ADOPTED RULES

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

TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 2. GENERAL POLICIES AND PROCEDURES

SUBCHAPTER A. PRINCIPLES AND PROCEDURES OF THE COMMISSION

13 TAC §§2.3, 2.5, 2.7 - 2.9, 2.46, 2.48

The Texas State Library and Archives Commission (commission) adopts amendments to 13 TAC §§2.3, Procedures of the Commission; 2.7, Library Systems Act Advisory Board; 2.8, Texas Historical Records Advisory Board; 2.46, Negotiated Rulemaking; 2.48, Petition for Adoption of Rule Changes; new §2.5, Advisory Committees; General Requirements and new §2.9, TexShare Library Consortium Advisory Board (TexShare Advisory Board). Sections 2.3 and 2.48 are adopted without changes to the proposed text as published in the March 13, 2020 issue of the Texas Register (45 TexReg 1780). These sections will not be republished. Sections 2.5, 2.7 - 2.9, and 2.46 are adopted with changes to the text as proposed in the March 13, 2020, issue of the Texas Register (45 TexReg 1780) and will be republished.

The amendments and new rule in part implement Government Code, §441.0065 and the Sunset Advisory Commission's Recommendation 4.3, Sunset Advisory Commission Staff Report with Final Results, 2018-2019 (86th Legislature) related to advisory committees. New §2.5 establishes the general requirements for all advisory committees of the commission. Unless otherwise provided by law or a commission rule, the general requirements apply to all commission advisory committees established by rule. The section has been modified on adoption to include the general statement that the section governs procedures for the creation and operation of advisory committees, except as provided by law or commission rule. In the proposed version, a similar disclaimer was included in individual subsections of §2.5. Including this language in subsection (a) clarifies that all sections of §2.5 apply unless otherwise specified.

Amended §2.7 and §2.8 and new §2.9 re-establish the Library Systems Act Advisory Board, the Texas Historical Records Advisory Board, and the TexShare Library Consortium Advisory Board, each with an expiration date of February 20, 2024. On adoption, the commission clarified and simplified each of these sections by removing the subsections that provided that each advisory committee must comply with §2.5, except for certain specified sections. With the clarification to §2.5 referenced above, a restatement of such applicability is unnecessary in §§2.7 - 2.9.

As specified in §2.5(a), any provision of law or rule regarding the creation or operation of an advisory committee will control over a requirement of §2.5 in the event of a difference. For example, §2.7(c) and Government Code, §441.124(b) specify that the term of office for each LSA Board member is three years. Therefore, §2.5(e) (providing that members of advisory committees serve two- or four-year terms) will not apply to the LSA Board. Similarly, §2.5(c) regarding appointment procedures will not apply to the THRAB because §2.8(c) and Government Code, §441.243 prescribe the THRAB membership, which includes public members appointed by the Governor.

The amendment to §2.3 amends subsection (e) to change the minimum number of commission meetings per year from six to five.

The amendments to §2.46 update the language for clarity and consistency with the statutory language for negotiated rulemaking in Government Code, Chapter 2008.

The amendments to §2.48 update the rule title and language for clarity and consistency with the statutory language for petitions for the adoption of rules in Government Code, §2001.021.

No comments were received regarding adoption of the amendments or new rules.

STATUTORY AUTHORITY. The amendments and new rules are adopted under Government Code, §441.0065, which authorizes the commission to establish advisory committees by rule; Government Code, §441.226, which requires the commission to adopt rules regarding the organization and structure of the TexShare Advisory Board; Government Code, §2110.005, which requires a state agency that establishes an advisory committee to state the purpose and tasks of the committee and describe the manner in which the committee will report to the agency by rule; Government Code, §2110.008, which authorizes a state agency to designate the date on which an advisory committee will automatically be abolished by rule; Government Code, §2001.021, which requires a state agency to prescribe the form for a petition for the adoption of rules and the procedure for its submission, consideration, and disposition; and Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.


§2.5. Advisory Committees; General Requirements.

(а) Purpose and scope. This section governs procedures for the creation and operation of advisory committees, except as otherwise provided by law or commission rule. The purpose of an advisory committee is to make recommendations to the commission on programs, rules, and policies affecting the delivery of information services in the state. An advisory committee's sole role is to advise the commission.
An advisory committee has no executive or administrative powers or duties with respect to the operation of the commission, and all such powers and duties rest solely with the commission.

(b) Creation and duration of advisory committees. The commission shall create advisory committees by commission order. An advisory committee is abolished on the fourth anniversary of the date of its creation unless the commission designates a different expiration date for an advisory committee or an advisory committee has a specific duration prescribed by law.

(c) Appointment procedures. The commission will appoint members to an advisory committee based on advice and input from the director and librarian. Each advisory committee will elect from its members a presiding officer, who will report the advisory committee's recommendations to the commission.

(d) Size and quorum requirement. An advisory committee must be composed of a reasonable number of members not to exceed 24. A majority of advisory committee membership will constitute a quorum. An advisory committee may act only by majority vote of the members present at the meeting.

(e) Membership terms. Advisory committee members:

(1) may serve two- or four-year staggered terms, as ordered by the commission; and

(2) are appointed by and serve at the pleasure of the commission. If a member resigns, dies, becomes incapacitated, is removed by the commission, otherwise vacates the position, or becomes ineligible prior to the end of the member's term, the commission will appoint a replacement to serve the remainder of the unexpired term.

(f) Conditions of membership.

(1) Qualifications. To be eligible to serve as a member of an advisory committee, a person must have knowledge about and interests in the specific purpose and tasks of an advisory committee as established by commission order.

(2) Conflict of interest. Advisory committee members are subject to the same laws and policies governing ethical standards of conduct as those for commission members and employees.

(3) Training requirements. Each member of an advisory committee must complete training regarding the Open Meetings Act, Chapter 551 of the Government Code, and the Public Information Act, Chapter 552 of the Government Code.

(g) Administrative support. For each advisory committee, the director and librarian will designate a division of the commission that will be responsible for providing any necessary administrative support essential to the functions of the committee.

(h) Meetings.

(1) Meeting requirements. The division designated for an advisory committee under subsection (g) of this section shall submit to the Secretary of State notice of a meeting of the advisory committee. The notice must provide the date, time, place, and subject of the meeting. All advisory committee meetings shall be open to the public.

(2) Scheduling of meetings. Meeting dates, times, places, and agendas will be set by the division designated under subsection (g) of this section.

(3) Attendance. A record of attendance at each meeting of an advisory committee will be made. Unless otherwise provided by law, if a member of an advisory committee misses three consecutive advisory committee meetings, the member automatically vacates the position and the commission will appoint a new member to fill the remainder of the unexpired term created by the vacancy.

(i) Record. Commission staff shall maintain minutes of each advisory committee meeting and distribute copies of approved minutes and other advisory committee documents to the commission and advisory committee members.

(j) Reporting recommendations. An advisory committee shall report its recommendations to the commission in writing. The presiding officer of an advisory committee or designee may appear before the commission to present the committee's recommendations.

(k) Reimbursement. Members of an advisory committee shall not be reimbursed for expenses unless reimbursement is authorized by law and approved by the director and librarian.

(l) Review of advisory committees. The commission shall monitor the composition and activities of advisory committees. To enable the commission to evaluate the continuing need for an advisory committee, an advisory committee shall report in writing to the commission a minimum of once per year. The report provided by the advisory committee shall be sufficient to allow the commission to properly evaluate the committee's work and usefulness.

(m) Compliance with the Open Meetings Act. An advisory committee shall comply with the Open Meetings Act, Government Code, Chapter 551.

(n) Rules. For each advisory committee appointed, the commission shall adopt rules that address the purpose of the advisory committee. The rules may address additional items, including membership qualifications, terms of service, operating procedures, and other standards to ensure the effectiveness of an advisory committee appointed under this subchapter.

§2.7. Library Systems Act Advisory Board (LSA Board).

(a) The LSA Board is created to advise the commission on matters relating to the Library Systems Act. The LSA Board's tasks include reviewing and making recommendations regarding the minimum standards for accreditation of libraries in the state library system, reviewing and making recommendations regarding the application of the standards to local libraries, reviewing and making recommendations regarding the future development of the Library Systems Act, reviewing and making recommendations regarding grant programs for local libraries, and reviewing and making recommendations regarding agency programs that affect local libraries.

(b) The LSA Board reports to the commission through its meetings and meeting minutes, and/or reports or letters to the Director and Librarian.

(c) The LSA Board membership consists of five librarians qualified by training, experience, and interest to advise the commission on the policy to be followed in applying Government Code, Chapter 441, Subchapter I, Library Systems. The term of office for each LSA Board member is three years.

(d) The LSA Board shall expire on February 20, 2024.

§2.8. Texas Historical Records Advisory Board (THRAB).

(a) The THRAB is created to serve as the central advisory body for historical records planning and projects funded by the National Historical Publications and Records Commission that are developed and implemented in this state and advise the Texas State Library and Archives Commission on matters related to historical records in the state. The advisory board's tasks include those enumerated in Government Code §441.242.
(b) The advisory board reports to the commission through its meetings and meeting minutes, and/or reports or letters to the Director and Librarian.

(c) The THRAB is composed of:

(1) the state archivist, who shall be appointed as the historical records coordinator by the governor and who serves as presiding officer of the THRAB;

(2) two public members, appointed by the governor; and

(3) six members, appointed by the director and librarian, who must have recognized experience in the administration of government records, historical records, or archives.

(d) The terms of office for the members of the THRAB are as follows:

(1) The historical records coordinator serves a four year term;

(2) The two public members appointed by the governor serve staggered terms of three years with the terms of the members expiring on February 1 of different years; and

(3) The six members appointed by the director and librarian serve staggered terms of three years with the terms of one-third of the members expiring on February 1 of each year.

(e) The THRAB shall expire on February 20, 2024.

§2.9. TexShare Library Consortium Advisory Board (TexShare Advisory Board).

(a) The TexShare Advisory Board is created to advise the commission on matters relating to the consortium.

(b) The TexShare Advisory Board membership shall represent the various types of libraries comprising the membership of the consortium, with at least two members representing the general public. Members must be qualified by training and experience to advise the commission on policy to be followed in applying Government Code, Chapter 441, Subchapter M, TexShare Library Consortium. TexShare Advisory Board members serve three-year terms beginning September 1.

(c) The TexShare Advisory Board shall expire on February 20, 2024.

§2.46. Negotiated Rulemaking.

(a) It is the commission’s policy to engage in negotiated rulemaking procedures under Government Code, Chapter 2008, when appropriate. When the commission finds that proposed rules are likely to be complex or controversial, or to affect disparate groups, negotiated rulemaking may be proposed.

(b) When negotiated rulemaking is proposed, the director and librarian will appoint a convener to assist in determining whether it is advisable to proceed. The convener shall perform the duties and responsibilities contained in Government Code, Chapter 2008.

(c) If the convener recommends proceeding with negotiated rulemaking and the commission adopts the recommendation, the commission shall initiate negotiated rulemaking according to the provisions of Government Code, Chapter 2008.

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

13 TAC §2.6, §2.57

The Texas State Library and Archives Commission (commission) adopts the repeal of §2.6, Sunset Dates for Advisory Committees; and §2.57, Petition for Adoption of a Rule. The repeals of these sections are adopted with no changes to the proposal as published in the March 13, 2020, issue of the Texas Register (45 TexReg 1785). The rules will not be republished.

In conjunction with the adoption of these rules, the commission is also adopting amendments to each of its existing advisory committee rules and adopting a new rule applicable to advisory committees generally. These amended and new rules establish each specific advisory committee’s expiration date. The commission is also adopting amendments to §2.48, Petition for Adoption of Rules, to clarify the language and ensure consistency with the statutory language for petitions for the adoption of rules in Government Code, §2001.021.

Based on the adoption of these amendments and new rule, §2.6 and §2.57 are unnecessary and should be repealed.

No comments were received regarding adoption of the repeal.

STATUTORY AUTHORITY. The repeals are adopted under Government Code, §§441.0065, which authorizes the commission to establish advisory committees by rule; Government Code, §2110.008, which authorizes a state agency to designate the date on which an advisory committee will automatically be abolished by rule; Government Code, §2001.021, which requires a state agency to prescribe the form for a petition for the adoption of rules and the procedure for its submission, consideration, and disposition; and Government Code, §2001.004, which requires a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.


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

Filed with the Office of the Secretary of State on June 11, 2020.

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Sarah Swanson
General Counsel
Texas State Library and Archives Commission
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Proposal publication date: March 13, 2020
For further information, please call: (512) 463-5591

TITLE 16. ECONOMIC REGULATION
PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

ADOPTED RULES  June 26, 2020  45 TexReg 4321
CHAPTER 24. SUBSTANTIVE RULES APPLICABLE TO WATER AND SEWER SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) repeals existing 16 TAC §24.245, relating to revocation of a certificate of convenience and necessity, and adopts new 16 TAC §24.245, relating to revocation of a certificate of convenience and necessity or amendment of a certificate of convenience and necessity by decertification, expedited release, or streamlined expedited release, with changes to the proposed text as published in the March 13, 2020, issue of the Texas Register (45 TexReg 1787). The new rule will implement Senate Bill 2272, enacted by the 86th Texas Legislature, and clarify processes for revocation or amendment of certificates of convenience and necessity (CCN) by decertification, expedited release, and streamlined expedited release. This repeal and new rule are adopted under Project Number 50028.

No public hearing was requested so no public hearing was held. The Texas Association of Water Companies (TAWC) submitted comments on the proposed new rule. No reply comments were received.

Unless otherwise specified, all references to subsections, paragraphs, and subparagraphs relate to §24.245.

General Comments on §24.245

TAWC would like the commission to adopt CCN policies that provide the best opportunity possible for CCN holders to retain their lawfully obtained CCNs and receive just and adequate compensation under the applicable statutory framework.

Commission Response

The new rule is intended to implement Texas Water Code requirements and the policies established by the Legislature. §24.245(c)(1)

Proposed paragraph (c)(1) states "An order of the commission in any proceeding under this section does not create a vested property right." TAWC requested that the commission not adopt this proposed provision because the language is not statutorily required, suggests the commission can determine by rule what is or is not a vested property right in Texas, and is unnecessary in the context of a CCN decertification proceeding.

Commission Response

The commission agrees that the provision is unnecessary and removes it from the rule. §24.245(d)(2)(F)

Proposed subsection (d) applies to CCN revocations or amendments initiated by the commission or the CCN holder. TAWC stated that the proposed language for §24.245(d)(2)(F) should be modified to clarify that it applies to decertification amendments or revocations by consent ordered under subsection (d) and not to other CCN application matters filed under other commission rules or pursuant to agreements.

Commission Response

The commission modifies §24.245(d)(2)(F) to clarify that it applies only to CCN revocations and decertifications ordered under §24.245(d)(2).

Proposed subsection (e) implements TWC §13.2451 which provides for decertification of a municipality’s service area under certain circumstances. TAWC requested that the rule permit any retail public utility, not just retail public utilities with “adjacent” service areas, to file a petition to remove certificated areas under this subsection. TAWC stated that it is not clear whether “adjacent” means directly abutting the area to be removed or further away. TAWC suggested that for purposes of both paragraph (e)(2) and notice under paragraph (e)(5), it might be appropriate to define the appropriate distance as up to two miles away in line with CCN application notice requirements.

Commission Response

The commission deletes paragraph (e)(2) and modifies paragraph (e)(5) of the proposed rule to provide flexibility concerning who may file a petition under this subsection and will determine eligibility to submit a petition and appropriate notice on a case by case basis. §24.245(f)(4)

Proposed paragraph (f)(4) provides that the fact that a CCN holder is a borrower under a federal loan program is not a bar to a request for expedited release and provision of services by an alternate retail public utility. TAWC questioned the legality of the federal debt language in light of recent federal court decisions and stated that the commission should consider removing this language.

Commission Response

The commission declines to modify the rule as suggested by TAWC. The proposed rule is based on clear requirements in TWC §13.254(a-1). The court challenges to which TAWC refers are not yet finally decided. If a change in law occurs, the commission will implement the new law at that time. §24.245(f)(14)

Proposed paragraph (f)(14) relates to compensation to a former CCN holder after expedited release has been granted. TAWC commented that a CCN holder should not be required to file a response to a petition under subsection (f) concerning release or face a requirement to overcome a "rebuttable presumption" that no compensation should be paid. TAWC stated that the propriety of CCN release and compensation are two different issues and should be handled separately and the following language, which is not statutorily required, should be removed: "If the current CCN holder did not timely file a response to the landowner’s petition, there is a rebuttable presumption that the amount of compensation to be paid is zero.”

Commission Response

The commission modifies the rule as proposed by TAWC. §24.245(g)

Proposed subsection (g) provides that the commission will determine the compensation to be paid to the CCN holder at the time another retail public utility seeks to provide service in the removed area and before service is actually provided. TAWC requested the commission to manage the award of compensation for a TWC §13.254(a-1) expedited release in the same proceeding as the CCN release to make the process more like the streamlined expedited release process and provide better assurance to Texas utilities that compensation will in fact be addressed. TAWC stated that leaving compensation to a future potential proceeding does not guarantee CCN holders will be com-
The commission declines to modify the rule as proposed by TAWC. The provision to which TAWC objects is in the current commission rule and reflects the commission's interpretation of the TWC §13.2541 requirements.

§24.245(h)(8)

Proposed paragraph (h)(8) provides that the fact that a CCN holder is a borrower under a federal loan program is not a bar to the release of land under §24.245(h) and the CCN holder must not initiate an application to borrow money under a federal loan program after the date the petition is filed until the commission issues a final decision on the petition. TAWC questioned the legality of the federal debt language in light of recent federal court decisions and stated that the commission should consider removing this language.

Commission Response

The commission declines to modify the rule as requested by TAWC. TWC §13.254(e) provides that after expedited release under §13.254(a-1), the amount of compensation, if any, must be determined at the time another retail public utility seeks to provide service. The utility that ultimately seeks to serve the area, which may or may not be the alternate retail public utility identified by the petitioning landowner, is not required to be a party to the expedited release proceeding. Therefore, it may not be possible to decide the amount of compensation in the proceeding on the petition for expedited release. In streamlined expedited release proceedings, no consideration is required to be given to future service to the removed area, although under TWC §13.2541(a), which incorporates TWC §13.254(d), no utility may serve the removed area until compensation has been paid. The compensation to the CCN holder is paid by the petitioning landowner and there is a statutory deadline for payment.

§24.245(g)(3)

Proposed paragraph (g)(3) provides that if a former CCN holder and prospective retail public utility have agreed on the amount of compensation to be paid, they must make a joint filing stating the amount of compensation to be paid. TAWC questioned the requirement to file a statement about the amount of agreed compensation in a TWC §13.254(a-1) expedited release matter. TAWC stated that this requirement could be viewed as violative of settlement privileges and chill negotiation efforts, and that at a minimum, the rule should clarify that the statement may be filed confidentially.

Commission Response

The commission declines to modify the proposed rule. The commission is required to find that the compensation amount is just and adequate and cannot make such a finding without knowing the amount. The commission's procedural rules provide for filing of information claimed to be confidential, subject to the commission's authority to declassify information later determined not to be confidential.

§24.245(h)(1)(C)

Proposed subparagraph (h)(1)(C) provides that the owner of a tract of land may petition for streamlined expedited release of all or a portion of the tract of land if at least part of the tract of land is located in the current CCN holder's certificated service area and at least some of that part is located in a qualifying county. TAWC commented that the rule should require that the entire 25 acres should be required to be in a targeted CCN and qualifying county to be eligible for removal. TAWC stated that the proposed requirement expands the types of tracts eligible for removal from a CCN holder's certificated service area to the detriment of Texas utilities.

Commission Response

The commission declines to modify the proposed rule. The commission is required to find that the compensation amount is just and adequate and cannot make such a finding without knowing the amount. The commission's procedural rules provide for filing of information claimed to be confidential, subject to the commission's authority to declassify information later determined not to be confidential.

§24.245(i)(4)

TAWC disagreed with the inclusion of proposed paragraph (i)(4) which provides that if the former CCN holder fails to make a filing about the amount of agreed compensation or to engage
an appraiser or file an appraisal within the timeframes required, the amount of compensation to be paid will be deemed to be zero. TAWC stated that CCN holders targeted by streamlined expedited release petitions should never receive zero dollars as compensation because TWC §13.254(d) and (g) as incorporated by reference in TWC §13.2541 collectively mandate a requirement for "just and adequate compensation" which should be required whether a targeted CCN holder makes a filing regarding compensation or not. TAWC further stated that the petitioner and the commission should be required to figure out the appropriate amount owed with or without a filing by the targeted CCN holder. TAWC stated that the PUC continues to order CCN holders who lose service territory through the streamlined expedited release process to make a county recording with a map and boundary description of the changed CCN area pursuant to TWC §13.257(r) for which there is typically a filing fee and time involved. Further, some amount of time and expense is always required for a CCN holder's attorney or other representative to review and determine an appropriate response to each streamlined expedited release petition filed against it. TAWC stated that these minimum expenses exist regardless of whether a targeted CCN holder makes a filing so there should be some "just and adequate" amount awarded.

Commission Response

The commission declines to modify the rule because TWC §13.2541 requires the former CCN holder to reach an agreement with the landowner or engage an appraiser. The proposed rule is intended to provide an incentive for the former CCN holder to comply with the statutory requirements so that the proceeding can be concluded within the required time periods.

§24.245(j)(5)

TAWC noted that this paragraph includes a typographical error. "CNN" should be changed to "CCN."

Commission Response

The commission corrects the typographical error.

§24.245(j)

TWC §13.254(g) and proposed 16 TAC §24.245(j)(2)(H) allow consideration of "other relevant factors" in compensation determinations. TAWC commented that proposed §24.245(j) should specifically permit consideration of expenses required to comply with TWC §13.257(r). TAWC stated that the rule should also recognize that the revenue stream lost from anticipated future customers in growth areas, not just existing customers which typically do not exist in expedited release and streamlined expedited release situations, is a "relevant" compensation consideration even though not specifically stated in TWC §13.254(g).

Commission Response

The commission modifies the rule to expressly provide for expenses incurred under TWC §13.257(r) as necessary and reasonable legal expenses under §24.245(j)(2)(G). The commission declines to modify the rule to expressly allow recovery of the revenue stream from future customers because it is not included in TWC §13.254(g). However, the former CCN holder is able to request recovery under §24.245(j)(2)(H).

Appraiser Qualifications

TAWC stated that the proposed rule does not establish qualifications or a procedure for maintaining a list of qualified individuals for appraisal preparation under the TWC §§13.254 and 13.2541 compensation procedures and suggested that the commission establish ground rules for who can perform this work.

Commission Response

The commission does not adopt requirements for appraisers in this project because it is outside the scope of the notice of the proposed rule.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other modifications for the purpose of clarifying its intent.

SUB CHAPTER H. CERTIFICATES OF CONVENIENCE AND NECESSITY

16 TAC §24.245

This repeal is adopted under the Texas Water Code §13.041, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; Texas Water Code §13.254, which authorizes decertification and expedited release; Texas Water Code §13.2541, which authorizes streamlined expedited release; and Texas Water Code §13.2551, which authorizes the commission to place conditions on decertification.


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

Filed with the Office of the Secretary of State on June 12, 2020.
TRD-202002363
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Effective date: July 2, 2020
Proposal publication date: March 13, 2020
For further information, please call: (512) 936-7244

16 TAC §24.245

Statutory Authority

The new rule is adopted under Texas Water Code §13.041, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and Texas Water Code §13.2551, which authorizes the commission to place conditions on decertification.


(a) Applicability. This section applies to proceedings for revocation or amendment by decertification, expedited release, or streamlined expedited release of a certificate of convenience and necessity (CCN).
(b) Definitions. The following terms, when used in this section, have the following meanings unless the context indicates otherwise:

1. Alternate retail public utility -- The retail public utility from which a landowner plans to receive service after the landowner obtains expedited release under subsection (f) of this section.

2. Amendment -- The change of a CCN to remove a portion of a service area by decertification amendment, expedited release, or streamlined expedited release.

3. Current CCN holder -- An entity that currently holds a CCN to provide service to an area for which revocation or amendment is sought.

4. Decertification amendment -- A process by which a portion of a certificated service area is removed from a CCN, other than expedited release or streamlined expedited release.


6. Former CCN holder -- An entity that formerly held a CCN to provide service to an area that was removed from the entity's service area by revocation or amendment.

7. Landowner -- The owner of a tract of land who files a petition for expedited release or streamlined expedited release.

8. Prospective retail public utility -- A retail public utility seeking to provide service to a removed area.

9. Removed area -- Area that will be or has been removed under this section from a CCN.


(c) Provisions applicable to all proceedings for revocation, decertification amendment, expedited release, or streamlined expedited release.

1. An order of the commission issued under this section does not transfer any property, except as provided under subsection (l) of this section.

2. A former CCN holder is not required to provide service within a removed area.

3. If the CCN of any retail public utility is revoked or amended by decertification, expedited release, or streamlined expedited release, the commission may by order require one or more other retail public utilities to provide service to the removed area, but only with the consent of each retail public utility that is to provide service.

4. A retail public utility, including an alternate retail public utility, may not in any way render retail water or sewer service directly or indirectly to the public in a removed area unless any compensation due has been paid to the former CCN holder and a CCN to serve the area has been obtained, if one is required.

(d) Revocation or amendment by decertification.

1. At any time after notice and opportunity for hearing, the commission may revoke any CCN or amend any CCN by decertifying a portion of the service area if the commission finds that any of the circumstances identified in this paragraph exist.

(A) The current CCN holder has never provided, is no longer providing, is incapable of providing, or has failed to provide continuous and adequate service in all or part of the certificated service area. If the current CCN holder opposes revocation or decertification amendment on one of these bases, it has the burden of proving that it is, or is capable of, providing continuous and adequate service.

(B) The current CCN holder is in an affected county as defined in TWC §16.341, and the cost of providing service by the current CCN holder is prohibitively expensive as to constitute denial of service. Absent other relevant factors, for commercial developments or residential developments started after September 1, 1997, the fact that the cost of obtaining service from the current CCN holder makes the development economically unfeasible does not render such cost prohibitively expensive.

(C) The current CCN holder has agreed in writing to allow another retail public utility to provide service within its certificated service area or a portion of its service area, except for an interim period, without amending its CCN.

(D) The current CCN holder failed to apply for a cease-and-desist order under TWC §13.252 and §24.255 of this title (relating to content of request for cease and desist order by the commission under TWC §13.252) within 180 days of the date that the current CCN holder became aware that another retail public utility was providing service within the current CCN holder's certificated service area, unless the current CCN holder proves that good cause exists for its failure to timely apply for a cease-and-desist order.

(E) The current CCN holder has consented in writing to the revocation or amendment.

2. A retail public utility may file a written request with the commission to revoke its CCN or to amend its CCN by decertifying a portion of the service area.

(A) The retail public utility must provide, at the time it requests, notice of its request to each customer and landowner within the affected service area of the utility.

(B) The request must specify the area that is requested to be revoked or removed from the CCN area.

(C) The request must address the effect of the revocation or decertification amendment on the current CCN holder, any existing customers, and landowners in the affected service area.

(D) The request must include the mapping information required by §24.257 of this title (relating to Mapping Requirements for Certificate of Convenience and Necessity Applications).

(E) The commission may deny the request to revoke or amend a CCN if existing customers or landowners will be adversely affected.

(F) If a retail public utility's request for decertification amendment or revocation by consent under this paragraph is granted, the retail public utility is not entitled to compensation from a prospective retail public utility.

(G) The commission may initiate a proceeding to revoke a CCN or decertify a portion of a service area on its own motion or upon request of commission staff.

3. The commission may decertify a portion of a service area on its own motion or upon request of commission staff.

(A) The current CCN holder has the burden to establish that it is, or is capable of, providing continuous and adequate service and, if applicable, that there is good cause for failing to file a cease and desist action under TWC §13.252 and §24.255 of this title.

(B) Decertification amendment for a municipality's service area. After notice to a municipality and an opportunity for a hearing, the commission may decertify an area that is located outside the municipality's extraterritorial jurisdictional boundary if the municipality has not provided service to the area on or before the fifth anniversary
of the date the CCN was granted for the area. This subsection does not apply to an area that was transferred to a municipality's certificated service area by the commission and for which the municipality has spent public funds.

(1) A proceeding to remove an area from a municipality's service area may be initiated by the commission with or without a petition.

(2) A petition filed under this subsection must allege that a CCN was granted for the area more than five years before the petition was filed and the municipality has not provided service in the area.

(3) A petition filed under this subsection must include the mapping information required by §24.257 of this title.

(4) Notice of the proceeding to remove an area must be given to the municipality, landowners within the area to be removed, and other retail public utilities as determined by the presiding officer.

(5) If the municipality asserts that it is providing service to the area, the municipality has the burden to prove that assertion.

(f) Expedited release.

(1) An owner of a tract of land may petition the commission for expedited release of all or a portion of the tract of land from a current CCN holder's certificated service area so that the area may receive service from an alternate retail public utility if all the following circumstances exist:

(A) the tract of land is at least 50 acres in size;

(B) the tract of land is not located in a platted subdivision actually receiving service;

(C) the landowner has submitted a request for service to the current CCN holder at least 90 calendar days before filing the petition;

(D) the alternate retail public utility possesses the financial, managerial, and technical capability to provide service as identified in the request for service provided under paragraph (5) of this subsection on a continuous and adequate basis; and

(E) the current CCN holder:

(i) has refused to provide service;

(ii) cannot provide service as identified in the request for service provided under paragraph (5) of this subsection on a continuous and adequate basis; or

(iii) conditions the provision of service on the payment of costs not properly allocable directly to the landowner's service request, as determined by the commission.

(2) An owner of a tract of land may not file a petition under paragraph (1) of this subsection if the landowner's property is located in the boundaries of any municipality or the extraterritorial jurisdiction of a municipality with a population of more than 500,000 and the municipality or retail public utility owned by the municipality is the current CCN holder.

(3) The landowner's desired alternate retail public utility must be:

(A) an existing retail public utility; or

(B) a district proposed to be created under article 16, §59 or article 3, §52 of the Texas Constitution.

(4) The fact that a current CCN holder is a borrower under a federal loan program does not prohibit the filing of a petition under this subsection or authorizing an alternate retail public utility to provide service to the removed area.

(5) The landowner must submit to the current CCN holder a written request for service. The request must be sent by certified mail, return receipt requested, or by hand delivery with written acknowledgment of receipt. For a request other than for standard residential or commercial service, the written request must identify the following:

(A) the tract of land or portion of the tract of land for which service is sought;

(B) the time frame within which service is needed for current and projected service demands in the tract of land;

(C) the reasonable level and manner of service needed for current and projected service demands in the area;

(D) the approximate cost for the alternate retail public utility to provide service at the same level, and in the same manner, that is requested from the current CCN holder;

(E) the flow and pressure requirements and specific infrastructure needs, including line size and system capacity for the required level of fire protection requested, if any; and

(F) any additional information requested by the current CCN holder that is reasonably related to determining the capacity or cost of providing service at the level, in the manner, and in the time frame, requested.

(6) The landowner's petition for expedited release under this subsection must be verified by a notarized affidavit and demonstrate that the circumstances identified in paragraph (1) of this subsection exist. The petition must include the following:

(A) the name of the alternate retail public utility;

(B) a copy of the request for service submitted as required by paragraph (5) of this subsection;

(C) a copy of the current CCN holder's response to the request for service, if any;

(D) copies of deeds demonstrating ownership of the tract of land by the landowner; and

(E) the mapping information described in subsection (k) of this section.

(7) The landowner must mail a copy of the petition to the current CCN holder and the alternate retail public utility via certified mail on the day that the landowner files the petition with the commission.

(8) The presiding officer will determine whether the petition is administratively complete. If the petition is determined not to be administratively complete, the presiding officer will issue an order describing the deficiencies in the petition and setting a deadline for the petitioner to address the deficiencies. When the petition is determined to be administratively complete, the presiding officer will establish a procedural schedule that is consistent with paragraphs (9) and (10) of this subsection. The presiding officer may recommend dismissal of the petition under §22.181(d) of this title if the petitioner fails to supplement or amend the petition within the required timeframe after the presiding officer has determined that the petition is not administratively complete.

(9) The current CCN holder may file a response to the petition within a timeframe specified by the presiding officer, not to exceed 20 days from the date the petition is determined to be administratively complete. The response must be verified by a notarized affidavit.
(10) The commission will grant the petition within 60 calendar days from the date the petition was found to be administratively complete unless the commission makes an express finding that the landowner failed to satisfy all of the requirements of this subsection and makes separate findings of fact and conclusions of law for each requirement based solely on the information provided by the landowner and the current CCN holder. The commission may condition the granting or denial of a petition on terms and conditions specifically related to the landowner's service request and all relevant information submitted by the landowner, the current CCN holder, and commission staff.

(11) The commission will base its decision on the filings submitted by the current CCN holder, the landowner, and commission staff. Chapter 2001 of the Texas Government Code does not apply to any petition filed under this subsection. The current CCN holder or landowner may file a motion for rehearing of the commission's decision on the same timeline that applies to other final orders of the commission. The commission's order ruling on the petition may not be appealed.

(12) If the current CCN holder has never made service available through planning, design, construction of facilities, or contractual obligations to provide service to the tract of land, the commission is not required to find that the alternate retail public utility can provide better service than the current CCN holder, but only that the alternate retail public utility can provide the requested service. This paragraph does not apply to Cameron, Willacy, and Hidalgo Counties or to a county that meets any of the following criteria:

(A) the county has a population of more than 30,000 and less than 35,000 and borders the Red River;
(B) the county has a population of more than 100,000 and less than 200,000 and borders a county described by subparagraph (A) of this paragraph;
(C) the county has a population of 130,000 or more and is adjacent to a county with a population of 1.5 million or more that is within 200 miles of an international border; or
(D) the county has a population of more than 40,000 and less than 50,000 and contains a portion of the San Antonio River.

(13) If the alternate retail public utility is a proposed district, then the commission will condition the release of the tract of land and required CCN amendment or revocation on the final and unappealable creation of the district. The district must file a written notice with the commission when the creation is complete and provide a copy of the final order, judgment, or other document creating the district.

(14) The commission may require an award of compensation to the former CCN holder under subsection (g) of this section. The determination of the amount of compensation, if any, will be made according to the procedures in subsection (g) of this section.

(g) Determination of compensation to former CCN holder after revocation, decertification amendment or expedited release. The determination of the monetary amount of compensation to be paid to the former CCN holder, if any, will be determined at the time another retail public utility seeks to provide service in the removed area and before service is actually provided. This subsection does not apply to revocations or decertification amendments under paragraph (d)(2) of this section or to streamlined expedited release under subsection (h) of this section.

(1) After the commission has issued its order granting revocation, decertification, or expedited release, the prospective retail public utility must file a notice of intent to provide service. A notice of intent filed before the commission issues its order under subsection (d) or (f) of this section is deemed to be filed on the date the commission's order is signed.

(2) The notice of intent must include the following information:

(A) a statement that the filing is a notice of intent to provide service to an area that has been removed from a CCN under subsection (d) or (f) of this section;
(B) the name and CCN number of the former CCN holder; and
(C) whether the prospective retail public utility and former CCN holder have agreed on the amount of compensation to be paid to the former CCN holder.

(3) If the former CCN holder and prospective retail public utility have agreed on the amount of compensation to be paid to the former CCN holder, they must make a joint filing with the commission stating the amount of the compensation to be paid.

(4) If the former CCN holder and prospective retail public utility have not agreed on the amount of compensation to be paid to the former CCN holder, the monetary amount of compensation must be determined by a qualified individual or firm serving as an independent appraiser as follows:

(A) If the former CCN holder and prospective retail public utility have agreed on an independent appraiser, they must make a joint filing with the commission identifying the individual or firm who will be the independent appraiser within ten days of the filing of the notice of intent under paragraph (1) of this subsection. The costs of the independent appraiser must be borne by the prospective retail public utility.

(B) If the former CCN holder and prospective retail public utility cannot agree on an independent appraiser within ten days of the filing of the notice of intent, the former CCN holder and prospective retail public utility must each engage its own appraiser at its own expense. Each appraiser must file its appraisal with the commission within 60 calendar days of the filing of the notice of intent. After receiving the appraisals, the commission will appoint a third appraiser who must make a determination of compensation within 30 days. The determination by the commission-appointed appraiser may not be less than the lower appraisal or more than the higher appraisal of the appraisals engaged by the former CCN holder and prospective retail public utility. The former CCN holder and prospective retail public utility must each pay half the cost of the commission-appointed appraisal directly to the commission-appointed appraiser.

(C) The appraisers must determine the amount of compensation in accordance with subsection (j) of this section.

(5) The determination of compensation by the agreed-upon appraiser under paragraph (4)(A) or the commission-appointed appraiser under paragraph (4)(B) of this subsection is binding on the commission, the landowner, the former CCN holder, and the prospective retail public utility.

(6) If the former CCN holder fails to make a filing with the commission about the amount of agreed compensation, or to engage an appraiser, or file an appraisal within the timeframes required by this subsection, the amount of compensation to be paid will be deemed to be zero. If the prospective retail public utility fails to make a filing with the commission about the amount of agreed compensation, or to engage an appraiser, or file an appraisal within the timeframes required by this subsection, the presiding officer may recommend dismissal of the notice of intent to provide service to the removed area.
The commission will issue an order establishing the amount of compensation to be paid to the former CCN holder not later than 90 days after the date on which a retail public utility files its notice of intent to provide service to the decertified area.

(h) Streamlined expedited release.

(1) The owner of a tract of land may petition the commission for streamlined expedited release of all or a portion of the tract of land from the current CCN holder's certificated service area if all the following conditions are met:
   (A) the tract of land is at least 25 acres in size;
   (B) the tract of land is not receiving service of the type that the current CCN holder is authorized to provide under the applicable CCN; and
   (C) at least part of the tract of land is located in the current CCN holder's certificated service area and at least some of that part is located in a qualifying county.

(2) A qualifying county under paragraph (1)(C) of this subsection:
   (A) has a population of at least one million;
   (B) is adjacent to a county with a population of at least one million, and does not have a population of more than 45,000 and less than 47,500; or
   (C) has a population of more than 200,000 and less than 220,000 and does not contain a public or private university that had a total enrollment in the most recent fall semester of 40,000 or more.

(3) A landowner seeking streamlined expedited release under this subsection must file with the commission a petition and supporting documentation containing the following information and verified by a notarized affidavit:
   (A) a statement that the petition is being submitted under TWC §13.2541 and this subsection;
   (B) proof that the tract of land is at least 25 acres in size;
   (C) proof that at least part of the tract of land is located in the current CCN holder's certificated service area and at least some of that part is located in a qualifying county;
   (D) a statement of facts that demonstrates that the tract of land is not currently receiving service;
   (E) copies of deeds demonstrating ownership of the tract of land by the landowner;
   (F) proof that a copy of the petition was mailed to the current CCN holder via certified mail on the day that the landowner filed the petition with the commission; and
   (G) the mapping information described in subsection (k) of this section.

(5) The presiding officer will determine whether the petition is administratively complete. If the petition is determined not to be administratively complete, the presiding officer will issue an order describing the deficiencies in the petition and setting a deadline for the petitioner to address the deficiencies. When the petition is determined to be administratively complete, the presiding officer will establish a procedural schedule that is consistent with paragraphs (6) and (7) of this subsection. The presiding officer may recommend dismissal of the petition if the petitioner fails to supplement or amend the petition within the required timeframe after the presiding officer has determined that the petition is not administratively complete.

(6) The current CCN holder may file a response to the petition within a timeframe specified by the presiding officer, not to exceed 20 days from the date the petition is determined to be administratively complete. The response must be verified by a notarized affidavit.

(7) The commission will issue a decision on a petition filed under this subsection no later than 60 calendar days after the presiding officer by order determines that the petition is administratively complete. The commission will base its decision on the information filed by the landowner, the current CCN holder, and commission staff. No hearing will be held.

(8) The fact that a current CCN holder is a borrower under a federal loan program is not a bar to the release of a tract of land under this subsection. The CCN holder must not initiate an application to borrow money under a federal loan program after the date the petition is filed until the commission issues a final decision on the petition.

(9) The commission may require an award of compensation by the landowner to the former CCN holder as specified in subsection (i).

(i) Determination of compensation to former CCN holder after streamlined expedited release. The amount of compensation, if any, will be determined after the commission has granted a petition for streamlined expedited release filed under subsection (b) of this section. The amount of compensation, if any, will be decided in the same proceeding as the petition for streamlined expedited release.

(1) If the former CCN holder and landowner have agreed on the amount of compensation to be paid to the former CCN holder, they must make a joint filing with the commission stating the amount of the compensation to be paid.

(2) If the former CCN holder and landowner have not agreed on the compensation to be paid to the former CCN holder, the monetary amount of compensation must be determined by a qualified individual or firm serving as an independent appraiser under the following procedure.

(A) If the former CCN holder and landowner have agreed on an independent appraiser, the former CCN holder and landowner must make a joint filing with the commission identifying the individual or firm who will be the independent appraiser within ten days after the commission grants streamlined expedited release under subsection (b) of this section. The costs of the independent appraiser must be borne by the landowner. The appraiser must file its appraisal with the commission within 70 days after the commission grants streamlined expedited release.

(B) If the former CCN holder and landowner have not agreed on an independent appraiser within ten days after the commission grants streamlined expedited release under subsection (b) of this section, the former CCN holder and landowner must each engage its own appraiser at its own expense. Each appraiser must file its appraisal with the commission within 70 calendar days after the commission grants streamlined expedited release. After receiving the appraisals, the commission will appoint a third appraiser who must make a determination of compensation within 100 days after the date the commission grants streamlined expedited release. The determination by the commission-appointed appraiser may not be less than the lower appraisal or more than the higher appraisal made by the appraisers engaged by the former CCN holder and landowner. The former CCN holder and landowner must each pay half the cost of the commission-appointed appraiser directly to the commission-appointed appraiser.

(C) The appraisers must determine the amount of compensation in accordance with subsection (j) of this section.
(3) The determination of compensation by the agreed-upon appraiser under paragraph (2)(A) or the commission-appointed appraiser under paragraph (2)(B) of this subsection is binding on the commission, former CCN holder, and landowner.

(4) If the former CCN holder fails to make a filing with the commission about the amount of agreed compensation or engage an appraiser or file an appraisal within the timeframes required by this subsection, the amount of compensation to be paid will be deemed to be zero. If the landowner fails to make a filing with the commission about the amount of agreed compensation, or engage an appraiser, or file an appraisal within the timeframes required by this subsection, the commission will base the amount of compensation to be paid on the appraisal provided by the CCN holder.

(5) The commission will issue an order establishing the amount of compensation to be paid and directing the landowner to pay the compensation to the former CCN holder not later than 60 days after the commission receives the final appraisal.

(6) The landowner must pay the compensation to the former CCN holder not later than 90 days after the date the compensation amount is determined by the commission. The commission will not authorize a prospective retail public utility to serve the removed area until the landowner has paid to the former CCN holder any compensation that is required.

(j) Valuation of real and personal property of the former CCN holder.

(1) The value of real property must be determined according to the standards set forth in chapter 21 of the Texas Property Code governing actions in eminent domain.

(2) The value of personal property must be determined according to this paragraph. The following factors must be used in valuing personal property:

(A) the amount of the former CCN holder's debt allocable to service to the removed area;

(B) the value of the service facilities belonging to the former CCN holder that are located within the removed area;

(C) the amount of any expenditures for planning, design, or construction of the service facilities of the former CCN holder that are allocable to service to the removed area;

(D) the amount of the former CCN holder's contractual obligations allocable to the removed area;

(E) any demonstrated impairment of service or any increase of cost to consumers of the former CCN holder remaining after a CCN revocation or amendment under this section;

(F) the impact on future revenues lost from existing customers;

(G) necessary and reasonable legal expenses and professional fees, including costs incurred to comply with TWC §13.257(r); and

(H) any other relevant factors as determined by the commission.

(k) Mapping information.

(1) For proceedings under subsections (f) or (h) of this section, the following mapping information must be filed with the petition:

(A) a general-location map identifying the tract of land in reference to the nearest county boundary, city, or town;

(B) a detailed map identifying the tract of land in reference to verifiable man-made and natural landmarks, such as roads, rivers, and railroads. If ownership of the tract of land is conveyed by multiple deeds, this map must also identify the location and acreage of land conveyed by each deed; and

(C) one of the following for the tract of land:

(i) a metes-and-bounds survey sealed or embossed by either a licensed state land surveyor or a registered professional land surveyor;

(ii) a recorded plat; or

(iii) digital mapping data in a shapefile (SHP) format georeferenced in either NAD 83 Texas State Plane Coordinate System (US feet) or in NAD 83 Texas Statewide Mapping System (meters). The digital mapping data must include a single, continuous polygon record.

(2) Commission staff may request additional mapping information.

(3) All maps must be filed in accordance with §22.71 and §22.72 of this title.

(l) Additional conditions for decertification under subsection (d) of this section.

(1) If the current CCN holder did not agree in writing to a revocation or amendment by decertification under subsection (d) of this section, then an affected retail public utility may request that the revocation or amendment be conditioned on the following:

(A) ordering the prospective retail public utility to provide service to the entire service area of the current CCN holder;

(B) transferring the entire CCN of the current CCN holder to the prospective retail public utility.

(2) If the commission finds that, as a result of revocation or amendment by decertification under subsection (d) of this section, the current CCN holder will be unable to provide continuous and adequate service at an affordable cost to the current CCN holder's remaining customers, then:

(A) the commission will order the prospective retail public utility to provide continuous and adequate service to the remaining customers at a cost comparable to the cost of that service to the prospective retail public utility's other customers and will establish the terms under which service must be provided; and

(B) the commission may order any of the following terms:

(i) transfer of debt and other contract obligations;

(ii) transfer of real and personal property;

(iii) establishment of interim rates for affected customers during specified times; and

(iv) other provisions necessary for the just and reasonable allocation of assets and liabilities.

(3) The prospective retail public utility must not charge the affected customers any transfer fee or other fee to obtain service, except for the following:

(A) the prospective retail public utility's usual and customary rates for monthly service, or

(B) interim rates set by the commission, if applicable.
(4) If the commission orders the prospective retail public utility to provide service to the entire service area of the current CCN holder, the commission will not order compensation to the current CCN holder, the commission will not make a determination of the amount of compensation to be paid to the current CCN holder, and the prospective retail public utility must not file a notice of intent under subsection (g) of this section.

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

Filed with the Office of the Secretary of State on June 12, 2020.

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 65. BOILERS

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 65, Subchapter A, §65.2; Subchapter C, §65.13; Subchapter N, §65.214; Subchapter O, §65.300; and Subchapter R, §65.603 and §65.607, regarding the Boilers program. The amendments are adopted without changes to the proposed text as published in the January 31, 2020, issue of the Texas Register (45 TexReg 683). These rules will not be republished.

The Commission also adopts amendments to 16 TAC, Chapter 65, Subchapter N, §65.206, regarding the Boilers program, with changes to the proposed text as published in the January 31, 2020, issue of the Texas Register (45 TexReg 683). This rule will be republished.

The adopted rule amendments are referred to as "adopted rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 65 implement Texas Health and Safety Code, Chapter 755, Boilers.

The adopted rules are the product of analysis and discussion among the staff and with the Board of Boiler Rules. The primary focus and goal are the protection of public health, safety, and welfare. All participants agreed that it is necessary to that protection to implement a simple method to prevent additional deaths and injuries to Texans. Other unrelated changes are included for administrative matters and overall clarity in the rules.

The adopted rules include three components. First, a carbon monoxide (CO) detector and interlock system is newly required for boilers installed in boiler rooms on or after September 1, 2020, which will significantly reduce deaths and injuries resulting from CO poisoning. This requirement is necessary to protect public health, safety, and welfare. Second, the adopted rules provide the Department the opportunity to address public comments received during the most recent four-year review of the Boilers rules. Finally, the adopted rules make edits and clarifications for consistency and understandability.

SECTION-BY-SECTION SUMMARY

The amendments to §65.2 update the Modular Boiler definition and clarify the Authorized Inspector definition.

The amendments to §65.13 add clarifying wording for temporary boiler operating permits.

The amendments to §65.206 update the name of the section to reflect its increased scope and add the requirement for a CO detector and interlock system to disable the burners of any CO-producing boiler if the concentration of CO in the boiler room reaches a dangerous level. The amendments also specify applicability and update citations. The section is renumbered accordingly. In response to a public comment the effective date of subsection (a) is modified from June 1, 2020, to September 1, 2020.

The amendments to §65.214 update wording for a modular boiler requirement consistent with the revised definition of Modular Boiler and update a citation.

Amendments to §65.300 make clarifying wording changes.

The amendments to §65.603 reword existing boiler room ventilation requirements to more clearly describe both applicability and the ventilation options.

The amendment to §65.607 corrects a citation.

Texas Government Code, §2001.039 requires state agencies to review their rules every four years to determine if the reasons for initially adopting the rules continue to exist. The Notice of Intent to Review the Boilers rules was published in the Texas Register on August 24, 2018 (43 TexReg 5545). During the subsequent public comment period two comments were submitted. The content of the comments and the conclusion of the review process appeared in the Texas Register on February 8, 2019 (44 TexReg 594). No changes to the Boilers rules were made during the rule review process and none are being adopted in this rulemaking that are related to the rule review. However, the Department is taking this opportunity to address those comments as part of the response to the comments received for this proposed rule.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the January 31, 2020, issue of the Texas Register (45 TexReg 683). The deadline for public comments was March 3, 2020. The Department received comments from two interested parties on the proposed rules during the 30-day public comment period. The public comments are summarized below.

Comment: One commenter supports the rule but describes concerns with immediate and unwarned disabling of the burners of one or more boilers in low-risk environments, including remote boilers in isolated buildings and boiler rooms with segregated combustion air and ventilation systems. The commenter expressed that the consequences could be costly, result in significant loss of product, and possibly endanger public health and welfare in some facilities. The commenter recommends that the carbon monoxide detector function as an audible and visual alarm without disabling the burners, or as a two-stage alarm system that provides time to address the problem before the burners are disabled, for certain categories of boiler users.
Department Response: The Department appreciates the support of the rules, and agrees that some facilities could face serious consequences if the interlock operates to disable the burners unexpectedly. The Department recommends that in such applications, the owner install an alarm that initiates before the trigger point of 50 ppm (at which concentration the burners must automatically be disabled). Such early warning could provide time to address an increased concentration of carbon monoxide before it reaches 50 ppm.

The Department is examining the feasibility of identifying types or categories of boilers or installations that may operate safely and maintain protectiveness with modification of the operation of the CO detector and interlock system. Rulemaking may be undertaken to address those applications. The existing variance procedure is available to request modification of the operation of the required CO detector and interlock system. The approval of variances is at the discretion of the Executive Director and the Authorized Inspection Agency. Variances will not be approved absent the demonstration of significant need for modification and reasonableness of any modification. No change has been made to the rule in response to this comment.

Comment: One commenter stated that reducing safety risks is of the highest priority and that he is in favor of the rule changes and appreciates the work of the Department.

The commenter inquires if the level of ppm at which the burners are disabled could be maintained at the existing level of 100 ppm in the vent that will be replaced instead of being lowered to the proposed 50 ppm, because the difference in amount of exposure time required for negative effects would be negligible.

Department Response: The Department appreciates support for the rule amendments and the Department. The concentration at which the burners must be disabled was set at 50 ppm because this concentration is the Occupational Safety and Health Administration's (OSHA) Permissible Exposure Limit (PEL) for carbon monoxide. Disabling the burners only when the concentration of CO reaches 100 ppm would create the risk that the CO concentration would exceed the PEL, possibly for extended amounts of time. The Department disagrees with the recommendation and believes the current PEL is the safe and appropriate level at which the interlock must be triggered. No change has been made to the rule in response to this comment.

Comment: The commenter explains that the proposed effective date of the CO detector and interlock requirement of June 1, 2020, would follow the effective date of the rule by about one month. The commenter expressed that this is a significant rule change and this time frame for implementation does not provide adequate planning time when designing new boiler rooms or installations. The commenter recommends that the CO detector and interlock requirement become effective on September 1, 2020.

Department Response: The Department agrees that the June 1, 2020, effective date in §65.206 of the rule must be extended to September 1, 2020, due to a later than anticipated schedule for adoption of the rule amendments and to provide adequate period of time for owners and operators to prepare to implement this new requirement. The Department has made the change to the effective date of §65.206(a) of the adopted rule in response to this comment.

The Department received two public comments in response to the Notice of Intent to Review the Boilers rules published in the Texas Register on August 24, 2018 (43 TexReg 5545). The public comments are summarized below.

Comment: One commenter recommended that the membership of the Board of Boiler Rules be changed from including three members who represent companies that insure boilers in Texas to instead include three members representing authorized inspection agencies, because the majority of authorized inspection agencies are not insurance companies and therefore cannot have representatives on the Board.

Department Response: The Department understands the comment and concerns, but the composition of the board is specified by Texas Boiler law, Health and Safety Code §755.011(b)(2). A statute revision during the legislative session would need to occur to address this specific concern. The rule, Texas Administrative Code §65.101(a)(2), merely echoes the statute and will be amended only if the statutory requirement is revised. No change has been made to the rules in response to this comment.

Comment: The second comment on the Notice of Intent to Review references Texas Administrative Code §65.213, which prohibits HLW boilers (potable water heaters) from being incorporated into a hot water heating system as a hot water heating boiler. The commenter asked if these boilers could be grandfathered until replacement is necessary.

Department Response: The prohibition on using HLW boilers in a hot water heating system as hot water heating boilers was first incorporated into the Texas Administrative Code on December 8, 2005. The present rule, however; indicates that it was adopted on June 15, 2015, because the Boilers rules were readopted at that time and this rule changed from its former number, Texas Administrative Code §65.70(j), to the present number, §65.213. The text of the rule, and thus the substantive requirement, remained unchanged since 2005. Therefore, the rules have prohibited HLW water heaters from being incorporated into water heating systems as hot water heating boilers from 2005 forward. At the time the rule first became effective in 2005 such an existing system would have been "grandfathered" and could continue to operate, but no new use of an HLW boiler in this way would have been approved after 2005. No changes have been made to the Boilers rules in response to this comment.

ADVISORY BOARD RECOMMENDATIONS AND COMMISSION ACTION

The Board of Boiler Rules (Advisory Board) met on February 26, 2020, to discuss the proposed rules and the single public comment received to that date. The Board agreed to allow the Department to respond to any additional comments that the Department might receive in the days remaining before the end of the comment period provided that the response would not necessitate Board action. The Advisory Board recommended adopting the proposed rules with any permissible changes. Following the Board meeting the Department received an additional public comment. In response to that comment the Department modified the effective date in §65.206 from June 1, 2020 to September 1, 2020. This change does not require Board action. At its meeting on May 19, 2020, the Commission adopted the proposed rules with changes as recommended by the Board.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §65.2

STATUTORY AUTHORITY
The adopted rules are adopted under Texas Occupations Code, Chapter 51, and Texas Health and Safety Code, Chapter 755, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 51 and Texas Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adopted rules.

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

Filed with the Office of the Secretary of State on June 11, 2020.

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Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
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Proposal publication date: January 31, 2020
For further information, please call: (512) 463-3671

SUBCHAPTER C. BOILER REGISTRATION AND CERTIFICATE OF OPERATION—REQUIREMENTS

16 TAC §65.13

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapter 51, and Texas Health and Safety Code, Chapter 755, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 51 and Texas Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adopted rules.

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

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Brad Bowman
General Counsel
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For further information, please call: (512) 463-3671

SUBCHAPTER N. RESPONSIBILITIES OF THE OWNER AND OPERATOR

16 TAC §65.206, §65.214

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapter 51, and Texas Health and Safety Code, Chapter 755, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 51 and Texas Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adopted rules.

§65.206. Boiler Room.

(a) Each boiler room containing one or more boilers from which carbon monoxide can be produced shall be equipped with a carbon monoxide detector with a manual reset.

(1) The carbon monoxide detector and boiler(s) shall be interlocked to disable the burners when the measured level of CO rises above 50 ppm.

(2) The carbon monoxide detector shall disable the burners upon loss of power to the detector.

(3) The carbon monoxide detector shall be calibrated in accordance with the manufacturer's recommendations or every eighteen months after installation of the detector. A record of calibration shall be posted at or near the boiler, or be readily accessible to an inspector.

(4) The requirements in this subsection apply to boiler rooms in which new installations or reinstallation of one or more boilers are completed on or after September 1, 2020.

(b) The boiler room shall be free from accumulation of rubbish and materials that obstruct access to the boiler, its setting, or firing equipment.

(c) The storage of flammable material or gasoline-powered equipment in the boiler room is prohibited.

(d) The roof over boilers designed for indoor installations, shall be free from leaks and maintained in good condition.

(e) Adequate drainage shall be provided.

(f) All exit doors shall open outward.

(g) It is recommended that the ASME Code, Section VI, Care and Operation of Heating Boilers, be used as a guide for proper and safe operating practices.

(h) It is recommended that the ASME Code, Section VII, Care and Operation of Power Boilers, be used as a guide for proper and safe operating practices.

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

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Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
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SUBCHAPTER O. FEES

16 TAC §65.300

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapter 51, and Texas Health and Safety Code, Chapter 755, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 51 and Texas Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adopted rules.

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

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Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-3671

SUBCHAPTER R. TECHNICAL REQUIREMENTS

16 TAC §65.603, §65.607

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapter 51, and Texas Health and Safety Code, Chapter 755, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 51 and Texas Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adopted rules.

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

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Brad Bowman
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Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-3671

CHAPTER 130. PODIATRIC MEDICINE PROGRAM

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 TexAdmin Code (TAC), Chapter 130, Subchapter D, §130.42, and §130.45; Subchapter E, §§130.53, 130.56, and 130.58; Subchapter F, §130.60; and Subchapter G, §130.72, regarding the Podiatry Program, without changes to the proposed text as published in the January 3, 2020, issue of the Texas Register (45 TexReg 50). These rules will not be republished.

The Commission also adopts amendments to Subchapter D, §130.44 and new rule Subchapter E, §130.59 regarding the Podiatry Program with changes to the proposed text as published in the January 3, 2020, issue of the Texas Register (45 TexReg 50). These rules will be republished.

The adopted rule amendments and new rule are referred to as "adopted rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The adopted rules require practitioners to complete a human trafficking training course as required by House Bill (HB) 2059 and the newly-created Chapter 116 of the Occupations Code.

The adopted rules establish limits on prescribing opioids for acute pain, address electronic prescribing, and require continuing education on prescribing and monitoring controlled substances. These rules implement HB 2174, HB 3284, and HB 3285, which revised the Texas Controlled Substances Act in Chapter 481 of the Health and Safety Code.

The adopted rules also clarify the scope of delegation permitted and allow for a podiatrist to delegate to a qualified and properly trained podiatric medical assistant as outlined in HB 2847. Implementing a transfer from the Texas Medical Board to the Department's regulatory authority in HB 2847, the adopted rules provide for the regulation of podiatric medical radiological technicians and establish a fee for this license.

The adopted rules update the administrative penalties and sanctions for podiatrists, implementing HB 1899 and Occupations Code, Chapter 108, as well as penalties for improperly accessing the Texas Prescription Monitoring Program provided for in HB 3284 and the Texas Controlled Substances Act.

Finally, the adopted rules provide for the orderly transition of assessing continuing medical education hours as the Department transitions to biennial podiatric license terms. Biennial license terms were adopted in a previous rulemaking and made effective September 1, 2019 (44 TexReg 4725).

SECTION-BY-SECTION SUMMARY

The adopted rules amend §130.42 to require the completion of human trafficking prevention training for each renewal on or after September 1, 2020. This training is required by Texas Occupations Code §116.003.

The adopted rules amend §130.44 to require two hours of continuing medical education (CME) related to prescribing and monitoring controlled substances prior to the first anniversary of podiatric medical licensure. The amendment requires one hour of CME covering best practices, alternative treatment options, and multimodal approaches to pain management for podiatrists whose practice involves the prescription and dispensation of opi-
oids. Additionally, the amendment revises the CME due date requirements and provides a guide to transition for CME requirements as the Department moves podiatric license renewal to biennial periods. After publication of the proposed rule text, the Department made changes to subsection (o) to consistently use the word "licensee."

The adopted rules amend §130.45, by deleting subsection (f), which was duplicative of a similar subsection in §130.44.

The adopted rules amend §130.53, by establishing regulatory authority over podiatric medical radiological technicians as created by HB 2847. The amendment also specifies a requirement of 60 x-rays for student training and requires completion of human trafficking prevention training for each renewal on or after September 1, 2020. The amendment deletes a reference to an act of moral turpitude as grounds for the Department to refuse renewal of a podiatric medical radiology technician license.

The adopted rules amend §130.56 to clarify the scope of delegated authority from a podiatrist to a podiatric medical assistant.

The adopted rules amend §130.58 to permit a podiatrist to designate an agent to communicate prescriptions to a pharmacist. Additionally, the amendment specifies that unauthorized access of the Texas Prescription Monitoring Program (PMP) is grounds for disciplinary action by the Department.

The adopted rules create new §130.59 that outlines the limits on the prescription of opioids to treat acute pain. The new section also requires the electronic prescription of all controlled substance prescriptions after September 1, 2021, and provides a list of exceptions for this requirement. Additionally, in response to a public comment submitted by the Texas Medical Association, the Department removed published subsection (c) from Subchapter E, §130.59 and the rest of the subsections were re-lettered.

The adopted rules amend §130.60 to provide the fees applicable for Active Duty Military Members ($0), and Podiatric Medical Radiological Technicians ($25).

The adopted rules amend §130.72 to establish grounds for disciplinary actions and sanctions based upon improper access and dissemination of information obtained from the PMP. Additionally, the amendment incorporates denial of licensure, and suspension or revocation of licenses, for offenses identified in Chapter 108, Subchapter B, of the Occupations Code.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the January 3, 2020, issue of the Texas Register (45 TexReg 50). The deadline for public comments was February 4, 2020. The Department received five comments from four interested parties on the proposed rules during the 30-day public comment period. The public comments are summarized below.

Comment: One individual commenter would like more specification of what "improper access to the PMP" means.

Department Response: The Department disagrees with this comment. Section 481.071 of the Texas Health and Safety Code states that a practitioner may not access the Prescription Monitoring Program (PMP) database except for a valid medical purpose and in the course of medical practice. In accordance with the Health and Safety Code provisions, §130.72 of the proposed rules provide that a practitioner may not disclose or use information from the PMP in a manner not authorized by law. The rules also provide that a person authorized to receive information from the PMP may not make a material misrepresentation or fail to disclose a material fact in the request for information. No change has been made to the proposed rules in response to this comment.

Comment: One individual commenter is not sure what "human sex trafficking" has to do with podiatry and does not see the benefit of a podiatrist learning about this issue.

Department Response: The Department disagrees with this comment. The proposed rules implement HB 2059, 86th Legislature Regular Session (2019). HB 2059 requires practitioners complete human trafficking training as a condition of license renewal. No change has been made to the proposed rules in response to this comment.

Comment: One individual commenter believes that the human trafficking course is burdensome and believes resources need to be better used to combat this issue. The commenter also believes there needs to be an exception to e-prescribing for small practices that write less than twenty-five prescriptions for controlled substances a year. This same commenter provided a second comment containing a link to an article on "how wasteful of a burden" the proposal to have human trafficking training is for a podiatrist.

Department Response: The Department disagrees with this comment. The proposed rules implement HB 2059 and HB 2174, 86th Legislature Regular Session (2019). HB 2059 requires practitioners complete human trafficking training as a condition of license renewal.

HB 2174 requires electronic prescriptions for controlled substances and authorizes written or telephonic communication of prescriptions in certain circumstances. HB 2174 also requires the Texas State Board of Pharmacy to convene a workgroup to implement a waiver process for e-prescribing. This portion of the comment is beyond the scope of this rulemaking. However, this comment has been referred to the appropriate division for review. No change has been made to the proposed rules in response to this comment.

Comment: The Texas Medical Association submitted comment on §130.59(c). Subsection (c) of this section of the rule states "the 10-day limit does not apply to a prescription for an opioid approved by the United States Food and Drug Administration for the treatment of substance addiction that is issued by a practitioner for the treatment of substance addiction." The Texas Medical Association is concerned that the inclusion of subsection (c) may cause confusion among podiatrists, who may question their authorized scope of practice. As a result, the Texas Medical Association recommends the proposed new subsection (c) be deleted.

Department Response: The Department agrees with this comment. The proposed rules implement HB 2174, 86th Legislature Regular Session (2019). Chapter 202 of the Texas Occupations Code defines "podiatry" as "the treatment of or offer to treat any disease, disorder, physical injury, deformity, or ailment of the human foot by any system or method." The practice of podiatry does not include the treatment for substance abuse or addiction. Deleting proposed rule §130.59(c) does not affect the current law, removes an unnecessary provision from the podiatry rules, and does not change the scope of practice for podiatrists. The Department has deleted subsection (c) of §130.59 as published in the Texas Register and re-lettered the subsection accordingly.
ADVISORY BOARD RECOMMENDATIONS AND COMMISSION ACTIONS

On March 9, 2020, the Podiatric Medical Examiners Advisory Board recommended adopting the proposed rules with the Department recommended changes. The Department recommended changes are to Subchapter D, §130.44(o), to consistently use the word "licensee." Additionally, in response to the Texas Medical Association comment, the published subsection (c) was removed from Subchapter E, §130.59 and the rest of the subsections were re-lettered. At its meeting on May 19, 2020, the Commission adopted the proposed rules as recommended by the Advisory Board.

SUBCHAPTER D. DOCTOR OF PODIATRIC MEDICINE

16 TAC §§130.42, 130.44, 130.45

STATUTORY AUTHORITY

The rules are adopted under Texas Occupations Code, Chapters 51 and 202, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The adopted rules are also adopted under Texas Occupations Code, Chapter 108, which establishes the Department's authority to deny, suspend or revoke podiatrists for certain criminal convictions; Texas Occupations Code, Chapter 116, which requires the completion of human trafficking prevention training for health professions licensees; and Texas Health and Safety Code Chapter 481, which mandates certain continuing education for controlled substance prescribers, places limits on the prescription of opioids for acute pain, requires the submission of electronic prescriptions for controlled substances, and forbids unauthorized access to the PMP.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 51, 108, 116, and 202; and Texas Health and Safety Code, Chapter 481. No other statutes, articles, or codes are affected by the adopted rules.

§130.44. Continuing Medical Education—General Requirements.

(a) Each person licensed to practice podiatric medicine in the State of Texas is required to have 50 hours of continuing medical education (CME) every two years for the renewal of the license to practice podiatric medicine. One hour of training is equal to one hour of CME.

(b) Two hours of the required 50 hours of department approved CME shall be a course, class, seminar, or workshop in: Ethics in the Delivery of Health Care Services and/or Rules and Regulations pertaining to Podiatric Medicine in Texas, Topics on Human Trafficking Prevention, Healthcare Fraud, Professional Boundaries, Practice Risk Management or Podiatric Medicine related Ethics or Jurisprudence courses, Abuse and Misuse of Controlled Substances, Opioid Prescription Practices, and/or Pharmacology, including those sponsored by an entity approved by CPME, APMA, APMA affiliated organizations, AMA, AMA affiliated organizations, or governmental entities, or the entities described in subsections (e) and (f) are acceptable.

(c) Each person initially licensed to practice podiatric medicine in the State of Texas is required to complete two hours of continuing medical education related to approved procedures of prescribing and monitoring controlled substances prior to the first anniversary of date the license was originally issued.

(d) For each person licensed to practice podiatric medicine in the State of Texas whose practice includes prescription or dispensation of opioids shall annually attend at least one hour of continuing medical education covering best practices, alternative treatment options, and multi-modal approaches to pain management that may include physical therapy, psychotherapy, and other treatments.

(e) A licensee shall receive credit for each hour of podiatric medical meetings and training sponsored by APMA, APMA affiliated organizations, TPMA, state, county or regional podiatric medical association podiatric medical meetings, university sponsored podiatric medical meetings, hospital podiatric medical meetings or hospital podiatric medical grand rounds, medical meetings sponsored by the Foot & Ankle Society or the orthopedic community relating to foot care, and others at the discretion of the Board. A practitioner may receive credit for giving a lecture, equal to the credit that a podiatrist attending the lecture obtains.

(f) A licensee shall receive credit for each hour of training for non-podiatric medical sponsored meetings that are relative to podiatric medicine and department approved. The department may assign credit for hospital grand rounds, hospital CME programs, corporate sponsored meetings, and meetings sponsored by the American Medical Association, the orthopedic community, the American Diabetes Association, the Nursing Association, the Physical Therapy Association, and others if approved.

(g) It shall be the responsibility of the licensee to ensure that all CME hours being claimed meet the standards for CME as set by the commission. Practice management, home study and self-study programs will be accepted for CME credit hours only if the provider is approved by the Council on Podiatric Medical Education. The licensee may obtain up to, but not exceed twenty (20) hours of the aforementioned hours per biennium.

(h) Cardiopulmonary Resuscitation (CPR) certification is eligible for up to three (3) hours of CME credit and Advanced Cardiac Life Support (ACLS) certification for up to six (6) hours of CME credit. Practitioners may only receive credit for one, not both. No on-line CPR certification will be accepted for CME credit.

(i) If a practitioner has an article published in a peer review journal, the practitioner may receive one (1) hour of CME credit for the article, with credit for the article being provided only once, regardless of the number of times or the number of journals in which the article is published.

(j) With the exception of the allowed hours carried forward, the required 50 hours of continuing medical education must be obtained in a 24-month period immediately preceding the date in which the license is to be renewed. The 24-month period will begin on the first full day of the month after the practitioner's date of renewal and end two years later. A licensee who completes more than the required 50 hours during the preceding CME period may carry forward a maximum of ten (10) hours for the next renewal CME period.

(k) The department shall employ an audit system for continuing education reporting. The license holder shall be responsible for maintaining a record of his or her continuing education experiences. The certificates or other documentation verifying earning of continuing education hours are not to be forwarded to the department at the time of renewal unless the license holder has been selected for audit.

(l) The audit process shall be as follows:

(1) The department shall select for audit a random sample of license holders to ensure compliance with CME hours.

(2) If selected for an audit, the license holder shall submit copies of certificates, transcripts or other documentation satisfactory to
the department, verifying the license holder's attendance, participation and completion of the continuing education.

(3) Failure to timely furnish this information within thirty (30) calendar days or providing false information during the audit process or the renewal process are grounds for disciplinary action against the license holder.

(4) If selected for continuing education audit during the renewal period, the license holder may renew and pay renewal fees.

(m) Licensees that are deficient in CME hours must complete all deficient CME hours and current biennium CME requirement in order to maintain licensure.

(n) Continuing education obtained as a part of a disciplinary action is not acceptable credit towards the total of fifty (50) hours required every two years.

(o) The 85th Texas Legislature enacted changes to Chapter 202, Occupations Code, providing the commission with authority to establish a one or two-year license term for licensees. See H.B. 3078, 85th Legislature, Regular Session (2017). The purpose of this transition rule is to provide guidance on how continuing medical education will be assessed when transitioning from a one to two-year license term. This rule applies only to licensees renewing on or after September 1, 2019. Beginning September 1, 2019, the department shall stagger the continuing medical education biennium of licenses as follows. Licensees renewing in an odd numbered year are to obtain 50 hours of CME for a 24-month period between 2019 and 2021; and for every 2-years thereafter in between renewal dates. Licensees renewing in an even numbered year are to obtain 50 hours of CME for a 24-month period between 2020 and 2022; and for every 2-years thereafter in between renewal dates. This rule expires on August 31, 2022.

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

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TRD-202002348
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
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Proposal publication date: January 3, 2020
For further information, please call: (512) 463-3671

SUBCHAPTER E. PRACTITIONER RESPONSIBILITIES AND CODE OF ETHICS
16 TAC §§130.53, 130.56, 130.58, 130.59

STATUTORY AUTHORITY
The rules are adopted under Texas Occupations Code, Chapters 51 and 202, which authorize the Texas Commission of Licensing and Regulation, the Department’s governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The adopted rules are also adopted under Texas Occupations Code, Chapter 108, which establishes the Department's authority to deny, suspend or revoke podiatrists for certain criminal convictions; Texas Occupations Code, Chapter 116, which requires the completion of human trafficking prevention training for health professions licensees; and Texas Health and Safety Code Chapter 481, which mandates certain continuing education for controlled substance prescribers, places limits on the prescription of opioids for acute pain, requires the submission of electronic prescriptions for controlled substances, and forbids unauthorized access to the PMP.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 51, 108, 116, and 202; and Texas Health and Safety Code, Chapter 481. No other statutes, articles, or codes are affected by the adopted rules.


(a) In this section, "acute pain" means the normal, predicted, physiological response to a stimulus such as trauma, disease, and operative procedures. Acute pain is time limited and the term does not include:

(1) chronic pain;
(2) pain being treated as part of cancer care;
(3) pain being treated as part of hospice or other end-of-life care; or
(4) pain being treated as part of palliative care.

(b) For the treatment of acute pain, a podiatrist may not:

(1) issue a prescription for an opioid in an amount that exceeds a 10-day supply; or
(2) provide for a refill of an opioid.

(c) After January 1, 2021 all controlled substances must be prescribed electronically except:

(1) in an emergency or in circumstances in which electronic prescribing is not available due to temporary technological or electronic failure, in a manner provided for by the Texas State Board of Pharmacy rules;
(2) by a practitioner to be dispensed by a pharmacy located outside this state, in a manner provided for by the Texas State Board of Pharmacy rules;
(3) when the prescriber and dispenser are in the same location or under the same license;

(4) in circumstances in which necessary elements are not supported by the most recently implemented national data standard that facilitates electronic prescribing;

(5) for a drug for which the United States Food and Drug Administration requires additional information in the prescription that is not possible with electronic prescribing;

(6) for a non-patient-specific prescription pursuant to a standing order, approved protocol for drug therapy, collaborative drug management, or comprehensive medication management, in response to a public health emergency or in other circumstances in which the practitioner is considered a non-patient-specific prescription;

(7) for a drug under a research protocol;

(8) by a practitioner who has received a waiver under Section 481.0756 of the Texas Health and Safety Code from the requirement to use electronic prescribing; or

(9) under circumstances in which the practitioner has the present ability to submit an electronic prescription but reasonably determines that it would be impractical for the patient to obtain the drugs prescribed under the electronic prescription in a timely manner and that a delay would adversely impact the patient's medical condition.
The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 11, 2020.
TRD-202002349
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Effective date: July 1, 2020
Proposal publication date: January 3, 2020
For further information, please call: (512) 463-3671

SUBCHAPTER F. FEES

16 TAC §130.60
The rules are adopted under Texas Occupations Code, Chapters 51 and 202, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The adopted rules are also adopted under Texas Occupations Code, Chapter 108, which establishes the Department's authority to deny, suspend or revoke podiatrists for certain criminal convictions; Texas Occupations Code, Chapter 116, which requires the completion of human trafficking prevention training for health professions licensees; and Texas Health and Safety Code Chapter 481, which mandates certain continuing education for controlled substance prescribers, places limits on the prescription of opioids for acute pain, requires the submission of electronic prescriptions for controlled substances, and forbids unauthorized access to the PMP.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 51, 108, 116, and 202; and Texas Health and Safety Code, Chapter 481. No other statutes, articles, or codes are affected by the adopted rules.

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

Filed with the Office of the Secretary of State on June 11, 2020.
TRD-202002351
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Effective date: July 1, 2020
Proposal publication date: January 3, 2020
For further information, please call: (512) 463-3671

TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 175. FEES AND PENALTIES

22 TAC §175.1, §175.2
The Texas Medical Board (Board) adopts amendments to 22 TAC 175, §175.1, concerning Application and Administrative Fees and §175.2, concerning Registration and Renewal Fees, without changes to the proposed text as published in the March 20, 2020, issue of the Texas Register (45 TexReg 1935). The adopted rules will not be republished.

Sections 175.1 and 175.2 were amended to add application, registration and renewal fees for Radiology Assistance, a new certificate type mandated by and in accordance with House Bill 1504 (86th Regular Session).

Section 175.1, relating to Application and Administrative Fees, regarding fees for processing an application for a certificate, added an application and certificate fee for a Radiologist Assistant Certificate in the amount of $140.00, and also to add a fee for an application for a temporary certificate in the amount of $140.00 amendments to add a new definition for "personnel", distinguishing personnel from physicians.

Section 175.2, relating to Registration and Renewal Fees, was amended to provide the fee amount for biennial renewal of a Radiologist Assistant Certificate, in the amount of $100.00.

No written comments were received and no one appeared to testify regarding the amendments to Sections 175.1 and 175.2 at the public hearing on June 12, 2020.

ADOPTED RULES  June 26, 2020  45 TexReg 4337
The amendments are adopted in accordance with House Bill 1504 (86th Regular Session) and under the authority of the Texas Occupations Code Annotated, §601.057, which allow the board to set and collect fees in amounts that are reasonable and necessary to cover the costs of administering and enforcing Chapter 601.

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

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

File with the Office of the Secretary of State on June 12, 2020.
TRD-202002371
Scott Freshour
General Counsel
Texas Medical Board
Effective date: July 2, 2020
Proposal publication date: March 20, 2020
For further information, please call: (512) 305-7016

CHAPTER 178. COMPLAINTS

22 TAC §178.8

The Texas Medical Board (Board) adopts amendments to Title 22, Part 9, §178.8, concerning Appeals, without changes to the proposed text as published in the March 27, 2020, issue of the Texas Register (45 TexReg 2126). The adopted rule will not be republished.

Section 178.8, relating to Appeals, was amended to add language requiring that the board receive a complainant's appeal no later than 90 days after the complainant's receipt of notice of the board's dismissal of the complaint.

No written comments were received and no one appeared to testify regarding the amendment to Section 178.8 at the public hearing on June 12, 2020.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to recommend and adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine; and enforce this subtitle. The amendments are also adopted under the authority of the Texas Occupations Code annotated, Chapter 154.

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

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

File with the Office of the Secretary of State on June 12, 2020.
TRD-202002373
Scott Freshour
General Counsel
Texas Medical Board
Effective date: July 2, 2020
Proposal publication date: March 27, 2020
For further information, please call: (512) 305-7016

CHAPTER 180. TEXAS PHYSICIAN HEALTH PROGRAM

The Texas Medical Board (Board) adopts amendments to the Title of Chapter 180 to change the name to Texas Physician Health Program, §180.1, concerning Purpose, §180.2, concerning Definitions, §180.3, concerning Texas Physician Health Program, §180.4, concerning Operation of Program and the repeal of §180.7, without changes to the proposed text as published in the March 27, 2020, issue of the Texas Register (45 TexReg 2127). The adopted rules will not be republished.

Amendment to Title 180, amendments to §§180.1, 180.2, 180.3, 180.4 and repeal of §180.7 are adopted as follows:

Section 180.1, relating to Purpose, was amended to describe the authority for rulemaking and the purpose of the Texas Physician Health Program under Chapter 167 of the Texas Occupations Code.

Section 180.2, relating to Definitions, was amended to update existing definitions and add new definitions in order to maintain consistency within this chapter.

Section 180.3, relating to Texas Physician Health Program, was amended to clarify and update existing language to ensure consistency with current program processes and TXPHP Governing Board directives.

Section 180.4, relating to Operation of Program, was amended to clarify and update existing language to ensure consistency with current program processes and TXPHP Governing Board directives.

Section 180.7, relating to Rehabilitation Orders, was repealed.

The Board sought stakeholder input through the Texas Medical Board and Texas Physicians Health Program PHP Rules Stakeholder Group which made comments on the proposed changes to the rules that were incorporated in the proposed text.

The Board received no comments. No one appeared to testify regarding the amendments to the rule and the repeal of §180.7, relating to Rehabilitation Orders at the public hearing on June 12, 2020.

22 TAC §§180.1 - 180.4

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to recommend and adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine; and enforce this subtitle.

The amendments are also adopted under the authority of the Texas Occupations Code annotated, Chapter 167.

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

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

File with the Office of the Secretary of State on June 15, 2020.
TRD-202002378

45 TexReg 4338  June 26, 2020  Texas Register
Scott Freshour  
General Counsel  
Texas Medical Board  
Effective date: July 5, 2020  
Proposal publication date: March 27, 2020  
For further information, please call: (512) 305-7016

22 TAC §180.7

The repeal is adopted under the authority of the Texas Occupations Code Annotated, §§153.001, 204.101, 205.101, and 206.101 which provide authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and establish rules related to licensure. The repeal is also authorized by §153.001, Texas Occupations Code.

Sections 167.001 - 167.011, Texas Occupations Code, are affected by this adoption. The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 15, 2020.

TRD-202002379  
Scott Freshour  
General Counsel  
Texas Medical Board  
Effective date: July 5, 2020  
Proposal publication date: March 27, 2020  
For further information, please call: (512) 305-7016

CHAPTER 195. PAIN MANAGEMENT CLINICS

22 TAC §195.1, §195.4

The Texas Medical Board (Board) adopts amendments to 22 TAC 195, §195.1, concerning Definitions and §195.4, concerning Operation of Pain Management Clinics, without changes to the proposed text as published in the March 27, 2020, issue of the Texas Register (45 TexReg 2131). The adopted rules will not be republished.

The amendments were necessitated by House Bill 2454 (86th Legislature, R.S.), which set forth new continuing education requirements in the topic of opioid prescribing and provided that the new hours may not be credited toward hours required under board rule for pain clinic personnel.

Section 195.1, relating to Definitions, was amended to add a new definition for "personnel", distinguishing personnel from physicians.

Section 195.4, relating to Operation of Pain Management Clinics, was amended to add language distinguishing personnel from physicians who may be employed or contracted to provide medical services at a pain clinic.

No written comments were received and no one appeared to testify regarding the amendments to §§195.1 and 195.4 at the public hearing on June 12, 2020.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to recommend and adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine; and enforce this subtitle. The amendments are further adopted under the authority of House Bills 2059, 2174, 2454, and 3285 (86th Texas Legislature, R.S.). No other statures, articles, or codes are affected by this adoption.

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

Filed with the Office of the Secretary of State on June 12, 2020.

TRD-202002374  
Scott Freshour  
General Counsel  
Texas Medical Board  
Effective date: July 2, 2020  
Proposal publication date: March 27, 2020  
For further information, please call: (512) 305-7016

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 49. ORAL HEALTH IMPROVEMENT PROGRAM

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts the repeal of §§49.1 - 49.10, 49.13 - 49.18, concerning the Oral Health Program; and new §§49.1 - 49.6, concerning the Oral Health Improvement Program.

The repeal of §§49.1 - 49.10, 49.13 - 49.18 and new §§49.1 - 49.6 are adopted without changes to the proposed text as published in the March 6, 2020, issue of the Texas Register (45 TexReg 1598), and therefore will not be republished.

BACKGROUND AND JUSTIFICATION

The new rules repeal and replace rules in Chapter 49, in accordance with Texas Government Code, §2001.039, regarding Agency Review of Existing Rules. The repeal and new rules are necessary to accurately reflect program activities and functions of the Oral Health Improvement Program, due to changes implemented by Senate Bill 200 and Senate Bill 219, 84th Legislature, Regular Session, 2015.

The repealed rules included direct client services, which were transferred to HHSC post transformation. The Oral Health Improvement Program remains at DSHS as a public health program that promotes oral health and reduces the burden of dental disease through evidence-based public health initiatives including oral health education and preventive interventions. The program also conducts oral health surveillance activities, analyzes
data from multiple sources, and disseminates findings to stakeholders.

COMMENTS
The 31-day comment period ended on April 6, 2020.
During this period, DSHS did not receive any comments regarding the proposed rules.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §§49.1 - 49.4

STATUTORY AUTHORITY
The repeals are authorized under Texas Health and Safety Code, Texas Oral Health Improvement Act, Chapter 43; Texas Education Code, §22.0834; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which provides for the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services agencies.

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

Filed with the Office of the Secretary of State on June 9, 2020.
TRD-202002320
Barbara Klein
General Counsel
Department of State Health Services
Effective date: June 29, 2020
Proposal publication date: March 6, 2020
For further information, please call: (512) 776-2008

25 TAC §§49.1 - 49.6

STATUTORY AUTHORITY
The new sections are authorized under Texas Health and Safety Code, Texas Oral Health Improvement Act, Chapter 43; Texas Education Code, §22.0834; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which provides for the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services agencies.

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

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TRD-202002324
Barbara Klein
General Counsel
Department of State Health Services
Effective date: June 29, 2020
Proposal publication date: March 6, 2020
For further information, please call: (512) 776-2008

SUBCHAPTER B. RECIPIENT PARTICIPATION IN FFS ORAL HEALTH TREATMENT BENEFITS

25 TAC §§49.5 - 49.9

STATUTORY AUTHORITY
The repeals are authorized under Texas Health and Safety Code, Texas Oral Health Improvement Act, Chapter 43; Texas Education Code, §22.0834; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which provides for the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services agencies.

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

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TRD-202002321
Barbara Klein
General Counsel
Department of State Health Services
Effective date: June 29, 2020
Proposal publication date: March 6, 2020
For further information, please call: (512) 776-2008

SUBCHAPTER C. PROVIDER PARTICIPATION IN FFS ORAL HEALTH TREATMENT BENEFITS

25 TAC §§49.10, 49.13 - 49.15

STATUTORY AUTHORITY
The repeals are authorized under Texas Health and Safety Code, Texas Oral Health Improvement Act, Chapter 43; Texas Education Code, §22.0834; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which provides for the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services agencies.

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

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TRD-202002322
Barbara Klein
General Counsel
Department of State Health Services
Effective date: June 29, 2020
Proposal publication date: March 6, 2020
For further information, please call: (512) 776-2008

SUBCHAPTER D. APPEALS PROCESS FOR FFS ORAL HEALTH TREATMENT BENEFITS AND SERVICES
25 TAC §§49.16 - 49.18

STATUTORY AUTHORITY

The repeals are authorized under Texas Health and Safety Code, Texas Oral Health Improvement Act, Chapter 43; Texas Education Code, §22.0834; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which provides for the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services agencies.

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

Filed with the Office of the Secretary of State on June 9, 2020.

TRD-202002323
Barbara Klein
General Counsel
Department of State Health Services
Effective date: June 29, 2020
Proposal publication date: March 6, 2020
For further information, please call: (512) 776-2008

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) adopts the repeal of §7.117 and simultaneously adopts new §7.117.

The repeal of §7.117 is adopted without changes to the proposal as published in the February 28, 2020, issue of the Texas Register (45 TexReg 1302) and, therefore, will not be republished. New §7.117 is adopted with changes to the proposed text as published and, therefore, will be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking implements 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 adopts the repeal of §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 also adopts the current text of the MOU under new §7.117 and amends 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 changes to the current MOU which are required by HB 2230 and HB 2771. The RRC proposed similar changes to its rule in 16 TAC §3.30 (February 28, 2020, issue of the Texas Register (45 TexReg 1290)).

The RRC and the TCEQ agree that both agencies intend that the MOU at 16 TAC §3.30, once amended, and the MOU adopted at §7.117 will include the same substantive explanations of jurisdiction and requirements. The TCEQ acknowledges that there will be some minor stylistic differences. The RRC did not receive any comments on its rule proposal. The TCEQ received comments from the Sierra Club, Lone Star Chapter. As discussed in the Public Comment section of this preamble, the TCEQ did not make any changes to the MOU in response to the comments.

The MOU is the result of collaboration between the 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 the 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. Additionally, the current MOU describes coordination of actions and cooperative sharing of information between the two agencies under the subsection entitled Interagency activities.

In addition to current language, as required by HB 2771, the amended MOU describes the transfer of the RRC’s responsibilities to the TCEQ relating to regulation of discharges into surface water in the state of produced water (as defined in 30 TAC §305.541), 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 will occur upon the United States Environmental Protection Agency’s (EPA) approval of the TCEQ’s request to amend or supplement its Texas Pollutant Discharge Elimination System (TPDES) program.

Upon EPA’s approval of the TCEQ’s request to amend or supplement its TPDES program, the TCEQ shall assume authority over the final orders at the RRC that are within the scope of the functions, programs, powers, duties, or activities transferred to the TCEQ. The RRC shall retain any enforcement actions pending at the time the TCEQ receives delegation from EPA that are within the scope of the functions, programs, powers, duties, or activities transferred to the TCEQ until final resolution of any such enforcement action is reached. An enforcement action considered pending at the time the TCEQ receives delegation from EPA includes any violation within the scope of the functions, programs, powers, duties, or activities transferred to the TCEQ cited by the RRC in a Notice of Violation that has not resulted in a final order from the RRC. Compliance monitoring for enforcement actions pending at the time the TCEQ receives delegation from EPA shall transfer to the TCEQ when the administrative order of the RRC becomes final. The RRC will provide the TCEQ any relevant information in its possession regarding the final enforcement orders that are transferred to the TCEQ. The TCEQ shall assume authority for tracking compliance with any other final RRC order that is within the scope of the functions, programs, powers, duties, or activities transferred to the TCEQ that have not been resolved at the time the TCEQ receives delegation from EPA.

The TCEQ and the RRC agree that all pending lawsuits at the Office of the Attorney General (OAG), except for collections-only

ADOPTED RULES June 26, 2020 45 TexReg 4341
actions, within the scope of the functions, programs, powers, duties, or activities transferred to the TCEQ are the responsibility of the TCEQ after the transfer. The TCEQ and the RRC will coordinate with the OAG as needed to ensure that these lawsuits are transferred to the TCEQ. The RRC agrees to cooperate with and assist, as necessary, the TCEQ and the OAG with RRC enforcement actions and appeals of RRC decisions.

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 adopted MOU implements the dual authority granted by HB 2230. The adopted MOU also allows 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 repeals §7.117 and simultaneously adopts new §7.117 to incorporate MOU language regarding the division of jurisdiction between the RRC and the TCEQ. The adopted rulemaking incorporates the MOU as it currently exists in 16 TAC §3.30, with the amendments required by HB 2771 and HB 2230. The TCEQ repeals and adopts new §7.117 to ensure the TCEQ has completed all necessary requirements for the delegation package before requesting approval from EPA for delegation of National Pollutant Discharge Elimination System (NPDES) permitting authority for discharges 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.

Adopted new §7.117(a) provides the reason the MOU is needed. Additionally, subsection (a)(4) provides the reference to effective dates of the MOU and subsection (a)(5) provides the reference to the current MOU.

Adopted new §7.117(b) provides the general agency jurisdictions. Additionally, adopted new subsection (b)(1)(B)(i) - (iii) and (2)(B)(i) provides 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 will occur upon EPA’s approval of the TCEQ’s request to amend or supplement its TPDES program.

Adopted new §7.117(c) provides the definition of hazardous waste and identifies exemptions from classifications as hazardous waste for certain oil and gas waste.

Adopted new §7.117(d) describes 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, adopted new subsection (d)(12)(A) and (C) provides 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 will occur upon EPA’s approval of the TCEQ’s request to amend or supplement its TPDES program.

Adopted new §7.117(e) describes 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.

Adopted new subsection (e)(1)(A) amends 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, adopted new subsection (e)(4)(E) amends 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) includes the citation to the Code of Federal Regulations (CFR) for the definition of “underground source of drinking water.”

Adopted new §7.117(f) describes the jurisdiction of the TCEQ and the RRC to regulate and license various types of radioactive materials.

Adopted new §7.117(g) reflects the effective date of the MOU and amends current MOU language to reflect the new effective date of July 15, 2020.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted 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 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 adopted MOU is the result of collaboration between the 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 implements HB 2230 which enacted TWC, §27.026, and HB 2771 which amended TWC, §26.131.

The adopted MOU also describes 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 will occur upon EPA’s approval of the TCEQ’s request to amend or supplement its TPDES program. The adopted MOU also reflects 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 adopted rulemaking does not constitute a "Major environmental rule," a regulatory impact analysis is not required.

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

Takings Impact Assessment

The commission performed an assessment of this rule in accordance with Texas Government Code, §2007.043. The adopted MOU is the result of collaboration between the 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 implements HB 2230 which enacted TWC, §27.026, and HB 2771 which amended TWC, §26.131.

The specific purpose of this rulemaking is to repeal §7.117 and adopt new §7.117 to incorporate 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 EPA’s approval of the 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 DWTR, under the jurisdiction of the TCEQ, into a Class II injection well permitted by the RRC.

This rulemaking imposes no burdens on private real property because the adopted 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 adopted rulemaking and found that the rulemaking is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action or authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the adopted rulemaking is not subject to the Texas Coastal Management Program (CMP).

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

Public Comment

The comment period closed on March 30, 2020. Comments were received from Sierra Club, Lone Star Chapter (Sierra Club).

Comment

Sierra Club stated general support for the MOU.

Response

The TCEQ acknowledges the comment.

§7.117(b)(2)(B)

Comment

Sierra Club commented that the RRC should require that the entities regulated by the RRC comply with the TCEQ’s regulations.

Response

The TCEQ did not make any changes in response to this comment. The RRC does not have authority to require an entity to comply with the TCEQ’s rules.

§7.117(b)(2)(B)

Comment

Sierra Club recommended that “The TCEQ and the RRC may consult as necessary regarding application and interpretation of Texas Surface Water Quality Standards” be replaced with “The TCEQ and the RRC will consult as necessary regarding application and interpretation of Texas Surface Water Quality Standards.”

Response

The TCEQ did not make any changes in response to this comment. The MOU describes how the RRC and the TCEQ imple-
ment the jurisdiction granted to each agency; the MOU does not impose requirements on the RRC or the TCEQ that are not reflective of each agency’s statutory jurisdiction. The TCEQ and the RRC work collaboratively on environmental issues, therefore the TCEQ respectfully disagrees with the recommendation to change the existing MOU language.

§7.117(e)(3)(G)

Comment

Sierra Club commented that the type and volume of waste under the RRC’s jurisdiction that is disposed of at a TCEQ-regulated facility should be reported to the TCEQ-regulated facility, then the TCEQ-regulated facility should be required to report the type and volume of waste to the TCEQ.

Response

The TCEQ did not make any changes in response to this comment. Generally, the existing regulations achieve the purposes set out in this comment. Transporters of oil and gas waste under the jurisdiction of the RRC notify operators of waste management facilities under the jurisdiction of the TCEQ that waste presented for management or final disposition is oil and gas waste. Additionally, operators of waste management facilities under the jurisdiction of the TCEQ are required to make and maintain records of the types and volumes of waste received and make those records available to the TCEQ upon request and/or report the information to the TCEQ. Because TCEQ-authorized waste management facilities may only accept waste that is authorized for acceptance by the facility permit or other authorization, before waste is accepted, a facility operator must ensure that acceptance of the waste is authorized. As such, transporters delivering waste to TCEQ-authorized waste management facilities for management or final disposition are required to provide documentation, such as bills of lading or manifests, regarding the characteristics and volumes of waste that include identifying waste under the jurisdiction of the RRC as oil and gas waste.

§7.117(e)(6)(B)

Comment

Sierra Club suggested language be added to the MOU requiring: 1) the TCEQ notify the RRC if it receives a complaint or information regarding a violation at a facility regulated by the RRC; and 2) the RRC notify the TCEQ if it receives a complaint or information regarding a violation at a facility regulated by the TCEQ.

Response

The TCEQ did not make any changes in response to this comment. The RRC and the TCEQ have long-standing established protocols and practices regarding the coordination of actions and the cooperative sharing of information between the two agencies. The RRC and the TCEQ have an existing and longstanding policy and practice of active interagency communication and coordination regarding complaints and enforcement. To specifically address the interagency policy following the delegation transfer, the TCEQ will continue to notify the RRC regarding any potential violations of RRC requirements identified by the TCEQ and will continue to provide available information as requested to assist with the RRC’s enforcement actions. The RRC will continue to notify the TCEQ regarding any potential violations of TCEQ requirements identified by the RRC and will continue to provide available information as requested to assist with the TCEQ’s enforcement actions. The TCEQ will continue to refer to the RRC, as appropriate, those complaints under the jurisdiction of the RRC. The RRC will continue to refer to the TCEQ, as appropriate, those complaints under the jurisdiction of the TCEQ. Additionally, the TCEQ and the RRC will continue to coordinate investigations and responses to complaints and possible enforcement actions that may involve both agencies’ jurisdictions.

Moreover, the MOU articulates in §7.117(e)(6)(B) a notification procedure when employees of either agency receive a complaint or discover a violation in the course of their official duties.

§7.117(e)(6)(B)

Comment

Sierra Club commented that further discussion about enforcement, including OAG enforcement, is warranted.

Response

The TCEQ did not make any changes in response to this comment. The Background and Summary of the Factual Basis for the Adopted Rules section of this preamble describes the coordination of action and sharing of information between the two agencies regarding enforcement actions that are within the scope of the functions, programs, powers, duties, or activities to be transferred to the TCEQ in accordance with HB 2771.

30 TAC §7.117

Statutory Authority

The repeal of this section is adopted 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 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, §§5.104, which establishes the authority of the commission to enter the memorandum of understanding (MOU) with any other state agency and adopt by rule the MOU; TWC, §§5.105, which establishes that the commission, by rule, shall establish and approve all general policy of the commission; 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 a memorandum of understanding by rule to implement House Bill (HB) 2230 (84th Texas Legislature, 2015); TWC, §27.049, which establishes the authority of the RRC and the TCEQ to comply with TWC, Chapter 27 to enter a memorandum of understanding by rule and amend or enter a new memorandum of understanding by rule; Texas Health and Safety Code (THSC), §361.011, which establishes the TCEQ’s jurisdiction over municipal solid waste; THSC, §361.016, which establishes the authority of the commission to enter the MOU with any other state agency and adopt by rule the MOU; THSC, §361.017, which establishes the TCEQ’s jurisdiction over industrial solid waste and municipal hazardous waste; 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 the MOU with state agencies by rule.
The repeal of this section implements HB 2230, which enacted TWC, §27.026, and HB 2771 (86th Texas Legislature, 2019), which amended TWC, §26.131.

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

Filed with the Office of the Secretary of State on June 12, 2020.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: February 28, 2020
For further information, please call: (512) 239-2678

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30 TAC §7.117

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The new section implements HB 2230, 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 477-7, 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 so doing 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 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, 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 non-hazardous, 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 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 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.

(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 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 non-hazardous) resulting from activities associated with the exploration, development, or production of oil or gas or geothermal resources, including 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. When 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(l)(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(l)(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, §27.011 and §27.014, 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 productive 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 Re-
sources 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 an "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 

(2) Federal regulations adopted under authority of the 
federal Solid Waste Disposal Act, as amended by RCRA, exempt from 
regulation as hazardous waste certain oil and gas wastes. Under 40 
Code of Federal Regulations (CFR) §261.4(b)(5), "drilling fluids, pro-
duced waters, and other wastes associated with the exploration, develop-
ment, 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 consid-
ered 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, develop-
ment, 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 farm, 
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), as-
bestos insulation, domestic sewage, and trash are subject to the juris-
diction 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 market-
ing 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 juris-
diction 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 regulations 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 explor- ing 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.

(c) Intergency 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) of this section 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 "RRCT";

(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 "XXRC" 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, II, 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 sludges 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 nonhazardous 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 authorized 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 collaboratively 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 identifying 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 TCEQ 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); 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 waste 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 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 Injection Control) 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 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 July 15, 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 adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 12, 2020.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality

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Proposal publication date: February 28, 2020
For further information, please call: (512) 239-2678

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CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

SUBCHAPTER K. MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 3. DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM FOR NON-ROAD VEHICLES

30 TAC §114.622, §114.629

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amended §114.622 and §114.629.

The amendments to §114.622 and §114.629 are adopted without changes to the proposed text as published in the January 31, 2020, issue of the Texas Register (45 TexReg 688), and, therefore, will not be republished.

The adopted amendments to §114.622 and §114.629 will be submitted to the United States Environmental Protection Agency as revisions to the State Implementation Plan.

Background and Summary of the Factual Basis for the Adopted Rules

The Texas Emissions Reduction Plan (TERP) was established under Texas Health and Safety Code (THSC), Chapter 386, by Senate Bill 5, during the 77th Texas Legislature, 2001. The TERP was created to provide financial incentives for reducing emissions of on-road heavy-duty motor vehicles and non-road equipment, with the Diesel Emissions Reduction Incentive Program (DERIP) established under THSC, Chapter 386, Subchapter C as the primary incentive program. The DERIP includes the Emissions Reduction Incentive Grants Program, Rebate Grants Program, and third-party grants.

House Bill (HB) 1346, 86th Texas Legislature, 2019, amended THSC, Chapter 386, Subchapter C to provide that the commission may not set the minimum percentage of vehicle miles traveled or hours of operation required to take place in a nonattain-
ment area or affected county as less than 55%. HB 1627, 86th Texas Legislature, 2019 amended THSC, Chapter 386, Subchapter A to remove Victoria County from the list of affected counties eligible for grants under the TERP DERIP.

The adopted rulemaking revises §114.622 and §114.629 to implement HB 1346 and HB 1627.

Section by Section Discussion

The commission adopts non-substantive changes, such as grammatical corrections. These changes are non-substantive and are not specifically discussed in this preamble.

§114.622, Incentive Program Requirements

The commission adopts amended §114.622(b) and (c) to change the minimum percentage of usage in a nonattainment area or affected county from 75% to 55% to implement HB 1346.

§114.629, Affected Counties and Implementation Schedule

The commission adopts amended §114.629(a) to remove Victoria County from the list of affected counties eligible for grants under the TERP DERIP to implement HB 1627.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking is not subject to Texas Government Code, §2001.0225, because the rulemaking does not meet the definition of a “Major environmental rule” as defined in that statute. A “Major environmental rule” is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect, in a material way, the economy, 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 amendments to §114.622 and §114.629 are adopted in accordance with HB 1346 and HB 1627, which amended THSC, Chapter 386, Subchapters A and C. The adopted rulemaking revises, eligibility criteria for a voluntary grant program. Because the adopted rules place no involuntary requirements on the regulated community, the adopted rules will not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. In addition, none of these amendments place additional financial burdens on the regulated community.

In addition, a regulatory impact analysis is not required because the adopted rulemaking does not meet any of the applicability criteria for requiring a regulatory analysis of a “Major environmental rule” as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general authority of the commission. This rulemaking does not exceed a standard set by federal law. Additionally, this rulemaking does not exceed an express requirement of state law or a requirement of a delegation agreement and was not developed solely under the general powers of the agency but is authorized by specific sections of the THSC that are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

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

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether the adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission’s preliminary assessment indicates Texas Government Code, Chapter 2007, does not apply.

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

Promulgation and enforcement of the adopted rulemaking will be neither a statutory nor a constitutional taking of private real property. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with the amendments to THSC, Chapter 386 as a result of HB 1346 and HB 1627. The adopted rules revise a voluntary program and only affect motor vehicles that are not considered to be private real property. The adopted rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.
The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP.

Public Comment

The commission offered a public hearing on February 25, 2020. The comment period closed on March 3, 2020. No comments were received regarding this rulemaking.

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and THSC, Chapter 386, which establishes the Texas Emissions Reduction Plan.

The amendments are adopted as part of the implementation of THSC, Chapter 386, Subchapters A and C, as amended by House Bill (HB) 1346 and HB 1627, 86th Texas Legislature, 2019.

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

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Robert Martinez
Director, Environmental Law
Texas Commission on Environmental Quality
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CHAPTER 328. WASTE MINIMIZATION AND RECYCLING
SUBCHAPTER K. GOVERNMENTAL ENTITY RECYCLING AND PURCHASING OF RECYCLED MATERIALS

30 TAC §§328.200 - 328.204

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§328.200 - 328.204.

Sections 328.200 - 328.203 are adopted without changes to the proposed text as published in the January 31, 2020, issue of the Texas Register (45 TexReg 91) and will not be republished. Section 328.204 is adopted with change to the proposed text as published in the same issue of the Texas Register and will be republished.

Background and Summary of the Factual Basis for the Adopted Rules

The adopted rulemaking adds rules that apply to certain governmental entities to establish recycling programs and purchasing preferences for products made of recycled materials.

Senate Bill (SB) 1376, 86th Texas Legislature, 2019, amended Texas Health and Safety Code (THSC), §361.425 and §361.426 to exempt certain governmental entities from compliance with recycling requirements, if the commission finds that compliance will create a hardship on the governmental entity. SB 1376 also requires the commission to exempt certain governmental entities from compliance with purchasing preferences for recycled materials, if the commission finds that compliance will create a hardship on the governmental entity.

The commission adopts new Chapter 328, Subchapter K, Governmental Entity Recycling and Purchasing of Recycled Materials, to establish requirements for a governmental entity to create a recycling program, to give preference in purchasing to products made of recycled materials, and to create an exemption that will apply to certain governmental entities, if compliance with Chapter 328, Subchapter K will create a hardship.

Section by Section Discussion

§328.200, Purpose

The commission adopts new §328.200 which pertains to governmental entities and establishes a standard to implement a recycling program.

§328.201, Definitions

The commission adopts new §328.201 to define "Governmental entity," "Hardship," and "Recyclable materials" within the context of the requirements.

§328.202, General Requirements

The commission adopts new §328.202 to describe the responsibilities for governmental entities to establish a recycling program. Overall, the entity must consider how to collect and store recyclable materials, maintain containers for recyclable materials, create procedures with buyers of recyclable materials, evaluate and modify the recycling program, and create measures to encourage employee participation.

§328.203, Exemptions

The commission adopts new §328.203, which provides for specific exemptions that are allowed under the rule as well as opportunities for an exemption request due to a hardship.

§328.204, Purchasing Preference for Recycled Materials

The commission adopts new §328.204, which requires certain governmental entities to give preference to purchase products made of recycled materials. At adoption, the commission revises §328.204 to provide consistency with Texas Government Code, §2155.445, which states that preference for the purchasing of products made of recycled materials will be given if the product meets applicable specifications as to quantity and quality, and the average price of the product is not more than 10% greater than the price of comparable nonrecycled products.

Final Regulatory Impact Determination

ADOPTED RULES  June 26, 2020  45 TexReg 4355
The commission reviewed the adopted rulemaking in light of the Regulatory Impact Analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted 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 that statute. A "Major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. New §§328.200 - 328.204 are adopted in accordance with SB 1376 which amended THSC, Chapter 361, Subchapter N. The adopted rules establish requirements for a governmental entity to create a recycling program and to give preference in purchasing to products made of recycled materials. The adopted rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or sector of the state. In addition, the adopted rules provide an exemption for the regulated community if compliance with the adopted rules will create a hardship on the regulated entity.

In addition to the fact that the adopted rules do not meet the definition of a "Major environmental rule," the adopted rules are not subject to Texas Government Code, §2001.0225. Texas Government Code, §2001.0225, applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. Adopted new §§328.200 - 328.204 do not exceed an express requirement of state law or a requirement of a delegation agreement and were not developed solely under the general powers of the agency but are authorized by specific sections of the THSC that are cited in the Statutory Authority portion of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

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

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether the adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission’s preliminary assessment indicates Texas Government Code, Chapter 2007, does not apply.

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

Promulgation and enforcement of the adopted rulemaking will be neither a statutory nor a constitutional taking of private real property. The primary purpose of the rulemaking is to amend Chapter 326 in accordance with the amendments to THSC, Chapter 361 as a result of SB 1376. The adopted rules will establish requirements for a governmental entity to create a recycling program and require certain governmental entities to give preference to purchase products made of recycled materials. The adopted rulemaking does not affect a landowner’s rights in private real property because this rulemaking does not burden, restrict, or limit the owner’s right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

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

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

Public Comment

The commission offered a public hearing on February 27, 2020. The comment period closed on March 3, 2020. The commission received written comments from the State of Texas Alliance for Recycling (STAR) and the Texas Lone Star Chapter, Solid Waste Association of North America, Inc (TxSWANA). All commenters were in support of the rulemaking. Specific changes to the rules were suggested in TxSWANA’s comments.

Response to Comments

Comment

STAR stated that it supports the rulemaking and the Texas Legislature’s vision of reducing hardship for Texas schools serving populations less than 5,000 individuals. TxSWANA commented that they support the goal to promote overall recycling within the state.

Response

The commission acknowledges the comments.

Comment

TxSWANA requested that the commission provide clarity on what constitutes a hardship for the purposes of the exemption in proposed §328.203. TxSWANA elaborated that the only guidance in the legislation and proposed rulemaking on what constitutes a hardship appears to be the rulemaking’s fiscal note, which implies that if the requirements fiscally impact a governmental entity, then the governmental entity qualifies for a hardship exemption. TxSWANA added that if this is
the standard, the rule should explicitly define hardship and/or unreasonable burden. TXSWANA also requested clarification on whether a governmental entity may request a full or partial hardship exemption.

Response

The commission's goal is to promote continued recycling efforts by governmental entities where feasible. The commission highly encourages entities to continue recycling efforts for materials that are viable in their market conditions. The commission will evaluate hardship on a case-by-case basis as needed. Determinations of whether a governmental entity would qualify for a partial exemption from Chapter 328, Subchapter K will be made on a case-by-case basis. THSC, §361.425 specifies certain commodities that should be recycled. The commission recognizes that not all communities have access to recycling some or all commodities. Therefore, entities without viable access to recycling may remove items from a program that would cause a hardship. The commission understands that each entity is unique and not all recycling programs are able to recycle one or multiple recyclable materials defined in §328.201. The commission will allow entities to exempt one, multiple, or all recyclable materials and suggests that entities document the reason(s) for excluding one or multiple recyclable materials. For example, if aluminum and steel containers are not recycled by the entity, it should be documented with reason. Some examples to consider when documenting a hardship may include but are not limited to: fiscal limitations, viability of a solid waste provider or third party to recycle a given material, and whether an entity is or is not serviced by a solid waste provider or third party recycler. No changes were made to the rules as a result of this comment.

Comment

TXSWANA requested clarity on whether exemptions would apply to all of the requirements of Chapter 328, Subchapter K or whether they would only apply to the portions for which the entity shows a specific hardship.

Response

The exemptions found in §328.203 apply to Chapter 328, Subchapter K. No changes were made to the rules as a result of this comment.

Comment

TXSWANA commented it has a concern of a potential conflict between the requirement to include a preference for recycled materials in bidding policies and existing requirements to accept low bids. TXSWANA requested that TCEQ provide clarification that it is sufficient to give preference to recycled materials when the costs are otherwise the same.

Response

In order to provide additional clarity, the commission revises §328.204 to specify that preference for the purchasing of products made of recycled materials will be given if the product meets applicable specifications as to quantity and quality, and the average price of the product is not more than 10% greater than the price of comparable nonrecycled products. This language is consistent with Texas Government Code, §2155.445. The commission does not foresee any conflicts with existing agency guidance. Section 328.204 is to be applied in accordance with state procurement statutes and rules and is not intended to conflict with any other state requirements. The commission understands that materials with a dissimilar cost may not always be given preference and entities should continue to use best judgement in bidding policy decisions.

Statutory Authority

The new rules are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The new rules are also adopted under Texas Health and Safety Code (THSC), §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste; THSC, §361.425, which provides that the commission shall adopt rules for administering governmental entity recycling programs; and THSC, §361.426, which provides that the commission shall adopt rules for administering governmental entity preferences for recycled products.

The new rules are adopted to implement THSC, Chapter 361, Subchapter N, as amended by Senate Bill 1376, 86th Texas Legislature, 2019.

§328.204. Purchasing Preference for Recycled Materials.

A state agency, state court, or judicial agency not subject to Texas Government Code, Title 10, Subtitle D, and a county, municipality, school district, junior or community college, or special district shall give preference in purchasing to products made of recycled materials if the products meet applicable specifications as to quantity and quality and the average price of the product is not more than 10% greater than the price of comparable nonrecycled products. Preferences will be applied in accordance with state procurement statutes and rules.

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

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Title 43. Transportation

Part 10. Texas Department of Motor Vehicles

Chapter 217. Vehicle Titles and Registration

Subchapter A. Motor Vehicle Titles

43 TAC §217.11

Introduction. The Texas Department of Motor Vehicles (department) adopts amendments to Title 43 of the Texas Administrative Code (TAC) §217.11 concerning rescission, cancellation, or revocation of an existing title or application by affidavit. The department adopts the amendments to §217.11 without changes
to the proposed text as published in the April 17, 2020, issue of the Texas Register (45 TexReg 2519). The rule will not be republished.

REASONED JUSTIFICATION. The amendments help remove barriers to Texas businesses, streamlines administrative processes for efficiency, and protects consumers from fraud. The amendment to §217.11(a) extends the deadline to submit to the department an affidavit asking the department to rescind, cancel, or revoke an existing title or application for a title for a vehicle involved in the process of a first sale. The deadline is extended from within 21 days of initial sale to within 90 days of initial sale. By extending the deadline, the department is giving motor vehicle dealers and their customers more time to ask the department to rescind, cancel, or revoke a title to a new motor vehicle in cases where title was applied for in the customer's name, but the dealer, customer, and any lienholder have all agreed to cancel the sale. The amendment does not change any existing sales or contracting requirements under the Transportation Code or Finance Code, but merely extends the deadline to submit an affidavit to the department.

The rescission of title related to a cancelled sale on a new motor vehicle involved in a first sale results in the title record being deleted from the department's title records. This allows a motor vehicle dealer to obtain a duplicate Manufacturer's Certificate of Origin (MCO). Once a dealer has obtained a duplicate MCO, the dealer may treat a subsequent sale to another buyer as a first sale of a new motor vehicle rather than a used car sale, provided the vehicle never left the dealer's possession. Extending the deadline for title rescission eliminates confusion for subsequent purchasers as to whether they purchased a new motor vehicle or a used motor vehicle, while maintaining the true value of a vehicle that has never really been the subject of a first sale.

Transportation Code §501.051 provides the department authority to rescind, cancel, or revoke an application for a title if a notarized or county-stamped affidavit is presented, but does not state a deadline for the affidavit to be presented to the department. By extending the deadline to 90 days, the department is balancing the needs of businesses and consumers. The new deadline provides ample time for businesses to recognize that an affidavit needs to be submitted, while protecting consumers and preventing fraud by not allowing for sale rescissions, cancelations, and revocations to take place indefinitely and having the transactions take place within the administrative process.

SUMMARY OF COMMENTS.
The department received written comments from the Denton County Tax Assessor-Collector and the Texas Automobile Dealers Association:

Comment.
A commenter asks for text in the rule to clarify if the title process will include Manufacturer's Certificate of Origin (MCO) and/or used vehicles and notes that the rule assumes inferred knowledge of the MCO process when a buyer doesn't complete a first sale.

Response.
The commenter is correct that the MCO is discussed in the preamble as background information. The purpose of this is to provide context to the process that results in applying the rule. Once the affidavit process described in the rule is followed, additional statutes and rules apply to the transaction, not §217.11. As a result, no changes were made to the rule text. The affidavit process outlined in §217.11 is available only for vehicles that were in the process of a new sale. Any vehicle that has been subject to a prior sale, a used vehicle, is not eligible for a sale rescind under Transportation Code §501.051(b) and is not subject to the extended timeline in §217.11.

Comment.
A commenter endorses the addition of time from 21 to 90 days and notes that while Transportation Code §501.051 does not state a deadline for the affidavit to be presented to the department, it concurs with the TxDMV that the extended deadline balances the needs of businesses and consumers.

Response. The department appreciates the supportive comment and understands the importance of balancing the needs of businesses and consumers.

STATUTORY AUTHORITY. The department adopts amended §211.17 under Transportation Code §1002.001 which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically. Transportation Code §501.051 which provides the department authority to rescind, cancel, or revoke an application for a title if a notarized or county-stamped affidavit is presented.

CROSS REFERENCE TO STATUTE. Transportation Code, §503.051 and §1002.001.

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

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SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §§217.22, 217.27, 217.32, 217.38, 217.41, 217.55, 217.58 - 217.64

INTRODUCTION. The Texas Department of Motor Vehicles (department) adopts amendments to 43 TAC §§217.22, 217.27, 217.32, 217.38, 217.41, 217.55 and new 43 TAC §§217.58 - 217.64. The department adopts §§217.22, 217.27, 217.32, 217.38, 217.41, 217.55, 217.60, 217.61, 217.63, and 217.64 without changes to the proposed text as published in the April 17, 2020, issue of the Texas Register (45 TexReg 2521). The department adopts §§217.58, 217.59 and 217.62 with changes to the proposed text as published in the April 17, 2020 issue of the Texas Register (45 TexReg 2521).

REASONED JUSTIFICATION. These new and amended sections are necessary to implement Senate Bill 604, 86th Legislature, Regular Session (2019), which amended Transportation
Code Chapter 504 by adding Subchapter B-1 to allow certain vehicles to be equipped with digital license plates.

The adopted amendments to §217.22 are necessary to add definitions that relate to digital license plates.

Amended §217.22(11) defines "digital license plate" to create a conforming reference to Transportation Code §504.151.

Amended §217.22(12) defines "digital license plate owner" to create a conforming reference to Transportation Code §504.151.

Amended §217.22(21) defines "GPS" as a global positioning system (GPS) tracking device to address the collection of information by a receiver in a digital license plate that can determine the location of the digital license plate. GPS features are not expressly addressed in Transportation Code Chapter 504 Subchapter B-1.

Amended §217.22(25) defines "legend" to clarify the meaning of the term as it is used in the definition of the phrase "required digital license plate information" in these adopted rules. The term "legend" is defined as a name, motto, slogan, or registration expiration notification appearing on and centered horizontally at the bottom of the license plate. The definition is also necessary to clarify that a digital license plate must display a registration expiration notification.

Amended §217.22(27) defines "metal license plate" to differentiate between a metal license plate and a digital license plate.

Amended §217.22(30) defines "optional digital license plate information" as any information authorized to be displayed on a digital license plate in addition to required digital license plate information. Amended §217.22(30)(A) - (D) list examples of optional digital license plate information.

Amended §217.22(31) defines "park" to conform with the statutory meaning in Transportation Code §541.401.

Amended §217.22(33) defines "primary region of interest" to describe the size requirements of the alphanumeric characters representing the plate number.

Amended §217.22(35) defines "required digital license plate information" to clarify the minimum information that must be displayed on a digital license plate. This definition is necessary to clarify that the same information required to be displayed on a metal license plate must also be displayed on a digital license plate: alphanumeric characters representing the plate number, the word "Texas," the legend, and the registration expiration month and year, if applicable. The definition also clarifies that digital license plates must also display the registration expiration notification if the vehicle's registration is expired. The department has sole control over the design, typeface, color, and alphanumeric pattern for all license plates under Transportation Code §504.005.

Amended §217.22(36) defines "secondary region of interest" to describe the size requirements for the field with the word "Texas" centered on the top of the plate.

The amendments to §217.27 are necessary to clarify the exclusions for digital license plates from the existing paragraph, and clarify existing requirements for metal license plates. Amended §217.27(a)(2) exempts digital license plates from existing requirements for displaying vehicle registration insignia for certain vehicles without a windshield. Amended §217.27(a)(3) clarifies that if a vehicle has a digital license plate, then the expiration month and year will appear digitally on the electronic visual display, and any registration insignia issued by the department must be retained in the vehicle. Vehicles with a digital license plate will be issued a voided registration sticker that will not be affixed to the windshield. Vehicles with metal license plates that do not have a windshield are issued registration stickers that must be adhered to the rear metal license plate. This amendment provides consistency for law enforcement for metal license plates and digital license plates. The amendment also helps the digital license plate owner because they will have the metal license plate in their vehicle and their registration receipt in the event their digital license plate becomes inoperable or unreadable.

Amendments to §217.27(b)(1) add language clarifying that license plates must be clearly visible, readable, and legible and that the rear license plate must be in an upright horizontal position. These amendments are necessary to assist law enforcement by facilitating a quicker replacement of license plates that have become unreadable or illegible due to age or wear and to facilitate enforcement when a license plate is not placed on the vehicle in an upright position. These amendments also help ensure that license plates are readable and legible as required by §217.32, as well as Transportation Code §§502.475, 504.155(b)(2), and 504.945.

The amendments to §217.32 are necessary to differentiate between metal license plates and digital license plates. Amended §217.32(a) - (b) add "metal" and "metal license plate" to differentiate between metal license plates and digital license plates. A replacement digital license plate will be obtained from a digital license plate provider, rather than from a county tax assessor-collector.

The amendment to §217.38 is necessary to differentiate between metal license plates and digital license plates. Amended §217.38(1) adds "metal" to differentiate between metal license plates and digital license plates. The customer is not required to return the digital license plate to the county tax assessor-collector when applying for a registration fee credit.

The amendments to §217.41 are necessary to differentiate between metal plates and digital license plates. A replacement digital license plate will be obtained from a digital license plate provider, rather than from a county tax assessor-collector.

The amendments to §217.55 are necessary to differentiate between metal license plates and digital license plates. Amended §217.55(c)(1) and (2) add "metal license" to differentiate between metal license plates and digital license plates. A replacement digital license plate will be obtained from a digital license plate provider, rather than from a county tax assessor-collector.

New §217.58 lists the types of vehicles that are eligible and ineligible for a digital license plate and the requirements for eligibility verification and issuance of digital plates. New §217.58(a) lists the statutorily-eligible vehicles as any vehicle owned or operated by a governmental entity, any commercial fleet vehicle, or a truck, motorcycle, moped, trailer, semitrailer, or sport utility vehicle or other vehicle that is required to be registered under Transportation Code Chapter 502. Changes were made to the proposed language in amended §217.58 to clarify the reference to fleet vehicle and to ensure that the previously listed vehicles included all possible eligible vehicles under Transportation Code Chapter 502. These amendments to the rule text do not alter the eligibility requirements for a digital license plate outlined in statute, do not put additional stakeholders on notice, and add no additional costs.
New §217.58(b) lists which vehicles are ineligible for a digital license plate. The proposed language in §217.58(b) was amended for clarity. Section §217.58(b) was amended after proposal to clarify that any vehicle registered as a passenger vehicle, that is not part of a commercial fleet or owned or operated by a governmental entity, is ineligible for a digital license plate. These amendments to the rule text do not alter the eligibility requirements for a digital license plate outlined in statute, do not put additional stakeholders on notice, and add no additional costs.

New §217.58(c) is necessary to ensure that digital license plate providers and applicants are aware that registration is completed separately from digital license plate issuance and that all digital license plate owners are issued their metal license plates to attach to the vehicle in case of digital license plate removal or malfunction. The proposed rule text in Section 217. 58(c)(5) has been deleted because it was unnecessary and may cause confusion as to whether a digital license plate could be replaced if it was lost or malfunctioned. The original purpose of the requirement, to prevent one vehicle from being linked to two or more different digital license plates, will be achieved through department programming controls.

New §217.59 outlines the requirements for digital license plate testing. New §217.59 requires a digital plate provider to provide the department with documentation demonstrating that testing was completed on a digital license plate model before the approval and initial deployment of that digital license plate model, and for each subsequent hardware upgrade. A hardware upgrade is any upgrade to any physical aspects of the digital license plate except for the mounting bracket. The documentation demonstrating that testing was completed must be sufficient for the department to be assured that the digital license plate approved for use was tested in a manner set forth by the department. The documentation must include a description of the testing protocols and methods and must be conducted by governmental entities, universities, or independent nonprofit research and development organizations. New §217.59 is necessary to ensure that digital license plates meet the statutory requirements for license plates and that the testing is conducted by the types of organizations with which the department has established relationships. The department works with these types of entities on a regular basis for different projects and requiring these types of entities to perform testing will ensure consistency and independence in testing. The testing must be conducted for four separate issues: reflectivity, legibility, readability, and network and data security. As discussed in the response to comments, the proposed rule text has been changed to require reflectivity testing with results demonstrating that the digital license plates are manufactured utilizing reflectorized material as required by Transportation Code §504.005, and are reflective in daytime, as defined in Transportation Code §541.401 and nighttime, as defined in Transportation Code §541.401 with the use of low beam headlights, at a distance of no less than 75 feet. Reflectivity testing with results demonstrating that the digital license plates perform consistently with the International Organization for Standardization ISO 7591, clauses 6 and 7 is preferred. This change is necessary to provide an incentive for digital license plate providers to achieve retroreflectivity as the technology develops, while not creating a barrier to enter the market if the standard is not currently possible. The digital license plate provider must comply with the requirement in Transportation Code §504.005(d), which promotes highway safety by requiring that each license plate is made with a reflectorized material that provides effective and dependable brightness for the period for which the plate is issued. New §217.59(2) requires legibility testing with results demonstrating that digital license plates are legible during daytime and also during nighttime using low beam headlights, under optimal conditions, at a distance of no less than 75 feet. New §217.59(2) also requires readability testing with results demonstrating that digital license plates are readable with commercially-available automated license plate readers, and in a variety of weather conditions. This is necessary to comply with the industry standard and to comply with the requirement that the digital license plate display be legible under Transportation Code §504.155(b)(2); to ensure that law enforcement can read the digital license plate to determine compliance with Transportation Code §504.945; and to ensure that law enforcement and toll entities can read the digital license plates with commercially-available automated license plate readers. New §217.59(3) requires commercially-available penetration testing for protection of the digital license plate, the electronic display information, and the digital license plate provider’s systems. The penetration testing will be decided by the department and the provider in contracting process. New §217.59(3) is necessary to ensure the safety and security of the digital license plates for the benefit of the digital license plate owner, law enforcement, and the public. If the digital license plate or the provider’s system are vulnerable to penetration, this could enable fraud and jeopardize public safety. In addition to testing before initial approval and each subsequent hardware upgrade, penetration testing must be completed for each software or firmware upgrade. This requirement is necessary to ensure that new vulnerabilities are not instituted in subsequent updates.

New §217.60 outlines the specifications and requirements for digital license plates. New §217.60(a) requires digital license plate providers to ensure that the digital license plate meets or exceeds the benefits to law enforcement provided by metal license plates. This requirement is necessary to conform to the statutory requirement in Transportation Code §504.155(b)(4). New §217.60(a) paragraphs §217.60(a)(1) - (4) provide further requirements for the digital license plate. Paragraph §217.60(a)(1) outlines the physical requirements for a digital license plate. Paragraph §217.60(a)(2) requires that the digital license plate include one or more security features that verify the plate was issued by an approved digital license plate provider. Paragraph §217.60(a)(2) is necessary to provide benefits to law enforcement by allowing them to visually ensure that a digital license plate is not a counterfeit. Metal license plates have two security features that law enforcement can visually check to see if the metal license plate is counterfeit. Paragraphs §217.60(a)(3) - (4) require a digital license plate to display the same information as a metal license plate while not in park. This includes displaying required digital license plate information and the registration expiration month and year in the same font size and location as the information displayed on the corresponding metal license plate; as well as ensuring that the required information continues to display when the digital license plate is not connected to a wireless network. These requirements are necessary to fulfill the requirement under Transportation Code §504.155 for the board of the Texas Department of Motor Vehicles (board) to set the specifications and requirements for digital license plates. By setting consistent standards and features, the department is aiding law enforcement by preventing fraud and aiding consumers by ensuring their digital license plate displays the information required by law.
New §217.60(b) outlines the requirements for placement of a digital license plate and the vehicle registration insignia for a vehicle displaying a digital license plate. New §217.60(b)(1) requires that the digital license plate must be attached to the exterior rear of the vehicle. This requirement is necessary to comply with the definition of digital license plate defined in Transportation Code §504.151, which states that a digital license plate is designed to be placed on the rear of a vehicle in lieu of a physical, metal license plate. This requirement is also necessary to comply with Transportation Code §504.154(a), which states a digital license plate is placed on the rear of the vehicle in lieu of a physical, metal license plate. New §217.60(b)(2) requires a metal license plate to be attached to the exterior front of the vehicle, unless the vehicle is not required to display a plate on the front of the vehicle under this chapter. This requirement is necessary to comply with the requirements in Transportation Code §504.943 and 43 TAC §§217.27(b), 217.46(b)(3), and 217.56(c)(2)(E). New §217.60(b)(3) requires that the vehicle’s registration insignia for validation of registration must be displayed in accordance with 43 TAC §217.27. Owners of vehicles with digital license plates will keep their registration receipt in or on the vehicle, and their registration month and year will be displayed on the electronic visual display of the digital license plate. New §217.60(b)(3) is necessary to provide consistency for law enforcement and limit fraud.

New §217.61 outlines the prohibitions and requirements for digital plate designs and display. New §217.61(a)(1) prohibits digital license plate providers from creating or designing a specialty license plate under Transportation Code Chapter 504 unless they have a contract with the department under Transportation Code §504.851. This is necessary to ensure that the department is aware of and approves all specialty license plates in the state of Texas. If specialty plates were created without the department’s knowledge and approval it would be difficult to verify the legitimacy of the license plates. New §217.61(a)(2) requires the digital license plate provider to enter into a licensing agreement, with standard language as approved by the department, for the display of any third party’s intellectual property on a digital license plate. New §217.61(a)(2) is necessary to protect third-party intellectual property.

New §217.61(b) outlines the requirements for the display of information on a digital license plate. New §217.61(b)(1) requires that the display of electronic information on a digital license plate be approved by the department. New §217.61(b)(1) provides that the digital license plate may not be personalized under any region of interest except under current rules governing specialty license plates. New §217.61(b)(1) is necessary to maintain consistency between digital license plates and metal license plates which assists law enforcement by ensuring that the digital license plate information is readable and legible. New §217.61(b)(2) - (4) describe the requirements for the display of optional digital license plate information while the vehicle is in park. These requirements are necessary to permit digital license plates to display an emergency alert, public safety alert, manufacturer or safety recalls, advertising or parking permits, while ensuring that the required digital license plate information remains legible and readable for law enforcement when the vehicle is in park. New §217.61(b)(5) permits the digital license plate provider to electronically collect tolls with approval by and agreement with the appropriate toll entity. New §217.61(b)(5) provides a possible benefit to digital license plate owners.

New §217.61(c) requires that digital license plate providers display an expiration message on the digital license plate if registration has not been renewed at the time of registration expiration, and that the expiration message may not be removed until after the department confirms renewal of expired registration and clarifies that optional digital license plate information may not encroach on the primary and secondary regions of interest. New §217.61(c) is necessary because Transportation Code §504.155(b)(4) requires a digital license plate to provide benefits to law enforcement that meet or exceed the benefits provided by a metal license plate.

New §217.61(d) prohibits digital license plate providers from displaying an emergency alert or other public safety alert, vehicle manufacturer safety recall notices, advertising, or a parking permit on a digital license plate without authorization from the digital license plate owner. This is necessary to ensure that the digital license plate does not display this optional digital license plate information without the owner’s approval. For example, a person who graduated from a university might not like it if they were required to display the logo of a rival university on their license plate. New §217.61(d)(2) - (3) discuss the disclosure of GPS data. Unless the disclosure of the GPS data is required by law, the digital license plate provider may not disclose GPS data to any person unless it explains to the digital license plate owner how the GPS data will be used and to whom it will be disclosed, and the digital license plate owner consents to its disclosure. This is necessary to protect the privacy and safety of digital license plate owners. Additionally, the department’s Vehicle Titles and Registration Advisory Committee recommended these disclosure requirements and their recommendation was adopted by the board at its February 6, 2020 board meeting. New §217.61(d)(4) prohibits the digital license plate provider from requiring the owner to authorize the display of optional digital plate information or the disclosure of GPS data as a condition of purchase of lease of a digital license plate. This is necessary to protect the digital license plate owner’s right to decide whether to opt in. New §217.61(d)(5) and (d)(6) require the digital license plate provider to immediately discontinue the display of optional digital license plate information at the digital license plate owner’s request and to have the same mechanism for opting in and out of the display of the optional digital license plate information. This requirement is necessary to allow the digital license plate owner a consistent way to opt out of the display of optional digital license plate information on their digital license plate after they have opted in.

New §217.62 outlines the requirements for a digital license plate provider if a digital license plate is removed or malfunctions. New §217.62(a) requires that the digital license plate provider have a mechanism to prevent theft and tampering with the digital license plate. New §217.62(a)(1) and (a)(2) require the digital license plate provider to ensure that the digital license plate ceases the display of required digital license plate information in case of malfunction, if service is terminated, or if it determines that the digital license plate has been compromised, tampered with, or fails to maintain the integrity of registration data. The proposed rule text in 217.62 (a)(1) has been new to add a missing word. New §217.62(a)(1) is necessary to help prevent fraud and protect consumers if their digital license plate is stolen.

New §217.62(b) outlines when the digital license plate provider must notify the department. New §217.62(b)(1) - (4) require digital license plate providers to immediately notify the department in case of digital license plate commencement of service, termination of service, determination that the digital license plate has been compromised, or the transfer of a digital plate to a new owner. These requirements are necessary to ensure that the
department has accurate and current data on the digital license plates.

New §216.62(c) permits a digital license plate provider to disable the display of a digital license plate if the digital license plate owner fails to pay the provider's fees. This is necessary to allow a digital license plate provider to discontinue service when the digital license plate owner is not paying the fees required by their contract.

New §217.63 outlines the digital plate fees and payment. New §217.63(a) requires that a person applying for a digital license plate must pay an administrative fee of $95.00 upon application for a digital license plate and annually on renewal of registration for a vehicle with a digital license plate. The fee will be aligned with the registration period and adjusted to yield the appropriate fee. The administrative fee is necessary to recoup the department's costs to implement and then administer the digital license plate program for the first five years. The implementation and administration cost is estimated to be $1.8 million. The breakdown of this estimate is as follows:

**Programming- Information Technology - $1,036,550**

**Program Specialists (two FTEs) - $815,625**

**IMPLEMENTATION COST - $1,852,175 Total**

To determine an administrative fee, the total estimated implementation cost was divided by the number of digital license plates issued in California (1,300 plates total), since that is the only jurisdiction with a digital plate program that has been operational for several years. That amount was divided by fifteen with the goal of recouping the implementation and administration cost in approximately fifteen years. The amount of the fee and the time of its collection were recommendations from the department’s Vehicle Titles and Registration Advisory Committee, and the recommendations were adopted by the board at its February 6, 2020 board meeting. New §217.63(a)(3) clarifies that a digital license plate administrative fee will be refunded only when registration fees are overcharged under Transportation Code §502.195. This is necessary to inform consumers of when a refund will be issued.

New §217.63(b) clarifies that the $95 administrative fee is due upon receipt of an application for a digital license plate and annually on renewal of registration for a vehicle with a digital license plate. This is necessary to ensure that the fees for digital license plates are being paid and timely deposited into the state treasury under Government Code §404.094. It also clarifies that a digital license plate provider that collects the administrative fee must submit payment of the fee to the department in full on behalf of the digital license plate owner.

New §217.64 outlines the services that a digital license plate provider is required to provide, including digital license plate replacement when necessary. New §217.64(a)(1) requires a digital license plate provider to provide customer support for customers during standard business hours, Central Time. This requirement is necessary to ensure that customers can access support if they have issues with their digital plate and it corresponds to the hours that customer service is available for a metal license plate. New §217.64(a)(2) clarifies that a customer must go to the digital plate provider for repair, service, and replacement of a digital license plate. This clarification is necessary so that customers are aware of who to contact in case an issue arises with their digital license plate.

New §217.64(b) informs the customer where they can obtain a replacement license plate. New §217.64(b)(1) clarifies that if a customer wants a replacement digital license plate they can obtain one from the provider. New §217.64(b)(2) permits the customer to install the rear metal license plate issued for the vehicle in lieu of the digital license plate. New §217.64(c) explains how to obtain a replacement metal license plate. New §217.64(b) and (c) are necessary because customers need to know where to obtain replacement plates if their digital license plate malfunctions or is destroyed, or if their metal license plate is lost, stolen, mutilated, or needs to be replaced for cosmetic or readability reasons. Digital plate owners cannot operate their vehicle until the digital license plate is repaired or replaced, or until they remove the digital license plate and replace it with a metal license plate.

**REGULATORY COMPLIANCE DIVISION**

The new and amended sections were reviewed by the Governor’s Division of Regulatory Compliance (Division). The Division gave the Board permission to adopt the new and amended sections on June 9, 2020.

**SUMMARY OF COMMENTS AND AGENCY RESPONSE.**

The department received written comments requesting clarifications or changes in the proposed text from: Collin County Sheriff Office, Central Texas Regional Mobility Authority, North Texas Tollway Authority, The Tax Assessor-Collectors Association of Texas, Lubbock County Tax Assessor-Collector, Harris County Toll Road Authority, 3M, and Denton County Tax Assessor-Collector.

**General Comment.**

A commenter requests that the initial registration and the renewal process should remain the same, as with any other vehicle, through the county tax assessor’s office and suggests that if the digital license plate provider would like the county to collect and remit the digital license plate fees this can be accomplished, however, should the provider prefer to collect the fees independently for their digital plates they can bill separately.

**Agency Response.**

The department disagrees with the comment because there is no change to how a vehicle is initially registered or renewed.

**§217.22(27)**

**Comment.**

A commenter requests that the county should be the responsible entity to issue non-digital plates and not the department.

**Agency Response.**

The department disagrees with the comment because there is no change to the current process on issuing metal license plates.

**§217.27(b)**

**Comment.**

A commenter notes that §217.27(b) and §217.60(b) appear to contemplate that most registered vehicles that are eligible for a digital license plate will still display two plates and notes that this is consistent Transportation Code 504.154(a), which generally requires preservation of the two-plate rule for vehicles using a digital license plate.

**Agency Response.**
The department agrees with the comment and confirms that all vehicles that are required to have two license plates will continue to be required to display two license plates.

§217.27(a)
Comment.
A commenter requests that the department clarify the difference between references to the department, TxDMV, and the county tax accessor’s office in §217.27(a).

Agency Response.
The department disagrees with the comment and declines to amend the rule to clarify the definitions. The proposed rule is consistent with statutory language in Transportation Code §502.059(b).

§217.58
Comment.
A commenter supports the following proposed rules relevant to tolling operations in their current form:

(a) 217.58 - Digital License Plate Eligibility
(b) 217.61 - Digital License Plate Designs and Displays

Agency Response.
The department appreciates the supportive comment.

§217.58(a)(2)(b)
Comment.
A commenter requests a clarification between the definition of passenger and non-passenger vehicles.

Agency Response.
The department disagrees with the comment and declines to make the clarification in §217.58(a)(2)(B) because the term passenger car and other vehicle classifications are currently defined in Transportation Code, Chapter 502.

§217.59
Comment.
A commenter believes that the testing requirements in §217.59 should be more robust and should be confirmed to work properly based on real world tests utilizing toll cameras, automatic license plate readers and other equipment actually in use in the major metro areas of Texas, including Harris County and the surrounding counties. Furthermore, the rules should require at least six (6) months of legibility and readability testing with results demonstrating that the digital license plate technology works properly, without adverse impacts from strobing or glaring effects, for toll projects in Harris County and the surrounding area and the county constables and other law enforcement agencies patrolling those projects, whether in daytime or nighttime and during varying weather conditions, including specifically during peak periods of heat in the summer months and peak periods of cold during the winter months.

Response.
The department disagrees with the comment and declines to make the requested change. The department agrees that accurately assigning tolls to the registered vehicle owner is important. The department intends to include toll entities in testing their license plate readers and will require that digital plate providers supply digital plates to toll entities for testing, under the department’s contract with any digital plate provider.

§217.59(1)
Comment.
A commenter discussed the importance of retroreflective license plate specifications and encourages the department to retain the requirements in §217.59, which call for testing of the license plate retroreflectivity according to ISO 7591 clauses 6 and 7, to ensure a method of fail-safe functionality for the safety of Texas motorists.

Agency Response.
The department disagrees with the comment and declines to retain the proposed requirement in §217.59(1). Upon further research and discussion with the American Association of Motor Vehicle Administrators, the department has determined that current digital license plates do not have retroreflectivity capabilities. While the department prefers uniform standards for retroreflectivity for all license plates, it understands the importance of adopting safety standards that are achievable by a digital license plate while also ensuring that all license plates meet the reflectivity requirements under Transportation Code §504.005. In order to ensure that the requirements are achievable, the department is amending the language in §217.59(1) to read, "(1) reflectivity testing with results demonstrating that the digital license plates are manufactured utilizing reflectorized material as required by Transportation Code, §504.005, and are reflective in daytime, as defined in Transportation Code, §541.401 and nighttime, as defined in Transportation Code, §541.401 with the use of low beam headlights, at a distance of no less than 75 feet. Reflectivity testing with results demonstrating that the digital license plates perform consistently with the International Organization for Standardization ISO 7591, clauses 6 and 7 is preferred." Recognizing the importance of retroreflectivity for law enforcement, this updated language provides an incentive for digital license plate providers to achieve retroreflectivity as the technology develops, while not creating a barrier to enter the market if the standard is not currently possible. The change does not add a new requirement or cost for digital license plate providers.

§217.59(2)
Comment.
A commenter is supportive of the department’s testing requirements under §217.59(2), but suggests the addition of additional language to preserve the value of existing inventories of automated license plate readers. The commenter suggests that §217.59(2) be amended to read, "demonstrating that digital license plates are ... readable with automated license plate readers that were commercially available as of September 1, 2019."

Agency Response.
The department disagrees with the comment and declines to make the requested change. The department appreciates the comment and understands the importance of preserving the value of automated license plate readers; however, declines to make the suggested change. If the date September 1, 2019, is inserted into the rule, it could subject digital license plate providers to a requirement they cannot meet as technology changes. The current language which specifies that commercially available automated license plate readers be used will allow the technologies to grow and shift together so that the standard can continue to be reached in years to come.
§217.59 and §217.60

Comment.

A commenter notes that if a vehicle does not have a toll transponder, tolling agencies rely on in-lane cameras and optical character recognition (OCR) to capture license plate images, correctly identify the alphanumeric digits on the plate, and accurately assign tolls to the registered vehicle owner. The commenter suggests that there be no fewer than six months of digital plate testing by tolling entities on their in-lane cameras and OCR systems evaluating certain criteria.

Agency Response.

The department agrees with the comment that accurately assigning tolls to the registered vehicle owner is important. The department intends to include toll entities in testing license plate readers and will require that digital plate providers supply digital license plates to toll entities for testing, under the department's contract with a digital plate provider.

Comment.

A commenter notes that tolling agencies, DMV, and law enforcement could encounter toll collection and other enforcement "gaps" as digital plate owners and digital plate providers settle billing disputes.

Agency Response.

The department agrees with the comment that a digital license plate that no longer displays registration information would cause enforcement issues; however, the digital license plate owner is required to replace the digital license plate with the metal license plate that they were provided at time of registration issuance or renewal. Vehicles required to have two license plates will continue to display a metal plate on the front of the vehicle.

§217.61

Comment.

A commenter believes that the DMV should decline to promulgate any rule allowing digital plate vendors to serve as toll account issuers. Should DMV opt for allowing digital plate vendors to process tolls, the commenter recommends the following:

Afford tolling entities full discretion to decline allowing digital plate providers to embed transponders in their service area or, at a minimum, the option to register plate transponder through a local toll authority;

require a digital plate-embedded transponder to be compatible with the protocols approved by the Central U.S. interoperability agreement already in effect (all Texas tolling entities plus Oklahoma and Kansas toll authorities participate in that agreement); and submit the digital plate vendor to the governing statutes and rules of the tolling provider, regional tollway authority, regional mobility authority, or county toll road authority where the vehicle with the digital plate is registered in addition to Transportation Code Chapter 372, the catch-all statute for Texas tolling agencies.

Agency Response.

The department disagrees with the comment and declines to make a change. The proposed language in §217.61 only allows such agreement between any digital plate provider and a toll entity as an option. Any such agreement is not required. The department has no regulatory authority over the toll entities operating in Texas.

§217.61(b)(5)

Comment.

A commenter asks if the requirement in §217.61(b)(5) authorizing electronic toll collection with approval from, and agreement between, a digital license plate provider and the appropriate toll entity mean that a person with a digital plate would not need the toll tag sticker on their windshield? Or does it mean there would be a collection mechanism to allow the toll authority to collect tolls using the digital plate owner account?

Agency Response.

The department disagrees with the comment and declines to make a change. The department has no regulatory authority over the toll entities operating in Texas. This matter would be determined by agreement between the toll entity and the digital license plate provider.

Comment.

A commenter requests clarification on what "appropriate toll entity" must enter into an agreement with the digital license plate provider, as the rules are silent on which type of entity may be an appropriate toll entity. Additionally, it believes the term "appropriate toll entity" should be limited to public toll agencies in Texas.

Agency Response.

The department disagrees with the comment and declines to make a change. Section 217.61(b)(5) does not require any toll entity to enter into an agreement with any digital license plate provider, but merely permits them to. The proposed rules only apply to digital license plates and digital plate providers in Texas.

Comment.

A commenter requests that §217.61(b)(5) be withdrawn. The commenter thinks a better approach for toll collection purposes would be for the toll entities to work directly with the vendor and the other toll agencies in Texas to ensure that, as this kind of technology is introduced into the tolling market place in Texas, it satisfies the requirements for interoperability and compatibility with the HCTRA system.

Agency Response.

The department disagrees with the comment and declines to withdraw §217.61(b)(5). The proposed language in §217.61(b)(5) only allows such agreement between a digital plate provider and a toll entity as an option. Any such agreement is not required. The department has no regulatory authority over the toll entities operating in Texas.

Comment.

A commenter requests that given increased frustration with toll billing errors, some consideration should be given to customer service experience and resources, including call center and customer account maintenance capabilities, with additional consideration given to the primary transponder used in a particular region of the State. EZ TAG, issued by HCTRA, is the primary transponder used in the Harris County region, while TollTAGs issued by the North Texas Tollway Authority ("NTTA") is the primary transponder used in North Texas. Other regions of the State use TXTAGs issued by the Texas Department of Transportation.

Agency Response.
The department disagrees with the comment and declines to make a change. The department has no regulatory authority over the toll entities operating in Texas. Appropriate handling of these concerns would be determined by agreement between the toll entity and any digital license plate provider.

Comment.
A commenter suggests that the proposed rules address compliance with interoperability protocols or requirements for maintaining valid electronic customer accounts such as, the Central United States interoperability hub for the processing of toll transactions from toll agencies in Texas, Oklahoma and Kansas based on specified interoperability protocols and requirements.

Agency Response.
The department disagrees with the comment and declines to make a change. The department has no regulatory authority over the toll entities operating in Texas. This matter would be determined by the agreement between the toll entity and any digital license plate provider.

Comment.
A commenter questions whether a proposed rule, at this time, is necessary to deal with advancements in toll collection technology, as technology develops, the commenter thinks a better approach would be for us to work directly with market innovators, including the digital license plate vendor, to ensure that the proposed technology satisfies the requirements for interoperability and compatibility with the HCTRA system.

Agency Response.
The department disagrees with the comment and declines to make a change. Because the department has no regulatory authority over the toll entities operating in Texas this matter would be determined by agreement between the toll entity and any digital license plate provider. Additionally, proposed §217.61(b)(5) only allows such agreement between a digital plate provider and a toll entity as an option. Any such agreement is not required. Under any agreement, specifics with regard to evolving technology may be required.

Comment.
A commenter notes that it is unclear whether the digital license plate would come with a separate transponder that would be affixed to the front windshield. If the digital license plate comes with a separate transponder to affix on the front windshield, then the commenter questions whether there really would be a public benefit or amenity that is not available with a metal plate.

Agency Response.
The department disagrees with the comment and declines to make a change. Transponder technology would be determined by any optional agreement between the toll entity and a digital plate provider.

Comment.
A commenter notes that it is unclear whether the digital license plate would be linked with an electronic customer account with a valid method of payment and questions whether a digital license plate provider would be able to satisfy the requirements of Senate Bill 198. Although Senate Bill 198 allows toll agencies to contract with each other to allocate responsibilities for sending notices and taking other actions required by the legislation, Senate Bill 198 does not authorize a toll agency to delegate responsibilities to a private vendor.

Agency Response.
The department disagrees with the comment and declines to make a change. Because the department has no regulatory authority over the toll entities operating in Texas, this matter would be determined by agreement between the toll entity and any digital license plate provider. Furthermore, the toll entity and digital license plate provider may work together to ensure that any agreement would comply with all relevant Texas law.

Comment.
A commenter is concerned that rather than providing a public benefit that is no cost to local government, digital license plates may make it easier for toll scofflaws to cheat the system resulting in an increase in lost toll revenue, as well as an increase in collection costs.

Agency Response.
The department disagrees with the comment and declines to make a change. It is the department's understanding that toll entities utilize front license plate readers in addition to rear license plate readers. Vehicles that currently display two license plates will continue to have two plates and those vehicles with a digital license plate will continue to display a metal plate on the front of the vehicle.

§217.62(c)

Comment.
A commenter notes that, specific to proposed §217.62(c), readability would be impossible if a digital plate owner fails to pay fees owed to a digital plate provider for service, resulting in the disabling of the digital plate.

Agency Response.
The department disagrees with the comment and declines to make a change. A digital license plate that no longer displays registration information would cause readability issues; however, the digital plate owner is required to replace the digital license plate with the metal license plate that they were provided at time of registration issuance or renewal. Vehicles required to have two plates will continue to display a metal plate on the front of the vehicle.

Comment.
A commenter requests that the following language be added as §217.62(c)(a)(2): "For each digital license plate fee that is collected by a county assessor-collector and for which the department is allocated a portion of the fee for administrative costs, the department shall credit $2.30 dollars from its administrative costs to the county treasurer of the applicable county, who shall credit the money to the general fund of the county to defray the costs to the county of administering this chapter."

Agency Response.
The department disagrees with the comment and declines to make the suggested addition. The $95 administrative fee is not a plate fee but is intended to recoup the department's cost in implementing the program. The $0.50 county compensation from metal specialty license plates is to defray the cost to the county of administering Transportation Code Chapter 504, and the county will not perform extra duties because the vehicle has a digital license plate. If the digital license plate provider has a licensing
agreement with a state specialty plate sponsor, then the county will retain the portion of the plate fee as they do today under Transportation Code §504.008 for a metal specialty plate. Digital license plate issuance will be handled by the department and any digital plate provider, and there will not be additional work associated with processing renewal transactions of vehicles with a digital license plate.

§217.63
Comment.
A commenter asks if the digital license plate owner would pay the administrative fee to the county tax accessor-collector when renewing their registration?

Agency Response.
The department agrees with the comment for any renewal done through the county tax accessor-collector's office.

Comment.
A commenter asked whether the administrative fee would be on the "renewal form," and how the county tax accessor-collector will be informed that the administrative fee needs to be collected apart from it appearing in the Registration & Title System (RTS). The commenter also asked for clarification regarding whether there will be an option to pay the administrative fee directly to the department and if so, would the county tax accessor-collector be required to verify if the administrative fee has been paid timely?

Agency Response.
The department disagrees with the comment and declines to make a change. There is not a registration renewal form. The administrative fee for a digital license plate will be line itemed on the renewal notice if applicable. The county will know to collect the administrative fee for a digital plate through RTS. For vehicles for which the department processes the registration or renewal, the customer must pay the fee to the department. At the county, the fee will be collected through RTS so there will be no need to verify collection of the administrative fee.

§217.63(b)(1)
Comment.
A commenter requests that the current county registration renewal fees be collected and credited by each county and the current registration process remain the same for state, county and local fees while the digital license plate provider collects their fees separately.

Response.
The department agrees with the comment. There is no change to how registration renewal fees, including county and local fees, are collected and credited to each county. There is no change to the registration renewal process under the proposed rules. The digital license plate provider(s) will collect the fee for the digital license plate.

§217.64
Comment.
A commenter requests that the following language be added as §217.64(e) to align the process with the metal specialty license plate process: (e) If the digital license plate is lost, stolen, mutilated, or needs to be replaced, replacement plate may be obtained as indicated:

- The owner submits a written request to the county tax accessor-collector for replacement digital license plate accompanied by a copy of the registration receipt.
- The county tax accessor-collector will:
  - order the replacement plates through the system,
  - collect the $6 replacement fee and the automation fee.
- After manufacture, the replacement digital plate is mailed directly to the customer.

Agency Response.
The department disagrees with the comment and declines to make the requested change because the digital license plate provider will replace the digital license plate as appropriate for the customer. Replacement of a digital license plate will be handled under contract between the department and any digital license plate provider.

STATUTORY AUTHORITY. The amendments and new sections are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically, Transportation Code, §§504.151-504.157 which authorize digital license plates while giving the department rulemaking authority to implement the statutory provisions including setting specifications and requirements for digital plates and establishing a fee.

CROSS REFERENCE TO STATUTE. Transportation Code, §§504.151-504.157 and §1002.001.

§217.58. Digital License Plate Eligibility.
(a) Vehicles eligible for a digital license plate. The following vehicles are eligible for a digital license plate, subject to the exceptions in subsection (b) of this section:

1. any vehicle owned or operated by a governmental entity; or
2. a vehicle owned or operated by a person other than a governmental entity if the vehicle is:
   (A) part of a commercial fleet, as defined by Transportation Code, §502.001; or
   (B) a truck, motorcycle, moped, trailer, semitrailer, sport utility vehicle, or other vehicle that is required to be registered under Transportation Code, Chapter 502.

(b) Vehicles not eligible for a digital license plate.

1. Notwithstanding subsection (a) of this section, a vehicle is not eligible for a digital license plate if the vehicle is not required to display a license plate on the rear of the vehicle, including:
   (A) truck-tractors; or
   (B) trucks with combination registration under Transportation Code, §502.255.

2. Notwithstanding subsection (a)(2)(B) of this section, a vehicle registered as a passenger vehicle is not eligible for a digital license plate.

3. Requirements for Eligibility Verification and Issuance of Digital Plates.
   (A) An applicant for a digital license plate may not obtain a digital license plate from a digital license plate provider if the vehi-
Before each assessment, the assessment provider shall issue the vehicle's assessment number.

A digital license plate provider must obtain the following information from a digital license plate applicant before it verifies the vehicle's eligibility for a digital license plate:

(A) the last four digits of the vehicle identification number; and

(B) the existing metal license plate number.

A digital license plate provider may not issue a digital license plate for a vehicle that has not been issued Texas registration in the name of the applicant for the digital license plate.

Any metal license plate issued for the rear of the vehicle and any associated plate sticker issued for a rear metal license plate must be carried in or on the vehicle at all times when using a digital license plate.

§217.59. Digital License Plate Testing.

Before the initial deployment of a digital license plate model and for each subsequent hardware upgrade, which includes all physical aspects of the digital license plate except for the mounting bracket, a digital license plate provider must provide the department with documentation sufficient for the department to be assured that the digital license plate model for which approval is sought was tested in a manner set forth by the department. The documentation must include a description of the testing protocols and methods. Digital license plate testing must be conducted by governmental entities, universities, or independent non-profit research and development organizations. Testing must include:

(1) reflectivity testing with results demonstrating that the digital license plates are manufactured utilizing reflectorized material as required by Transportation Code, §504.005, and are reflective in daytime, as defined in Transportation Code, §541.401 and nighttime, as defined in Transportation Code, §541.401 with the use of low beam headlights, at a distance of no less than 75 feet. Reflectivity testing with results demonstrating that the digital license plates perform consistently with the International Organization for Standardization ISO 7591, clauses 6 and 7 is preferred;

(2) legibility and readability testing with results demonstrating that digital license plates are legible in daytime, as defined in Transportation Code, §541.401 and nighttime, as defined in Transportation Code, §541.401, using low beam headlights, under optimal conditions at a distance of no less than 75 feet; and are readable with commercially-available automated license plate readers and in a variety of weather conditions;

(3) commercially-available penetration testing, as approved by the department, for the protection of the digital license plate, the electronic display information, and the digital license plate provider's systems. In addition to testing before initial approval and each subsequent hardware upgrade, testing described in this paragraph must be completed for each software or firmware upgrade.

§217.62. Digital License Plate Removal and Malfunction.

(a) A digital license plate provider must have a mechanism to prevent potential theft of and tampering with the digital license plate. At a minimum, a digital license plate provider must ensure the digital license plate ceases the display of digital license plate information:

1. when a digital license plate malfunctions or upon termination of services between a digital license plate provider and owner; or

2. if a digital license plate provider determines that the digital license plate has been compromised, tampered with, or fails to maintain integrity of registration data.

(b) Digital license plate providers must immediately notify the department in the following circumstances:

1. commencement of services by the digital license plate provider;

2. termination of services by the digital license plate provider;

3. determination that the digital license plate has been compromised; or

4. the transfer of a digital license plate to a different owner.

(c) The digital license plate provider is authorized to disable the display of a digital license plate for failure of the digital license plate owner to pay the fees due to the digital license plate provider.

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

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