payable at the time of closing and may be financed as a part of the financial assistance.

The Board may offer financial assistance in accordance with the Act and the IUP under which the project received funding.

[a] The Board may offer financial assistance up to 20 years for the planning, acquisition, design and/or construction of a project, in accordance with the Act and the IUP under which the project received funding.

[b] In accordance with the Act and notwithstanding the terms in subsection (a) of this section, the Board may offer financial assistance in excess of 20 years, up to 30 years for:

[(c) a disadvantaged community, provided that the financial assistance does not exceed the expected design life of an eligible project, or]

[(d) the purchase of bonds issued by a municipality, provided the financial assistance does not exceed the useful life of the underlying asset.]

§371.17. Principal Forgiveness.
(a) (No change.)

(b) Total amount of principal forgiveness. The total amount of principal forgiveness may not exceed the percentages established by federal law, appropriations acts, or by the terms of the capitalization grant.

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

Filed with the Office of the Secretary of State on February 14, 2020.
TRD-2020000624
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

SUBCHAPTER D. APPLICATION FOR ASSISTANCE
31 TAC §§371.31, 371.34, 371.36

STATUTORY AUTHORITY
This rulemaking is proposed under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

§371.31. Timeliness of Application and Required Application Information.
(a) Time to submit applications. Applications and required additional data or information, must be submitted by the deadlines established by the executive administrator. Failure [ in a timely basis. The failure] to timely submit the application, the information necessary to complete the application or additional requested information will result in the bypass of the project.

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

(b) Required application information. For eligible public Applicants and eligible NPNC Applicants that are also eligible public Applicants, an application must [shall] be in the form and number of copies prescribed by the executive administrator and, in addition to any...
other information that may be required by the executive administrator or the Board, the Applicant shall provide the following documentation:

(1) a resolution from its governing body that must [shall]:
   (A) - (C) (No change.)

(2) (No change.)

(3) copies of the following project documents:
   (A) (No change.)
   (B) contracts for engineering services must [should] include the scope of services, level of effort, costs, project schedules, and other information necessary for adequate review by the executive administrator. A project schedule must [shall] be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project;
   (4) - (9) (No change.)

(10) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant, unless an alternative method of establishing a reliable accounting of the financial records of the Applicant is approved by the executive administrator; [and]

(11) a listing of all the funds used for the project, including funds already expended from sources other than financial assistance offered from the Board, such as from participating local government entities or prior-issued debt; [and[.]

(12) a Preliminary Engineering Feasibility Report signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, must provide:
   (A) a description and purpose of the project;
   (B) the entities to be served and current and future population;
   (C) the cost of the project;
   (D) a description of alternatives considered and reasons for the selection of the project proposed;
   (E) sufficient information to evaluate the engineering feasibility of the project;
   (F) maps and drawings as necessary to locate and describe the project area; and
   (G) any other information the executive administrator determines is necessary to evaluate the project.

(c) (No change.)

§371.34. Required Water Conservation Plan and Water Loss Audit.

(a) Water Conservation Plan. An Applicant shall submit a water conservation plan prepared in accordance with Texas Water Code §16.4021 (§363.15 of this title (relating to Required Water Conservation Plan)).

(b) (No change.)

(c) If an applicant that is a retail public utility providing potable water has a [utility's total] water loss that meets or exceeds the threshold for that utility in accordance with §358.6 of this title, the retail public utility must use a portion of any financial assistance received from the DWSRF, or any additional financial assistance provided by the Board, to mitigate the utility's water loss. However, at the request of a retail public utility, the Board may waive this requirement in accordance with §358.6 of this title.


(a) Commitment periods may be set for a period of up to five years. The minimum interest rate reduction for [the] multi-year commitments will be established for the five-year [five year] period based on the interest rate reduction prescribed in the IUP for the first year's commitment.

(b) This option is only available for projects as described in the IUP. [that do not receive principal forgiveness based on the affordability criteria. However, the entity receiving a multi-year commitment may receive principal forgiveness for the other eligible options, such as principal forgiveness for green projects, for the amount of funds committed for the initial year.]

(c) (No change.)

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000625
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

SUBCHAPTER E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS

31 TAC §371.41
STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16


(a) Policy and purpose. This subchapter governs the environmental review of projects funded in whole or in part by the DWSRF. Environmental review of all proposed infrastructure projects is a condition of the use of DWSRF financial assistance and is subject to annual audits by the EPA. This subchapter follows the procedures established by the EPA for implementing the National Environmental Policy Act set forth at 40 CFR Part 6. The environmental review process described in this subchapter applies to the maximum extent legally and practically feasible. However, the environmental review process may be modified due to an emergency condition as described in §371.40(3) of this title (relating to Definitions). The environmental review is subject to public comment. The Applicant, at all times throughout the design, construction, and operation of the project, shall comply with the findings resulting from the environmental review.

(b) - (d) (No change.)
(c) Equivalency projects. The Board will inform EPA when consultation or coordination by EPA with other federal agencies is necessary to resolve issues regarding compliance with applicable federal laws.

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

Filed with the Office of the Secretary of State on February 14, 2020.
TRD-202000627
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

SUBCHAPTER F. ENGINEERING REVIEW AND APPROVAL

31 TAC §§371.60 - 371.63

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

§371.60. Applicability.

This subchapter applies to financial assistance for non-equivalency and equivalency projects.


(a) The Applicant shall submit an engineering feasibility report signed and sealed by a professional engineer registered in the State. The report, based on guidelines provided by the executive administrator, must provide:

1. a description and purpose of the project;
2. the names of the entities to be served, along with the current and future population;
3. the cost of the project;
4. a description of the alternatives considered and reasons for selection of the project proposed;
5. sufficient information to evaluate the engineering feasibility;
6. maps and drawings as necessary to locate and describe the project area;
7. sufficient detail to document how the project will remedy the drinking water issues and problems that were evaluated for rating on the IUP;
8. information showing that the project is cost effective; and for projects that implement new systems or significantly alter current systems, a detailed cost-effective analysis, including detailed operation and maintenance costs, may be requested to document program eligibility;
9. a detailed project schedule with timelines for each phase of the project and the milestones within each phase of the project; and
10. any other information or data necessary to evaluate the proposed project. The Applicant must submit any additional information requested by the executive administrator to document the project's eligibility for funding by the program.

(b) Approval of engineering feasibility report. The executive administrator will approve the engineering feasibility report when:

1. the items listed in subsection (a) of this section have been completed, including requests for additional information or data;
2. the appropriate environmental findings have been completed in accordance with this chapter and the Applicant has agreed to incorporate into project documents, including contracts, all mitigation measures as a result of the environmental review; and
3. the project and alternatives to the project have been analyzed and the proposed project is cost effective.

(c) Request for project amendment. After the approval of the engineering feasibility report, a request to amend a project will be granted only if implementation of the amendment does not affect the original purpose of the project. The implementation of a project amendment must remedy the problems and issues identified in the Applicant's original project information form. Significant amendments to a project require previous approval by the executive administrator. The Applicant must:

1. provide a description of and the need for an amendment;
2. submit additional engineering or environmental information as requested by the executive administrator;
3. provide an estimate of any increase or decrease in total project costs resulting from the proposed amendment; and
4. certify that the proposed amendment will not significantly alter the purpose of the project.

(d) Alternative methods of project delivery. Design build, construction manager at-risk, and other alternative methods of project delivery are eligible for available financial assistance, including combinations of planning, design and construction funding, in accordance with programmatic requirements. The executive administrator will provide written guidance regarding modifications of the type of financial assistance, and the review, approval, and release of funds processes for alternative delivery projects. The Board may specify special conditions in the commitment as appropriate to accommodate an alternative method of project delivery.


(a) Contract documents include the documents that form the construction contracts and the documents that form the contracts for alternative methods of project delivery, which may include the construction phase or other phases of the project.

(b) Unless otherwise specified by the executive administrator, an Applicant must submit at least one paper and one electronic copy of proposed contract documents, including engineering plans and specifications, which must be as detailed as would be required for submission to contractors bidding on the work. The Applicant must provide the executive administrator with all contract documents proposed for bid advertising. The executive administrator will review contract documents:
(g) No liability. The executive administrator and the Board have no liability for any event arising out of or in any way related to project contracts or construction.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000628
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

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SUBCHAPTER G. LOAN CLOSINGS AND AVAILABILITY OF FUNDS

31 TAC §§371.70 - 371.75

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

§371.70. Applicability.

This subchapter applies to financial assistance for non-equivalency and equivalency projects.

§371.71. Financial Assistance Secured by Bonds or Other Authorized Securities.

(a) Applicability and required documents. This section applies to closings for financial assistance with entities issuing bonds or other authorized securities. The following documents and conditions are required for closing financial assistance secured by bonds or other authorized securities:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) a certified copy of the ordinance or resolution adopted by the governing body authorizing the issuance of debt to be sold to the Board that is acceptable to the executive administrator. The ordinance or resolution must have sections providing as follows:

(A) if financial assistance proceeds are to be deposited into an escrow account at the time of closing then an escrow account separate from all other accounts and funds must be created, as follows:

(i) the account must be maintained by an escrow agent as defined in §371.1 of this title (relating to Definitions);

(ii) funds cannot be released from the escrow account without prior written approval from the executive administrator, who shall issue written authorization for the release of funds;

(iii) escrow account statements must be provided to the executive administrator upon request;
(iv) the investment of any financial assistance proceeds deposited into an approved escrow account must be handled in a manner that complies with the Public Funds Investment Act, Texas Government Code Chapter 2256; and

(v) the escrow account must be adequately collateralized in a manner sufficient to protect the Board's interest in the project and in compliance with the Public Funds Collateral Act, Texas Government Code Chapter 2257.

(B) the Applicant shall fix and maintain rates in accordance with state law, and collect charges to provide adequate operation and maintenance of the project;

(C) a construction account must be created and must be kept separate from all other accounts and funds of the Applicant;

(D) bonds must be closed in book-entry-only form;

(E) the use of a paying agent/registrar that is a Depositary Trust Company (DTC) participant is required;

(F) the payment of all DTC closing fees assessed by the Board's custodian bank must be directed to the Board's custodian bank by the Applicant;

(G) the Applicant must provide evidence that one fully registered bond has been sent to the DTC or to the Applicant's paying agent/registrar prior to closing;

(H) all payments, including the origination fee, must be made to the Board via wire transfer at no cost to the Board;

(I) insurance coverage must be obtained and maintained in an amount sufficient to protect the Board's interest in the project;

(J) the Applicant, or an obligated person for whom financial or operating data is presented, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, must undertake in a written agreement or contract to comply with requirements for continuing disclosure as required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule. Such continuing disclosure undertaking is for the benefit of the Board and the beneficial owner of the political subdivision's obligations if the Board sells or otherwise transfers such obligations, and the beneficial owners of the Board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12. The ordinance or resolution required in paragraph (2) of this subsection must also contain any other requirements of the SEC or the IRS relating to arbitrage, private activity bonds, or other relevant requirements regarding the securities held by the Board;

(K) current, accurate, and complete records and accounts must be maintained in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

(L) the Applicant must annually submit an audit prepared by a certified public accountant in accordance with generally accepted auditing standards;

(M) the Applicant must submit a final accounting within 60 days of project completion;

(N) the Applicant must document the adoption and implementation of an approved water conservation plan for the duration of the financial assistance;

(O) the Applicant must comply with special environmental conditions specified in the Board's environmental finding as well as with any applicable Board laws or rules relating to use of the financial assistance;

(P) the Applicant must establish a dedicated source of revenue for repayment of the financial assistance;

(Q) interest payments must commence no later than one year after the date of closing;

(R) annual principal payments must commence no later than 18 months after completion of project construction; and

(S) any other recitals mandated by the executive administrator.

(3) unqualified approving opinions of the attorney general of Texas and, if bonds or other authorized securities are issued, a certification from the comptroller of public accounts that such debt has been registered in that office;

(4) an unqualified approving opinion by a recognized bond attorney;

(5) assurances that the Applicant will comply with any special conditions specified by the Board's environmental finding;

(6) if the project will result in the development of surface water or groundwater resources, the Applicant must provide information showing that it has the legal right to use the water that the project will provide. Upon receipt of the information, the executive administrator will prepare a finding that the Applicant has a reasonable expectation of obtaining the water rights to the water that the project will provide prior to any release of funds for planning, land acquisition, and design activities. Prior to the release of funds for construction, a written water rights certification will be prepared by the executive administrator. The certification will be based on the Applicant's information showing the necessary water rights have been acquired.

(7) evidence that the Applicant has the technical, managerial, and financial capacity to maintain the system unless the use of the funds will be to ensure that the system has the technical, managerial, and financial capacity to comply with the national primary or applicable state drinking water regulations over the long term;

(8) a Private Placement Memorandum containing a detailed description of the issuance of the debt to be sold to the Board. The Applicant must submit a draft Private Placement Memorandum at least 30 days before closing of the financial assistance; a final electronic version of the Memorandum must be submitted no later than seven days before closing;

(9) when any portion of the financial assistance is to be held in an escrow account, the Applicant must execute an escrow agreement approved as to form and substance by the executive administrator;

(10) if applicable, a home rule municipality pursuant to Texas Local Government Code Chapter 104 must execute a Certification of Trust as defined in §371.1 of this title; and

(11) any additional information specified in writing by the executive administrator.

(b) Certified bond transcript. Within sixty (60) days of closing the financial assistance, the Applicant shall submit a transcript of proceedings relating to the debt purchased by the Board which must contain those instruments normally furnished by a purchaser of debt.

(c) Phased closing. The executive administrator may determine that closing the financial assistance in phases is appropriate when:
(1) the project has distinct phases for planning, design, acquisition, and construction, or if any one of the phases can be logically and practically divided into discrete sections;

(2) the project utilizes the design-build or construction manager-at-risk process or any process wherein there is simultaneous design and construction;

(3) there are limitations on the availability of funds;

(4) additional oversight is required due to the financial condition of the Applicant or the complexity of the project; or

(5) due to any unique facts arising from the particular transaction.

(d) Financial assistance consisting of 100 percent principal forgiveness. Notwithstanding subsection (a) of this section, the following documents are required for closing financial assistance consisting of 100 percent principal forgiveness:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) an executed principal forgiveness agreement adopted by the governing body that is acceptable to the executive administrator. The agreement must have the following sections:

(A) if financial assistance proceeds are to be deposited into an escrow account at the time of closing, then an escrow account separate from all other accounts and funds must be created, as follows:

(i) the account must be maintained by an escrow agent as defined in §371.1 of this title;

(ii) funds cannot be released from the escrow account without prior written approval from the executive administrator, who shall issue written authorization for the release of funds;

(iii) escrow account statements must be provided to the executive administrator upon request;

(iv) the investment of any financial assistance proceeds deposited into an approved escrow account must be handled in a manner that complies with the Public Funds Investment Act, Texas Government Code Chapter 2256; and

(v) the escrow account must be adequately collateralized in a manner sufficient to protect the Board's interest in the project and in compliance with the Public Funds Collateral Act, Texas Government Code Chapter 2257;

(B) the Applicant must fix and maintain rates in accordance with state law and collect charges to provide adequate operation and maintenance of the project;

(C) a construction account separate from all other accounts and funds of the Applicant must be created;

(D) insurance coverage must be obtained and maintained in an amount sufficient to protect the Board's interest in the project;

(E) the Applicant, or an obligated person for whom financial or operating data is presented, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, must undertake in a written agreement or contract to comply with requirements for continuing disclosure as required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule. Such continuing disclosure undertaking is for the benefit of the Board and the beneficial owner of the political subdivision's obliga-

(2) current, accurate, and complete records and accounts must be maintained in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

(G) the Applicant must annually submit an audit prepared by a certified public accountant in accordance with generally accepted auditing standards;

(H) the Applicant must submit a final accounting within 60 days of the completion of the project;

(I) the Applicant must document the adoption and implementation of an approved water conservation plan for the duration of the financial assistance;

(J) the Applicant must comply with special environmental conditions specified in the Board's environmental finding as well as with any applicable Board laws or rules relating to use of the financial assistance;

(3) assurances that the Applicant will comply with any special conditions specified by the Board's environmental finding;

(4) if the project will result in the development of surface water or groundwater resources, the Applicant must provide information showing that it has the legal right to use the water that the project will provide. Upon receipt of the information, the executive administrator will prepare a finding that the Applicant has a reasonable expectation of obtaining the water rights to the water that the project will provide prior to any release of funds for planning, land acquisition, and design activities. Prior to the release of funds for construction, a written water rights certification will be prepared by the executive administrator. The certification will be based upon the Applicant's information showing the necessary water rights have been acquired;

(5) evidence that the Applicant has the technical, managerial, and financial capacity to maintain the system unless the use of the funds will be to ensure that the system has the technical, managerial, and financial capacity to comply with the national primary or applicable state drinking water regulations over the long term;

(6) when any portion of the financial assistance is to be held in an escrow account, the Applicant must execute an escrow agreement approved as to form and substance by the executive administrator;

(7) if applicable, a home rule municipality pursuant to Texas Local Government Code Chapter 104 must execute a Certification of Trust as defined in §371.1 of this title; and

(8) any additional information specified in writing by the executive administrator.

§371.72. Financial Assistance Secured by Promissory Notes and Deeds of Trust.

(a) Applicability. This section contains closing requirements for a water supply corporation, an eligible NPNC, or an eligible private Applicant or other Applicant that is not authorized to issue bonds or other securities. This section applies to financial assistance for either pre-design or construction funding.

(b) Use of consultants. The executive administrator may recommend, but not require, that the entity engage the services of a fi-
nancial advisor or other consultant to ensure the appropriateness of the proposed debt and to provide advice to the entity,

(c) Documents required for closing. The following documents and conditions are required for closing financial assistance secured by promissory notes and deeds of trust:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permitted and authorizations;

(2) an executed promissory note and loan agreement in a form approved by the executive administrator;

(3) a Deed of Trust and Security Agreement that must contain a first mortgage lien evidenced by a deed of trust on all the real and personal property of the water system; provided, however, this is not needed if the financial assistance consists of 100 percent principal forgiveness;

(4) an owner's title insurance policy for the benefit of the Board covering all the real property identified in the deed of trust; provided, however, this is not needed if the financial assistance consists of 100 percent principal forgiveness;

(5) evidence that the rates on which the Applicant intends to rely for repayment of the financial assistance have received final and binding approval from the Utility Commission and, for Applicants required to utilize a surcharge account, evidence that the approval of the Utility Commission was conditioned on the creation of a surcharge account;

(6) a certified copy of the resolution adopted by the governing body authorizing the indebtedness and a certificate from the secretary of the governing body attesting to adoption of the resolution in accordance with the bylaws or rules of the governing body and in compliance with the Open Meetings Act, if applicable;

(7) a legal opinion from Applicant's counsel that provides:

(A) that the entity has the legal authority to enter into the loan agreement and to execute a promissory note;

(B) that the entity is not in breach or default of any state or federal order, judgment, decree, or other instrument which would have a material effect on the loan transaction;

(C) that there is no pending suit, action, proceeding, or investigation by a public entity that would materially adversely affect the enforceability or validity of the required financial assistance documents;

(D) evidence that the entity is in good standing with the Texas Office of the Secretary of State; and

(E) a statement addressing any other issues deemed relevant by the executive administrator.

(8) evidence that an approved water conservation plan has been adopted and will be implemented through the life of the project;

(9) evidence of the Applicant's agreement to comply with special environmental conditions contained in the Board's environmental finding;

(10) evidence that the Applicant has established a dedicated source of revenue for repayment of the financial assistance;

(11) evidence that the Applicant has adopted final water rates and charges that are not subject to appeal to the Utility Commission;

(12) copies of executed service and revenue contracts;

(13) evidence that the Applicant has the technical, managerial, and financial capacity to maintain the system unless the use of the funds will be to ensure that the system has the technical, managerial, and financial capacity to comply with the national primary or applicable state drinking water regulations over the long term;

(14) if the project will result in the development of surface water or groundwater resources, the Applicant must provide information showing that it has the legal right to use the water that the project will provide. Upon receipt of the information, the executive administrator will prepare a finding that the Applicant has a reasonable expectation of obtaining the water rights to the water that the project will provide prior to any release of funds for planning, land acquisition, and design activities. Prior to the release of funds for construction, a written water rights certification must be prepared by the executive administrator. The certification will be based on the Applicant's information showing the necessary water rights have been acquired.

(15) when any portion of the financial assistance is to be held in an escrow account, the Applicant shall execute an escrow agreement, approved as to form and substance by the executive administrator; and

(16) any additional information specified in writing by the executive administrator.

(d) if financial assistance proceeds are to be deposited into an escrow account at the time of closing, then an escrow account separate from all other accounts and funds must be created, as follows:

(1) the account must be maintained by an escrow agent as defined in §371.1 of this title (relating to Definitions);

(2) funds cannot be released from the escrow account without prior written approval of the executive administrator, who shall issue written authorization for the release of funds;

(3) escrow account statements must be provided to the executive administrator upon request;

(4) the investment of any financial assistance proceeds deposited into an approved escrow account, must be handled in a manner that complies with the Public Funds Investment Act, Texas Government Code Chapter 2256; and

(5) the escrow account must be adequately collateralized in a manner sufficient to protect the Board's interest in the project and that complies with the Public Funds Collateral Act, Texas Government Code Chapter 2257.

(e) Construction account. A construction account must be created and must be kept separate from all other accounts and funds of the Applicant.

(f) Phased closing. The executive administrator may determine that closing the financial assistance in phases is appropriate when:

(1) the project has distinct phases for planning, design, acquisition, and construction, or if any one of the phases can be logically and practically divided into discrete sections;

(2) the project utilizes the design-build or construction manager-at-risk process or any process wherein there is simultaneous design and construction;

(3) there are limitations on the availability of funds;

(4) additional oversight is required due to the financial condition of the Applicant or the complexity of the project; or

(5) due to any unique facts arising from the particular transaction.
§371.73. Disbursement of Funds.

(a) Escrow of funds. The executive administrator may deposit funds into an escrow account at the time of closing of the financial assistance. Releases from an escrow account must occur sequentially as described in subsection (c) of this section or in accordance with phasing required for the applicable project. The Applicant must submit outlays for all expenses incurred.

(b) Reimbursement method of accessing funds. DWSRF financial assistance is available for disbursement under a reimbursement method unless the executive administrator approves the deposit of funds into an escrow account at the closing of the financial assistance, as appropriate. The executive administrator will reimburse the Applicant’s expenditures upon the receipt of an outlay report supported by detailed invoices of expenditures, or the executive administrator may issue a written authorization for the release of funds from an escrow account based on the receipt of outlay reports supported by detailed invoices of expenditures. The outlays and releases from an escrow account must be consistent with the approved project schedule.

(c) Sequence of availability of funds. Financial assistance is available for disbursement in the following sequence:

1. for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase, and after approval of a water conservation plan;
2. for design costs, after receipt of executed contracts for design, after approval of an engineering feasibility report, and after completion of the environmental review; and
3. for construction costs, after issuance of any applicable permits, after acquisition documents and contract documents (including plans and specifications) are approved and executed, and after the executive administrator has approved the issuance of a Notice to Proceed.

(d) Outlay reports. Applicant’s outlay reports must be supported by detailed invoices for incurred costs as the project progresses in accordance with the project schedule. Outlay reports must be submitted in a form determined by the executive administrator, and on the following schedule:

1. for financial assistance for planning, acquisition, and design, quarterly; and
2. for financial assistance for construction, monthly.

(e) Consistency for project schedules and outlays. Projects must proceed in accordance with approved project schedules as closely as possible.

§371.74. Remaining Unused Funds.

(a) Remaining unused funds are those funds unspent after the original approved project is completed. Remaining unused funds may be spent for enhancements to the original project upon written approval by the executive administrator, including green components.

(b) If there are no enhancements authorized, the Applicant must submit a final accounting and disposition of any unused funds as specified in §371.86 of this title (relating to Final Accounting).

§371.75. Surcharge.

For eligible private Applicants and eligible NPNC Applicants that are not also eligible public Applicants, the establishment of a surcharge and creation of a surcharge account is required. If the executive administrator determines that the use of a surcharge and surcharge account is not available to an Applicant through the Utility Commission, the executive administrator may recommend that the Board consider other sources of revenue available to an Applicant for repayment of financial assistance from the Board.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000629
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

**SUBCHAPTER H. CONSTRUCTION AND POST-CONSTRUCTION REQUIREMENTS**

31 TAC §§371.80 - 371.91

**STATUTORY AUTHORITY**

This rulemaking is proposed under the authority of Texas Water Code §§6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

§371.80. Applicability.

This subchapter applies to financial assistance for non-equivalency and equivalency projects.

§371.81. Inspection During Construction.

(a) Applicant’s inspection. The Applicant shall provide for the adequate qualified inspection of the project under the supervision of a registered engineer and shall require the engineer’s assurance that the work is being performed in a satisfactory manner in accordance with the approved plans, specifications, and other engineering design or permit documents, approved alterations or changes, in accordance with the requirements in the environmental finding applicable to the project, and using sound engineering principles and construction practices.

(b) Board’s site visits. The executive administrator may conduct site visits regarding the construction and materials of a project at any time. The purpose of site visits is to determine whether the contractor is substantially complying with the approved engineering plans for the project and is constructing the project in accordance with the approved project schedule. The site visits do not subject the state to any civil liability.

(c) Scope of inspections. Inspections may include, but are not limited to:

1. on-site observations and review of the conditions at the construction sites, including compliance with environmental mitigation measures;
2. review of documents related to the construction projects, including but not limited to:
   A. payroll, daily attendance, and any other records relating to person employed during the construction, and records relating to the Davis-Bacon Act and related federal laws and regulations regarding prevailing wage rates;
(B) invoices, receipts for materials, accounting ledgers, and any other documents related to expenditure of funds to facilitate tracking the project's progress;

(C) evidence of testing of installed materials and equipment;

(D) deviations from approved plans and specifications;

(E) change orders and supporting documents;

(F) compliance with EPA's American Iron and Steel requirements; and

(G) review of any other documents to ensure compliance with the terms of the approved contract documents and the Board's rules.

d) The executive administrator may document issues to ensure compliance with applicable laws, rules, and contract documents, and may recommend to the owner that certain corrective actions occur to ensure compliance with laws, rules, and approved plans and specifications.

e) The Applicant must provide the executive administrator with a response to any documented issues relating to compliance.

§371.82  Alterations During Construction.

(a) Changes after approval of engineering feasibility report. The Applicant must notify the executive administrator of any changes to the project that occur after the approval of the report but prior to the start of construction. The executive administrator will review the proposed changes and notify the Applicant if additional engineering or other information is required. For facilities required to have Commission approval, the Commission must give its approval before any substantial or material changes are made in the plans. No changes may be implemented without the express written approval of the executive administrator.

(b) Changes during construction. Any proposed change to the construction contract must be submitted to the executive administrator in the form of a formal change order; the proposed change will be reviewed for compliance with program requirements and applicable Commission rules. Depending on the scope and complexity of the proposed change, approval by the executive administrator also may require amendments to other engineering and environmental documents and coordination with the Commission for issues involving variances to Commission rules.

§371.83  Force Account.

All significant elements of a project must be constructed with skilled laborers and mechanics obtained through the competitive bidding process. The Applicant, with the prior approval of the executive administrator, may utilize its own employees and equipment for inspection or minor construction upon showing that Applicant possesses the competence required to accomplish such work and that the work can be accomplished more economically by use of the force account method.

§371.84  As Built Plans.

After a project is completed, the Applicant shall notify the executive administrator of the receipt of a complete set of as-built drawings of the project from the project construction engineer.

§371.85  Certificate of Approval and Project Completion.

(a) Purpose. The executive administrator will issue a Certificate of Approval (certificate) upon completion of all work under each prime construction contract.

(b) Final prime construction contract. A certificate will be issued at the completion of all work under the final prime construction contract. This certificate will be transmitted to the Applicant with a statement that the project and the Board's inspection process are complete.

§371.86  Final Accounting.

(a) Within 60 days of Applicant's receipt of the Certificate of Approval for the final prime construction contract and the final inspection report, the Applicant shall submit a final accounting and a final funds requisition form.

(b) After the final accounting, the executive administrator will notify the Applicant if remaining surplus funds exist and advise the Applicant that any remaining surplus funds may be used in a manner approved by the executive administrator.

§371.87  Records Retention.

The Applicant must retain all documents, records, and invoices whether in electronic form or otherwise relating to the expenditure of all financial assistance from the DWSRF for a period of three full state fiscal years after completion of the project and receipt of the final certificate of approval.

§371.88  Release of Retainage.

(a) Retainage. The Applicant will withhold a minimum of five percent of each progress payment throughout the course of the construction contract.

(b) Full release of retainage. The executive administrator will approve the full release of retainage on a contract when:

(1) the Applicant's engineer approves the contractor's request for release of retainage; and

(2) the Applicant's governing body approves the release of retainage; and

(3) the executive administrator issues the Certificate of Approval.

(c) Partial release of retainage. If the executive administrator determines that a project is substantially complete, the executive administrator may approve a partial release of retainage.

§371.89  Responsibilities of Applicant.

After the satisfactory completion of the project, the Applicant remains responsible for compliance with applicable laws and rules relating to the project and to the financial assistance documents, including but not limited to submission of an annual audit, implementation and enforcement of the approved water conservation plan and other assurances made to the Board. The Board has a continuing interest in the State's investment; therefore, the Applicant will be subject to the continuing authority of the Board and the executive administrator through final payment of the financial assistance.

§371.90  Authority of the Executive Administrator.

(a) The financial assistance provided by the Board is based on the project's economic feasibility, and the Board shares the Applicant's desire to maintain this feasibility in the project's operation and maintenance at all times. The executive administrator will periodically inspect, analyze, and monitor the project's revenues, operation, and any other information the Board requires in order to perform its duties and to protect the public interest.

(b) After construction is complete and the Applicant has completed construction, the executive administrator is authorized to:

(1) inspect the project at any time. If the executive administrator determines that the project is being improperly or inadequately operated and maintained to the extent that the project purposes are not
being properly fulfilled or that integrity of the State's investment is being endangered, the executive administrator may require the Applicant to take corrective action;

(2) inspect certified copies of all minutes, operating budgets, monthly operating statements, contracts, leases, deeds, audit reports, and other documents concerning the operation and maintenance of the project;

(3) inspect and review the project and to obtain information through documents or interviews with appropriate personnel to ensure that the Applicant is complying with the requirements of the covenants of the bond indenture and/or the master agreement;

(4) inspect accounting and financial records to ensure that the Applicant maintains debt service fund accounts and all other fund accounts related to the DWSRF debt in accordance with standards set forth by the Governmental Accounting Standards Board; and

(5) request the Applicant to determine the status of compliance with mitigation measures as required in the final environmental determination.

§371.91. Disallowance of Project Costs and Remedies for Noncompliance.

If the Applicant does not comply with applicable laws and rules relating to the project and to the financial assistance documents, the executive administrator may take any of the following actions:

(1) impose additional conditions to remedy the noncompliance;

(2) withhold releases from escrows or disbursements until the Applicant comes into compliance;

(3) refrain from closing on existing commitments;

(4) disallow all or part of the cost of a project expenditure that is not in compliance;

(5) allow a substitution of eligible cost activities for disallowed costs or require repayment of disallowed costs, at the discretion of the executive administrator; and

(6) take other remedial actions that may be legally available.

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

Filed with the Office of the Secretary of State on February 14, 2020.
TRD-202000633
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

CHAPTER 371. DRINKING WATER STATE REVOLVING FUND


BACKGROUND AND SUMMARY OF THE FACTUAL ISSUES FOR THE PROPOSED REPEALS.

The TWDB proposes to repeal these sections of the rules because new rules 31 TAC §§371.60 - 371.63, 371.70 - 371.75, and 371.80 - 371.89 are being proposed elsewhere in this issue of the Texas Register.

SECTION BY SECTION DISCUSSION OF THE PROPOSED REPEALS

31 TAC §371.60, Engineering Feasibility Report

Section 371.60 is proposed for repeal due to addition of a new §371.60 outlining applicability of the subchapter on engineering review and approval. The new §371.60 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.61, Contract Documents: Review and Approval

Section 371.61 is proposed for repeal to replace it with the Engineering Feasibility Report rule previously numbered as 371.60. The new §371.61 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.62, Advertising and Awarding Construction Contracts

Section 371.62 is proposed for repeal to replace it with the Contract Documents: Review and Approval rule previously numbered as 371.61. The new §371.62 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.70, Financial Assistance Secured by Bonds or Other Authorized Securities

Section 371.70 is proposed for repeal due to addition of a new §371.70 outlining applicability of the subchapter on loan closing and availability of funds. The new §371.70 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.71, Financial Assistance Secured by Promissory Notes and Deeds of Trust

Section 371.71 is proposed for repeal to replace it with the Financial Assistance Secured by Bonds and Other Authorized Securities rule previously numbered as 371.70 The new §371.71 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.72, Disbursement of Funds

Section 371.72 is proposed for repeal to replace it with the Financial Assistance Secured by Promissory Notes and Deeds of Trust rule previously numbered as 371.71. The new §371.72 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.73, Remaining Unused Funds

Section 371.73 is proposed for repeal to replace it with the Disbursement of Funds rule previously numbered as 371.72. The new §371.73 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.74, Surcharge

Section 371.74 is proposed for repeal to replace it with the Remaining Unused Funds rule previously numbered as 371.73. The new §371.74 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.80, Inspection During Construction
Section 371.80 is proposed for repeal due to addition of a new §371.78 outlining applicability of the subchapter on construction and post-construction requirements. The new §371.70 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.81, Alteration During Construction

Section 371.81 is proposed for repeal to replace it with the Inspection During Construction rule previously numbered as 371.80. The new §371.81 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.82, Force Account

Section 371.82 is proposed for repeal to replace it with the Alterations During Construction rule previously numbered as 371.81. The new §371.82 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.83, As Built Plans

Section 371.83 is proposed for repeal to replace it with the Force Account rule previously numbered as 371.82. The new §371.83 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.84, Certificate of Approval and Project Completion

Section 371.84 is proposed for repeal to replace it with the As Built Plans rule previously numbered as 371.83. The new §371.84 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.85, Final Accounting

Section 371.85 is proposed for repeal to replace it with the Certificate of Approval and Project Completion rule previously numbered as 371.84. The new §371.85 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.86, Records Retention

Section 371.86 is proposed for repeal to replace it with the Final Accounting rule previously numbered as 371.85. The new §371.86 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.87, Release of Retainage

Section 371.87 is proposed for repeal to replace it with the Records Retention rule previously numbered as 371.86. The new §371.87 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.88, Responsibilities of Applicant

Section 371.88 is proposed for repeal to replace it with the Release of Retainage rule previously numbered as 371.87. The new §371.88 is proposed for adoption elsewhere in this issue of the Texas Register.

31 TAC §371.89, Authority of the Executive Administrator

Section 371.89 is proposed for repeal to replace it with the Responsibilities of Applicant rule previously numbered as 371.88. The new §371.89 is proposed for adoption elsewhere in this issue of the Texas Register.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Rebecca Treviño, Chief Financial Officer, has determined that there will be no significant fiscal implications for state or local governments resulting from the proposed repeals. For the first five years these proposed repeals are in effect, there is no expected additional cost to state or local governments.

The repeal of these rules is not expected to result in reductions in costs to either state or local governments. There is no change in costs because there are no direct costs associated with the proposed repeals. These repeals are not expected to have any impact on state or local revenues. These repeals do not require any increase in expenditures for state or local governments as a result of administering the repeals. Additionally, there are no foreseeable implications relating to state or local governments’ costs or revenue resulting from these repeals.

Because these repeals will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these repeals are necessary to receive a source of federal funds and are necessary to comply with federal and state law.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Treviño also has determined that for each year of the first five years the proposed repeals are in effect, there will be no impact to the public.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed repeals do not adversely affect a local economy in a material way for the first five years that they are in effect because they will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities from enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board 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 Texas Government Code §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, or a rule that may adversely affect in a material way the economy or 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 intent of these repeals is to reorganize the rules based on the addition of sections that implement new requirements in state and federal law within the current framework of the drinking water state revolving fund.

Even if the proposed repeals were major environmental rules, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of
state law, unless the rule is specifically required by federal law; 
(3) exceed a requirement of a delegation agreement or contract 
between the state and an agency or representative of the fed-
eral 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 criteria because it: (1) does 
not exceed any federal law; (2) does not exceed an express re-
quirement of state law; (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 
a state and federal program; and (4) is not proposed solely 
under the general powers of the agency, but rather is proposed 
under the authority of Texas Water Code §§15.604, 15.605, 
and 16.093. Therefore, the proposed repeals do not fall under any of 

The board invites public comment regarding this draft regulatory 
impact analysis determination. Written comments on the draft 
regulatory impact analysis determination may be submitted to 
the contact person at the address listed under the Submission 
of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT
The board evaluated the proposed repeals and performed an 
analysis of whether they constitute a taking under Texas Govern-
ment Code Chapter 2007. The specific purpose of the repeals 
is to reorganize the rules based on the addition of sections that 
implement new requirements in state and federal law within the 
current framework of the drinking water state revolving fund. The 
board’s analysis indicates that Texas Government Code Chap-
ter 2007 does not apply to the proposed repeals because this is 
an action that is reasonably taken to fulfill an obligation man-
dated by state and federal law, which is exempt under Texas 
Government Code, §2007.003(b)(4). The board is the agency 
that provides financial assistance for the construction of water, 
wastewater, flood control, and other related projects.

Nevertheless, the board further evaluated the proposed repeals 
and performed an assessment of whether they constitute a taking 
under Texas Government Code Chapter 2007. Pro-
mulgation and enforcement of the proposed repeals would 
be neither a statutory nor a constitutional taking of private 
real property. Specifically, the proposed rulemaking does not 
afford a landowner’s rights in private real property because this 
rulemaking does not burden nor restrict or limit the owner’s 
right to property and reduce its value by 25% or more beyond 
that which would otherwise exist in the absence of the repeal. 
Therefore, the proposed rulemaking does not constitute a taking 

GOVERNMENT GROWTH IMPACT STATEMENT
The board reviewed the proposed rulemaking in light of the gov-
ernment growth impact statement requirements of Texas Gov-
ernment Code §2001.0221 and has determined that for the first 
five years the proposed repeals would be in effect, they will not: 
(1) create or eliminate a government program; (2) require the 
creation of new employee positions or the elimination of exist-
ing employee positions; (3) require an increase or decrease in 
future legislative appropriations to the agency; (4) require an 
increase or decrease in fees paid to the agency; (5) create a new 
regulation; (6) expand, limit, or repeal an existing regulation; (7) 
increase or decrease the number of individuals subject to the 
rules applyability; or (8) positively or adversely affect this state’s 
economy. The proposed repeals reorganize the rules based on 
the addition of sections that implement new requirements in state 
and federal law within the current framework of the drinking wa-
ter state revolving fund.

SUBMISSION OF COMMENTS
Written comments on the proposed rulemaking may be submit-
ted by mail to Office of General Counsel, Texas Water Devel-
opment Board, P.O. Box 13231, Austin, Texas 78711-3231, by 
e-mail to rules.comments@twdb.texas.gov, or by fax to (512) 475-
2053. Include reference to Chapter 371 in the subject line. Com-
ments will be accepted until 5:00 p.m. of the 31st day following 
publication in the Texas Register.

SUBCHAPTER F. ENGINEERING REVIEW 
AND APPROVAL
31 TAC §§371.60 - 371.62
STATUTORY AUTHORITY
These repeals are proposed under the authority of Texas Water 
Code §6.101, which gives the TWDB the authority to adopt rules, 
and under the authority of Texas Water Code §§15.604, 15.605, 
and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 
16.

§371.60. Engineering Feasibility Report. 
The agency certifies that legal counsel has reviewed the prop-
osal and found it to be within the state agency’s legal authority 
to adopt.

Filed with the Office of the Secretary of State on February 14, 
2020.

TRD-202000659
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

SUBCHAPTER G. LOAN CLOSINGS AND 
AVAILABILITY OF FUNDS
31 TAC §§371.70 - 371.74
STATUTORY AUTHORITY
These repeals are proposed under the authority of Texas Water 
Code §6.101, which gives the TWDB the authority to adopt rules, 
and under the authority of Texas Water Code §§15.604, 15.605, 
and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 
16.

§371.70. Financial Assistance Secured by Bonds or Other Authorized 
Securities. 
§371.71. Financial Assistance Secured by Promissory Notes and 
Deeds of Trust. 
§371.72. Disbursement of Funds. 
§371.73. Remaining Unused Funds. 
§371.74. Surcharge.
The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2020.
TRD-202000661
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

CHAPTER 375. CLEAN WATER STATE REVOLVING FUND

The Texas Water Development Board ("TWDB") proposes adding new 31 Texas Administrative Code (TAC) §§375.72 and 375.111 and amending existing 31 TAC §§375.1, 375.16, 375.17, 375.31, 375.41, 375.43, 375.45, 375.60, 375.82, 375.91, 375.92, 375.94, 375.101 and 375.109, relating to the Clean Water State Revolving Fund.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED ADDITIONS AND AMENDMENTS.

The purpose of the additions and amendments is to implement legislative changes from House Bill 3339, 86th (R) Legislative Session and from America's Water Infrastructure Act of 2018 (AWIA), and to implement changes in program management, including addition of remedies for non-compliance. The specific provisions being amended or added and the reasons for the amendments are addressed in more detail below.

SECTION BY SECTION DISCUSSION OF THE PROPOSED ADDITIONS AND AMENDMENTS

31 TAC §375.1 Definitions

Section 375.1 is amended to define the term "water conservation plan" as a plan in compliance with Texas Water Code §16.4021, as required by H.B. 3339, 86th (R) Legislative Session.

31 TAC §375.16 Fees for Financial Assistance

Section 375.16 is amended to clarify the origination fee.

31 TAC §375.17 Term of Financial Assistance

Section 375.17 is amended to remove mention of specific loan time periods and to provide the terms in the IUP.

31 TAC §375.31 Rating Process

Section 375.31 is amended to make emergency relief applicable to all disasters, not just natural disasters.

31 TAC §375.41 Timeliness of Application and Required Application Information

Section 375.41 is amended to add the requirement that a preliminary engineering feasibility report signed and sealed by a professional engineer be submitted as part of an application, and detailing the information to be included in the report.

31 TAC §375.43 Required Water Conservation Plan and Water Loss Audit

Section 375.43 is amended to require that the water conservation plan comply with Texas Water Code §16.4021, as enacted by H.B. 3339, 86th (R) Legislative Session, and to clarify that a requirement that a portion of assistance be used for water loss mitigation applies only to Applicants providing potable water.

31 TAC §375.45 Multi-Year Commitment

Section 375.45 is amended to tie the terms to the IUP, increasing flexibility for financial assistance recipients.

31 TAC §375.60 Definitions

Section 375.60 is amended to define the term "emergency relief project".

31 TAC §375.72 Emergency Relief Project Procedures

Section 375.72 is added to outline emergency relief project procedures identical to those already contained in rules for the Drinking Water State Revolving Fund.

31 TAC §375.82 Contract Documents: Review and Approval

Section 375.82 is amended to include a requirement that Applicants submit an electronic copy of applications and reduces the
number of paper copies required unless the Applicant is directed otherwise.

31 TAC §375.91 Financial Assistance Secured by Bonds or Other Authorized Securities

Section 375.91 is amended to add requirements for closing financial assistance projects consisting of 100 percent principal forgiveness.

31 TAC §375.92 Financial Assistance Secured by Promissory Notes and Deeds of Trust

Section 375.92 is amended to clarify language and conform with rules for the Drinking Water State Revolving Fund.

31 TAC §375.94 Remaining Unused Funds

Section 375.94 is amended to clarify the disposition of remaining project funds.

31 TAC §375.101 Inspection During Construction

Section 375.101 is amended to change the term "inspection" to "site visits" and to add the requirement to review compliance with EPA's American Iron and Steel requirements.

31 TAC §375.109 Responsibilities of Applicant

Section 375.109 is amended to change the term "water conservation program" to "water conservation plan," the term used in Texas Water Code §16.4021.

31 TAC §375.111 Disallowance of Project Costs and Remedies for Noncompliance

Section 375.111 is added to provide remedies for noncompliance with project rules and financial assistance documents.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Rebecca Treviño, Chief Financial Officer, has determined that there will be no significant fiscal implications for state or local governments resulting from the proposed rulemaking. For the first five years these rules and amendments are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for state and local governments because the proposed additions and amendments implement statutory requirements and clarify the language in the rules. These rules are not expected to have any impact on state or local revenues. The rules and their administration will not require any increase in expenditures for state or local governments. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are necessary to receive a source of federal funds and are necessary to comply with federal and state law.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Treviño also has determined that for each year of the first five years the proposed rulemaking is in effect, there will be no additional cost to the public, and the public will benefit from the rulemaking as it is intended to comply with state law and implement changes in program management, including addition of remedies for non-compliance.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has 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 they are in effect because they will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities from enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board 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 Texas Government Code §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, or a rule that may adversely affect in a material way the economy or 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 intent of the rulemaking is to implement new requirements in state and federal law and changes in program management within the current framework of the clean water state revolving fund.

Even if the proposed amendments and rules were major environmental rules, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule the result of which is to: (1) exceed a standard set by federal law; unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (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 a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather is proposed under the authority of Texas Water Code §§15.604, 15.605, and 16.093. Therefore, the proposed amendments do not fall under any of the applicability criteria in Texas Government Code §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to
the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT
The board evaluated the proposed rules and amendments and performed an analysis of whether they constitute a taking under Texas Government Code Chapter 2007. The specific purpose of the rules is to implement new requirements in state and federal law and changes in program management within the current framework of the clean water state revolving fund.

The board’s analysis indicates that Texas Government Code Chapter 2007 does not apply to the proposed rules because this is an action that is reasonably taken to fulfill an obligation mandated by state and federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that provides financial assistance for the construction of water, wastewater, flood control, and other related projects.

Nevertheless, the board further evaluated the proposed rules and performed an assessment of whether they constitute a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rulemaking does not affect a landowner’s rights in private real property because this rulemaking does not burden nor restrict or limit the owner’s right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, these rules require compliance with state and federal laws regarding financial assistance under the state revolving funds without burdening or restricting or limiting an owner’s right to property and reducing its value by 25% or more. Therefore, the proposed rulemaking does not constitute a taking under Texas Government Code Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT
The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined that for the first five years the proposed rules would be in effect, the proposed rules will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule’s applicability; or (8) positively or adversely affect this state’s economy. The proposed rules implement new requirements in state and federal law and changes in program management within the current framework of the drinking water state revolving fund.

SUBMISSION OF COMMENTS
Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulecomments@twdb.texas.gov, or by fax to (512) 475-2053. Include reference to Chapter 375 in the subject line. Comments will be accepted until 5:00 p.m. of the 31st day following publication in the Texas Register.

SUBCHAPTER A. GENERAL PROGRAM REQUIREMENTS

31 TAC §375.1
STATUTORY AUTHORITY
This rulemaking is proposed under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

§375.1. Definitions.
The following words and terms, when used in this chapter, shall have the following meanings when used in this chapter, unless the context clearly indicates otherwise. Words defined in Chapter 15 of the Texas Water Code and not defined here shall have the meanings provided by Chapter 15.

(1) - (68) (No change.)

(69) Water conservation plan--A plan that complies with the requirements of Texas Water Code Section 16.4021 [report outlining the methods and means by which water conservation may be achieved within a particular facilities planning area].

(70) Water conservation program--A comprehensive description and schedule of the methods and means to implement and enforce a water conservation plan.

(71) [Reserved]

(72) Water quality management plan--A plan prepared and updated annually by the State and approved by the Environmental Protection Agency that determines the nature, extent, and causes of water quality problems in various areas of the State and identifies cost-effective and locally acceptable facility and nonpoint measures to meet and maintain water quality standards.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000645
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

SUBCHAPTER B. FINANCIAL ASSISTANCE

31 TAC §375.16, §375.17
STATUTORY AUTHORITY
This rulemaking is proposed under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

§375.16. Fees for Financial Assistance.

(a) General. The Applicant will be assessed charges for the purpose of recovering administrative costs of all projects receiving CWSRF financial assistance. However, no fees or costs will be assessed on the portion of the project that receives principal forgiveness as detailed in the IUP.
(b) Origination fee. An administrative fee not to exceed 1.75 percent of the project costs will be assessed as a one-time non-refundable charge. Project costs on which the fee will be assessed do not include the origination fee or those project costs that are funded through principal forgiveness. The fee is due and payable at the time of loan closing and may be financed as a part of the financial assistance.

§375.17. Term of Financial Assistance.

The Board may offer financial assistance in accordance with the Act and the IUP under which the project received funding.

[(a) The Board may offer financial assistance up to 30 years for the planning, acquisition, design and/or construction of a project, in accordance with the Act and the IUP under which the project received funding.]

[(b) Notwithstanding the terms in subsection (a) of this section, the term of financial assistance may not exceed the useful life of an eligible project, in accordance with the Act.]

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000646
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

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SUBCHAPTER C. INTENDED USE PLAN

31 TAC §375.31

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §§6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16


(a) - (e) (No change.)

(f) Emergency relief. Projects that are affected by [natural] disasters and according to the following requirements:

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

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000647

Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

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SUBCHAPTER D. APPLICATION FOR ASSISTANCE

31 TAC §§375.41, 375.43, 375.45

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §§6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

§375.41. Timeliness of Application and Required Application Information.

(a) (No change.)

(b) Required application information. For eligible public Applicants, an application shall be in the form and number of copies prescribed by the executive administrator and in addition to any other information that may be required by the executive administrator or the Board, the Applicant shall provide the following documentation:

(1) - (11) (No change.)

(12) Preliminary Engineering Feasibility Report signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, must provide:

(A) a description and purpose of the project;

(B) the entities to be served and current and future population;

(C) the cost of the project;

(D) a description of alternatives considered and reasons for the selection of the project proposed;

(E) sufficient information to evaluate the engineering feasibility of the project;

(F) maps and drawings as necessary to locate and describe the project area; and

(G) any other information the executive administrator determines is necessary to evaluate the project.

(e) (No change.)

§375.43. Required Water Conservation Plan and Water Loss Audit.

(a) Water Conservation Plan. An Applicant shall submit a water conservation plan prepared in accordance with Texas Water Code Section 16.4021 [§363.15 of this title (relating to Required Water Conservation Plan)].

(b) (No change.)

(c) If an Applicant that is a retail public utility providing potable water has a water loss that [If a retail public utility's total water loss] meets or exceeds the threshold for that utility in accordance with §358.6 of this title, the retail public utility must use a portion of any new financial assistance, or any other financial assistance provided by
the Board, for project projects costs that are eligible under the Act and the applicable IUP to mitigate the utility's water loss. However, at the request of a retail public utility, the Board may waive this requirement in accordance with §358.6 of this title.

§375.45. Multi-year Commitments.
(a) Commitment periods may be set for a period of up to five years. The minimum interest rate reduction for the multi-year commitments will be established for the five-year period based on the interest rate reduction prescribed in the IUP for the first year's commitment.

(b) This option is only available for projects as described in the IUP that do not receive principal forgiveness based on the affordability criteria. However, the entity receiving a multi-year commitment may receive principal forgiveness for the other eligible options, such as principal forgiveness for green projects, for the amount of funds committed for the initial year.

(c) (No change.)

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

Filed with the Office of the Secretary of State on February 14, 2020.
TRD-202000648
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

SUBCHAPTER E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS

31 TAC §375.00, §375.72

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

§375.60. Definitions.

Unless specifically defined differently within this subchapter, the following terms and acronyms, used in this subchapter, mean:

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

(3) Emergency Relief Project--An infrastructure construction project that provides relief to an entity experiencing an emergency condition or incident that causes an imminent peril to public health, safety, environment, or welfare, including natural disasters and any other emergency condition as described in an IUP.

(4) [(3)] Environmental Assessment--A public document prepared by the executive administrator for projects that may result in adverse environmental impacts where and the significance of those impacts is not known. The Environmental Assessment, based primarily on the Environmental Information Document, must provide sufficient evidence and analysis to determine whether to prepare a Finding of No Significant Impact or an Environmental Impact Statement.

(5) [(4)] Environmental Impact Statement (EIS)--A detailed written statement prepared by a third-party contractor, in close coordination with the executive administrator, that analyzes environmental impacts of project alternatives for projects with significant adverse impacts on the quality of the human environment. An EIS is required for projects that do not qualify for a Finding of No Significant Impact. An EIS provides the most comprehensive and detailed information about potential environmental impacts and mitigation required to comply with the NEPA. It is the basis for the Record of Decision issued by the Board.

(6) [(5)] Environmental Information Document (EID)--A written analysis prepared by the Applicant that provides sufficient information, including appropriate regulatory agency correspondence and public participation documentation, for the executive administrator to undertake an environmental review and determine if the project qualifies for a Finding of No Significant Impact or if an Environmental Impact Statement will be required. An EID is not always necessary to determine if the project will require preparation of an EIS.

(7) [(6)] Federal Environmental Cross-cutters--Federal environmental statutes, laws and Executive Orders that apply to projects and activities with a federal nexus, including the receipt of federal financial assistance.

(8) [(7)] Finding of No Significant Impact (FONSI)--An environmental finding issued by the Board when the environmental assessment prepared for the project supports the determination that the project will not have a significant adverse effect on the human environment and therefore, does not require the preparation of an environmental impact statement.

(9) [(8)] Human environment--The natural and physical environment and the relationship of people with that environment.

(10) [(9)] Indian tribes--Federally recognized Indian tribes.

(11) [(10)] Mitigation--

(A) avoiding the impact altogether by not taking a certain action or parts of an action;

(B) minimizing the impact [impacts] by limiting the degree or magnitude of the action and its implementation;

(C) - (E) (No change.)


(13) [(12)] Record of Decision (ROD)--An environmental finding issued by the Board that identifies the selected project alternative, presents the basis for the decision, identifies all the alternatives considered, specifies the environmentally preferable alternative, and provides information on the adopted means to mitigate for environmental impacts. The ROD is based on the conclusions of the EIS.

(14) [(13)] Statement of Finding (SOF)--An environmental finding issued by the Board to correct, clarify, modify, or adopt a previous environmental finding(ies) issued by the Board or other agency.

§375.72. Emergency Relief Project Procedures.

(a) If an Applicant requests funding for an emergency relief project, the executive administrator shall review all information relevant to the emergency, proposed project, status of environmental review of the proposed project, known issues with the natural or cultural environment of the project area, and availability of funding.

(b) If an emergency condition described in §375.60(3) of this title (relating to Definitions) is present, the Board may authorize funding for the emergency relief project, subject to availability of funds,
without full preparation or public review of NEPA review documentation (including a CE finding, EA, or EIS) if the executive administrator determines that:

1. delaying commencement of project construction during the period it would take to prepare, review, and circulate NEPA documentation would increase the imminent peril to the public health, safety, environment, or welfare; and

2. consultations required by the Endangered Species Act and National Historic Preservation Act have been completed.

(c) Special conditions appropriate to minimize any potential for adverse impact due to abbreviated or expedited review may be required.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000649
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-7686

SUBCHAPTER G. LOAN CLOSINGS AND AVAILABILITY OF FUNDS

31 TAC §§375.91, 375.92, 375.94

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §§6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

§375.91. Financial Assistance Secured by Bonds or Other Authorized Securities.

(a) Applicability and required documents. This section applies to closings for financial assistance with entities issuing bonds or other authorized securities. The following documents and conditions are required for closing financial assistance secured by bonds or other authorized securities:

1. (No change.)

2. a certified copy of the ordinance or resolution adopted by the governing body authorizing the issuance of debt to be sold to the Board that is acceptable to the executive administrator. The ordinance or resolution must have sections provided as follows:

   A. if financial assistance proceeds are to be deposited into an escrow account at the time of closing, then an escrow account separate from all other accounts and funds must be created that shall be separate from all other accounts and funds, as follows:

   i. the account must be maintained by an escrow agent as defined in §375.1 of this title;

   ii. funds cannot be released from the escrow without prior written approval from the executive administrator, who shall issue written authorization for release of the funds;

   iii. escrow account statements must be provided to the executive administrator upon request;

   iv. the investment of any financial assistance proceeds deposited into an approved escrow account must be handled in a manner that complies with the Public Funds Investment Act, Texas Government Code, Chapter 2256;

   v. the escrow account must be adequately collateralized in a manner sufficient to protect the Board's interest in the project and in compliance with the Public Funds Collateral Act, Texas Government Code, Chapter 2257;
(B) that the Applicant shall fix and maintain rates[,] in accordance with state law, and collect charges to provide adequate operation and maintenance of the project;

(C) that a construction account must [shall] be created and must [which shall] be kept separate from all other accounts and funds of the Applicant;

(D) that bonds must [shall] be closed in book-entry-only form;

(E) the use of a paying agent/registrar that is a Depositary Trust Company (DTC) participant is required;

(F) that the payment of all DTC closing fees assessed by the Board's custodian bank must be directed to the Board's custodian bank by the Applicant;

(G) the Applicant must provide evidence that a fully registered bond has been sent to the DTC or to the Applicant's paying agent/registrar prior to closing;

(H) that all payments, including the origination fee, must be [make] made to the Board via wire transfer at no cost to the Board;

(I) that insurance coverage must be obtained and maintained in an amount sufficient to protect the Board's interest in the project;

(J) that the Applicant, or an obligated person for whom financial or operating data is presented, will undertake[,] either individually or in combination with other issuers of the Applicant's obligations or obligated persons, must undertake in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis as required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter under the meaning of such rule. Such [this continuing disclosure undertaking is] for the benefit of the Board and the beneficial owner of the political subdivision's obligations[.]

(K) the maintenance of current, accurate, and complete records and accounts must be maintained in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

(L) that the Applicant must [shall] annually submit an audit[,] prepared by a certified public accountant in accordance with generally accepted auditing standards;

(M) that the Applicant must [shall] submit a final accounting within 60 days of [the] completion of the project.

(N) that the Applicant must [shall] document the adoption and implementation of an approved water conservation plan [program] for the duration of the financial assistance;

(O) the Applicant must [Applicant's agreement to] comply with special environmental conditions specified in the Board's environmental finding as well as any applicable Board laws or rules relating to use of the financial assistance;

(P) that the Applicant must [shall] establish a dedicated source of revenue for repayment of the financial assistance;

(Q) that interest payments must [shall] commence no later than one year after the date of closing;

(R) that annual principal payments must [shall] commence no later than one year after completion of project construction; and

(S) (No change.)

(3) - (5) (No change.)

(6) a Private Placement Memorandum containing a detailed description of the issuance of debt to be sold to the Board. The Applicant must [shall] submit a draft Private Placement Memorandum at least 30 days before [prior to the] closing of the financial assistance; a final electronic version of the Memorandum must [shall] be submitted no later than seven days before closing;

(7) when any portion of the financial assistance is to be held in an escrow account, the Applicant must [shall] execute an escrow agreement[.] approved as to form and substance by the executive administrator;

(8) if applicable, a home rule municipality pursuant to Texas Local Government Code 104 must [Local Government Code shall] execute a Certification of Trust as defined in §375.1 of this title; and

(9) (No change.)

(b) Certified bond transcript. Within sixty (60) days of closing the financial assistance, the Applicant must submit a transcript of proceedings relating to the debt purchased by the Board which must [shall] contain those instruments normally furnished by a purchaser of debt.

(c) (No change.)

(d) Financial assistance consisting of 100 percent principal forgiveness. Notwithstanding subsection (a) of this section, the following documents are required for closing financial assistance consisting of 100 percent principal forgiveness:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) an executed principal forgiveness agreement adopted by the governing body that is acceptable to the executive administrator. The agreement must have the following sections:

(A) if financial assistance proceeds are to be deposited into an escrow account at the time of closing then an escrow account separate from all other accounts and funds must be created, as follows:

(i) the account must be maintained by an escrow agent as defined in §375.1 of this title;

(ii) funds cannot be released from the escrow account without prior written approval from the executive administrator, who shall issue written authorization for the release of funds;

(iii) escrow account statements must be provided to the executive administrator upon request;

(iv) the investment of any financial assistance proceeds deposited into an approved escrow account must be handled in a manner that complies with the Public Funds Investment Act, Texas Government Code Chapter 2256; and

(v) the escrow account must be adequately collateralized in a manner sufficient to protect the Board's interest in the project.
and that complies with the Public Funds Collateral Act, Texas Government Code Chapter 2257;

(B) the Applicant must fix and maintain rates in accordance with state law, and collect charges to provide adequate operation and maintenance of the project;

(C) a construction account separate from all other accounts and funds of the Applicant must be created;

(D) insurance coverage must be obtained and maintained in an amount sufficient to protect the Board’s interest in the project;

(E) the Applicant, or an obligated person for whom financial or operating data is presented, either individually or in combination with other issuers of the Applicant’s obligations or obligated persons, must undertake in a written agreement or contract to comply with requirements for continuing disclosure as required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule. Such continuing disclosure undertaking is for the benefit of the Board and the beneficial owner of the political subdivision’s obligations if the Board sells or otherwise transfers such obligations, and the beneficial owners of the Board’s bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12. The ordinance or resolution required in subsection (a)(2) of this section must also contain any other requirements of the SEC or the IRS relating to arbitrage, private activity bonds, or other relevant requirements regarding the securities held by the Board;

(F) current, accurate, and complete records and accounts must be maintained in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

(G) the Applicant must annually submit an audit prepared by a certified public accountant in accordance with generally accepted auditing standards;

(H) the Applicant must submit a final accounting within 60 days of the completion of the project;

(I) the Applicant must document the adoption and implementation of an approved water conservation plan for the duration of the financial assistance;

(J) the Applicant must comply with special environmental conditions specified in the Board’s environmental finding as well as with any applicable Board laws or rules relating to use of the financial assistance;

(3) assurances that the Applicant will comply with any special conditions specified by the Board’s environmental finding;

(4) if the project will result in the development of surface water or groundwater resources, the Applicant must provide information showing that it has the legal right to use the water that the project will provide. Upon receipt of the information, the executive administrator will prepare a finding that the Applicant has a reasonable expectation of obtaining the water rights to the water that the project will provide prior to any release of funds for planning, land acquisition, and design activities. Prior to the release of funds for construction, a written water rights certification will be prepared by the executive administrator. The certification will be based upon the Applicant’s information showing the necessary water rights have been acquired;

(5) evidence that the Applicant has the technical, managerial, and financial capacity to comply with the national primary or applicable state drinking water regulations over the long term;

(6) when any portion of the financial assistance is to be held in an escrow account, the Applicant must execute an escrow agreement, approved as to form and substance by the executive administrator;

(7) if applicable, a home rule municipality pursuant to Texas Local Government Code Chapter 104 must execute a Certification of Trust as defined in §375.1 of this title; and

(8) any additional information specified in writing by the executive administrator.

§375.92. Financial Assistance Secured by Promissory Notes and Deeds of Trust.

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

(c) Documents required for closing. The executive administrator shall ensure that the following documents and conditions are required for [have been submitted prior to] closing financial assistance secured by promissory notes and deeds of trust:

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

(3) a Deed of Trust and Security Agreement that must [shall] contain a first mortgage lien evidenced by a deed of trust on all the real and personal property of the water system provided; however, this is not needed if the financial assistance consists of 100 percent forgiveness;

(4) an owner’s title insurance policy for the benefit of the Board covering all the real property identified in the deed of trust provided; however, this is not needed if the financial assistance consists of 100 percent principal forgiveness;

(5) - (6) (No change.)

(7) a legal opinion from Applicant’s counsel that provides:

(A) - (D) (No change.)

(E) a statement addressing [relating to] any other issues deemed relevant by the executive administrator.

(8) - (9) (No change.)

(10) evidence that the Applicant has established [shall establish] a dedicated source of revenue for repayment of the financial assistance;

(11) - (14) (No change.)

(d) if [in the event that] financial assistance proceeds are to be deposited into an escrow account at the time of closing [the financial assistance, then] an escrow account separate from all other accounts and funds must be created, [shall be created that shall be separate from all other accounts and funds] as follows:

(1) the account must [shall] be maintained by an escrow agent as defined in §375.1 of this title (relating to Definitions);

(2) funds cannot [shall not] be released from the escrow account without prior written approval of the executive administrator, who shall issue written authorization for the release of funds;

(3) [upon request of the executive administrator] escrow account statements must [shall] be provided on a monthly basis to the executive administrator upon request;

(4) the investment of any financial assistance proceeds deposited into an approved escrow account must [shall] be handled in a manner that complies with the Public Funds Investment Act, Texas Government Code[s] Chapter 2256; and
(5) the escrow account must [shall] be adequately collateralized in a manner sufficient to protect the Board's interest in the project and that complies with the Public Funds Collateral Act, Texas Government Code[, Chapter 2257.]

(c) Construction account. A construction account must [shall] be created and must [shall be required to] be kept separate from all other accounts and funds of the Applicant.

(f) (No change.)

§375.94. Remaining Unused Funds.

(a) (No change.)

(b) If there are no enhancements authorized, the Applicant must [shall be required to] submit a final accounting and disposition of any unused funds as specified in §375.106 (relating to Final Accounting).

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000652

Todd Chenoweth

General Counsel

Texas Water Development Board

Earliest possible date of adoption: March 29, 2020

For further information, please call: (512) 463-7686

SUBCHAPTER H. CONSTRUCTION AND POST CONSTRUCTION REQUIREMENTS

31 TAC §§375.101, 375.109, 375.111

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

§375.101. Inspection During Construction.

(a) Applicant's inspection. The Applicant shall provide for the adequate qualified inspection of the project under the supervision of a registered engineer and shall require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans, specifications, and other engineering design or permit documents, approved alterations or changes, and in accordance with the requirements in the environmental finding applicable to the project, and using [to the] sound engineering principles and construction practices.

(b) Board's site visits [inspection]. The executive administrator may conduct site visits regarding [at his discretion, inspect] the construction and materials of any project at any time. The purpose of the site visits [inspection] is to determine whether the contractor is substantially complying with the approved engineering plans of the project and is constructing the project in accordance with the approved project schedule. The site visits do [inspection by the Board does] not subject the state to any civil liability.

(c) Scope of inspections. Inspections may include, but are not limited to:

(1) (No change.)

(2) review of documents related to the construction projects, including but not limited to:

(A) payroll, daily attendance, and any other records relating to person employed during the construction, and records relating to the Davis-Bacon [Davis Bacon] Act and related federal laws and regulations relating to prevailing wage rates;

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

(E) change orders and supporting documents; [and]

(F) compliance with EPA's American Iron and Steel requirements; and

(G) [E] review of any other documents to ensure compliance with the terms of the approved contract documents and the Board's rules.

(d) The executive administrator may document issues to ensure compliance with applicable laws, rules, and contract documents, and may recommend to the owner that certain corrective actions occur to ensure compliance with laws, rules, and approved plans and specifications.

(e) The Applicant must [shall] provide the executive administrator with a response to any documented [the] issues relating to compliance.

§375.109. Responsibilities of Applicant.

After the satisfactory completion of the project, the Applicant remains responsible for compliance with applicable laws and rules relating to the project and to the financial assistance documents required by the Board resolution or the bond ordinance or resolution, including but not limited to submission of an annual audit, implementation and enforcement of the approved water conservation plan [program] and other assurances made to the Board. The Board has a continuing interest in the State's investment and therefore, the Applicant will [shall] be subject to the continuing authority of the Board and the executive administrator through final payment of the financial assistance.

§375.111. Disallowance of Project Costs and Remedies for Noncompliance.

If the Applicant does not comply with applicable laws and rules relating to the project and to the financial assistance documents, the executive administrator may take any of the following actions:

(1) impose additional conditions to remedy the noncompliance;

(2) withhold releases from escrows or disbursements until the Applicant comes into compliance;

(3) refrain from closing on existing commitments;

(4) disallow all or part of the cost of a project expenditure that is not in compliance;

(5) allow a substitution of eligible cost activities for disallowed costs or require repayment of disallowed costs, at the discretion of the executive administrator; and

(6) take other remedial actions that may be legally available.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.
TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER G. CIGARETTE TAX

34 TAC §3.101

The Comptroller of Public Accounts proposes amendments to §3.101, concerning Cigarette Tax and Stamping Activities. The amendments implement Senate Bill 21 and House Bill 4614, 86th Legislature, 2019, effective September 1, 2019, that provide the basis for updates to the section by increasing the legal age for a person importing cigarettes in small quantities and modernizing relevant definitions and first sale language.

The comptroller adds new subsection (a) to include definitions found under Tax Code, §154.001 (Definitions), for terms used but not previously defined in this section. The comptroller adds new paragraphs (1) through (10) to define the terms "bonded agent," "cigarette," "distributor," "export warehouse," "first sale," "individual package of cigarettes," "manufacturer," "retailer," "stamp," and "wholesaler," using the meanings assigned by Tax Code, §154.001.

The comptroller reletters subsequent subsections accordingly.

The comptroller amends subsection (b)(1) to remove language that stated that cigarettes must be received in the state in order to constitute a first sale and relocates language regarding cigarette stamping requirements. Subsection (b)(2)(A) is amended for readability.

The comptroller adds new subsection (c) to address permitted distributors' tax liabilities.

The comptroller amends subsections (d) and (e) to make grammatical changes.

The comptroller amends subsection (i) to add the Texas Alcoholic Beverage Commission's (TABC) tax rate for a pack of cigarettes that is imported into this state and makes grammatical changes.

The comptroller reorganizes relettered subsection (l) to improve readability and change all references to the legal age from 18 to 21 for a person who imports cigarettes in small quantities. The comptroller amends the title of the subsection to better reflect the content of the subsection. In paragraph (1), the comptroller replaces existing language concerning importation of 200 or fewer cigarettes with the requirement that a person must be 21 years of age to import small quantities of cigarettes or meet one of the exceptions provided by SB 21. The comptroller replaces existing provisions related to TABC tax collection at ports of entry with language regarding importation of 200 or fewer cigarettes from another state or an Indian reservation under the jurisdiction of the U.S. government. In paragraph (3), the comptroller deletes the age requirement now found in paragraph (1) and adds that the TABC will collect at ports of entry the cigarette tax from each person who imports and personally transports more than 200 cigarettes into the state from another country. The comptroller amends paragraph (4) to include the exceptions to the age requirement found in SB 21 and to omit a now incorrect cross-reference.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amendment is in effect, the amendment: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy. This proposal amends a current rule.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, the proposed amendment would benefit the public by conforming the rule to current statutes. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. The proposed amendment would have no significant fiscal impact on the state government, units of local government, or individuals. There would be no anticipated significant economic costs to the public.

Comments on the proposal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78771-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the Texas Register.

This amendment is proposed under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture) and §111.0022 (Application to Other Laws Administered by Comptroller), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2 (State Taxation), and taxes, fees, or other charges which the comptroller administers under other law.

The amendments implement Tax Code, §§154.001 (Definitions), 154.022 (Tax Imposed on First Sale of Cigarettes), 154.0225 (Liability of Permittee distributors), 154.024 (Importation of Small Quantities), 154.101 (Permits), 154.1015 (Sales; Permit Holders and Nonpermit Holders) and Health & Safety Code §161.252 (Possession, purchase, consumption, or receipt of cigarettes, e-cigarettes, or tobacco products by minors prohibited).

§3.101. Cigarette Tax and Stamping Activities.

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

(1) Bonded agent—A person in this state who is a third-party agent of a manufacturer outside this state and who receives cigarettes in interstate commerce and stores the cigarettes for distribution or delivery to distributors under orders from the manufacturer.

(2) Cigarette—A roll for smoking:
(A) that is made of tobacco or tobacco mixed with another ingredient and wrapped or covered with a material other than tobacco; and

(B) that is not a cigar.

(3) Distributor--A person who:

(A) is authorized to purchase for the purpose of making a first sale in this state, cigarettes in unstamped packages from manufacturers who distribute cigarettes in this state and to stamp cigarette packages;

(B) ships, transports, imports into this state, acquires, or possesses cigarettes and makes a first sale of the cigarettes in this state;

(C) manufactures or produces cigarettes; or

(D) is an importer.

(4) Export warehouse--A person in this state who receives cigarettes in unstamped packages from manufacturers and stores the cigarettes for the purpose of making sales to authorized persons for resale, use, or consumption outside the United States.

(5) First sale--Except as otherwise provided in this section:

(A) the first transfer of possession in connection with a purchase, sale, or any exchange for value of cigarettes in or into this state, which:

(i) includes the sale of cigarettes by a distributor in or outside this state to a distributor, wholesaler, or retailer in this state; and includes the sale of cigarettes by a manufacturer in this state who transfers the cigarettes in this state; and

(ii) does not include the sale of cigarettes by a manufacturer outside this state to a distributor in this state; and does not include the transfer of cigarettes from a manufacturer outside this state to a bonded agent in this state;

(B) the first use or consumption of cigarettes in this state; or

(C) the loss of cigarettes in this state whether through negligence, theft, or other unaccountable loss.

(6) Individual package of cigarettes--A package that contains at least 20 cigarettes.

(7) Manufacturer--A person who manufactures, fabricates, or assembles cigarettes, or causes or arranges for the manufacture, fabrication, or assembly of cigarettes, for sale or distribution.

(8) Retailer--A person who engages in the business of selling cigarettes to consumers and includes the owner of a cigarette vending machine.

(9) Stamp--Includes only a stamp that:

(A) is printed, manufactured, or made by authority of the comptroller;

(B) shows payment of the tax imposed by this chapter;

(C) is consecutively numbered and uniquely identifiable as a Texas tax stamp; and

(D) is not damaged beyond recognition as a valid Texas tax stamp.

(10) Wholesaler--A person, including a manufacturer's representative, who sells or distributes cigarettes in this state for resale but who is not a distributor.

(b) [40] Imposition of tax.

(1) A tax is imposed on a person who uses or disposes of cigarettes in this state. The tax rate is $70.50 per thousand on cigarettes weighing three pounds or less per thousand plus $2.10 per thousand on cigarettes weighing more than three pounds per thousand. The tax becomes due and payable when a person [in this state] receives cigarettes to make a first sale. A person who pays the tax shall securely affix a stamp to each individual package of cigarettes to show payment of the tax. The ultimate consumer or user of cigarettes in this state bears the impact of the tax; and, if another person pays the tax, the amount of the tax is added to the price to the ultimate consumer or user. [A person who pays the tax shall securely affix a stamp to each individual package of cigarettes to show payment of the tax.] Absence of a stamp on an individual package of cigarettes is notice that the tax has not been paid.

(2) Cigarettes are exempt from the imposition of tax and the stamping requirements described in this section if the cigarettes are:

(A) contained in a package labeled with "Experimental Use Only," "Reference Cigarettes," or other similar wording indicating that the manufacturer intends for the product to be used exclusively for experimental purposes in compliance with Experimental Purposes, 27 C.F.R. §40.232 [Code of Federal Regulations Section 40.232] [2002 Experimental Purposes];

(B) sold directly by a manufacturer to a research facility in this state, including:

(i) a laboratory, hospital, medical center, college, or university; or

(ii) a facility designated as a Tobacco Center of Regulatory Science by the National Institutes of Health;

(C) used by the research facility exclusively for experimental purposes; and

(D) not resold by the research facility.

(c) Liability of a permitted distributor. A permitted distributor who makes a first sale to a permitted distributor in this state is liable for and shall pay the tax.

(d) [40] Cigarette tax stamp meters. Cigarette distributors cannot [are not authorized to] use stamp metering machines as evidence of payment of the cigarette tax.

(e) [40] Cigarette tax stamp credits.

(1) Allowance of credit for cigarette tax stamps. The comptroller may authorize credit for [40]:

(A) stamps that are affixed to cigarette packages that have been damaged or are unfit for sale and have been returned to the manufacturer in accordance with Tax Code, §154.306 (Exchange of Stamps);

(B) stamps that have been destroyed by vandalism, fire, flood, or other natural disasters. The distributor must present evidence that such stamps were purchased by the distributor and were subsequently destroyed by such natural disaster;

(C) stamps that have been erroneously affixed to cigarette carton flaps rather than the cigarette packages. The distributor must submit the stamped carton flaps to the comptroller in order to obtain credit. The comptroller will issue an authorization for refund of the tax with disallowance of the stamping discount;

(D) stamps used to restamp cigarette packages provided that the original tax stamps were of an illegible quality and the restamp-
ing is required by the comptroller's office. There is no stamping allowance for restamped cigarettes; or

(E) stamps that have been torn or otherwise damaged by a stamping machine. The distributor must submit the damaged stamps to the comptroller in order to obtain credit. The comptroller will notify the distributor of the amount of stamp credit authorized.

(2) Disallowance of credit for cigarette tax stamps. The comptroller will not authorize credit for stamps lost due to theft, negligence, or any unaccountable loss or for stamps that have been affixed two or more times to the same package of cigarettes resulting in double stamping.

(f) [44] Cigarette tax stamp payments. All persons who purchase cigarette tax stamps from the comptroller shall transfer payments by electronic funds transfer.

(g) [42] Evidence of return of cigarettes unfit for use. A distributor who requests replacement of cigarette tax stamps affixed to cigarettes that have been returned to the manufacturer must submit the following documentation to the comptroller:

(1) a credit memorandum from the manufacturer to whom the cigarettes were returned, verifying the number of cigarettes returned for credit;

(2) an affidavit from the manufacturer confirming that the tax stamps affixed to the cigarettes listed in the memorandum have been destroyed and listing the number, denomination, and the value of such stamps; and

(3) an affidavit from the distributor stating that the distributor returned the number of cigarettes listed in the manufacturer's credit memorandum and that the number, denomination, and the value of state cigarette tax stamps shown in the manufacturer's affidavit were affixed to the cigarettes returned.

(h) [46] Delivery of unstamped cigarettes to instrumentalities of the United States government.

(1) Distributors may use their own vehicles to deliver previously invoiced quantities of unstamped cigarettes to instrumentalities of the United States government. These tax-free cigarettes must be packaged in a manner that prevents the unstamped cigarettes from commingling with any other cigarettes in the distributor's vehicle.

(2) Each sale of unstamped cigarettes by a distributor to an instrumentality of the United States government shall be supported by a separate sales invoice and a properly completed federal exemption certificate. Sales invoices must be numbered and dated and must show the name of the seller, name of the purchaser, and the destination.

(i) [46] Generation and affixing of cigarette tax stamps by the Texas Alcoholic Beverage Commission (TABC).

(1) The comptroller, by interagency cooperation contract, may authorize the TABC to generate a cigarette tax stamp using the TABC's Port of Entry Tax Collection System (POETCS) and to affix the cigarette tax stamp to cigarette packages for the purpose of collecting the cigarette tax at ports of entry into the state.

(2) The TABC imposes a rate of $1.50 per pack for a conventional package of 20 cigarettes.

(3) [42] Payment for the cigarette tax stamps sold will be made by that agency according to the terms and conditions stipulated in the interagency cooperation contract between the comptroller and the TABC.

(j) [44] Affixing of cigarette tax stamps by TABC agents. Cigarette tax stamps affixed by agents of the TABC must be affixed to the cellophane wrapper on the bottom of each individual package of cigarettes.

(k) [44] Disposition of cigarettes seized by TABC agents.

(1) TABC agents shall seize all cigarettes for which the holder refuses to pay the tax imposed by Tax Code, §154.021 (Imposition and Rate of Tax).

(2) Cigarettes seized shall be released to agents of the comptroller for immediate disposition.

(l) [44] Importation of cigarettes for personal use [200 or fewer cigarettes].

(1) Only a person 21 years of age or older, a person who is at least 18 and in the United States military or State military forces, or a person who has been born on or before August 31, 2001, may import the cigarettes into the state by or on behalf of a person under 21 years of age. [A person 18 years of age or older, or a person younger than 18 years when the individual possesses the cigarettes in the presence of an adult parent, a guardian, or a spouse of the individual, who imports and personally transports 200 or fewer cigarettes into this state from another state, for personal use and not for sale is not required to pay the tax imposed by Tax Code, §154.021.]

(2) A person who imports and personally transports 200 or fewer cigarettes into this state from another state or an Indian reservation under the jurisdiction of the U.S. government, for personal use and not for sale, is not required to pay the tax imposed by Tax Code, §154.021. [TABC agents shall collect the tax imposed by Tax Code, §154.021, at ports of entry from each person who imports and personally transports more than 200 cigarettes into this state from another state and who is at least 18 years of age or who is younger than 18 and possesses the cigarettes in the presence of an adult parent, a guardian, or a spouse of the individual.]

(3) TABC employees shall collect the tax imposed by Tax Code, §154.021, at ports of entry from each person who imports and personally transports more than 200 cigarettes into this state from another state, except in the presence of an adult parent, a guardian, or a spouse of the individual.

(4) TABC employees shall seize at ports of entry all cigarettes in the possession of a person younger than 21 [48] years of age, unless the person is at least 18 and in the United States military or State military forces, or was born on or before August 31, 2001 [except in situations where paragraph (3) of this subsection applies].

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

Filed with the Office of the Secretary of State on February 10, 2020.

TRD-202000554
William Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts

Earliest possible date of adoption: March 29, 2020

For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PROPOSED RULES  February 28, 2020  45 TexReg 1359
PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 10. IGNITION INTERLOCK DEVICE

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §§10.4 - 10.6

The Texas Department of Public Safety (the department) proposes amendments to §10.4 and new §10.5 and §10.6, concerning General Provisions. These rule changes are necessary to implement Senate Bill 616, 86th Legislative Session. Senate Bill 616 authorizes the department to obtain fingerprints and to access and use criminal history record information that relates to those who hold or apply for authorization to act as vendors of ignition interlock devices. This authority requires the adoption of rules relating to disqualifying criminal offenses and the procedures for appeal of licensing actions based on criminal history determinations. Senate Bill 616 also requires adoption of procedures for the informal resolution of complaints against ignition interlock vendors.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the sections as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be enhanced public safety through criminal history background checks, and greater efficiency in the administrative oversight of ignition interlock vendors through the informal resolution of complaints.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions or eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rules are in effect, the proposed rules should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made 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 Transportation Code, §521.2476 which authorizes the department to adopt rules to administer the program; and Texas Government Code, Chapter 411, Subchapter Q and Subchapter R, which authorize the Public Safety Commission to adopt rules governing various regulatory programs, including the Ignition Interlock Device program.

Texas Government Code, §411.004(3); Texas Transportation Code, §521.2476; and Texas Government Code, Chapter 411, Subchapter Q and Subchapter R, are affected by this proposal.

§10.4. Informal Hearing: Settlement Conference [Hearings].

(a) A person who receives notice of the department's intention to deny an application for device approval or for vendor authorization, to suspend or revoke a vendor authorization, or to impose an administrative fine, may appeal the decision by submitting a request to appeal by mail, facsimile, or electronic mail, to the department in the manner provided on the department's Ignition Interlock Device Program website, within thirty (30) calendar days after receipt of notice of the department's proposed action. If a timely written request to appeal is not submitted, the right to an informal hearing or settlement conference, as applicable, and to a hearing before the State Office of Administrative Hearings, is waived, and the proposed action becomes final [A request for a hearing must be submitted in writing (by mail, facsimile, or electronic mail) within 30 calendar days of the receipt of the Notice of Denial or Revocation].

(b) If the action is based on the person's criminal history, an informal, telephonic hearing will be scheduled. Following the hearing, the department will either dismiss the proceedings and withdraw the proposed action, or issue a written statement of findings to the respondent either upholding or modifying the original proposed action. [Hearings will be conducted before the State Office of Administrative Hearings, pursuant to Texas Government Code, Chapter 2001].

(c) If the proposed action is based on an administrative violation, or concerns the denial of an application for device approval, a settlement conference will be scheduled. The settlement conference may be conducted in person or by telephone, by agreement of the parties. Following the settlement conference, the parties will execute an agreed order, or, if no agreement is reached, the department will issue a written determination either upholding or modifying the originally proposed action.

(d) The department's findings resulting from the informal hearing, or its determination following a settlement conference, may be appealed as provided in §10.5 of this title (relating to Hearing Before the State Office of Administrative Hearings). If a written request is not submitted within thirty (30) calendar days of the date notice was received, the findings or determination shall become final.
(e) Requests for continuance must be submitted in writing at least three (3) business days prior to the scheduled hearing or conference. Requests must be based on good cause. Multiple requests may be presumed to lack good cause and may be denied on that basis.

§10.5. Hearing Before the State Office of Administrative Hearings.

(a) The department's findings following an informal hearing, or its determination following a settlement conference, may be appealed to the State Office of Administrative Hearings by submitting a request by mail, facsimile, or electronic mail, to the department in the manner provided on the department's Ignition Interlock Device website, within thirty (30) calendar days after receipt of the findings or determination.

(b) Following adequate notice of the hearing, failure of the respondent to appear at the time of hearing shall entitle the department to request from the administrative law judge an order dismissing the case from the docket and to informally dispose of the case on a default basis.

§10.6. Disqualifying Offenses.

(a) Pursuant to Texas Occupations Code, §53.021(a)(1), the department may deny an application for authorization or revoke an authorization if the applicant or vendor has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of an ignition interlock vendor, as provided in this section.

(b) The department has determined the types of offenses detailed in subsection (b)(1)-(4) of this section directly relate to the duties and responsibilities of ignition interlock device vendors. A conviction for an offense within one (1) or more of the categories in this subsection may result in the denial of an application (initial or renewal) for a vendor authorization or the revocation of an authorization. The Texas Penal Code references provided in this subsection are for illustrative purposes and are not intended to exclude similar offenses in other state or federal codes. The types of offenses directly related to the duties and responsibilities of vendors include, but are not limited to:

1. Theft (any offense within Texas Penal Code, Chapter 31);
2. Fraud (any offense within Texas Penal Code, Chapter 32);
3. Bribery and Corrupt Influence (any offense within Texas Penal Code, Chapter 36); and
4. Perjury and Other Falsification (any offense within Texas Penal Code, Chapter 37).

(c) A felony conviction for one of the offenses listed in subsection (b) of this section is disqualifying for ten (10) years from the date of the conviction.

(d) A misdemeanor conviction for one of the offenses listed in subsection (b) of this section or a substantially similar offense is disqualifying for five (5) years from the date of conviction.

(e) For the purposes of this chapter, all references to conviction are to those for which the judgment has become final.

(f) A person who is otherwise disqualified pursuant to the criteria in this section may submit documentation as detailed in paragraphs (1) - (8) of this subsection as evidence of his or her fitness to perform the duties and discharge the responsibilities of an ignition interlock vendor:

1. the extent and nature of the person's past criminal activity;
2. the age of the person when the crime was committed;
3. the amount of time that has elapsed since the person's last criminal activity;
4. the conduct and work activity of the person before and after the criminal activity;
5. evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release;
6. letters of recommendation;
7. evidence the applicant has:
   A. maintained a record of steady employment;
   B. supported the applicant's dependents;
   C. maintained a record of good conduct; and
   D. paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which the applicant has been convicted; and
8. any other evidence relevant to the person's fitness for the certification sought.

(g) The failure to provide the required documentation in a timely manner may result in the proposed action being taken against the application or license.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000609
D. Phillip Adkins
General Counsel
Texas Department of Public Safety

Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

SUBCHAPTER B. VENDOR AUTHORIZATION

37 TAC §§10.11, 10.13, 10.14, 10.17

The Texas Department of Public Safety (the department) proposes amendments to §10.11, §10.13, and §10.14 and new §10.17, concerning Vendor Authorization. These rule changes and new rule are necessary to implement Senate Bill 616, 86th Legislative Session. Senate Bill 616 authorizes the department to obtain fingerprints and to access and use criminal history record information that relates to those who hold or apply for authorization to act as vendors of ignition interlock devices. This authority requires the adoption of rules relating to disqualifying criminal offenses and the procedures for appeal of licensing actions based on criminal history determinations. Senate Bill 616 also requires adoption of procedures for the informal resolution of complaints against ignition interlock vendors. Senate Bill 616 requires changes to the date of expiration, the adoption of procedures for the informal resolution of complaints against device vendors, and the development of a penalty schedule for violations of a law or rule relating to the vendor authorization.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect
there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenon has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the sections as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenon has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be enhanced public safety through criminal history background checks, and greater efficiency in the administrative oversight of ignition interlock vendors through the informal resolution of complaints.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rules are in effect, the proposed rules should not impact positively or negatively the state’s economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal and new rule are made 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 Transportation Code, §521.2476 which authorizes the department to adopt rules to administer the program; and Texas Government Code, Chapter 411, Subchapter Q and Subchapter R, which authorize the Public Safety Commission to adopt rules governing various regulatory programs, including the Ignition Interlock Device program.

(a) The department may reprimand, suspend, or revoke an authorization if the vendor:

1. Fails to submit the required reports to the department pursuant to §10.12 of this title (relating to Vendor Standards);

2. Willfully or knowingly submits false, inaccurate, or incomplete information to the department;

3. Violates any provision of §10.12 of this title;

4. Fails to pay the annual inspection fee as provided in §10.15 (relating to Inspections and Fees);

5. Violates any law of this state relating to the conduct of business in this state; [⊥]

6. Is determined to be disqualified, or if a vendor's partner, shareholder, director or officer as described in §10.11 of this title (relating to Application; Renewal) is disqualified, under §10.6 of this title (relating to Disqualifying Offenses); or

7. [⊥] Otherwise violates the Act or this chapter.

(b) Prior to taking action against an authorization for a violation of subsection (a) of this section, the department will provide notice pursuant to §10.3 of this title (relating to Notice).

(c) The department's determination to revoke an authorization for any administrative, noncriminal history based violation may be based on the following considerations described in paragraphs (1) - (6) of this subsection:

1. The seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

2. The economic harm to property or the public caused by the violation;

3. The effect of the violation on the efficient administration of the program;

4. The history of previous violations, including any warnings or other attempts to gain compliance;

5. Efforts to correct the violation; and

6. Any other matter that justice may require.

(d) The revocation will become final on the thirtieth calendar day following the vendor's receipt of the notice of revocation, unless the vendor requests a hearing as outlined in §10.4 of this title (relating to Informal Hearings; Settlement Conference [Hearings]).

(e) The revocation proceeding may be dismissed, or the revocation may be probated, upon a showing of compliance.

§10.17. Administrative Penalties.

(a) In addition to or in lieu of discipline imposed pursuant to §10.14 of this title (relating to Reprimand, Suspension, and Revocation of Vendor Authorization) the department may impose an administrative penalty on a person who violates this chapter or the Act.

(b) The graphic in this subsection reflects the department's penalty schedule applicable to administrative penalties imposed under this section. For any violation not expressly addressed in the penalty schedule, the department may impose a penalty not to exceed $500.00 for the first (1st) violation. For the second (2nd) violation within the preceding one (1) year period, the penalty may not exceed $1,000.00.

Figure: 37 TAC §10.17(b)

(c) Upon receipt of a notice of administrative penalty under this section, a person may request a hearing before the department pursuant to §10.4 of this title (relating to Informal Hearing; Settlement Conference). The failure to timely appeal the proposed action will result in the issuance of a final order.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000610
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

SUBCHAPTER D. IGNITION INTERLOCK DEVICE APPROVAL

37 TAC §10.32

The Texas Department of Public Safety (the department) proposes amendments to §10.32, concerning Denial of Request for Approval; Revocation of Device Approval. This rule change is a non-substantive change to the title of a cross-referenced rule. The latter rule's title is being changed as part of the department's implementation of Senate Bill 616, 86th Legislative Session.

Suzy Whittenon, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenon has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenon has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be enhanced public safety through criminal history background checks, and greater efficiency in the administrative oversight of ignition interlock vendors through the informal resolution of complaints.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state’s economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made 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 Transportation Code, §521.2476 which authorizes the department to adopt rules to administer the program; and Texas Government Code, Chapter 411, Subchapter Q and Subchapter R, which authorize the Public Safety Commission to adopt rules governing various regulatory programs, including the Ignition Interlock Device program.

Texas Government Code, §411.004(3); Texas Transportation Code, §521.2476; and Texas Government Code, Chapter 411, Subchapter Q and Subchapter R, are affected by this proposal.

§10.32. Denial of Request for Approval; Revocation of Device Approval.

(a) A request for device approval may be denied if the device fails to meet the requirements for approval.

(b) Prior approval of a device may be revoked if changes in National Highway Traffic Safety Administration model specifications are such that the device no longer meets the requirements for approval.

(c) Denial of a request for device model approval, or revocation of a prior approval, may be appealed as provided in §10.4 of this title (relating to Informal Hearing; Settlement Conference [Hearings]).

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

 Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000612

D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

CHAPTER 23. VEHICLE INSPECTION
SUBCHAPTER A. VEHICLE INSPECTION STATION AND VEHICLE INSPECTOR CERTIFICATION

37 TAC §§23.1, 23.3, 23.5, 23.6

The Texas Department of Public Safety (the department) proposes amendments to §§23.1, 23.3, 23.5, and 23.6, concerning Vehicle Inspection and Vehicle Inspector Certification. These rule changes are in part necessary to implement Senate Bill 616, 86th Legislative Session, which amends Texas Transportation Code, Chapter 548. The proposed changes to §23.5, concerning Vehicle Inspection Station and Vehicle Inspector Disqualifying Criminal Offenses, implement House Bill 1342, 86th Legislative Session, which amended Occupations Code, §§53.021, 53.022, and 53.023. The proposed changes to §23.6, concerning Training, clarify the department's authority to provide online training for vehicle inspectors.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the sections as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation, and greater public safety as a result of enhanced background checks of vehicle inspectors and inspection station owners.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program;
will not require an increase or decrease in future legislative appropriations to the agency; require the creation of new employee positions or eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should positively impact the state’s economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made 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 Transportation Code, §548.002, which authorizes the Department of Public Safety to adopt rules to enforce Chapter 548; Texas Transportation Code, §548.410, which authorizes the Department of Public Safety to adopt rules establishing the expiration dates of inspector and station certificates; and Texas Transportation Code, §§548.506 and 548.507, which authorizes the Public Safety Commission to adopt rules establishing fees for certification as a vehicle inspector, and as an inspection station, respectively.

Texas Government Code, §411.004(3), and Texas Transportation Code, §§548.002, 548.410, 548.506, and 548.507 are affected by this proposal.

§23.1. New or Renewal Vehicle Inspection Station Applications.

(a) Applicants for new or renewal vehicle inspection station certification must apply in a manner prescribed by the department.

(b) By submitting a new or renewal vehicle inspection station application form, the applicant agrees to allow the department to conduct background checks as authorized by law.

(c) A new or renewal vehicle inspection station application must include, but is not limited to, the items listed in paragraphs (1) - (3) of this subsection:

1. Criminal history disclosure of all convictions, if the applicant is an entity other than an individual, the executive officer or other individual specifically authorized by the entity to sign the application and deferred adjudications for each owner or designee engaged in the regular course of business as a vehicle inspection station.

2. Proof of ownership and current status as required by the department. Such proof includes, but is not limited to, a current Certificate of Existence or Certificate of Authority from the Texas Secretary of State and a Certificate of Good Standing from the Texas Comptroller of Public Accounts; and

3. Payment of the §All fees required pursuant to Texas Transportation Code, Chapter 548 (the Act). The vehicle inspection station nonrefundable new and renewal application fee of $100 is nonrefundable.

(d) If an incomplete new or renewal vehicle inspection station application is received, notice will be sent to the applicant stating that the application is incomplete and specifying the information required for completion.

(e) The new or renewal vehicle inspection station applicant has 60 calendar days after receipt of notice to provide the required information and submit a complete application. If an applicant fails to furnish the information [documentation], the application will be considered withdrawn and a new application must be submitted.

(f) A new or renewal vehicle inspection station application is complete when:

1. It contains all items required by the department.

2. It conforms to the Act, this chapter and the Texas vehicle inspection program’s instructions.

3. All fees are [have been] paid pursuant to the Act and this chapter.

4. All requests for additional information are [have been] satisfied.

(g) The vehicle inspection station certificate will expire on August 31 of the odd numbered year following the date of issuance and is renewable every two years thereafter.

(h) A renewal of the vehicle inspection station certification issued by the department is conditional upon the receipt of criminal history record information.

(i) For a new or renewal vehicle inspection station application to be approved, the owner must:

1. Be at least 18 years of age;

2. Provide proof of identification as required by the department;

3. Not be currently suspended or revoked in the Texas vehicle inspection program;

4. Complete department provided training;

5. Have a facility that meets the standards for the appropriate class set forth in this chapter;

6. Have equipment that meets the standards set forth in §23.13 of this title (relating to Equipment Requirements for All Classes of Vehicle Inspection Stations); and

7. Meet all other eligibility criteria under the Act or this chapter.

(j) Certificate holders of vehicle inspection stations must submit a new application, including applicable fees, [in order] to change a location, or make a change of ownership.

(k) Applicants for new or renewal vehicle inspection station certification must apply for one of the classes defined in paragraphs (1) - (3) of this subsection:

1. Public--A station open to the public performing inspections on vehicles presented by the public. Stations open to the public will not be issued a fleet vehicle inspection station license unless such stations are currently certified as a public vehicle inspection stations;

2. Fleet--A station not providing vehicle inspection services to the public; or

3. Government--A station operated by a political subdivision, or agency of this state.

§23.3. New or Renewal Vehicle Inspector Applications.

(a) Applicants for a new or renewal vehicle inspector certificate must apply in a manner prescribed by the department.

(b) By submitting a new or renewal vehicle inspector application form, the applicant agrees to allow the department to conduct background checks as authorized by law.
(c) A new or renewal vehicle inspector application must include, but is not limited to, the items listed in paragraphs (1) and (2) of this subsection:

1. Criminal history disclosure of all convictions and deferred adjudications of the vehicle inspector applicant; and
2. Payment of the all fees required pursuant to Texas Transportation Code, Chapter 548 (the Act). The new or renewal vehicle inspector nonrefundable application fee of $25 is nonrefundable.

(d) If an incomplete new or renewal vehicle inspector application is received, notice will be sent to the applicant stating that the application is incomplete and specifying the information required for completion.

(e) The new or renewal vehicle inspector applicant has 60 calendar days after receipt of notice to provide the required information and submit a complete application. If an applicant fails to furnish the information documentation, the application will be considered withdrawn.

(f) A new or renewal vehicle inspector application is complete when:

1. It contains all items required by the department.
2. It conforms to the Act, this chapter, and the Texas vehicle inspection program's instructions.
3. All fees are paid pursuant to the Act and this chapter.
4. All requests for additional information are satisfied.

(g) The new or renewal vehicle inspector certificate will expire on August 31 of the even numbered year following the date of issuance and is renewable every two years thereafter.

(h) A renewal of the vehicle inspector certification issued by the department is conditional upon the receipt of criminal history record information.

(i) For a new or renewal vehicle inspector application to be approved the applicant must:

1. Be at least 18 years of age;
2. Hold a valid driver license to operate a motor vehicle in Texas;
3. Not be currently suspended or revoked in the Texas vehicle inspection program;
4. Complete department provided training as outlined in this chapter;
5. Pass with a grade of not less than 80, an examination on the Act, this chapter, and regulations of the department pertinent to the Texas vehicle inspection program;
6. Successfully demonstrate ability to correctly operate the testing devices; and
7. Meet all other eligibility criteria under the Act or this chapter.

§23.5 Vehicle Inspection Station and Vehicle Inspector Disqualifying Criminal Offenses.

(a) Vehicle inspection stations and vehicle inspectors are entrusted with ensuring the safety and fitness of vehicles traveling on the roads of Texas. Vehicle inspection stations and vehicle inspectors have constant access to and are responsible for the lawful disposition of government documents. For these reasons, the department has determined that the offenses contained within this section relate directly to the duties and responsibilities of vehicle inspection stations and vehicle inspectors certified under Texas Transportation Code, Chapter 548. The types of offenses listed in this section are general categories that include all specific offenses within the corresponding chapter of the Texas Penal Code and any such offenses regardless of the code in which they appear.

(b) The offenses listed in paragraphs (1) - (9) of this subsection are intended to provide guidance only, and are not exhaustive of either the types of offenses that may relate to vehicle inspections or the operation of a vehicle inspection station or those that are independently disqualifying under Texas Occupations Code, §53.021(a)(2) - (4). The disqualifying offenses also include those crimes under the laws of another state or the United States, if the offense contains elements that are substantially similar to the elements of a disqualifying offense under the laws of this state. Such offenses also include the "aggravated" or otherwise heightened versions of the offenses listed in paragraphs (1) - (9) of this subsection. In addition, after due consideration of the circumstances of the criminal act and its relationship to the position of trust involved in vehicle inspections or the operation of a vehicle inspection station, the department may find that a conviction not described in this section also renders a person unfit to hold a certificate as a vehicle inspector or vehicle inspection station owner. In particular, an offense that is committed in one's capacity as a vehicle inspection station owner or vehicle inspector, or an offense that is facilitated by licensure as an owner or inspector, will be considered related to the occupation and will render the person unfit to hold the certification.

1. Arson, Criminal Mischief, and Other Property Damage or Destruction (Texas Penal Code, Chapter 28).
2. Robbery (Texas Penal Code, Chapter 29).
4. Theft (Texas Penal Code, Chapter 31).
5. Fraud (Texas Penal Code, Chapter 32).
7. Perjury and Other Falsification (Texas Penal Code, Chapter 37).

(c) A felony conviction for any such offense is disqualifying for ten years from the date of conviction, unless the offense was committed in one's capacity as a vehicle inspection station owner or vehicle inspector, or was facilitated by licensure as an owner or inspector, in which case it is permanently disqualifying. Conviction for a sexually violent offense as defined by Texas Code of Criminal Procedure, Article 62.001, or an offense listed in Texas Code of Criminal Procedure, Article 42.12 §3g or Article 42A.054, is permanently disqualifying.

(d) A felony conviction for an offense not listed or described in this section that does not relate to the occupation is disqualifying for five years from the date of commission, pursuant to Texas Occupations Code, §53.021(a)(2).

(e) A Class A misdemeanor conviction for an offense listed in this section and any other offense determined by the department to directly relate to the duties and responsibilities of vehicle in-
inspection stations or vehicle inspectors, including any unlisted offense committed in one's capacity as a vehicle inspection station owner or vehicle inspector or that was facilitated by licensure as an owner or inspector, is disqualifying for five years from the date of conviction.

(e) [47] A Class B misdemeanor conviction for an offense listed in this section and any other offense determined by the department to directly relate to the duties and responsibilities of vehicle inspection stations or vehicle inspectors, including any unlisted offense committed in one's capacity as a vehicle inspection station owner or vehicle inspector or that was facilitated by licensure as an owner or inspector, is disqualifying for two years from the date of conviction.

[48] For purposes of this section, a person is convicted of an offense when an adjudication of guilt or an order of deferred adjudication for the offense is entered against the person by a court of competent jurisdiction.

(f) [49] A person who is otherwise disqualified pursuant to the criteria in this section may submit documentation as detailed in paragraphs (1) - (8) of this subsection as evidence of his or her fitness to perform the duties and discharge the responsibilities of a vehicle inspection station certificate holder or vehicle inspector:

1. the extent and nature of the person's past criminal activity;
2. the age of the person when the crime was committed;
3. the amount of time that has elapsed since the person's last criminal activity;
4. the conduct and work activity of the person before and after the criminal activity;
5. evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release;
6. letters of recommendation; [from]
   
   (A) prosecutors, law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;
   
   (B) the sheriff or chief of police in the community where the person resides; or
   
   (C) any other person in contact with the convicted person;
7. evidence the applicant has:
   
   (A) maintained a record of steady employment;
   
   (B) supported the applicant's dependents;
   
   (C) maintained a record of good conduct; and
   
   (D) paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which the applicant has been convicted; and
8. any other evidence relevant to the person's fitness for the certification sought.

(g) [44] The failure to provide the required documentation in a timely manner may result in the proposed action being taken against the application or license.

§23.6. Training.

(a) When attending a department [the department's] training course, the applicant must:

1. provide [Provide] a department approved government issued photo identification;[7]
2. not [Not] be under the influence of drugs or alcohol[;]
3. cooperate [Cooperate] with the classroom rules as provided by department personnel[;]
4. maintain [Maintain] good order and discipline during the training course; and[;]
5. successfully [Successfully] pass the written examination.

(b) Conduct which is disruptive or unsafe shall be grounds for immediate ejection from the training course and may result in the termination of the application process.

(c) The applicant for a vehicle inspection station certification or vehicle inspector certification will be given three (3) opportunities [an opportunity] to pass the written exam [up to three times]. Failure to pass the exam within 30 days of the date of training will terminate the application process.

(d) Once a completed application for a renewal of a [an] vehicle inspection station or vehicle inspector certification is received by the department, the applicant may be required to receive training and take a test prior to recertification.

(e) Each certified vehicle inspector must qualify, by training and examination provided by the department, for one or more of the endorsements listed in paragraphs (1) - (3) of this subsection which indicate the type of vehicle inspection reports the inspector is certified to issue and the types of vehicle inspections the inspector is qualified to perform.

1. S. May inspect any vehicle requiring a safety only vehicle inspection report, i.e., one-year, two-year, trailer, and motorcycle.
2. C. May inspect any vehicle requiring a commercial inspection report, i.e., commercial motor vehicle and commercial trailer.
3. E. May inspect any vehicle requiring an emissions test report, i.e., one-year safety/emissions and one-year emissions only (unique emissions test only inspection report).

(f) The department representative may, if the vehicle inspector's [inspector] performance warrants, require the [certified] vehicle inspector to take and pass all or a portion of the written [or demonstration] test [at any time]; or [may] require attendance at a vehicle inspection training program. Failure to pass a required test, or refusal to comply with the department representative's request under this section, may result in suspension of the vehicle inspector's certificate. The suspension will remain in effect until the inspector passes the required test or complies with the department representative's request, whichever is applicable.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000613
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

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SUBCHAPTER B. GENERAL VEHICLE INSPECTION STATION REQUIREMENTS

37 TAC §§23.12 - 23.14

The Texas Department of Public Safety (the department) proposes amendments to §§23.12 - 23.14, concerning General Vehicle Inspection Station Requirements. The proposed amendment to §23.12, concerning Standards of Conduct, implements Senate Bill 711, 86th Legislative Session, which authorizes the Department of Public Safety to include vehicle safety recall information on the Vehicle Inspection Report. The proposal requires the vehicle inspector to advise the vehicle owner or operator of the recall and any available details. The proposed amendment to §23.13, concerning Equipment Requirements for All Classes of Vehicle Inspection Stations, removes an unnecessary equipment requirement, and the proposed amendment to §23.14, concerning Vehicle Inspection Station Signage, clarifies that the requirement to post the station’s hours of operation refers only to the hours vehicle inspections are offered.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the sections as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation, and greater transparency regarding vehicle inspection station hours of operation.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does expand an existing regulation. It does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rules are in effect, the proposed rules should not impact positively or negatively the state’s economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made 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, §548.002, which authorizes the Department of Public Safety to adopt rules to enforce Chapter 548.

Texas Government Code, §411.004(3), and Texas Transportation Code, §548.002, are affected by this proposal.

§23.12 Standards of Conduct.

(a) All vehicle inspection stations must record the inspection of all vehicles, whether the vehicle passed, failed, or was repaired, into the appropriate state vehicle inspection database using a department provided device at the time of that inspection.

(b) The DPS Training and Operations Manual for official vehicle inspection stations and certified vehicle inspectors must be the instruction and training guide for the operation of all vehicle inspection stations and certified vehicle inspectors. It will serve as procedure for all vehicle inspection station operations and inspections performed.

(c) Fleet and government vehicle inspection stations must not inspect vehicles owned by officers, employees, or the general public.

(d) A vehicle inspection station must have a certified and properly endorsed vehicle inspector to perform inspections in a prompt manner during posted business hours.

(e) No vehicle inspection station shall refuse to inspect a vehicle for which it is endorsed that is presented for inspection during the posted business hours.

(f) A certified vehicle inspector must conduct a complete and thorough inspection of every vehicle presented for an official inspection in accordance with this chapter and Texas Transportation Code, Chapter 548 (the Act), as authorized by the vehicle inspector's certification and by the vehicle inspection station's endorsement.

(g) A certified vehicle inspector must not use, nor be under the influence of, alcohol or drugs while on duty. Prescription drugs may be used when prescribed by a licensed physician, provided the inspector is not impaired while on duty.

(h) A certified vehicle inspector must inspect a vehicle presented for inspection within a reasonable time.

(i) A certified vehicle inspector must notify the department representative supervising the vehicle inspection station immediately if his driver license is suspended or revoked.

(j) A certified vehicle inspector must conduct each inspection in the approved inspection area of the vehicle inspection station location designated on the certificate of appointment. The road test may be conducted outside this area.

(k) The certified vehicle inspector must consult the vehicle owner or operator prior to making a repair or adjustment.

(l) Inspections may be performed by more than one certified vehicle inspector, but the inspector of record is responsible for ensuring that the inspection is completed in accordance with the Act and this chapter.
The certified vehicle inspector must not require a vehicle owner whose vehicle has been rejected to have repairs made at a specific garage.

The certified vehicle inspector must maintain a clean and orderly appearance and be courteous in his contact with the public.

Any services offered in conjunction with the vehicle inspection must be separately described and itemized on the invoice or receipt.

At the conclusion of the inspection, the vehicle inspector must issue a signed vehicle inspection report to the owner or operator of the vehicle indicating whether the vehicle passed or failed.

If the vehicle being inspected is subject to a safety recall and has not been repaired or the repairs are incomplete, the inspector shall advise the vehicle owner or operator that the vehicle is subject to a recall, review with the vehicle owner or operator the details regarding the recall reflected on the inspection report, and advise the vehicle owner or operator that further details can be obtained from the dealer or manufacturer.


(a) All testing equipment must be approved by the department. All testing equipment must be installed and used in accordance with the manufacturer's and department's instructions. Equipment must be arranged and located at or near the approved inspection area and readily available for use.

(b) When equipment adjustments and calibrations are needed, the manufacturer's specifications and department's instructions must be followed. Defective equipment must not be used and the vehicle inspector or station must cease performing inspections until such equipment is replaced, recalibrated or repaired and returned to an operational status.

(c) To be certified as a vehicle inspection station, the station is required to possess and maintain, at a minimum, the equipment listed in paragraphs (1) - (7) of this subsection:

(1) a measured and marked brake test area which has been approved by the department, or an approved brake testing device;
(2) a measuring device clearly indicating measurements of 12 inches, 15 inches, 20 inches, 24 inches, 54 inches, 60 inches, 72 inches and 80 inches to measure reflector height, clearance lamps, side marker lamps and turn signal lamps on all vehicles, with the exception that the 80 inch measuring device requirement does not apply to motorcycle-only vehicle inspection stations;
(3) a gauge for measuring tire tread depth;
(4) a 1/4 inch round hole punch;
(5) a measuring device for checking brake pedal reserve clearance. This requirement does not apply to vehicle inspection stations with only a motorcycle endorsement;
(6) a department approved device for measuring the light transmission of sunscreening devices. This requirement does not apply to government inspection stations, or fleet inspection stations that have provided the department biennial written certification that the station has no vehicles equipped with a sunscreening device. This requirement does not apply to vehicle inspection stations with only a motorcycle and/or trailer endorsement; and
(7) a department approved device with required adapters for checking fuel cap pressure. The department requires vehicle inspection stations to obtain updated adapters as they become available from the manufacturer. A vehicle inspection station may not inspect a vehicle for which it does not have an approved adapter for that vehicle. This device is not required of government inspection stations or fleet inspection stations which have provided the department biennial written certification that the station has no vehicles meeting the criteria for checking gas cap pressure or that these vehicles will be inspected by a public inspection station capable of checking gas caps. This device is also not required of motorcycle-only or trailer-only inspection stations and certain commercial inspection stations that only inspect vehicles powered by a fuel other than gasoline.

(d) To be certified as a non-emissions vehicle inspection station, the station must have:

(1) an approved and operational electronic station interface device;
(2) a printer and supplies necessary for printing a vehicle inspection report on 8 1/2 x 11 paper; and
(3) a telephone line, or internet connection for the electronic station interface device to be used during vehicle inspections either dedicated solely for use with the electronic device, or shared with other devices in a manner approved by the department.

(e) For vehicle emissions inspection station requirements, see Subchapter E of this chapter (relating to Vehicle Emissions Inspection and Maintenance Program).


(a) Every public vehicle inspection station must display the official vehicle inspection station sign and inspection hours [of operation] in a manner clearly visible to the public.

(b) The official vehicle inspection station sign remains the property of the department as a means of identification of the vehicle inspection station. The sign must be surrendered upon demand by the department.

(c) The department will issue only one official vehicle inspection station sign per public vehicle inspection station license issued. The sign must not be altered in any manner. Dissimilar signs may also be displayed.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000614
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

SUBCHAPTER E. VEHICLE EMISSIONS INSPECTION AND MAINTENANCE PROGRAM
37 TAC §23.51, §23.55
The Texas Department of Public Safety (the department) proposes amendments to §23.51 and §23.55, concerning Vehicle Emissions Inspection and Maintenance Program. These rule
changes are necessary to address changes to the vehicle emission test requirements that took effect January 1, 2020.

The proposals remove references to vehicle emissions tailpipe tests, i.e., the Acceleration Simulation Mode (ASM) and Two-Speed Idle (TSI) tests, and the related equipment requirements. These tests, and the equipment necessary to conduct them, will no longer be necessary as of January 1, 2020. On that date the vehicles for which these tests are necessary became exempt from the state’s emission inspection requirements.

On January 1, 2020, model year 1995 vehicles became exempt from the state’s emissions inspection requirements pursuant to Texas Health and Safety Code §382.203(a)(2) (exempting vehicles twenty five years old or older). In addition, pursuant to federal Environmental Protection Agency regulations, model year 1996 and newer vehicles are equipped with on-board diagnostics (OBD) systems that enable emissions testing using the vehicle’s computer and which render tailpipe tests unnecessary. For these reasons the tailpipe tests and the equipment necessary to conduct them are no longer be necessary as of January 1, 2020.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the sections as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of statute and compliance with the State Implementation Plan for air quality.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does limit an existing regulation. It does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rules are in effect, the proposed rules should not impact positively or negatively the state’s economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made 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 Transportation Code, §548.002, which authorizes the Department of Public Safety to adopt rules to enforce Chapter 548.

Texas Government Code, §411.004(3), and Texas Transportation Code, §548.002 are affected by this proposal.


(a) In affected counties, to be certified by the department as a vehicle inspection station, the station must be certified by the department to perform vehicle emissions testing. This provision does not apply to vehicle inspection stations certified by the department as stations endorsed only to issue inspection reports for one or more of the listed categories of vehicles: trailer, motorcycle, commercial motor vehicle, or commercial trailer.

(b) A vehicle inspection station in a county not designated as an affected county shall not inspect a designated vehicle unless the vehicle inspection station is certified by the department to perform emissions testing, or unless the motorist presenting the vehicle signs an affidavit as prescribed by the department stating the vehicle is exempted from emissions testing. Under the exceptions outlined in paragraphs (1) - (3) of this subsection, a vehicle registered in an affected county may receive a safety inspection at a vehicle inspection station in a non-affected county.

(1) The vehicle is not a designated vehicle because it has not and will not be primarily operated in an affected county. This exception includes the subparagraphs (A) and (B) of this paragraph:

(A) Company fleet vehicles owned by business entities registered at a central office located in an affected county but operated from branch offices and locations in non-affected counties on a permanent basis.

(B) Hunting and recreational vehicles registered to the owner in an affected area, but permanently maintained on a hunting property or vacation home site in a non-affected county.

(2) The vehicle no longer qualifies as a designated vehicle because it no longer and will be no longer primarily operated in an affected county. For example, the vehicle registration indicates it is registered in an affected county, but the owner has moved, does not currently reside in, nor will primarily operate the vehicle in an affected county.

(3) The vehicle is registered in an affected county and is primarily operated in a non-affected county, but will not return to an affected county prior to the expiration of the current registration. Under this exception the vehicle will be reinspected at a vehicle inspection station certified to do vehicle emissions testing immediately upon return to an affected county. Examples of this exception include vehicles operated by students enrolled at learning institutions, vehicles operated by persons during extended vacations, or vehicles operated by persons on extended out-of-county business.
(c) All designated vehicles must be emissions tested at the time of and as a part of the designated vehicle's annual vehicle safety inspection at a vehicle inspection station certified by the department to perform vehicle emissions testing. The exceptions outlined in paragraphs (1) and (2) of this section apply to this provision.

(1) Commercial motor vehicles, as defined by Texas Transportation Code, §548.001, meeting the description of "designated vehicle" provided in this section. Designated commercial motor vehicles must be emissions tested at a vehicle inspection station certified by the department to perform vehicle emissions testing and must be issued an emissions test only inspection report, as authorized by Texas Transportation Code, §548.252 prior to receiving a commercial motor vehicle safety inspection report pursuant to Texas Transportation Code, Chapter 548. The emissions test only inspection report must be issued within 15 calendar days prior to the issuance of the commercial motor vehicle safety inspection report and will expire at the same time the newly issued commercial motor vehicle safety inspection report expires.

(2) Vehicles presented for inspection by motorists in counties not designated as affected counties meeting other exceptions listed in this section.

(d) A vehicle with a currently valid safety inspection report presented for an "Emissions Test on Resale" inspection shall receive an emissions test. The owner or selling dealer may choose one of two options:

(1) a complete safety and emissions test and receipt of a new inspection report; or

(2) an emissions test and receipt of the emissions test only inspection report. The emissions test only inspection report will expire at the same time as the current safety inspection report.

(e) Any vehicle not listed as an exempt vehicle that is capable of being powered by gasoline, from two years old up to and including 24 years old, presented for the annual vehicle safety inspection in affected counties will be presumed to be a designated vehicle and will be emissions tested as a part of the annual vehicle safety inspection.

[Emmissions testing will be conducted as follows:]

[(A)] In all affected counties, except Travis, Williamson, and El Paso counties:

[(A)] All 1996 model year and newer designated vehicles, which are equipped with an onboard diagnostic (OBD) system, will be emission tested using approved OBD inspection and maintenance (I/M) test equipment.

[(B)] All 1995 model year and older designated vehicles will be emission tested using the acceleration simulation mode (ASM-2) I/M test equipment.

[(C)] Vehicles which cannot be tested using the prescribed emission testing equipment will be tested using the default methods described within this subparagraph, only as prompted by the emissions testing analyzer or as approved by the department. OBD vehicles will be tested using ASM-2 test equipment. If the vehicle cannot be tested on ASM-2 test equipment (four-wheel drive and unique transmissions), then the vehicle will be tested using approved two-speed idle (TSI) I/M test equipment.

[(2)] This paragraph applies to all designated vehicles in Travis, Williamson and El Paso counties.

[(A)] All 1996 model year and newer designated vehicles, which are equipped with an onboard diagnostic system, will be emission tested using approved OBD I/M test equipment.

[(B)] All 1995 model year and older designated vehicles will be emission tested using TSI I/M test equipment.

[(C)] Vehicles which cannot be tested using the prescribed emission testing equipment will be tested using the following default method, only as prompted by the emissions testing analyzer or as approved by the department. OBD vehicles will be tested using TSI I/M test equipment.

[(D)] Vehicles inspected under the vehicle emissions testing program and found to meet the requirements of the program in addition to all other vehicle safety inspection requirements will be approved by the certified inspector, who will issue a unique emissions inspection report pursuant to Texas Transportation Code, §548.252. The only valid inspection report for designated vehicles shall be a unique emissions inspection report approved by the department, unless otherwise provided in this chapter.

[(f)] The department shall perform challenge tests to provide for the reinspection of a motor vehicle at the option of the owner of the vehicle as a quality control measure of the emissions testing program. A motorist whose vehicle has failed an emissions test may request a free challenge test through the department within 15 calendar days.

[(g)] Federal and state governmental or quasi-governmental agency vehicles that are primarily operated in affected counties that fall outside the normal registration or inspection process shall be required to comply with all vehicle emissions I/M requirements contained in the Texas I/M State Implementation Plan (SIP).

[(h)] Any motorist in an affected county whose designated vehicle has been issued an emissions related recall notice shall furnish proof of compliance with the recall notice prior to having their vehicle emissions tested at the next testing cycle. As proof of compliance, the motorist may present a written statement from the dealership or leasing agency indicating the emissions repairs have been completed.

[(i)] Inspection reports previously issued in a newly affected county shall be valid and remain in effect until the expiration date thereof.

[(j)] An emissions test only inspection report expires at the same time the vehicle's registration expires.

[(k)] The department may perform quarterly equipment and/or gas audits on all vehicle emissions analyzers used to perform vehicle emissions tests. If a vehicle emissions analyzer fails the calibration process during the gas audit, the department may cause the appropriate vehicle inspection station to cease vehicle emissions testing with the failing emissions analyzer until all necessary corrections are made and the vehicle emissions analyzer passes the calibration process.

[(l)] Pursuant to the Texas I/M SIP, the department may administer and monitor a follow up loaded mode I/M test on at least 0.1% of the vehicles subject to vehicle emissions testing in a given year to evaluate the mass emissions test data as required in Code of Federal Regulations, Title 40, §51.53(c)(3).

[(m)] Vehicle owners receiving a notice from the department requiring an emission test shall receive an out-of-cycle test, if the vehicle already has a valid safety and emission inspection report. This test will be conducted in accordance with the terms of the department's notice. The results of this verification emissions inspection shall be reported (online) to the Texas Information Management System Vehicle Identification Database. Vehicles identified to be tested by the notice will receive the prescribed test regardless of the county of registration and regardless of whether the vehicle has a valid safety inspection re-
shall offer [both the acceleration simulated mode (ASM-2) test and] the onboard diagnostic (OBD) test. [Certified emissions inspection stations in these affected counties desiring to offer OBD only emission testing to the public must request a waiver as low volume emissions inspection station from a department regional manager, as provided in §23.56 of this title (relating to Waiver for Low Volume Emissions Inspection Stations). All public certified emissions inspection stations in Travis, Williamson and El Paso counties must offer both the OBD and two speed idle (TSI) test.]

(c) The fee for an emissions test must provide for one free retest for each failed initial emissions inspection, provided that the motorist has the retest performed at the same vehicle inspection station where the vehicle originally failed and the retest is conducted within 15 calendar days of the initial emissions test, not including the date of the initial emissions test.

(d) To qualify as a certified emissions inspector, an applicant must:

1. be certified by the department as an official vehicle inspector;

2. complete the training required for the vehicle emissions inspection program and receive the department's certification for such training;

3. comply with the DPS Training and Operations Manual for Official Vehicle Inspection Stations and Certified Inspectors, this chapter, and other applicable rules, regulations and notices of the department; and

4. complete all applicable forms and reports as required by the department.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000615
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

37 TAC §23.56
The Texas Department of Public Safety (the department) proposes the repeal of §23.56, concerning Waiver for Low Volume Emissions Inspection Stations. This repeal is necessary to address changes to the vehicle emission test requirements that took effect January 1, 2020.

Section 23.56 authorizes a waiver from the requirement that vehicle emissions inspection stations maintain the equipment necessary to conduct vehicle emissions tailpipe tests. These tests, and the equipment necessary to conduct them, are no longer necessary as of January 1, 2020. On that date, model year 1995 vehicles became exempt from the state's emissions inspection requirements pursuant to Texas Health and Safety Code, §382.203(a)(2) (exempting vehicles twenty five years old or older). In addition, pursuant to federal Environmental Protection Agency regulations, model year 1996 and newer...
vehicles are equipped with on-board diagnostics (OBD) systems that enable emissions tests using the vehicle's computer and which render tailpipe tests unnecessary. For these reasons the tailpipe tests and the equipment necessary to conduct them are no longer necessary as of January 1, 2020, and §23.56's waiver therefore is unnecessary.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the repeal as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be the effective implementation of statute and compliance with the State Implementation Plan for air quality.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this repeal.

The department prepared a Government Growth Impact Statement assessment for this proposed repeal. The proposed repeal does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed repeal does limit an existing regulation. It does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed repeal is in effect, the proposed repeal should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made 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 Transportation Code, §548.002, which authorizes the Department of Public Safety to adopt rules to enforce Chapter 548.

Texas Government Code, §411.004(3), and Texas Transportation Code, §548.002 are affected by this proposal.

§23.56. Waiver for Low Volume Emissions Inspection Stations.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000616
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

SUBCHAPTER F. VIOLATIONS AND ADMINISTRATIVE PENALTIES

37 TAC §23.62, §23.63

The Texas Department of Public Safety (the department) proposes amendments to §23.62 and §23.63, concerning Violations and Administrative Penalties. These rule changes are necessary to implement Senate Bill 616, 86th Legislative Session. The proposed amendments reflect Senate Bill 616’s authorization for the adoption of procedures relating to the informal resolution of complaints against vehicle inspectors and inspection stations and the development of a penalty schedule for violations of a law or rule relating to the inspection of vehicles. The amendments also remove statutory references to Texas Transportation Code, §548.405 and §548.407, which were repealed by Senate Bill 616.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the sections as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation and enhanced administrative efficiency relating to administrative actions against vehicle inspectors and inspection station owners.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rules is in effect, the proposed rules should not impact positively or negatively the state’s economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made 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 Chapter 411, Subchapters Q and R, which authorize the Public Safety Commission to adopt rules governing various regulatory programs, including that of the Vehicle Inspection program; and Texas Transportation Code, §548.002, which authorizes the Department of Public Safety to adopt rules to enforce Chapter 548.

Texas Government Code, §411.004(3), and Texas Government Code Chapter 411, Subchapters Q and R, and Texas Transportation Code, §548.002, are affected by this proposal.


(a) In accordance with this section, the department may deny an application for a certificate, revoke or suspend the certificate of a person, vehicle inspection station, or inspector, place on probation, or reprimand a person who holds a certificate.

(b) The department will administer penalties by the category of the violation. The violations listed in this section are not an exclusive list of violations. The department may assess penalties for any violations of Texas Transportation Code, Chapter 548 (the Act), or rules adopted by the department. The attached graphic summarizes the violation categories and illustrates the method by which penalties are enhanced for multiple violations.

Figure: 37 TAC §23.62(b)

(c) Violation categories are as follows:

(1) Category A.

(A) Issuing a vehicle inspection report without inspecting one or more items of inspection.

(B) Issuing a vehicle inspection report without requiring the owner or operator to furnish proof of financial responsibility for the vehicle at the time of inspection.

(C) Issuing the wrong series or type of inspection report for the vehicle presented for inspection.

(D) Refusing to inspect a vehicle without an objective justifiable cause related to safety.

(E) Failure to properly safeguard inspection reports, department issued forms, the electronic station interface device, emissions analyzer access/identification card, and/or any personal identification number (PIN).

(F) Failure to maintain required records.

(G) Failure to have at least one certified inspector on duty during the posted hours of operations for the vehicle inspection station.

(H) Failure to display the official department issued vehicle inspection station sign, certificate of appointment, procedure chart and other notices in a manner prescribed by the department.

(I) Failure to post hours of operation.

(J) Failure to maintain the required facility standards.

(K) Issuing a vehicle inspection report to a vehicle with one failing item of inspection.

(L) Failing to enter information or entering incorrect vehicle information into the electronic station interface device or emissions analyzer resulting in the reporting of erroneous information concerning the vehicle.

(M) Failure to conduct an inspection within the inspection area approved by the department for each vehicle type.

(N) Failure of inspector of record to ensure complete and proper inspection.

(O) Failure to enter an inspection into the approved interface device at the time of the inspection.

(P) Conducting an inspection without the appropriate and operational testing equipment.

(Q) Failure to perform a complete inspection and/or issue a vehicle inspection report.

(R) Requiring repair or adjustment not required by the Act, this chapter, or department regulation.

(2) Category B.

(A) Issuing a passing vehicle inspection report without inspecting the vehicle.

(B) Issuing a passing vehicle inspection report to a vehicle with multiple failing items of inspection.

(C) Refusing to allow owner to have repairs or adjustments made at location of owner's choice.

(D) Allowing an uncertified person to perform, in whole or in part, the inspection or rejection of a required item during the inspection of a vehicle.

(E) Charging more than the statutory fee.

(F) Acting in a manner that could reasonably be expected to cause confusion or misunderstanding on the part of an owner or operator presenting a vehicle regarding the relationship between the
statutorily mandated inspection fee and a fee for any other service or product offered by the vehicle inspection station.

(G) Failing to list and charge for any additional services separately from the statutorily mandated inspection fee.

(H) Charging a fee, convenience fee or service charge in affiliation or connection with the inspection, in a manner that is false, misleading, deceptive or unauthorized.

(I) Inspector performing inspection while under the influence of alcohol or drugs.

(J) Inspecting a vehicle at a location other than the department approved inspection area.

(K) Altering a previously issued inspection report.

(L) Issuing a vehicle inspection report, while employed as a fleet or government inspection station inspector, to an unauthorized vehicle. Unauthorized vehicles include those not owned, leased or under service contract to that entity, or personal vehicles of officers and employees of the fleet or government inspection station or the general public.

(M) Preparing or submitting to the department a false, incorrect, incomplete or misleading form or report, or failing to enter required data into the emissions testing analyzer or electronic station interface device and transmitting that data as required by the department.

(N) Issuing a passing vehicle inspection report without inspecting multiple inspection items on the vehicle.

(O) Issuing a passing vehicle inspection report by using the emissions analyzer access/identification card, the electronic station interface device unique identifier, or the associated PIN of another.

(P) Giving, sharing, lending or displaying an emissions analyzer access/identification card, the electronic station interface device unique identifier, or divulging the associated PIN to another.

(Q) Failure of inspector to enter all required data pertaining to the inspection, including, but not limited to data entry into the emissions testing analyzer, electronic station interface device, vehicle inspection report or any other department required form.

(R) Conducting multiple inspections outside the inspection area approved by the department for each vehicle type.

(S) Issuing a passing vehicle inspection report in violation of Texas Transportation Code, §548.104(d).

(T) Vehicle inspection station owner, operator or manager directing a state certified inspector under his employ or supervision to issue a vehicle inspection report when in violation of this chapter, department regulations, or the Act.

(U) Vehicle inspection station owner, operator, or manager having knowledge of a state certified inspector under the owner’s employ or supervision issuing a passing vehicle inspection report in violation of this chapter, department regulations, or the Act.

(V) Issuing a safety only inspection report to a vehicle required to undergo a safety and emissions inspection without requiring a signed and legible affidavit, approved by the department, from the owner or operator of the vehicle, in a non emissions county.

(3) Category C.

(A) Issuing more than one vehicle inspection report without inspecting the vehicles.

(B) Issuing a passing vehicle inspection report to multiple vehicles with multiple failing items of inspection.

(C) Multiple instances of issuing a passing vehicle inspection report to vehicles with multiple defects.

(D) Emissions testing the exhaust or electronic connector of one vehicle for the purpose of enabling another vehicle to pass the emissions test (clean piping or clean scanning).

(E) Issuing a passing vehicle inspection report to a vehicle with multiple emissions related violations or violations on more than one vehicle.

(F) Allowing a person whose certificate has been suspended or revoked to participate in a vehicle inspection, issue a vehicle inspection report or participate in the regulated operations of the vehicle inspection station.

(G) Charging more than the statutory fee in addition to not inspecting the vehicle.

(H) Misrepresenting a material fact in any application to the department or any other information filed pursuant to the Act or this chapter.

(I) Conducting or participating in the inspection of a vehicle during a period of suspension, revocation, denial, after expiration of suspension but before reinstatement, or after expiration of inspector certification.

(J) Altering or damaging an item of inspection with the intent that the item fail the inspection.

(K) Multiple instances of preparing or submitting to the department false, incorrect, incomplete, or misleading forms or reports.

(L) Multiple instances of failing to enter complete and accurate data into the emissions testing analyzer or electronic station interface device, or failing to transmit complete and accurate data in the manner required by the department.

(4) Category D. These violations are grounds for indefinite suspension based on the temporary failure to possess or maintain an item or condition necessary for certification. The suspension of inspection activities is lifted upon receipt by the department of proof the obstacle has been removed or remedied.

(A) Failing to possess a valid driver license.

(B) Failing to possess a required item of inspection equipment.

(5) Category E. These violations apply to inspectors and vehicle inspection stations in which emission testing is required.

(A) Failing to perform applicable emissions test as required.

(B) Issuing a passing emissions inspection report without performing the emissions test on the vehicle as required.

(C) Failing to perform the gas cap test, or the use of unauthorized bypass for gas cap test.

(D) Issuing a passing emissions inspection report when the required emissions adjustments, corrections or repairs have not been made after an inspection disclosed the necessity for such adjustments, corrections or repairs.

(E) Falsely representing to an owner or operator of a vehicle that an emissions related component must be repaired, adjusted or replaced in order to pass emissions inspection.
require an emissions repair or adjustment not required by this chapter, department regulation, or the Act.

(G) Tampering with the emissions system or an emission related component in order to cause vehicle to fail emissions test.

(H) Refusing to allow the owner to have emissions repairs or adjustments made at a location of the owner's choice.

(I) Allowing an uncertified person to conduct an emissions inspection.

(J) Charging more than the authorized emissions inspection fee.

(K) Entering false information into an emission analyzer in order to issue an inspection report.

(L) Violating a prohibition described in §23.57 of the title (relating to Prohibitions).

(d) When assessing administrative penalties, the procedures detailed in this subsection will be observed:

(1) Multiple vehicle inspection station violations may result in action being taken against all station licenses held by the owner.

(2) The department may require multiple suspension periods be served consecutively.

(3) Enhanced penalties assessed will be based on previously adjudicated violations in the same category. Any violation of the same category committed after final adjudication of the prior violation will be treated as a subsequent violation for purposes of penalty enhancement.

(A) Category A violations are subject to a two year period of limitations preceding the date of the current violation.

(B) Under Category B, C, and E, subsequent violations are based on the number of previously adjudicated or otherwise finalized violations in the same category within the five year period preceding the date of the current violation.

(e) Certification for a vehicle inspection station may not be issued if the person's immediate family member's certification as a vehicle inspection station owner at that same location is currently suspended or revoked, or is subject to a pending administrative adverse action, unless the person submits an affidavit stating the certificate holder who is the subject of the suspension, revocation or pending action, has no, nor will have any, further involvement in the business of state inspections.

(f) A new certification for a vehicle inspection station may be issued at the same location where the previous certificate holder as an owner or operator is pending or currently serving a suspension or revocation, if the person submits an affidavit stating the certificate holder who is the subject of the suspension or revocation, has no, nor will have any, further involvement in the business of state inspections. The affidavit must contain the statement that the affidavit understands and agrees that in the event the department discovers the previous certificate holder is involved in the inspection business at that location, the certificate will be revoked under Texas Transportation Code, §548.405. In addition to the affidavit, when the change of ownership of the vehicle inspection station is by lease of the building or the inspection area, the person seeking certification must provide a copy of the lease agreement included with the application for certification as an official vehicle inspection station.

(g) Reinstatement. Expiration of the suspension period does not result in automatic reinstatement of the certificate. Reinstatement must be requested by contacting the department, and this may be initiated prior to expiration of the suspension. In addition, to meet all qualifications for the certificate, the certificate holder must:

(1) pass the complete written and demonstration test when required;

(2) submit the certification fee if certification has expired during suspension; and

(3) pay all charges assessed related to the administrative hearing process, if applicable.

§23.63. Informal Hearings, Settlement Conference.

(a) A person who receives notice of the department's intention to deny an application for an inspector certificate, or to suspend or revoke an inspector or to impose an administrative penalty under §23.62 of this title (relating to Violations and Penalty Schedule), may appeal the decision by submitting a request to appeal by mail, facsimile, or electronic mail, to the department in the manner provided on the department's Vehicle Inspection Program website within thirty (30) calendar days after receipt of notice of the department's proposed action. If a written request to appeal is not submitted within thirty (30) calendar days of the date notice was received, the right to an informal hearing or settlement conference, if applicable, or a hearing before the State Office of Administrative Hearings, is waived, and the action becomes final. [Certificate and seeks an administrative hearing as provided in Texas Transportation Code, §§548.407(b) may choose to have an informal, preliminary hearing prior to proceeding to the administrative hearing before the State Office of Administrative Hearings (SOAH). The preliminary hearing will be conducted by telephone, by department personnel, prior to the scheduling of the SOAH hearing.]

(b) If the action is based on the person's criminal history, a preliminary, telephonic hearing will be scheduled. Following the hearing, the department will either dismiss the proceedings and withdraw the proposed action, or issue a written statement of findings to the respondent either upholding or modifying the original proposed action. [Following the informal hearing, the hearing officer will issue a written statement of findings to the person at the address on file. If the findings result in the dismissal of the matter and rescission of the proposed action, or the applicant or certificate holder accepts the findings and chooses to withdraw the appeal, the department will schedule the administrative hearing before SOAH.]

(c) If the proposed action is based on an administrative violation, a settlement conference will be scheduled. The settlement conference may be conducted in person or by telephone, by agreement of the parties. Following the settlement conference, the parties will execute an agreed order, or, if no agreement is reached, the department will issue a written determination either upholding or modifying the originally proposed action.

(d) The department's findings following a preliminary hearing, or its determination following a settlement conference, may be appealed to the State Office of Administrative Hearings by submitting a request by mail, facsimile, or electronic mail, to the department in the manner provided on the department's Vehicle Inspection Program website, within thirty (30) calendar days after receipt of the findings or determination. If a written request is not submitted within thirty (30) calendar days of the date notice was received, the findings or determination shall become final.

(e) Requests for continuance must be submitted in writing at least three (3) business days prior to the scheduled hearing or conference. Requests must be based on good cause. Multiple requests may be presumed to lack good cause and may be denied on that basis.
The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 14, 2020.
TRD-202000617
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

CHAPTER 36. METALS RECYCLING ENTITIES
SUBCHAPTER A. GENERAL PROVISIONS
37 TAC §36.1

The Texas Department of Public Safety (the department) proposes amendments to §36.1, concerning Definitions. These rule changes are necessary to clarify certain terms and to enhance the department's regulatory oversight of the Metal Recycling Entities Program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be greater clarity and transparency in the administrative oversight of metals recycling entities.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made 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 Occupations Code, §1956.013, which authorizes the commission to adopt rules to administer Chapter 1956.

Texas Government Code, §411.004(3), and Texas Occupations Code, §1956.013, are affected by this proposal.

§36.1. Definitions.
The terms in this section have the following meanings when used in this chapter unless the context clearly indicates otherwise:
2. Advisory letter--An informational notification of an alleged minor violation of statute or administrative rule for which no disciplinary action is proposed.
3. Applicant--A person who has applied for registration under the Act.
4. Business owner--A sole proprietor, partner, member, or other individual with a financial interest in the entity.
6. Controlling interest--More than 50% ownership interest in the entity.
7. [ø] Department--The Texas Department of Public Safety.
8. [ç] Fixed location--A building or structure for which a certificate of occupancy can be issued.
9. [ø] Immediate family member--A parent, child, sibling, or spouse.
10. [ø] Military service member, military veteran, and military spouse--Have the meanings provided in Texas Occupations Code, §55.001.
11. [ø] On-site representative --An individual responsible for the day-to-day operation of the location.
12. [ø] Person--A corporation, organization, agency, business trust, estate, trust, partnership, association, holder of a certificate of registration, an individual, or any other legal entity.
Revocation--The withdrawal of authority to act as a metal recycling entity under the Act.

Statutory agent--The natural person to whom any legal notice may be delivered for each location.

Suspension--A temporary cessation of the authority to act as a metal recycling entity under the Act.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000618
D. Phillip Adkins
General Counsel
Texas Department of Public Safety

Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

SUBCHAPTER B. CERTIFICATE OF REGISTRATION

37 TAC §36.11

The Texas Department of Public Safety (the department) proposes amendments to §36.11, concerning Application for Certificate of Registration. These rule changes are necessary to clarify certain terms and to enhance the department’s regulatory oversight of the Metal Recycling Entities Program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be greater clarity and transparency in the administrative oversight of metal recycling entities.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state’s economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made 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 Occupations Code, §1956.013, which authorizes the commission to adopt rules to administer Chapter 1956.

Texas Government Code, §411.004(3), and Texas Occupations Code, §1956.013, are affected by this proposal.

§36.11. Application for Certificate of Registration.

(a) A certificate of registration may only be obtained through the department’s online application process.

(b) The application for certificate of registration must include, but is not limited to:

(1) Criminal history disclosure of all convictions for the owner with a controlling interest in the business, or if no owner has a controlling interest in the business, for the entity’s on-site representative [and deferred adjudications for each person listed as a business owner engaged in the regular course of business of a metal recycling entity on the application];

(2) Proof of ownership and current status as required by the department, including but not limited to, a current Certificate of Existence or Certificate of Authority from the Texas Office of the Secretary of State and a Certificate of Good Standing from the Texas Comptroller of Public Accounts;

(3) All fees required pursuant to §36.17 of this title (relating to Fees);

(4) A copy of any license or permit required by a county, municipality, or political subdivision of this state in order to act as a metal recycling entity in that county or municipality, issued to the applicant;

(5) Proof of training pursuant to §36.34 of this title (relating to Texas Metals Program Recycler Training); and

(6) A statutory agent disclosure pursuant to §36.12 of this title (relating to Statutory Agent Disclosure).
(c) Applicants proposing to conduct business at more than one location must complete an application for each location and obtain a certificate of registration for each location. An applicant proposing to conduct business at more than one location is only required to comply with the requirement of subsection (b)(5) of this section for the initial location at which the applicant is [they are] seeking to conduct business.

(d) A new certificate of registration for a metals recycling entity may not be issued if the applicant's immediate family member's registration as a metals recycling entity, at that same location, is currently suspended or revoked, or is subject to a pending administrative action, unless the applicant submits an affidavit stating the family member who is the subject of the suspension, revocation or pending action, has no, nor will have any, direct involvement or influence in the business of the metals recycling entity.

(e) A new certificate of registration may be issued at the same location where a previous owner's registration as a metals recycling entity is currently suspended, [pending or currently serving a suspension, revocation, or] is subject to a pending administrative action, or was previously revoked, if the applicant submits an affidavit stating the previous owner who is the subject of the suspension, revocation, or other pending administrative action, [has no, nor] will have no [an,] direct involvement or influence in the business of the metals recycling entity. The affidavit must contain the statement that the affiant understands and agrees that in the event the department discovers the previous registration holder is involved in the business of metals recycling entity at that location, the certificate of registration will be revoked pursuant to §36.53 of this title (relating to Revocation of a Certificate of Registration). In addition to the affidavit, when the change of ownership of the metals recycling entity is by lease of the location, the applicant seeking a certificate of registration must provide a copy of the lease agreement included with the application for [certificate] certification of registration.

(f) The failure of an applicant to meet any of the conditions of subsections (a) - (e) of this section will result in rejection of the application as incomplete.

(g) An applicant for a certificate of registration is not authorized to engage in any activity for which a certificate of registration is required prior to being issued a certificate of registration by the department.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000620
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

SUBCHAPTER C. PRACTICE BY CERTIFICATE HOLDERS AND REPORTING REQUIREMENTS

37 TAC §36.34, §36.36

The Texas Department of Public Safety (the department) proposes amendments to §36.34 and §36.36, concerning Practice by Certificate Holders and Reporting Requirements. These rule changes are necessary to clarify certain terms and to enhance the department's regulatory oversight of the Metal Recycling Entities Program.

Suzy Whitten, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whitten has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the sections as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

Ms. Whitten has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be greater clarity and transparency in the administrative oversight of metals recycling entities.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rules are in effect, the proposed rules should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made 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 Occupations Code, §1956.013, which
Texas Government Code, §411.004(3), and Texas Occupations Code, §1956.013, are affected by this proposal.

§36.34. Texas Metals Program Recycler Training.
Before receiving a certificate of registration pursuant to §36.11 of this title (relating to Application for Certificate of Registration) or renewal of certificate of registration pursuant to §36.16 of this title (relating to Renewal of Certificate of Registration), all applicants and registrants, or their on-site representative, must satisfactorily complete the department's Texas Metals Program Recycler Training. A copy of the proof of training for registrants, or their on-site representative, must be maintained at the place of business and available for inspection by anyone authorized to inspect pursuant to §1956.035(b)(2) of the Act.

§36.36. Standards of Conduct.
(a) Pursuant to §1956.035 of the Act, a metal recycling entity, and any individuals acting on behalf of the entity, shall cooperate fully with any investigation or inspection conducted by a peace officer, a representative of the department, or a representative of a county, municipality, or political subdivision that issues a license or permit under §1956.003(b) of the Act.

(b) Pursuant to §1956.035 of the Act, a metal recycling entity shall permit access during normal business hours to a person authorized to inspect.

(c) A metal recycling entity must not purchase, sell, or possess an explosive device, as defined by §1956.001(6-a) of the Act.

(d) If convicted of a disqualifying offense pursuant to §36.55 of this title (relating to Disqualifying Offenses), an applicant or registrant shall notify the department within seventy-two (72) hours of the conviction. Notification shall be made in a manner prescribed by the department.

(e) Any violation of subsection (a) - (d) of this section by a business owner, or on-site representative will be construed as a violation by the registrant.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000621
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

SUBCHAPTER E. DISCIPLINARY PROCEDURES AND ADMINISTRATIVE PROCEDURES

37 TAC §§36.51, 36.53, 36.55 - 36.57
The Texas Department of Public Safety (the department) proposes amendments to §§36.51, 36.53, 36.55, 36.56, and new §36.57, concerning Disciplinary Procedures and Administrative Procedures. These rule changes are in part necessary to clarify the scope of the department's regulatory authority, and in part to implement Senate Bill 616, 86th Legislative Session. Senate Bill 616 requires the adoption of procedures for the informal resolution of complaints against metals recycling entities. In addition, changes to §36.55 are intended to implement House Bill 1342, 86th Legislative Session, which amended Occupations Code, §§53.021, 53.022, and 53.023. Other rule changes simplify the rules or enhance the department's regulatory oversight of the Metal Recycling Entities Program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the sections as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the implementation of legislation, and greater clarity and consistency in the regulation of the metals recycling industry.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rules are in effect, the proposed rules should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made 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 Occupations Code, §1956.013, which authorizes the commission to adopt rules to administer Chapter 1956.

Texas Government Code, §411.004(3), and Texas Occupations Code, §1956.013, are affected by this proposal.

§36.51. Denial of Application for Certificate of Registration.
(a) The department may deny an application for a certificate of registration if:

(1) The applicant attempts to obtain a certificate of registration by means of fraud, misrepresentation, or concealment of a material fact;

(2) The applicant has sold, bartered, or offered to sell or barter a certificate of registration;

(3) The applicant or, if applicable, the applicant's on-site representative, is ineligible pursuant to §36.55 of this title (relating to Disqualifying Offenses);

(4) The applicant's certificate of registration was revoked within two (2) years prior to the date of application; or

(5) The applicant operated a metal recycling entity in violation of §1956.021 of the Act and, after notice of the violation, failed to obtain a registration required by the Act.

(b) Upon the denial of an application under this section, an applicant may request a hearing before the department pursuant to §36.56 of this title (relating to Informal Hearings).

§36.53. Revocation of a Certificate of Registration.
(a) The department may revoke a certificate of registration of a person who is registered under the Act if the owner with a controlling interest in the business or, if no owner has a controlling interest in the business, the entity's on-site representative (person):

(1) Commits multiple violations of the same type pursuant to §36.52(a) of this title (relating to Advisory Letters, Reprimands and Suspensions of a Certificate of Registration);

(2) Obtains a certificate of registration by means of fraud, misrepresentation, or concealment of a material fact;

(3) Sells, barters, or offers to sell or barter a certificate of registration;

(4) Is convicted of a disqualifying felony or misdemeanor offense pursuant to §36.55 of this title (relating to Disqualifying Offenses); or

(5) Submits to the department a payment that is dishonored, reversed, or otherwise insufficient or invalid.

(b) Upon receipt of notice of revocation under this section, a person may request a hearing before the department pursuant to §36.56 of this title (relating to Informal Hearings).

§36.55. Disqualifying Offenses.
(a) Pursuant to Texas Occupations Code, §53.021(a)(1), the department may revoke a certificate of registration or deny an application for a certificate of registration if the applicant the owner with a controlling interest in the business or, if applicable, the entity's on-site representative, [registrant, and/or business owner thereof] has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of a metal recycling entity.

(b) The department has determined the types of offenses detailed in this subsection directly relate to the duties and responsibilities of metal recycling entities. A conviction for an offense within one (1) or more of the [following] categories listed in paragraphs (1) - (9) of this subsection may result in the denial of an original or renewal application [(initial or renewal)] for a certificate of registration or the revocation of a certificate of registration. The Texas Penal Code references provided in this section are for illustrative purposes and are not intended to exclude similar offenses in other state or federal codes. The types of offenses directly related to the duties and responsibilities of metal recycling entities include, but are not limited to:

(1) Arson, Criminal Mischief, and other Property Damage or Destruction (Texas Penal Code, Chapter 28);

(2) Burglary and Criminal Trespass (Texas Penal Code, Chapter 30);

(3) Theft (Texas Penal Code, Chapter 31);

(4) Fraud (Texas Penal Code, Chapter 32);

(5) Bribery and Corrupt Influence (Texas Penal Code, Chapter 36);

(6) Perjury and Other Falsification (Texas Penal Code, Chapter 37);

(7) Any violation of Texas Occupations Code, §1956.038 or §1956.040;

(8) Prohibited Weapon - Explosive Weapon (Texas Penal Code, §46.05(a)(1); and

(9) Component of Explosives (Texas Penal Code, §46.09).

(c) A felony conviction for one of the offenses listed in subsection (b) of this section, a sexually violent offense as defined by Texas Code of Criminal Procedure, Article 62.001, or an offense listed in Texas Code of Criminal Procedure, Article 42.12, §3(g) or Article 42A.054, is disqualifying for ten (10) years from the date of the conviction, unless a full pardon has been granted under the authority of a state or federal official and not only by statutory effect.

(d) A misdemeanor conviction for one of the offenses listed in subsection (b) of this section or a substantially similar offense is disqualifying for five (5) years from the date of conviction.

(e) For the purposes of this chapter, all references to conviction are to those for which the judgment has become final.

(f) A person who is otherwise disqualified pursuant to the criteria in this section may submit documentation as detailed in paragraphs (1) - (8) of this subsection as evidence of his or her fitness to perform the duties and discharge the responsibilities of a metal recycling entity: [A certificate of registration may be revoked for the imprisonment of the registrant following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision for an offense that does not relate to the occupation of metal recycling and is disqualifying for five (5) years from the date of the conviction.]

(1) the extent and nature of the person's past criminal activity;

(2) the age of the person when the crime was committed;

(3) the amount of time that has elapsed since the person's last criminal activity;

(4) the conduct and work activity of the person before and after the criminal activity;

(5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release;

(6) letters of recommendation;
(7) evidence the applicant has:

(A) maintained a record of steady employment;
(B) supported the applicant's dependents;
(C) maintained a record of good conduct; and
(D) paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which the applicant has been convicted; and

(8) any other evidence relevant to the person's fitness for the certification sought.

(g) The failure to provide the required documentation in a timely manner may result in the proposed action being taken against the application or license.

(g) The department may consider the factors specified in Texas Occupations Code, §§53.022 and §53.023 in determining whether to grant, deny, or revoke any certificate of registration.

§36.56. Informal Hearings.

(a) A person who receives notice of the department's intention to deny an application for a certificate [certification] of registration, to reprimand, suspend or revoke a certificate of registration, to prohibit the registrant from paying cash for a purchase of regulated material pursuant to §1956.036(e) of the Act, or to impose an administrative penalty under §36.60 of this title (relating to Administrative Penalties), may appeal the decision by submitting a request to appeal by requesting an informal hearing.

(b) The request for hearing must be submitted by mail, facsimile, or electronic mail, to the department in the manner provided on the department's metals recycling program website within thirty (30) [twenty (20)] calendar days after receipt of notice of the department's proposed action. If a written request to appeal for a hearing is not submitted within thirty (30) [twenty (20)] calendar days of the date notice was received, the right to an informal hearing or settlement conference, as applicable, is waived and action becomes final.

(b) If the action is based on the person's criminal history, an informal, telephonic hearing will be scheduled. Following the hearing, the department will either dismiss the proceedings and withdraw the proposed action, or issue a written statement of findings to the respondent either upholding or modifying the originally proposed action.

(c) If the proposed action is based on an administrative violation, a settlement conference will be scheduled. The settlement conference may be conducted in person or by telephone, by agreement of the parties. Following the settlement conference, the parties will execute an agreed order, or, if no agreement is reached, the department will issue a written determination either upholding or modifying the originally proposed action.

(d) The department's findings resulting from the informal hearing, or its determination following a settlement conference, may be appealed as provided in §36.57 of this title. If a written request is not submitted within thirty (30) calendar days of the date notice was received, the findings or determination shall become final.

(e) Requests for continuance must be submitted in writing at least three (3) business days prior to the scheduled hearing or conference. Requests must be based on good cause. Multiple requests may be presumed to lack good cause and may be denied on that basis.

(e) An informal hearing will be scheduled and conducted by the department's designee.

(f) Following the informal hearing, the hearing officer will issue a written statement of findings to the person at the address on file. The result may be appealed to the State Office of Administrative Hearings as provided in §36.57 of this title.

§36.57. Hearings Before the State Office of Administrative Hearings.

(a) The department's findings following an informal hearing, or its determination following a settlement conference, may be appealed to the State Office of Administrative Hearings by submitting a request by mail, facsimile, or electronic mail, to the department in the manner provided on the department's Metal Recycling Program website, within thirty (30) calendar days after receipt of the findings or determination.

(b) In a case before State Office of Administrative Hearings, failure of the respondent to appear at the time of hearing shall entitle the department to request from the administrative law judge an order dismissing the case from the State Office of Administrative Hearings docket and to informally dispose of the case on a default basis.

(c) In cases brought before State Office of Administrative Hearings, in the event the respondent is adjudicated as being in violation of the Act or this chapter after a trial on the merits, the department has authority to assess the actual costs of the administrative hearing in addition to the penalty imposed. Such costs include, but are not limited to, investigative costs, witness fees, deposition expenses, travel expenses of witnesses, transcription expenses, or any other costs that are necessary for the preparation of the department's case. The costs of transcriptions and preparation of the record for appeal shall be paid by the respondent.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000622
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

37 TAC §§36.57 - 36.59

The Texas Department of Public Safety (the department) proposes the repeal of §§36.57 - 36.59, concerning Disciplinary Procedures and Administrative Procedures. The repeal of these rules is proposed in conjunction with other proposed amendments to the rules relating to hearings. The proposed amendments require the numbering of the rules, and also provide the opportunity to repeal rules that are duplicative of other department-wide rules.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the repeal as proposed. There is no anticipated economic cost to individuals who
are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenhont has determined that for each year of the first five-year period the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be the implementation of legislation, and greater clarity and consistency in the regulation of the metals recycling industry.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposal. The proposed repeal does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed repeal does limit an existing regulation. It does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed repeal is in effect, the proposed repeal should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules necessary for carrying out the department's work; and Texas Occupations Code, §1956.013, which authorizes the commission to adopt rules to administer Chapter 1956.

Texas Government Code, §411.004(3), and Texas Occupations Code, §1956.013, are affected by this proposal.

§36.70. Hearings Before the State Office of Administrative Hearings.
§36.71. Default Judgments.
§36.72. Hearing Costs.

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

Filed with the Office of the Secretary of State on February 14, 2020.

TRD-202000638
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 424-5848

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 15. TEXAS VETERANS COMMISSION

CHAPTER 452. ADMINISTRATION GENERAL PROVISIONS

40 TAC §452.2

The Texas Veterans Commission (commission) proposes to amend §452.2 of Title 40, Part 15, Chapter 452 of the Texas Administrative Code concerning Advisory Committees.

PART I. PURPOSE AND BACKGROUND

The amended rule is proposed to eliminate, pursuant to commission vote, two existing advisory committees, (1) "The Veterans Employment and Training Advisory Committee" and (2) "The Veterans Communication Advisory Committee," and add a committee addressing veterans' needs, to be named "The Veterans Services Advisory Committee."

The proposed amendment is authorized under Texas Government Code §434.010, granting the commission the authority to establish rules, and Texas Government Code §434.0101, granting the commission the authority to establish rules governing the agency's advisory committees.

PART II. EXPLANATION OF SECTIONS

§452.2. Advisory Committees.

Pursuant to §452.2(10)(b)(c), Texas Administrative Code, the commission may create or dissolve advisory committees. At the commission's first quarterly meeting (fiscal year 2020) on November 14, 2019, the commission voted to eliminate two of its four advisory committees: the Veterans Employment and Training Advisory Committee and the Veterans Communication Advisory Committee, and add a committee addressing veterans' needs, to be named "The Veterans Services Advisory Committee."

PART III. IMPACT STATEMENTS

FISCAL NOTE

Michelle Nall, Chief Financial Officer of the Texas Veterans Commission, has determined for each year of the first five years the proposed rule amendment will be in effect, there will not be an increase in expenditures or revenue for state and local government as a result of administering the proposed rule.

COSTS TO REGULATED PERSONS

Ms. Nall has also determined there will not be anticipated economic costs to persons required to comply with the proposed rule.
LOCAL EMPLOYMENT IMPACT

Jim Martin, Interim Director, Veterans Employment Services of the Texas Veterans Commission, has determined that there will not be a significant impact upon employment conditions in the state as a result of the proposed rule.

SMALL BUSINESS, MICRO BUSINESS AND RURAL COMMUNITIES IMPACT

Anna Baker, Manager, Veterans Entrepreneur Program of the Texas Veterans Commission, has determined that the proposed rule will not have an adverse economic effect on small businesses, micro businesses or rural communities as defined in Texas Government Code §2006.001. As a result, an Economic Impact Statement and Regulatory Flexibility Analysis is not required.

PUBLIC BENEFIT

Shawn Deabay, Deputy Executive Director of the Texas Veterans Commission, has determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated as a result of administering the amended rule will increase participation within each of the agency's two remaining advisory committees.

GOVERNMENT GROWTH IMPACT STATEMENTS

Mr. Deabay has also determined that for each year of the first five years that the proposed rule amendment is in effect, the following statements will apply:

(1) The proposed rule amendment will not create or eliminate a government program.
(2) Implementation of the proposed rule amendment will not require creation of new employee positions, or elimination of existing employee positions.
(3) Implementation of the proposed rule amendment will not require an increase or decrease in future legislative appropriations to the agency.
(4) No fees will be created by the proposed rule amendment.
(5) The proposed rule amendment will not require new regulations.
(6) The proposed rule amendment has no effect on existing regulations.
(7) The proposed rule amendment has no effect on the number of individuals subject to the rule's applicability.
(8) The proposed rule amendment has no effect on this state's economy.

PART IV. COMMENTS

Comments on the proposed amended rule may be submitted to Texas Veterans Commission, Attention: General Counsel, P.O. Box 12277, Austin, Texas 78711; faxed to (512) 475-2395; or emailed to rulemaking@tvc.texas.gov. For comments submitted electronically, please include "Chapter 452 Rules" in the subject line. The commission must receive comments postmarked no later than 30 days from the date this proposal is published in the Texas Register.

PART V.

STATUTORY AUTHORITY

The rule amendment is proposed under Texas Government Code §434.010 which authorizes the commission to establish rules it considers necessary for its administration; and Texas Government Code Section §434.0101, granting the commission authority to establish rules governing the agency's advisory committees.

The rule amendment is proposed to implement General Appropriations Act, Article I, Texas Veterans Commission Rider IX, 85th Legislature, Regular Session, 2017, which authorizes the commission to reimburse advisory committees. No other statutes, articles, or codes are affected by this proposal.

§452.2. Advisory Committees.

(a) The commission may establish advisory committees in accordance with Texas Government Code, Chapter 2110. The following shall apply to each advisory committee:

(1) - (10) (No change.)

(b) Veteran Services Advisory Committee. [Veterans Employment and Training Advisory Committee.]

(1) Purpose. The purpose of the Veteran Services Advisory Committee (VSAC) is to develop recommendations to improve all services to veterans, their families, and survivors by the TVC. TVC leadership will provide veteran service topics to the committee for analysis and feedback. [Purpose. The purpose of the Veterans Employment and Training Advisory Committee is to seek the input of employers to better assist veterans in gaining successful employment and/or training.]

(2) Committee member qualifications. The Committee shall be comprised of veterans and/or non-veterans that are interested in significantly improving the quality of life for all Texas veterans, their families, and survivors. [Committee member qualifications. Members may include individuals who are recognized authorities in the fields of business, employment, training, rehabilitation or labor or are nominated by veterans' organizations that have a national employment program.]

(c) Fund for Veterans' Assistance Advisory Committee.

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

{[d] Veterans Communication Advisory Committee.}

{[d]} Purpose. The purpose of the Veterans Communication Advisory Committee is to develop recommendations to improve communications with veterans, their families, and the general public regarding the services provided by the Texas Veterans Commission and information on benefits and assistance available to veterans from federal, state, and private entities.

{[d]} Committee member qualifications. Members may include representatives from the communications industry, state agencies, the Texas National Guard, U.S. Armed Forces reserve components, and other individuals with the experience and knowledge to assist the committee with achievement of its purpose.

{[d]} (d) Veterans County Service Officer Advisory Committee.

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

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

Filed with the Office of the Secretary of State on February 12, 2020.
Madeleine Connor
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: March 29, 2020
For further information, please call: (512) 463-3605