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 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 353. MEDICAID MANAGED CARE

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §353.6

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts an amendment to §353.6, concerning Audit of Managed Care Organizations. The amendment to §353.6 is adopted with changes to the proposed text as published in the March 13, 2020, issue of the *Texas Register* (45 TexReg 1753). The rule will be republished.

BACKGROUND AND JUSTIFICATION

Texas Government Code §533.015(b), as amended by Senate Bill (S.B.) 200 and S.B. 207, 84th Legislature, Regular Session, 2015, directed the HHSC Executive Commissioner to issue rules defining the coordination between HHSC and HHSC-Office of Inspector General (HHSC-OIG) in conducting audits of managed care organizations (MCOs) participating in Medicaid.

To comply with Texas Government Code §533.015(b), HHSC adopted 1 Texas Administrative Code (TAC) §353.6 and §371.37, effective July 14, 2016. These rules assign authority to the HHSC Executive Commissioner for establishing policy outlining the roles and responsibilities of divisions, departments, and offices of HHSC in performing audits of MCOs. The HHSC Medicaid and CHIP Services Division, the Health and Human Services (HHS) Internal Audit Division, and HHSC-OIG are responsible for audits of MCOs and any entity with which an MCO contracts.

In 2017, the Sunset Advisory Commission reported to the 85th Legislature that HHSC and HHSC-OIG had defined their respective audit roles, jurisdiction, and frequency in the HHSC Circular C-054, but the details were not defined in rule, as required by S.B. 200 and S.B. 207. The Sunset Advisory Commission recommended that the policies be prescribed in rule.

The amendment to §353.6 is necessary to implement the Sunset Advisory Commission's recommendation by codifying in rule a more detailed description of the coordination between HHSC and HHSC-OIG in planning and conducting audits of MCOs. The adoption of the counterpart to this rule, §371.37, which concerns Audit of Managed Care Organizations by HHSC-OIG, is published elsewhere in this issue of the *Texas Register.*

COMMENTS

The 31-day comment period ended April 13, 2020. During this period, HHSC received comments regarding the proposed rule from the Texas Association of Health Plans, Superior HealthPlan, and Evolving Steps Counseling. A summary of comments relating to the rule, and HHSC responses, follows.

Comment: One commenter recommends not changing "MCO subcontractors" to "any entity with which an MCO contracts," as proposed in §353.6(b).

Response: HHSC made the change in §353.6(b) to make the rule consistent with how §371.37(b) refers to entities with which an MCO contracts.

Comment: Two commenters recommend that HHSC add language to §353.6 that would require HHSC to conduct each audit based on the standards outlined in the Generally Accepted Government Auditing Standards.

Response: Section 353.6 focuses on HHSC's roles and responsibilities in coordinating with HHSC-OIG when HHSC conducts audits of MCOs. Additionally, Texas Government Code §2102.011 already requires audits performed by HHS Internal Audit to conform to generally accepted governmental auditing standards. No change was made in response to this comment.

Comment: One commenter states that it is glad to see HHSC and HHSC-OIG making changes to rules to improve coordination and eliminate duplication, it agrees with language in the rules requiring HHSC and HHSC-OIG to coordinate audits to eliminate duplication of audit efforts, and it supports language in the rules requiring the development of audit plans.

Response: HHSC appreciates the supportive comment. No change was made in response to this comment.

Comment: One commenter states that, because HHSC uses old time periods for audits, policies and practices may have changed resulting in non-applicable or non-actionable audit findings. Therefore, this commenter believes it would be beneficial for HHSC to stay current on their audits and target more recent time periods.

Response: HHSC audits of MCOs, and resulting findings, are based on the statutory, regulatory, and contractual requirements in effect for the time period to be examined by the audit. Additionally, HHSC complies with all legal timeframes when choosing a particular time period to be examined by the audit. No change was made in response to this comment.

Comment: One commenter asserts that there is no benefit to multiple entities performing multiple financial audits each year, rather each entity should limit their audit to one of those types of audits per year.

Response: HHSC and HHSC-OIG strive, to the extent possible, to minimize duplication of oversight of managed care plans under

Medicaid, as provided by Texas Government Code §533.015(a). No change was made in response to this comment.

Comment: One commenter states that MCOs should only be audited on existing statutory, regulatory, and contractual requirements. The commenter states further that, if during an audit, HHSC-OIG, HHSC, or any other entity believes an MCO should be conducting business in a manner that is not a current requirement either federally or by the State, that position should not be a finding, rather a discussion on potential policy changes. The commenter believes it is extremely important that findings in published audits are due to an MCO not following an existing policy and it is unreasonable to hold MCOs to a standard that is not in their contract or federally required.

Response: HHSC oversight of MCOs, and resulting findings, are based on the statutory, regulatory, and contractual requirements in effect for the time period to be examined by the review. HHSC may also identify control weaknesses or other risk factors that could contribute to future non-compliance and may offer recommendations to audited entities to address those issues. Additionally, HHSC complies with all legal timeframes when choosing a particular time period to be examined for an audit. No change was made in response to this comment.

Comment: One commenter recommends that HHSC also develop rules requiring coordination with the Texas Department of Insurance.

Response: HHSC appreciates the commenter's recommendation, however, the recommendation is beyond the scope of this rulemaking. The amendment to §353.6 implements the statutory requirements of Texas Government Code §533.015(b) by focusing on coordination between HHSC-OIG and HHSC in performing audits of MCOs. No change was made to the rule in response to this comment.

HHSC made a minor editorial change in §353.6(a) to replace "their subcontractors" with "any entity with which an MCO contracts" to make terminology in §353.6(a) consistent with §353.6(b).

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; §533.015, which requires the Executive Commissioner, after consulting with HHSC-OIG, to adopt rules defining the coordination between HHSC and HHSC-OIG in the performance of audits of MCOs; and Texas Human Resources Code §32.021, which provides HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and to adopt rules and standards for program administration.

§353.6. Audit of Managed Care Organizations.

(a) The Health and Human Services Commission (HHSC), through the Medicaid and CHIP Services Division, the Office of Inspector General (OIG), and Health and Human Services (HHS) Internal Audit Division, is responsible for audits of MCOs and any entity with which an MCO contracts.

(b) For purposes of this rule, "MCO" includes any entity with which an MCO contracts.

(c) HHSC conducts audits of MCOs, including financial audits, performance audits, compliance audits, and agreed upon procedures:

(1) with the scope and frequency necessary to provide information to allow for the effective oversight and control of the MCOs; and

(2) as necessary to comply with all federal and state laws.

(d) Medicaid and CHIP Services Division's roles and responsibilities for audits of MCOs include:

(1) determining, based on coordination with OIG about MCO audits, which audits to assign to contracted audit firms in order to eliminate duplication of audit effort and reduce the impact of potentially duplicative audits on the MCOs;

(2) coordinating with HHS Internal Audit Division to obtain delegated authority, from the State Auditor's Office (SAO), to procure audit services as required by Texas Government Code §321.020;

(3) facilitating and determining the extent of work to be performed in agreed upon procedures and audits of MCOs, through the use of contracted audit firms as part of the integrated business processes used to oversee and monitor MCOs;

(4) providing final reports of agreed upon procedures and audits to OIG, along with other information relevant to quantifying MCO performance under the contract with HHSC, including results of on-site monitoring visits, and other relevant MCO-related performance information;

(5) providing all deliverables, such as contracts, contract amendments, and audit reports, for contracted audit related engagements to HHS Internal Audit Division for delivery to the SAO; and

(6) ensuring actions planned to address audit recommendations are implemented, including actions planned by the Medicaid and CHIP Services Division or by an MCO.

(e) The OIG's roles and responsibilities, related to performing audits of MCOs, are as outlined in §371.37 of this title (relating to Audit of Managed Care Organizations).

(f) HHS Internal Audit Division's roles and responsibilities, related to audits of MCOs, are:

(1) auditing the Medicaid and CHIP Services Division and OIG, as part of its established audit authority and risk-based audit coverage, including auditing the effectiveness of coordination between the Medicaid and CHIP Services Division and OIG on the performance of MCO audits;

(2) notifying and conferring with the Medicaid and CHIP Services Division and OIG before initiating an audit of an MCO contained in the audit plan approved by the HHS Executive Commissioner;

(3) coordinating with Medicaid and CHIP Services Division when audit services need to be procured to ensure HHSC obtains the appropriate authority to procure audit services from the SAO; and

(4) coordinating with Medicaid and CHIP Services Division to ensure that all appropriate documents related to contracted audit services are obtained and provided to the SAO. These documents include executed contracts, contract amendments, and audit reports.

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 July 28, 2020.

TRD-202003073
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: August 17, 2020
Proposal publication date: March 13, 2020
For further information, please call: (512) 491-4096

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CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

SUBCHAPTER B. OFFICE OF INSPECTOR GENERAL

1 TAC §371.37

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts an amendment to §371.37, concerning Audit of Managed Care Organizations.

The amendment to §371.37 is adopted without changes to the proposed text as published in the March 13, 2020, issue of the *Texas Register* (45 TexReg 1755). The rule will not be republished.

BACKGROUND AND PURPOSE

Texas Government Code §533.015(b), as amended by Senate Bill (S.B.) 200 and S.B. 207, 84th Legislature, Regular Session, 2015, directed the HHSC Executive Commissioner to issue rules defining the coordination between HHSC and HHSC-Office of Inspector General (HHSC-OIG) in conducting audits of managed care organizations (MCOs) participating in Medicaid.

To comply with Texas Government Code §533.015(b), HHSC adopted 1 Texas Administrative Code (TAC) §353.6 and §371.37, effective July 14, 2016. These rules assign authority to the HHSC Executive Commissioner for establishing policy outlining the roles and responsibilities of divisions, departments, and offices of HHSC in performing audits of MCOs. The HHSC Medicaid and CHIP Services Division (MCSD), the Health and Human Services (HHS) Internal Audit Division, and HHSC-OIG are responsible for audits of MCOs and any entity with which an MCO contracts.

In 2017, the Sunset Advisory Commission reported to the 85th Legislature that HHSC and HHSC-OIG had defined their respective audit roles, jurisdiction, and frequency in the HHSC Circular C-054, but the details were not defined in rule, as required by S.B. 200 and S.B. 207. The Sunset Advisory Commission recommended that the policies be prescribed in rule.

The amendment to §371.37 is necessary to implement the Sunset Advisory Commission's recommendation by codifying in rule a more detailed description of the coordination between HHSC and HHSC-OIG in planning and conducting audits of MCOs. The adoption of the counterpart to this rule, §353.6, which concerns Audit of Managed Care Organizations by HHSC, is published elsewhere in this issue of the *Texas Register.*

COMMENTS

The 31-day comment period ended April 13, 2020. During this period, HHSC received comments regarding the proposed rule from the Texas Association of Health Plans, Superior HealthPlan, and Evolving Steps Counseling. A summary of comments relating to the rule, and HHSC responses, follow.

Comment: One commenter recommends that since HHSC-OIG is an office within HHSC it should keep the existing language in §371.37(a) and (b).

Response: While HHSC-OIG is an office within HHSC, the sentence added in the proposed amendment to §371.37(a) is based on the statutory requirements in Texas Government Code §531.102(a-5) and (a-6). The phrase "conducted independent of [HHSC]" is taken directly from Texas Government Code §531.102(a-6). In the proposed amendment to §371.37(a), HHSC also removed the reference to §353.6(d), which says "The HHSC Executive Commissioner establishes policy outlining the roles and responsibilities of the divisions and offices of HHSC [including OIG] in performing audits of participating MCOs" because the Executive Commissioner's policy establishing these roles and responsibilities is outlined in §371.37 and §353.6, as adopted in this issue of the *Texas Register.*

With respect to the proposed amendment to §371.37(b), OIG has broad regulatory authority to audit an MCO and the entities with which an MCO contracts to perform services under an MCO contract. HHSC-OIG has authority under 1 TAC §371.1603 to take administrative enforcement measures against any individual, partnership, corporation, professional entity, or other legal entity, based on an audit finding in the Medicaid or other HHS programs. HHSC-OIG's roles and responsibilities for coordinating with HHSC on audits of MCOs, as set forth in §371.37, apply to an HHSC-OIG audit of any entity with which an MCO contracts. Almost all of the language stricken in the amendment to §371.37(b) has been moved to other parts of the rule (see paragraphs (1), (3) and (9) in §371.37(c)). No change was made in response to this comment.

Comment: Two commenters recommend that HHSC add language to §371.37 that would require HHSC-OIG to conduct each audit based on the standards outlined in the Generally Accepted Government Auditing Standards.

Response: Section 371.37 focuses on HHSC-OIG's roles and responsibilities in coordinating with HHSC when HHSC-OIG conducts audits of MCOs. Additionally, 1 TAC §371.1719(b) already requires audits performed by HHSC-OIG to be "conducted and reported in accordance with Generally Accepted Governmental Auditing Standards or other appropriate standards recognized by the United States Government Accountability Office." No change was made in response to this comment.

Comment: One commenter states that it is glad to see HHSC and HHSC-OIG making changes to rules to improve coordination and eliminate duplication, it agrees with language in the rules requiring HHSC and HHSC-OIG to coordinate audits to eliminate duplication of audit efforts, and it supports language in the rules requiring the development of audit plans.

Response: HHSC appreciates the supportive comment. No change was made in response to this comment.

Comment: One commenter states that, because the State uses old time periods for audits, policies and practices may have changed resulting in non-applicable or non-actionable audit findings. Therefore, this commenter believes it would be beneficial for the State to stay current on their audits and target more recent time periods.

Response: HHSC-OIG audits of MCOs, and resulting findings, are based on the statutory, regulatory, and contractual require-

ments in effect for the time period to be examined by the audit. Additionally, HHSC-OIG complies with all legal timeframes when choosing a particular time period to be examined by the audit. No change was made in response to this comment.

Comment: One commenter asserts that there is no benefit to multiple entities performing multiple financial audits each year, rather each entity should limit their audit to one of those types of audits per year.

Response: HHSC and HHSC-OIG strive, to the extent possible, to minimize duplication of oversight of managed care plans under Medicaid, as provided by Texas Government Code §533.015(a). However, Texas Government Code §531.102(a) places responsibility on HHSC-OIG for the "prevention, detection, audit, inspection, review, and investigation of fraud, waste, and abuse in the provision and delivery of all health and human services in the state." Risk assessments, data mining, fraud referrals, or other factors may indicate an HHSC-OIG audit is necessary to fulfill its statutory responsibility in those specific circumstances, regardless of whether a more general financial audit was performed by others. No change was made in response to this comment.

Comment: One commenter states that MCOs should only be audited on existing statutory, regulatory, and contractual requirements. The commenter states further that, if during an audit, HHSC-OIG, HHSC, or any other entity believes an MCO should be conducting business in a manner that is not a current requirement either federally or by the State, that position should not be a finding, rather a discussion on potential policy changes. The commenter believes it is extremely important that findings in published audits are due to an MCO not following an existing policy and it is unreasonable to hold MCOs to a standard that is not in their contract or federally required.

Response: HHSC-OIG audits of MCOs, and resulting findings, are based on the statutory, regulatory, and contractual requirements in effect for the time period to be examined by the audit. HHSC-OIG may also identify control weaknesses or other risk factors that could contribute to future noncompliance and may offer recommendations to audited entities to address those issues. Additionally, HHSC-OIG complies with all legal timeframes when choosing a particular time period to be examined for an audit. No change was made in response to this comment.

Comment: One commenter recommends that HHSC also develop rules requiring coordination with the Texas Department of Insurance.

Response: HHSC appreciates the commenter's recommendation, however, the recommendation is beyond the scope of this rulemaking. The amendment to §371.37 implements the statutory requirements of Texas Government Code §533.015(b) by focusing on coordination between HHSC-OIG and HHSC in performing audits of MCOs. No change was made to the rule in response to this comment.

Comment: One commenter proposes adding the following language at the end of amended §371.37(a): "with a target goal of limiting the audits of the MCOs to one audit each year and with the goal of auditing recent time periods that cover a time span no greater than 18-24 months from the date that the audit is initiated."

Response: HHSC and HHSC-OIG strive, to the extent possible, to minimize duplication of oversight of managed care plans under Medicaid, as provided by Texas Government Code §533.015(a). However, Texas Government Code §531.102(a) places responsibility on HHSC-OIG for the "prevention, detection, audit, inspection, review, and investigation of fraud, waste, and abuse in the provision and delivery of all health and human services in the state." Risk assessments, data mining, fraud referrals, or other factors may indicate an HHSC-OIG audit is necessary to fulfill its statutory responsibility in those specific circumstances, regardless of whether another similar audit was performed recently. Additionally, HHSC-OIG complies with all legal timeframes when choosing a particular time period to be examined for an audit. No change was made in response to this comment.

Comment: One commenter recommends adding the following language at the end of amended §371.37(c)(1): "and determining, based on coordination with the HHS Internal Audit Division regarding MCO audits, which audits to perform in order to eliminate duplication of audit effort and reduce the impact of duplicative and multiple audits on the MCOs in a single year."

Response: HHSC and HHSC-OIG strive, to the extent possible, to minimize duplication of oversight of managed care plans under Medicaid, as provided by Texas Government Code §533.015(a). However, Texas Government Code §531.102(a) places responsibility on HHSC-OIG for the "prevention, detection, audit, inspection, review, and investigation of fraud, waste, and abuse in the provision and delivery of all health and human services in the state." Risk assessments, data mining, fraud referrals, or other factors may indicate an HHSC-OIG audit is necessary to fulfill its statutory responsibility in those specific circumstances, regardless of whether another similar audit was performed recently. No change was made in response to this comment.

Comment: One commenter recommends adding language to §371.37(c)(1) and (9) that would ensure audits are based on contractual requirements.

Response: HHSC-OIG's audit authority is not limited to audits based on contractual requirements. There are other legal requirements on MCOs in the delivery of health care, including federal and state statutes, regulation, and rules. No change was made in response to this comment.

Comment: One commenter recommends adding language to §371.37(c) that would require HHSC-OIG to (i) communicate preliminary results of MCO audits to the MCO for review and comment, (ii) consider MCO comments before finalizing MCO audit report recommendations, and (iii) share proposed audit findings with the MCO before issuing a final report to the MCO or to MCSD.

Response: Section 371.37 focuses on HHSC-OIG's roles and responsibilities in coordinating with HHSC when HHSC-OIG conducts audits of MCOs. Title 1 TAC §371.1719(b) - (d) specifically addresses HHSC-OIG audit procedures, notices, and due process requirements, including an auditee's right to receive a draft audit report and to provide a written management response to the draft audit report. No change was made in response to this comment.

Comment: One commenter submits comments, concerns and suggests a solution related to particular practices of MCOs located in the region where the commenter works.

Response: HHSC appreciates the thoughtful comment, however, it does not specifically address any proposed amendment to §371.37 and is beyond the scope of this rulemaking. These recommendations have been forwarded on to the relevant HHSC program area for review. No change was made in response to this comment.

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; §533.015, which requires the Executive Commissioner, after consulting with HHSC-OIG, to adopt rules defining the coordination between HHSC and HHSC-OIG in the performance of audits of MCOs; and Texas Human Resources Code §32.021, which provides HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and to adopt rules and standards for program administration.

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 July 28, 2020.

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: August 17, 2020
Proposal publication date: March 13, 2020
For further information, please call: (512) 491-4096

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

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

The Public Utility Commission of Texas (commission) adopts the repeal of 16 TAC §24.41, relating to cost of service; adopts new 16 TAC §24.41, relating to cost of service, and new 16 TAC §24.238, relating to fair market value; and also adopts amendments to 16 TAC §24.239, relating to sale, transfer, merger, consolidation, acquisition, lease or rental, and 16 TAC §24.243, relating to purchase of voting stock or acquisition of a controlling interest in a utility. New §24.238 is adopted with changes to the proposed text as published in the May 1, 2020, issue of the *Texas Register* (45 TexReg 2795) and will be republished. The repeal of §24.4, new §24.41, and the amendments to §24.239 and §24.243 are adopted without changes to the proposed text as published and will not be republished.

New rule §24.238 implements House Bill 3542 (HB 3542), passed in the 86th Legislature, Regular Session, which established a fair market valuation process that may be used by a Class A or Class B water or sewer utility that is acquiring another retail public utility or the facilities of another retail public utility. New rule §24.41 incorporates relevant aspects of proposed new rule §24.238 and will replace existing §24.41. New rule §24.41 also includes clarifying changes. The amendments to §24.239 incorporate relevant aspects of proposed new rule §24.238. The Commission adopts the repeal, new rules, and amendments in Project No. 49813.

New rule §24.238 implements House Bill 3542 (HB 3542), passed in the 86th Legislature, Regular Session, which established a fair market valuation process that may be used by a Class A or Class B water or sewer utility that is acquiring another retail public utility or the facilities of another retail public utility. New rule §24.41 incorporates relevant aspects of proposed new rule §24.238 and will replace existing §24.41. New rule §24.41 also includes clarifying changes. The amendments to §24.239 incorporate relevant aspects of proposed new rule §24.238. The Commission adopts the repeal, new rules, and amendments in Project No. 49813.

No public hearing was requested so no public hearing was held.

The Texas Association of Water Companies (TAWC) and National Association of Water Companies (NAWC) jointly submitted comments on the proposed new rule. The Office of Public Utility Counsel (OPUC), CSWR-Texas Utility Operating Company (CSWR Texas), and SJWTX, Inc. d/b/a Canyon Lake Water Service Company, LLC (CLWSC) also submitted comments.

TAWC and NAWC jointly submitted reply comments. OPUC, CSWR Texas, and the City of Houston (Houston) also submitted reply comments.

General Comments

TAWC and NAWC generally supported the proposed §24.238 and requested changes intended to improve the new fair market valuation process and encourage regionalization of Texas water and sewer systems. OPUC supported the overall important policy objectives behind the passage of HB 3542 and the proposed new rule. OPUC believed it is necessary to carefully evaluate the potential rate impacts of the proposed new fair market valuation rule. OPUC supported the creation of safeguards and criteria to help protect consumers from potential rate increases or other unintended consequences. CSWR Texas supported adoption of the proposed rule but encouraged the commission to consider certain changes to make the valuation procedures and the sale, transfer, merger (STM) approval process more efficient and cost-effective when the acquisition involves smaller water or wastewater systems in need of immediate investment to address critical water quality concerns.

In reply comments, TAWC and NAWC provided a general statement in support of the section-specific initial comments submitted by CLWSC and CSWR Texas.

Commission Response

The commission will respond to comments related to specific rule provisions in the discussion of those provisions.

§24.41(c)(2)(C)(i), Estimates and Trending Studies

Proposed §24.41(c)(2)(C)(i) provides that the commission may adjust rate base and the rate of return on equity associated with cost of plant and equipment that has been estimated by trending studies or other methods not based on historical records. TAWC and NAWC requested language that would permit the use of estimated or trending studies in lieu of historical records without a potential "penalty" detrimental to the financial integrity of the utility. TAWC and NAWC commented that often historical records are not available or are not reliable for a variety of reasons, and suggested that the fair market value process could be viewed as one method of estimation of original cost, and as such, the proposed rule language would conflict with new Texas Water Code

(TWC) §13.305. Alternatively, TAWC and NAWC suggested that §24.41(c)(2)(C)(i) could be eliminated altogether because there is no similar language in TWC Chapter 13.

OPUC generally advised caution when using trending studies or other methods that are not based on historical documentation to establish original cost. OPUC recognized that adequate historical records and documentation are not always available for older and smaller water utility systems and supported allowing the use of trending studies or other estimation methods for older and smaller water utilities, as long as ratepayers are protected from use of potentially speculative methods to establish original cost.

In reply comments, TAWC and NAWC stated that they interpreted OPUC's comments as generally supportive of trending studies or other estimation methods for original cost. However, TAWC and NAWC sought clarification that there will not be a risk of incurring a potential "penalty" detrimental to the financial integrity of the utility, such as an adjustment to rate base or rate of return on equity simply for using these types of estimation methods.

CSWR Texas stated that OPUC's position encouraging the commission to use a higher standard of review for "overly speculative" valuations that are not supported by historical records and documentation is antithetical to the Legislature's intent to remove roadblocks to the acquisition of smaller older systems.

CSWR Texas supported inclusion of TAWC and NAWC's proposed changes. CSWR Texas also stated its support for the use of alternative valuation methods, such as real estate appraisals, that can be performed more quickly and at a lower cost than the fair market value process. CSWR Texas stated that the commission should encourage use of alternative valuation methods to incentivize the acquisition of smaller, older systems and that "threatening to penalize" a utility's rate base or rate of return when the utility may have no other choice but to utilize trending studies or other methods to set rate base does not provide such encouragement. CSWR Texas further stated that the commission already has the authority to deny rate base amounts it finds unreasonable so there is simply no need for the commission to "threaten" to reduce a utility's rate of return when it can simply deny costs it finds unreasonable.

Commission Response

Proposed §24.41(c)(2)(C)(i) is substantively the same as existing §24.41(c)(2)(B)(i). The commission currently allows original cost of plant and equipment to be based on trending studies or other estimation methods when historical records are unavailable, but may adjust rate base or rate of return when appropriate to ensure just and reasonable rates. The commission agrees with CSWR Texas that the commission has the authority to exclude unreasonable costs from rate base. The commission also has the authority to adjust the rate of return applied to the rate base. For example, TWC §13.184(b) requires the commission to consider, among other things, the quality of the utility's management in fixing a reasonable return on invested capital. Absence of records relating to original cost of plant or equipment could, in some cases, be a sign of the quality of the utility's management. The proposed rule does not require the commission to make adjustments to rate base or rate of return, but reflects the commission's authority to do so.

In situations where the fair market valuation process is not used, TWC §13.185(b) requires rates to be set based on original cost of the facilities unless the commission uses alternative ratemaking approaches authorized under TWC §13.183(c). While the commission's rules permit original cost to be set based on trending studies or other estimation methods when historical records are unavailable, use of real estate appraisals is not an appropriate way to estimate the original cost of facilities because such appraisals estimate market value. Proposed §24.41(c)(2)(C)(i) is not in conflict with TWC §13.305 because it does not apply to the ratemaking rate base established under §24.238, which is governed by §24.41(c)(2)(A). The commission adopts §24.41(c)(2)(C)(i) as proposed.

§24.41(c) and (d), Return on Rate Base and Positive Acquisition Adjustments

CSWR Texas encouraged the commission to include language in the proposed rules that would allow entities that are not Class A or Class B utilities "to take advantage of the benefits of the fair market value process, even if they are not permitted to take advantage of the fair market value process itself." CSWR Texas stated that in other states it has relied on real estate appraisals to help establish rate base for systems it hopes to acquire and that use of real estate appraisals would also be considerably less expensive and time-consuming than the fair market value approach. CSWR Texas noted that "other estimating methods" are already anticipated in proposed §24.41(c)(2)(c)(i) and that use of real estate appraisals, or other reasonable estimating methods, would provide a more efficient and cost-effective alternative to the fair market value approach when the acquisition involves a smaller system, and is particularly necessary when the acquiring entity would be ineligible to participate in the fair market value process.

CSWR Texas also encouraged the commission to clarify the appropriateness of using positive acquisition adjustments, particularly where the acquiring entity is not eligible to participate in the fair market value process. CSWR Texas requested that the commission include language in the rules that would allow entities that invest in smaller systems to accrue Allowance of Funds Used During Construction (AFUDC) and defer depreciation for post-acquisition improvements in the same way provided for under the proposed rules for eligible utilities. CSWR Texas further stated that even when an acquiring utility is eligible to participate in the fair market value process, the purchase price for some systems is so small, it is unlikely the fair market value process would be used. CSWR Texas urged that acquiring entities should still be able to take advantage of the ability to accrue AFUDC and defer depreciation on post-acquisition improvements without having to spend the time and expense to seek unnecessary appraisals. CSWR Texas recommended that providing alternatives to the fair market value approach to rate base valuation for smaller water or wastewater systems, particularly when the acquiring entity is not eligible to utilize the fair market value approach, would provide flexibility and ratemaking clarity to entities seeking to acquire and upgrade those systems and ultimately result in safer, more reliable service.

Commission Response

The Commission declines to make the changes requested by CSWR. In enacting TWC §13.305, the Legislature set the parameters for use of fair market valuation to determine the ratemaking rate base purchased by the acquiring utility, including the type of utility that may use this process. The proposed rule reflects these limitations and requirements. If the fair market valuation process is not used, TWC §13.185(b) requires rates to be set based on original cost of the facilities unless the commission uses alternative ratemaking approaches authorized under TWC §13.183(c).

While the commission's rules permit original cost to be set based on trending studies or other estimation methods when historical records are unavailable, use of real estate appraisals is not an appropriate way to estimate the original cost of facilities.

§24.41(g), Intangible Assets

Proposed §24.41(g) relates to the evidence that must be used to support the inclusion of intangible assets in rate base. In both initial and reply comments, TAWC and NAWC requested that proposed §24.41(g) be removed. TAWC and NAWC stated that neither TWC Chapter 13 nor the commission's rules applicable to electric utilities contain this language and that intangible assets are routinely allowed as part of rate base for other utilities without the conditions included in this rule. TAWC and NAWC stated that intangible assets will necessarily be valued as part of the appraisals prepared for fair market value determinations and §24.41(g) should be eliminated. Alternatively, TAWC and NAWC suggested this subsection be revised to simply state that intangible assets, including but not limited to a source of supply such as water rights, must be allowed in rate base and repeated this suggestion in reply comments.

OPUC supported the commission's treatment of intangible assets under new §24.41(g), stating that intangible assets are difficult to value and quantify. OPUC stated that intangible assets have some level of value and agreed with the safeguards and requirements in the proposed rule. OPUC encouraged the commission to keep these safeguards and requirements for the protection of ratepayers from overly speculative claims about the value of intangible assets.

In both its initial and reply comments CSWR Texas objected to proposed §24.41(g) because the requirement is not included in the TWC and does not apply to electric utilities under the Public Utility Regulatory Act (PURA) or the commission's rules. CSWR Texas stated it is not clear why such a heightened burden is applied to water or wastewater utilities. CSWR Texas further commented that intangible assets like land rights are simple to appraise, contribute to the real value of a system, are included in the definition of "facilities" used to provide service under TWC §13.002(9), and also may be the only undepreciated assets that a smaller, older distressed system owns. CSWR Texas stated that this subsection should be eliminated and encouraged the commission to include language in §24.238 that permits appraisers to consider intangible assets as part of their fair market valuations.

In reply, TAWC and NAWC disagreed with OPUC that there is any justification for intangible asset or rate base qualifiers when there are no such qualifiers in place for other types of utilities the commission regulates. TAWC and NAWC argued that intangible assets are not difficult to value and quantify as OPUC contended and are routinely valued by qualified appraisers and valuation experts. TAWC and NAWC further commented that OPUC offered no specific legal or factual basis in support of what it described as "safeguards."

In reply comments, OPUC stated that the commission already disallows intangible assets unless a water utility can meet certain requirements in §24.41(f). OPUC observed that new subsection (g) is a continuation of the commission's existing treatment of intangible assets with which water utilities should already be well familiar. OPUC supported the commission's proposed requirements for intangible assets in new subsection (g) because water utilities should be required to prove through documentation and testimony the reasonableness and necessity of costs that they are seeking to pass on to ratepayers. OPUC stated that these proposed requirements are important and necessary safeguards because intangible assets should not be allowed in a water utility's rate base without a robust assessment of the asset's reasonableness, necessity, and benefits to the utility's ratepayers.

Houston disagreed with TAWC's and NAWC's request that proposed §24.41(g) be removed. Houston noted that TAWC and NAWC requested removal of a requirement that already exists in the commission's rules at §24.41(f) and stated that TAWC's and NAWC's proposal falls outside the scope intended within HB 3542. Houston commented that intangible assets, and specifically the value of water rights, are issues unique to water utilities that could have a significant impact on allowable rate base. Houston stated that inclusion of intangible assets without limitation could result in a rate base that is not reflective of the actual investment made by a utility. Therefore, Houston encouraged the commission to reject TAWC's and NAWC's proposal.

CSWR Texas stated in reply comments that electric utilities commonly include in rates the value of intangible assets like software, franchises, and organizational costs, which should not be difficult to value or require a heightened burden of proof. CSWR Texas agreed with TAWC and NAWC that §24.41(g) should be eliminated. Alternatively, CSWR Texas agreed with TAWC and NAWC's proposed changes. In addition, CSWR Texas encouraged the commission to include express language in §24.238 that intangible assets should be considered as part of fair market valuations.

Commission Response

As OPUC noted, proposed §24.41(g) is substantively the same as current §24.41(f). The commission acknowledges that 16 TAC Chapter 25, which governs electric utilities, is silent on intangible assets. However, setting rates for water utilities presents issues and challenges that differ from electric utilities and the proposed rule reflects the need for different rules in some areas. Proposed §24.41(g) requires that the utility provide documentation for the amount and nature of the asset; establish through testimony that the amount is reasonable, necessary and a benefit to customers; and establish through testimony that the amount requested is properly included as a rate base asset. These basic requirements for recovery of costs from customers are included in the rule to provide guidance to water and sewer utilities that seek to include intangible assets in rate base. The commission adopts the subsection as proposed.

The commission responds to comments about inclusion of intangible assets in fair market valuations in relation to comments on §24.238(b).

§24.238(b), Definitions--Intangible Assets

TAWC and NAWC expressed concern that intangible assets, such as water rights, will not be considered during the fair market value appraisal process use to establish ratemaking rate base. TAWC and NAWC stated that while TWC §13.305(c)(4) limits the engineer's assessment to tangible assets of the selling utility, intangible assets can be equally or even more valuable and are ordinarily considered in assessing a utility's fair market value and its purchase price. TAWC and NAWC recommended that the utility valuation experts conducting appraisals should be instructed to specifically consider intangible assets. TAWC and NAWC suggested changing the definition of ratemaking rate base to include both tangible and intangible assets.

OPUC replied that TAWC's and NAWC's requested change to §24.238(b)(4) is unnecessary because the definition of "facilities" in TWC §13.002(9) includes intangible assets.

Commission Response

The commission declines to change the definition of ratemaking rate base as requested by TAWC and NAWC. As OPUC pointed out, the definition of "facilities" in TWC §13.002(9) includes intangible assets. However, to further clarify this point, the commission modifies §24.238(f)(2) to expressly state that the appraisal performed by the utility valuation expert will include intangible assets, as appropriate.

§24.238(b), Definitions--Selling Utility

OPUC recommended that the commission modify the definition of "selling utility" in subsection (b)(5) to limit the rule's applicability to the sale of Class C and D utilities. OPUC cited Chairman Dade Phelan's statements at the House State Affairs Committee meeting on April 1, 2019 to establish that the intent of HB 3542, which enacted TWC §13.305, was to help drive investment by private companies in small communities that have an urgent need for water system infrastructure, but cannot afford needed system upgrades. OPUC maintained that HB 3542 was not intended to include the acquisition of large Class A and Class B utilities, which do not face the same financial hurdles as smaller Class C and D utilities due to economies of scale and access to more financial resources. OPUC argued that allowing the fair market value of larger, well-functioning and financially healthy Class A and B utilities in the ratemaking rate base of purchasing Class A and B utilities would result in higher costs for ratepayers.

TAWC and NAWC objected to OPUC's recommendation that the proposed rule's definition of "selling utility" should be restricted to Class C and D utilities, stating that the suggestion is contrary to the plain language of the fair market value statute. TAWC and NAWC argued that it is well established in Texas that where text is clear, text is determinative of the Legislature's intent and that the words the Legislature chooses should be the surest guide to legislative intent. TAWC and NAWC contended that if enforcement of the plain language of a statute produces an absurd result or is ambiguous, then other considerations may come into play, such as legislative history, but OPUC did not contend there is ambiguity or an absurd result produced by TWC §13.305, and thus, it is not appropriate to look to the legislative history. Moreover, TAWC and NAWC continued, comments by a single legislator about one purpose for a statute does not show the exclusion of other purposes or reflect the collective intent of the entire legislative body. TAWC and NAWC concluded that not only does the plain language of TWC §13.305 not contemplate the type of limitation OPUC suggested, it specifically makes the fair market value process available to acquisitions of retail public utilities, which include water and sewer providers that are not investor owned.

CSWR Texas opposed the limitations on the definition of selling utility proposed by OPUC. CSWR Texas stated that because it is not a Class A or B utility, it appears CSWR Texas is precluded from using the fair market valuation process and other incentives in the proposed rules. CSWR Texas argued that there is no reason that large, adequately capitalized, well-established entities seeking to bring new investment to smaller community-based water and wastewater systems in Texas should be excluded from such incentives, which were specifically designed to encourage the investment CSWR Texas seeks to make in Texas. CSWR Texas encouraged the commission to allow "capable" entities to utilize the fair market value procedures and to take advantage of other incentives.

Commission Response

The commission declines to change the definition of selling utility as recommended by OPUC because TWC §13.305 clearly does not limit the availability of the fair market value process to acquisitions of Class C and Class D water and sewer utilities. Similarly, the commission declines to change the definition as recommended by CSWR Texas, because TWC §13.305 limits use of the fair market valuation process to acquisitions by Class A and Class B utilities.

§24.238(c)(2), List of Qualified Utility Valuation Experts

OPUC supported the utility valuation expert disclosure requirements in proposed §24.238(c)(2). However, OPUC recommended that the commission also require a utility valuation expert to provide a list of all previous water utility-related employers to provide more transparency. OPUC stated that this additional disclosure requirement would help the commission determine whether a utility valuation expert has been employed by a water utility that is subject to the fair market valuation process and whether a utility valuation expert should be disqualified from the selection process.

OPUC contended that the additional disclosure requirement would provide the commission with more context on the utility valuation expert's past water utility-related experience when considering the expert's report. OPUC argued that while a utility valuation expert may not have been employed by a water utility in the previous year to warrant disqualification under proposed §24.238(e)(2)(B), the utility valuation expert may have been employed by a water utility several years ago and that past experience could affect the expert's analysis and report. OPUC stated that while a utility valuation expert's past water utility-related experience may not warrant disqualification, the commission should nonetheless be aware of the expert's water utility-related employment history in order to make an informed decision with more transparency in the fair market valuation process.

In reply, TAWC and NAWC opposed OPUC's proposed addition to §24.238(c)(2). TAWC and NAWC commented they do not believe that disclosure is necessary, noting that OPUC stated such experience would not necessarily call for disqualification. TAWC and NAWC stated that proposed §24.238(c)(2)(E) already requires a detailed description of a utility valuation expert's experience and OPUC's proposed language seemed overly broad and vague.

In reply comments, CSWR Texas expressed its concern that there will not be a sufficient number of participating appraisers to satisfy the potential demand for the new fair market valuation process and disagreed with any requirements that will discourage or limit the ability of a willing and available appraisal expert to participate in the fair market value process. CSWR Texas stated that the rules already include restrictions on who may participate as an appraiser, and prior employment by a water utility should not be grounds for disqualification of an appraiser or cause to dismiss or question the appraiser's conclusions. CSWR Texas further commented that the commission should clarify that providing consulting services as a third party vendor does not constitute "employment" under the rule because many qualified valuation experts may have worked as an outside consultant to a utility or other "utility-related" entities such as the commission, commission staff, OPUC, municipalities, or any number of other

industry groups. CSWR Texas stated that requiring disclosure of an expert's prior work as an outside consultant could breach confidentiality agreements or otherwise discourage experts from taking part in the appraisal process. CSWR Texas opposed OPUC's proposed changes to §24.238(c)(2) and urged the commission to consider ways to encourage appraisers to participate in the fair market value process.

Commission Response

The commission declines to change the disclosure requirements as suggested by OPUC and CSWR Texas. Instead, the commission adds §24.238(e)(2)(C) to state that a utility valuation expert selected by the executive director or the executive director's designee must not have received compensation under a contract for consulting or other services with the acquiring or selling utility, or executed a contract with either utility, within one year of the date the utility valuation expert is selected. This additional language creates a clear distinction between the term "employment" as used in §24.238(e)(2)(B) and work as a third party contractor and sets reasonable parameters on when a utility valuation expert's previous work as a third party contractor poses a conflict of interest.

§24.238(d), Notice of Intent to Determine Fair Market Value

Proposed §24.238(d)(3) provides that a notice of intent to determine fair market value must not include the purchase price agreed upon by the acquiring utility and selling utility. Proposed §24.238(f)(4) provides that the appraisals performed by the utility valuation experts must not consider the purchase price negotiated by the acquiring utility and selling utility. TAWC and NAWC commented that the acquiring and selling utility should be permitted to share an agreed-upon purchase price with the utility valuation experts conducting appraisals. TAWC and NAWC stated that utility valuation experts should be able to consider all available information they believe is relevant to their appraisal task, which may include considering an established purchase price along with other available purchase price information in the market. TAWC and NAWC further stated that in light of the statutory five percent cap on compensation, the purchase price may provide an approximation of the amount the prospective utility valuation experts may be paid. TAWC and NAWC suggested revising the proposed rule to provide that the notice of intent may include the purchase price agreed upon by the acquiring utility and the selling utility.

OPUC disagreed with TAWC's and NAWC's recommendation that the acquiring and selling water utility should be permitted to share their agreed-upon purchase price with the utility valuation experts conducting the appraisals. OPUC stated that permitting the acquiring and selling utilities to share their agreed-upon purchase price with the utility valuation experts would introduce subjectivity and bias into a process that is intended to be an independent, neutral and objective evaluation of the fair market value of a selling utility or selling utility's facilities. OPUC commented that HB 3542 included several provisions that speak to the Legislature's intent to create a voluntary fair market valuation process that is independent, neutral and objective, including conflict of interest protections with regard to the utility valuation experts; selection of utility valuation experts by the commission, rather than the selling and acquiring utilities; appointment of three utility valuation experts to perform the fair market valuation appraisal; and the use of the average of the three utility valuation experts' appraisals, rather than relying upon a single appraisal, to determine fair market value. OPUC urged the commission not to allow the acquiring and selling utilities to share their agreed-upon purchase price with the utility valuation experts in the fair market valuation process.

CSWR Texas agreed with TAWC and NAWC that participating utilities should be permitted to disclose the purchase price of a system to the selected utility valuation experts for consideration as part of the fair market value process. CSWR Texas commented that there is often a lack of available cost information or market data necessary to appraise smaller water or wastewater systems and appraisers should be able to consider all available information they consider relevant to their appraisal report, including the purchase price reached by willing parties to a transaction, as long as their deliberations are consistent with the Uniform Standards of Processional Appraisal Practice. CSWR Texas further commented that by requiring the averaging of three separate appraisals, the proposed rule already has sufficient protections to ensure reasonable valuations based on all available information. CSWR Texas supported TAWC's and NAWC's proposed changes to this subsection.

Commission Response

TWC §13.305(c)(3) requires that utility valuation experts perform appraisals using certain approaches that do not include consideration of the agreed-upon purchase price. To protect the integrity of the valuation process, the commission declines to change the rule as requested by TAWC and NAWC and supported by CSWR Texas.

§24.238(e), Selection of Utility Valuation Experts

Proposed §24.238(e)(1) requires the commission's executive director to select three utility valuation experts who will perform appraisals after a notice of intent to use the fair market value process is filed. TAWC and NAWC commented that with respect to this subsection, it is helpful to consider what other jurisdictions with fair market value legislation have done regarding appraisals. TAWC and NAWC stated that they recognized the limitations of TWC §13.305(c)(2), which says the commission is to "select three utility valuation experts" from its list but stated that the statute does not prohibit recommendations from the buyer and seller regarding valuation experts that the commission should consider. TAWC and NAWC commented that it is important for the buying and selling parties to have input on the selection of the utility valuation expert because they are closest to the transaction and requested that the proposed rule be modified to require the commission's executive director or the executive director's designee to accept and consider one recommended utility valuation expert included in the list maintained under subsection (c) of this section from the acquiring utility and one from the selling utility with the notice of intent filed under subsection (d).

CLWSC requested that the rule explicitly provide that once the commission has selected the utility valuation experts, the selling and acquiring utilities are to contract with the utility valuation experts without involvement by the commission. CLWSC stated that would help all parties involved by allowing the parties to provide assurances to the appraisers about negotiation of terms.

CSWR Texas agreed with TAWC and NAWC that it is important for the buying and selling utilities to each have input as to the selection of the utility valuation experts. CSWR Texas supported TAWC's and NAWC's proposed changes to this subsection. OPUC opposed TAWC's and NAWC's proposed changes arguing that allowing the buying and selling utilities input into the selection of the utility valuation experts introduces subjectiv-

ity and bias into what is intended to be an independent, neutral, and objective process.

Commission Response

The commission declines to change the proposed rule as requested by TAWC and NAWC and supported by CSWR Texas. In developing the proposed rule, the commission reviewed the processes used by other jurisdictions, as suggested by TAWC and NAWC. TWC §13.305 places responsibility for selecting the utility valuation experts solely with the commission. Selection of the utility valuation experts by the executive director or the executive director's designee, without input from persons who have an interest in the transaction, will contribute to preserving the integrity of the fair market valuation process.

In response to CLWSC's comments, the commission modifies proposed §24.238(e)(4) to clarify that once the commission has appointed the utility valuation experts, the acquiring utility must proceed to enter agreements with the selected experts.

§24.238(f), Determination of Fair Market Value--Engineering Assessment

Proposed §24.238(f) requires the three utility valuation experts to retain a licensed engineer to assess the tangible assets of the selling utility or the facilities to be sold to the acquiring utility. TAWC and NAWC recommended that the rule allow the seller and buyer to agree to rely on an engineering assessment that one or both has already conducted as part of the due diligence process rather than have another assessment performed. TAWC and NAWC suggested that proposed §24.238(f)(1) be modified to provide that if the commission is informed by verified affidavit of either the acquiring or selling utility that an engineering assessment was previously undertaken and is in compliance with §24.238(f)(1)(A) through (C), then upon acceptance by the commission's executive director or the executive director's designee, the requirement for a new engineering assessment is waived.

In reply comments, OPUC once again stated its concern that the involvement of the selling and acquiring water utility in aspects of the fair market valuation process introduces bias and subjectivity into a process intended to be independent, neutral, and objective. OPUC maintained that the conflict of interest provisions in HB 3542 show that the utility valuation experts are supposed to be independent parties in the fair market valuation process. OPUC argued that TAWC's and NAWC's recommendation to use an engineering assessment performed during the utility's due diligence process conflicts with the intent of the legislation and should not be adopted by the commission.

Houston recognized that the avoidance of duplicative engineering work can save time and potentially reduce transactional costs passed on to ratepayers, but recommended inclusion of additional requirements to provide for verification of the assessment by the engineer if the commission modifies the proposed rule as recommended by TAWC and NAWC. Houston proposed that the engineer responsible for conducting the assessment provide an affidavit in addition to the affidavit recommended by TAWC and NAWC. Houston further recommended that the rule require the engineer to attach the engineering assessment report to the affidavit and require the report to bear the professional engineer's seal and signature to authenticate the engineering assessment as accurate and independent. Houston provided recommended amendments to the §24.238(f)(1) language proposed by TAWC and NAWC.

CSWR Texas agreed with TAWC's and NAWC's recommendation that the appraisers be permitted to utilize complete and accurate engineering studies or appraisals that have already been performed by the acquiring or selling utility. CSWR Texas expressed concerns that for smaller systems with fewer assets, the cost of fair market value appraisals could far exceed the caps imposed under the statute. CSWR Texas stated that the cost of hiring an engineer as part of the fair market value process will be a significant driver of these appraisal costs, so to the extent the buyer and seller agree to the use of such information, the commission should permit the acquiring and selling utilities to provide such information to the appraisers and allow the appraisers to determine whether such information can be reasonably substituted for an entirely new engineering analysis. CSWR Texas agreed with TAWC's and NAWC's proposed changes to this subsection.

Commission Response

TWC §13.305(c)(4) requires the three utility valuation experts selected under §13.305(c)(2) to jointly retain a licensed engineer to conduct an assessment of the tangible assets of the selling utility or the facilities to be sold. The statute does not provide for use of a previous engineering assessment. The proposed rule appropriately reflects the statutory process; therefore, no amendments are necessary.

§24.238(f), Determination of Fair Market Value--Filing of Notice of Intent and Sale, Transfer, Merger (STM) Application

CSWR Texas commented that the commission should allow the acquiring and selling utilities to file their STM applications concurrently with the fair market value appraisal process. CSWR Texas also encouraged the commission to find other ways to compress the schedule as much as possible. In addition, CSWR Texas encouraged the commission to require appraisers to complete appraisals for Class D utilities within 60 days after appointment.

Commission Response

The commission addresses the timing of filing the notice of intent and STM application in relation to proposed §24.239. The commission declines to shorten the time period for the utility valuation experts to file their reports when the selling utility is a Class D utility. The commission retains the proposed time period as an outer limit to ensure the utility valuation experts have adequate time to prepare their reports.

§24.238(f), Determination of Fair Market Value--Engineer's Role

TAWC and NAWC recommended that the rule should specifically identify the engineering "assessment" as an inventory of the assets being sold rather than any type of valuation. TAWC and NAWC suggested that proposed §24.238(f)(1)(C) be modified to specify that the engineer should develop an inventory of the used and useful utility plant assets to be transferred that is compiled by year and account, separately identify any utility plant that is being held for future use, and develop a list of all non-depreciable property such as land and rights-of-way. Further, TAWC and NAWC recommended that the rule should require that the inventory must be developed from available records, maps, work orders, debt issue closing documents funding construction projects, and other sources to ensure an accurate listing of utility plant inventory by utility account.

Houston commented that although it supports clarity regarding the engineering assessment process, TAWC's and NAWC's proposal is too narrow and inappropriately limits the role of the engi-

neer. Houston stated that it is common for the appraiser to consider both the age and condition of the asset within the subject transaction. Houston commented that the engineer conducting the engineering assessment may be the most qualified individual to assess the condition of the assets in question, and that the engineer should not be limited in providing their opinion. Houston recommended amendments to the language proposed by TAWC and NAWC.

Commission Response

The commission declines to change the proposed rule as recommended by TAWC and NAWC. The commission agrees with Houston that the recommendation inappropriately limits the role of the engineer.

§24.238(f), Determination of Fair Market Value--Consideration of Purchase Price

For the reasons discussed with respect to proposed §24.238(d)(3), which prohibits including the agreed upon purchase price in the notice of intent to determine fair market value, TAWC and NAWC requested that proposed §24.238(f)(4) be modified to provide that the appraisal may consider the purchase price negotiated by the acquiring utility and the selling utility.

CLWSC stated that the commission lacks authority to prevent selling or acquiring utilities from sharing the purchase price or the process of arriving at the purchase price with the appointed utility evaluation experts. CLWSC stated that information is an important indicator of market value, especially when appraising assets that are not widely traded, and nothing in the statute authorizes the commission to limit information flow between a utility and a utility valuation expert. CLWSC noted that the statute merely holds utility valuation experts to the Uniform Standards of Professional Appraisal Practice and dictates the methods of valuation each expert is to employ. CLWSC took issue with the assumption that an appraisal will fail to be independent if the utility valuation expert receives information from the selling or acquiring utilities about the facilities in question. CLWSC further commented that the statute does not call for an "independent" appraisal, but reads "...each utility valuation expert shall perform an appraisal in compliance with Uniform Standards of Professional Appraisal Practice, employing the cost, market, and income approaches, to determine the fair market value...."

Commission Response

The commission declines to make changes to the proposed rule. TWC §13.305 provides an alternative, voluntary method for determining the appropriate rate base value for an acquired retail public utility or facilities. The statute does not expressly address the flow of information between the utility valuation experts and the acquiring and selling utility. Further, it does not expressly prohibit the commission from enacting rules to ensure that the information shared does not jeopardize the independence of the utility valuation experts and their appraisals. Although TWC §13.305 does not use the word "independent," it is reasonable to require that the appraisals provided by the utility valuation experts not be influenced by the agreed-upon purchase price or the methodologies or process used to arrive at the purchase price. The commission modifies §24.238(f)(4) to further clarify what information must not be considered by the utility valuation expert.

§24.238(f), Determination of Fair Market Value--Engineer's Fee

TAWC and NAWC stated that the proposed rule is unclear whether the fee for the engineer retained by the three selected utility valuation experts described in proposed §24.238(f)(1)(D) is subject to the same fee limitations expressed in subsection (k). TAWC and NAWC suggested additions to subsection (k) intended to clarify this issue.

Commission Response

The commission declines to make changes to the rule in response to TAWC's and NAWC's comments. TWC §13.305(e) specifically refers to fees paid to utility valuation experts. Because the utility valuation experts will retain and compensate the engineer, proposed §24.238(f)(2)(D) provides that the engineer's fee may be included in the utility valuation expert's compensation under subsection (k). Therefore, under the proposed rule, the engineer's fee is indirectly subject to the five percent cap, and no changes are necessary.

§24.238(f), Determination of Fair Market Value--Information Used by Utility Valuation Expert

TAWC and NAWC asked the commission to specify that the utility valuation experts and engineer should confer with the acquiring utility and selling utility to obtain available valuation and asset information as part of the fair market valuation determination process. TAWC and NAWC stated that ultimately the utility valuation experts will prepare their appraisal reports independently, but it is important for the best information available to be considered. TAWC and NAWC stated that most often, the acquiring and selling utilities will have that information, so the utility valuation experts should be compelled to request and consider information from the acquiring and selling utilities to the extent it is available.

Commission Response

The rule as proposed does not preclude the utility valuation experts from communicating with the selling and acquiring utilities to obtain information needed to perform the cost, market, and income analyses. However, the commission declines to expressly require that they do so.

§24.238(g) through (i), Cost Approach, Income Approach, and Market Approach

CSWR Texas commented that the requirements for the three valuation methodologies exceed the statutory requirements because TWC §13.305 does not prescribe any specific methodologies or requirements for the cost approach, income approach and market approach. Rather, it only requires the utility valuation experts to comply with the Uniform Standards of Professional Appraisal Practice. CSWR Texas stated that the proposed rule's appraisal process may be appropriate for larger, more sophisticated systems with adequate records, but it would be "inefficient or ineffective" for appraising smaller systems that lack data or comparable sales. CSWR Texas noted that the proposed rule does not appear to allow the utility valuation experts any discretion to apply their individual and specialized expertise to determine the most appropriate manner to determine fair market value. CSWR Texas was also concerned that the requirements on how appraisals must be performed could conflict with the Uniform Standards of Professional Appraisal Practice, with which the utility valuation experts are required to comply under TWC §13.305(c)(3), proposed §24.238(f)(2), their state licensing requirements, and the industry's ethical standards. Such a conflict could discourage utility valuation experts from participating in the fair market value process. To resolve these concerns,

CSWR Texas encouraged the commission to include language in subsections (g), (h) and (i) that allows the utility valuation experts to use "other reasonable methodologies that are consistent with the Uniform Standards of Professional Appraisal Practice" to perform each of the three approaches. In addition, CSWR Texas recommended that the commission clarify that an appraiser has discretion to use only those appraisal analyses the appraiser determines will result in reasonable or accurate valuations. According to CSWR Texas, allowing use of discretion is consistent with the Uniform Standards of Professional Appraisal Practice, would result in more accurate valuations, and would eliminate the time and expense of performing unnecessary or ineffective analyses.

Proposed §24.238(g)(1) states that a cost approach appraisal performed must be based on the investment required to replace or reproduce future service capability or the original cost of the facilities. TAWC and NAWC commented that there are other cost approach valuation methods that could potentially be utilized and paragraph (g)(1) should be revised to permit a cost appraisal to be based on other reasonable cost approach valuation methods in addition to those listed in the proposed rule.

Commission Response

TWC §13.305(c)(3) requires the utility valuation experts to perform appraisals using the cost, market, and income approaches. The proposed rule appropriately incorporates the statutory requirements; therefore, the commission declines to change the rule as recommended by CSWR Texas. The commission also declines to allow use of other cost approach valuation methods. Original cost and replacement cost are generally accepted methods for determining the value of facilities and are sufficient for the purposes of the fair market valuation process.

§24.238(h), Income Approach

Proposed §24.238(h)(2) provides that an appraisal that uses the income approach must exclude consideration of future capital improvements. TAWC and NAWC commented that future capital improvements are used in the development of the discounted cash flow method and excluding consideration of them will artificially increase the overall income approach value. TAWC and NAWC stated that proposed §24.238(h)(2) should be deleted.

Commission Response

The commission declines to delete or change §24.238(h)(2) because consideration of future capital improvements unnecessarily introduces additional uncertainty and inaccuracy into the income method.

§24.238(j), Contents of Utility Valuation Expert Report

OPUC supported the commission's inclusion of the conflict of interest provisions for engineers in subparagraph (f)(1)(A) of the proposed rule. Additionally, OPUC supported the required information sharing between the engineer and utility valuation expert in proposed §24.238(f)(1)(B). OPUC, however, noted that the engineer's information is shared with only the utility valuation experts and the utility valuation experts are not obligated to disclose the engineer's information in their reports. OPUC commented that transparency and holistic commission oversight are essential to the new fair market valuation process, and the engineer's information is just as important as the utility valuation expert's information for purposes of ensuring a non-biased valuation of a retail public utility or the facilities of a retail public utility. OPUC recommended that the commission modify proposed §24.238(j) to require the disclosure of information provided by the engineer to the utility valuation expert pursuant to §23.238(f)(1)(B) in the utility valuation expert's report.

In reply comments, TAWC and NAWC stated that OPUC's proposed addition to §24.238(j) that would require inclusion in the utility valuation expert's report of "the information submitted by the licensed engineer under subsection (f)(1)(B) to the utility valuation expert" may not be necessary given that proposed §24.238(j)(3) requires the utility valuation expert's report include "a detailed list of the utility plant assessed by the engineer."

Commission Response

In response to OPUC's comments, the commission modifies §24.238(j)(3) to require that the utility valuation expert's report must include the assessment prepared by the licensed engineer under §24.238(f)(1), including a detailed list of the utility plant assessed by the engineer.

§24.238(k), Transaction and Closing Costs

TAWC and NAWC expressed concern that proposed §24.238(k), which allows a fee paid to a utility valuation expert to be included in the transaction and closing costs associated with an STM, leaves open for future determination in a rate case the amount of transaction and closing costs, the acquiring utility may recover in rates. TAWC and NAWC stated that they think the intent of the statute is that the five percent cap should represent a total amount for all appraisal work and engineer fees. Further, TAWC and NAWC requested the commission not leave to a future case the determination of whether a fee amount other than the five percent will be approved. TAWC and NAWC noted that TWC §13.305(g) and (h)(3) require ratemaking rate base to be established for incorporation into the acquiring utility's rate base in its next rate case and be included in the STM application for the transaction, but TWC §13.305(h)(4) specifies that transaction and closing costs to be included in the acquiring utility's rate base are to be included in a fair market value STM application. TAWC and NAWC offered revisions to proposed §24.238(k)(2) that would require the commission to approve the collective fee amounts as part of the fair market value determination proceeding.

CSWR Texas commented that the actual costs for the utility valuation experts to perform appraisals could be significantly higher than five percent of the purchase price. For example, for a smaller system with a fair market value of $100,000, the appraisal and engineering fees would likely far exceed the five percent cap. CSWR Texas stated that it agrees reasonable caps should be placed on appraisal costs, but it will be difficult to find appraisers willing to engage in this process and hire outside engineers to assess these much smaller systems if their costs are not recoverable. The fact that the statutorily mandated caps may not allow valuations of these smaller systems supports adoption of more expedient and cost-effective alternatives to the proposed fair market valuation approach.

CLWSC commented that the five percent cap should apply to the combined fees paid to all three appraisers, and that the rule could state that combined fees of up to five percent is the maximum that may be recovered in rates, while allowing the acquiring utility to agree to whatever fees they negotiate with the appraisers. CLWSC stated this approach would allow the appraisers to be assured of a fee that they deem to be acceptable, but it would create a limit more in line with market conditions on how much of those fees could be expected to be passed on to ratepayers.

With respect to the appraisal fee referenced in TWC §13.305(e)(2), CLWSC advocated for a published fee schedule to be promulgated by the commission to create clarity and certainty in the fair market value determination process. The fee schedule would not be a requirement for what utilities must pay an appraiser, but rather would aid utilities in understanding what costs are recoverable once the utility has completed the fair market value determination process and proceeded with its STM application.

In reply comments, OPUC agreed with the concerns raised by TAWC, NAWC, and CLWSC relating to the five percent cap on fee amounts included in transaction and closing costs that are recoverable in rates. Although TWC §13.305(e) sets a five percent cap for recovery of utility valuation expert fees, TWC § 13.305(e) does not specify whether the five percent cap applies collectively or individually to the utility valuation expert and licensed engineer fees. OPUC agreed that the suggested language revisions to §24.238(k) proposed by TAWC and NAWC are consistent with the legislative intent of HB 3542 and that the five percent cap should apply collectively to the utility valuation expert and licensed engineer fees. OPUC stressed that the revised language proposed by TAWC and NAWC allows flexibility for the selling and acquiring water utility to negotiate a higher contractual price for the services of the utility valuation expert and licensed engineer, but limits the costs passed on to ratepayers.

Houston replied to TAWC's and NAWC's concern that transaction and closing costs associated with the fair market value process will not be considered by the commission until the rate case in which the fees are requested for recovery. Houston noted that as support for including transaction and closing costs in the fair market valuation process, TAWC and NAWC refer to the requirements of TWC §13.305(h)(4) that the STM application must include the transaction and closing costs incurred by the acquiring utility that will be included in the utility's rate base. Houston agreed that if the transaction and closing costs are to be included in rate base through the fair market valuation process in accordance with the proposed language in §24.41(c)(2)(A), then it does follow that the fair market valuation process would need to include consideration of these costs.

Houston expressed concern that considering these costs as part of the fair market valuation would circumvent the typical ratemaking process and effectively deny ratepayers the opportunity to comment on the reasonableness and necessity of these costs. Houston further commented that if included, the costs would continue to be a component of the fair market value rate base until depreciated over the life of the plant assets without having had the same scrutiny that is afforded affected parties in general rate proceedings. Houston noted that the use of system-wide or region-wide rates by Class A and B utilities complicates the situation. Houston stated it would need to intervene in all STM filings that could potentially result in a change in rate base underlying the rates charged to customers within its municipal limits to ensure adequate protection to ratepayers within Houston's original jurisdiction. Houston expressed uncertainty about whether it would have standing to intervene in such proceedings. Houston stated that, should intervention be granted, it could further complicate and delay the STM process, which could further hamper and delay much needed improvements in service to customers.

Houston agreed with TAWC and NAWC that the proposed rules appear to create confusion on when the transaction and closing costs associated with fair market value determination would be calculated and approved. However, Houston stated that the STM should not be conflated with the ratemaking processes and strongly urged the commission to ensure that ratepayers maintain the ability to comment on the reasonableness and necessity of the transaction and closing costs within the standard ratemaking process as opposed to including it within the fair market valuation or STM process.

Commission Response

The statutory framework for the fair market value process requires the commission to establish the ratemaking rate base in the STM proceeding. The commission's role in establishing the ratemaking rate base is not adjudicatory. No hearing on the issue will be required or permitted because the ratemaking rate base must be based on the utility valuation experts' reports or the purchase price. In contrast, determination by the commission of reasonable and necessary transaction and closing costs, including utility valuation expert fees, to be recovered in rates will be an adjudicatory process that may require a hearing. The proposed definition of ratemaking rate base in §24.238(b)(4) clarifies that transaction and closing costs are not part of ratemaking rate base, and therefore, are not required by TWC §13.305 to be determined in the STM case. The commission does not determine in the STM case the amount of transaction and closing costs properly included in rates.

The commission agrees with the commenters that the five percent cap should apply to the overall amount of utility valuation expert fees, including the engineer's fee, that may be recovered through rates and clarifies §24.238(e)(4) accordingly. The commission also has the authority under TWC §13.305(e)(2) to approve a different amount. The acquiring and selling utilities will negotiate the fees of the utility valuation experts, and as with other costs incurred by utilities, bear the risk of a commission finding that the fees are not reasonable, necessary, or recoverable through rates. The determination of the amount of transaction and closing costs that may be included in rates is properly carried out in a rate case where affected persons such as Houston, OPUC, and utility customers may intervene.

The commission declines to adopt a fee schedule as suggested by CLWSC because the reasonableness of the closing costs, including the utility valuation experts' fees, is appropriately decided on a case-by-case basis.

The commission declines to make changes to the proposed rule in response to CSWR's comments. The proposed rules implement HB 3542 and make corresponding changes to existing rules. Changing the proposed §24.238 to provide for more expedient and cost-effective alternatives to the fair market value approach is beyond the scope of this project and the authority granted in HB 3542. The rule precludes rate recovery of amounts for utility valuation expert fees that exceed the five percent cap, but does not prevent utilities from paying utility valuation experts fees that exceed that cap.

§24.239 Sale, Transfer, Merger, Consolidation, Acquisition, Lease or Rental--Timing of Fair Market Valuation and STM Application

TAWC and NAWC expressed concern about the extended length of time it could take to complete an acquisition using the §24.238 fair market valuation process if the STM application could not be filed until after the valuation was determined by the commission.

TAWC and NAWC stated that the commission's determination of the appropriate fair market valuation and approval of a transaction itself under §24.239 should occur at the same time and in

the same proceeding. TAWC and NAWC stated that until valuation is settled, the buyer will not know if it can earn a return of and on capital used to acquire the property of the seller such that an STM cannot be consummated until after the fair market valuation is pronounced by the commission. TAWC and NAWC recommended that this determination should occur as promptly and efficiently as possible. TAWC and NAWC stated that customers and employees also benefit from the STM proceeding not lingering too long becaduse existing management may be less likely to approve capital improvements and make other decisions that would benefit service during the pendency of a sale of the system, while employees will be operating under the uncertainty of their continuing positions with the new owner. TAWC and NAWC cited TWC §13.305(h) as indicative of clear legislative intent to consider the asset acquisition and its proper valuation in the same proceeding. TAWC and NAWC recommended that the commission should also recognize TWC §13.305(i), which specifies that the commission's order approving the acquisition must determine the acquiring company's ratemaking rate base. TAWC and NAWC commented that TWC §13.305(h)(4) also requires inclusion of the "transaction and closing costs incurred by the acquiring utility that will be included in the utility's rate base." TAWC and NAWC proposed that the commission replace proposed §24.239(d)(2) with language that would require approval of transaction and closing costs in the STM proceeding rather than deferring consideration to the next rate case.

CSWR Texas encouraged the commission to include language in proposed §24.239(d) that would allow an entity to file its STM application concurrently with its fair market value appraisal and to supplement the application to include the appraiser reports and costs once the fair market valuation is finalized. This would expedite the acquisition time by four to five months, increase regulatory certainty, and reduce costs.

In reply comments, CSWR Texas agreed with TAWC and NAWC that the commission should include language in the rule that allows a utility to engage in the fair market value process and file its STM concurrently. CSWR Texas noted that an STM proceeding can already take over a year, and the fair market valuation process could add an additional five to six months.

Commission Response

The commission disagrees that concurrent filing of the notice of intent to use the fair market value process and the associated STM application will result in the efficiencies projected by TAWC, NAWC, and CSWR Texas. TWC §13.305 clearly contemplates a two-step process. TWC §13.305(c) requires the acquiring utility and selling utility to notify the commission of their intent to use the fair market valuation process so that the commission may select the utility valuation experts. TWC §13.305(h) requires an acquiring utility that uses the fair market valuation process to submit copies of the three utility valuation expert appraisals in the STM application submitted under TWC §13.301. The commission cannot set an intervention date, provide for notice, determine whether a hearing is necessary, or evaluate the merits of the STM application without a complete application.

Further, the fair market valuation process is voluntary and any concerns about the additional time required to complete this process before filing an STM application can be weighed against the benefits of obtaining a fair market valuation before filing a notice of intent initiating the process. Therefore, the commission adopts the rule as proposed.

§24.239 Sale, Transfer, Merger, Consolidation, Acquisition, Lease or Rental--Ability to Contest Appraisals

TAWC and NAWC requested that parties to an STM proceeding have the opportunity to contest a fair market valuation based upon the existence of fact and mathematical errors in the appraisals or engineer's assessment. TAWC and NAWC stated that there is no indication that the legislature intended to eliminate the commission's ability to analyze and challenge the appraisals and the resulting rate base value. TAWC and NAWC commented that the appraisal process involves facts and assumptions that may be incorrect and in need of revision; the process is not simply the mathematical exercise of taking three appraisals without inquiry and dividing the sum of them by three. Rather, TAWC and NAWC stated that the commission has a statutory duty to assure the public interest and compliance with the TWC and commission rules.

TAWC and NAWC suggested adding a new paragraph to §24.239(d)(3) that provides that parties to an application proceeding that includes a fair market valuation may challenge the facts and assumptions made in an appraisal or engineering assessment relied upon in an appraisal.

CSWR Texas agreed with TAWC and NAWC that there should be a process to allow parties to identify and correct mathematical errors or underlying data in the appraisal reports or engineer analyses. While TAWC and NAWC recommended including language in §24.239 to address this within the context of an STM proceeding, CSWR Texas suggested allowing the utilities to communicate any errors to the appraisers once their reports are issued and allowing the appraisers to issue a corrected report within a reasonable amount of time. Allowing for correction of errors will improve the fair market valuation process and protect both the utility and customers.

In reply comments, OPUC expressed concern that including language in the proposed rule that permits challenges to the facts and assumptions of an appraisal or engineering assessment in the fair market valuation process will create an opportunity for parties to modify the results of the appraisal and engineering assessment and could result in unnecessary litigation that will negate the intended legislative purpose of incentivizing private investment in water and wastewater infrastructure in smaller communities that are in critical need of the infrastructure. OPUC recognized the validity of the concern raised by TAWC and NAWC, but stated that their proposed language exceeds the scope of their concern. OPUC provided language for a proposed new subsection if the commission wants to address TAWC's and NAWC's concern that allows for the opportunity to "correct factual and mathematical errors" rather than the opportunity to "challenge the facts and assumptions made."

Commission Response

The commission disagrees with TAWC and NAWC regarding the legislature's intention to eliminate the commission's ability to analyze and challenge the appraisals and the resulting rate base value. TWC §13.305(g) states that the ratemaking rate base is the lesser of the purchase price or the fair market value. TWC §13.305(f) states that the fair market value is the average of the three utility valuation experts appraisals.

However, factual or mathematical errors could be present in an appraisal report prepared by a utility valuation expert. Therefore, the commission modifies §24.238(f)(5) to require the acquiring and selling utilities to review the reports for mathematical and factual errors and notify the utility valuation experts of any math-

ematical or factual errors they identify, regardless of whether the errors increase or decrease the appraisal. The utility valuation expert may promptly revise the report in response to the utilities' notification. This change builds the review into the fair market valuation process before the adoption of a ratemaking rate base rather than waiting until the STM proceeding, which occurs after the ratemaking rate base is set.

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.

SUBCHAPTER B. RATES AND TARIFFS

16 TAC §24.41

Statutory Authority

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; and §13.305, which establishes a voluntary process for the valuation of utilities or facilities acquired by Class A or Class B utilities.

Cross reference to statutes: Texas Water Code §13.041 and §13.305.

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 July 31, 2020.

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Andrea Gonzalez
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Public Utility Commission of Texas
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Proposal publication date: May 1, 2020
For further information, please call: (512) 936-7244

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16 TAC §24.41

Statutory Authority

This new rule 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; and §13.305, which establishes a voluntary process for the valuation of utilities or facilities acquired by Class A or Class B utilities.

Cross reference to statutes: Texas Water Code §13.041 and §13.305.

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 H. CERTIFICATES OF CONVENIENCE AND NECESSITY

16 TAC §§24.238, 24.239, 24.243

Statutory Authority

The new rule and rule amendments are 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; and §13.305, which establishes a voluntary process for the valuation of utilities or facilities acquired by Class A or Class B utilities.

Cross reference to statutes: Texas Water Code §13.041 and §13.305.

§24.238. Fair Market Valuation.

(a) Applicability. This section applies to a voluntary arm's length transaction between an acquiring utility and a retail public utility under TWC §13.305 for which approval is required under TWC §13.301. This section does not apply to a transaction between a utility and its affiliate.

(b) Definitions. In this section, the following words and terms have the following meanings, unless the context indicates otherwise.

(1) Acquiring utility -- A Class A or Class B utility that is acquiring a selling utility, or the facilities of a selling utility.

(2) Allowance for funds used during construction (AFUDC) -- An accounting practice that recognizes the capital costs, including debt and equity funds, that are used to finance a transferee's construction costs of an improvement to a purchased asset.

(3) Fair market value -- The average of the three appraisals conducted under subsection (f) of this section.

(4) Ratemaking rate base -- The dollar value of the selling utility or the sold facilities of a selling utility that is incorporated into the rate base of the acquiring utility for post-acquisition purposes. The ratemaking rate base is the lesser of the purchase price negotiated by an acquiring utility and a selling utility or the fair market value. The ratemaking rate base does not include transaction and closing costs.

(5) Selling utility -- A retail public utility that is being purchased by an acquiring utility or is selling facilities to an acquiring utility.

(c) List of qualified utility valuation experts. The commission will maintain a list of qualified utility valuation experts to perform appraisals to determine a fair market value of a selling utility or facilities of a selling utility.

(1) A utility valuation expert may request to be included on the commission's list by submitting, under the control number designated for that purpose, the required information.

(2) The request filed by the utility valuation expert must include:

(A) The expert's name, mailing address, telephone number, and email address;

(B) The name of the company with which the expert is employed or associated, or the name under which the expert conducts business;

(C) The names of the principal officers of the company with which the expert is employed or associated, if applicable;

(D) The name and mailing addresses of any affiliates of the company with which the expert is employed or associated, if applicable; and

(E) A detailed description of the utility valuation expert's qualifications, such as professional licensing, certifications, training or past experience conducting economic evaluations of water and sewer utilities.

(3) The utility valuation expert must update the information in its request on file with the commission within ten business days of a material change to the information.

(4) A utility valuation expert who wishes to be removed from the list maintained by the commission under this subsection must file a letter with the commission requesting to be removed from the list. This letter must be filed under the control number designated for that purpose. The commission will acknowledge the removal request in writing.

(d) Notice of intent to determine fair market value.

(1) A selling utility and an acquiring utility that agree to use the fair market valuation process described in subsection (f) of this section must file a notice of intent to determine fair market value in the control number designated for that purpose.

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

(A) The name and certificate of convenience and necessity (CCN) number of the acquiring utility. If the acquiring utility holds multiple CCN numbers, the acquiring utility must provide all the CCN numbers.

(B) The name and contact information of the acquiring utility's representative.

(C) The number of connections served by the acquiring utility.

(D) The name and CCN number of the selling utility.

(E) The name and contact information of the selling utility's representative.

(F) The number of connections served by the selling utility.

(G) The estimated closing date of the planned acquisition.

(H) A list of the utility valuation experts on the commission's list of qualified experts who, as of the date of the notice of intent, are precluded under subsection (e)(2)(B) of this section from performing an appraisal of the transaction.

(3) The notice of intent must not include the purchase price agreed upon by the acquiring utility and the selling utility.

(e) Selection of utility valuation experts.

(1) The commission's executive director or the executive director's designee will select three utility valuation experts from the list maintained under subsection (c) of this section no later than 30 days after the filing of a notice of intent to determine fair market value that meets the requirements of subsection (d) of this section.

(2) The utility valuation experts selected under paragraph (1) of this subsection may not:

(A) derive material or financial benefit from the sale other than fees for services rendered;

(B) be or have been within the year preceding the date the service contract is executed a director, officer, or employee of the acquiring utility or the selling utility or an immediate family member of a director, officer, or employee of the acquiring utility or the selling utility; or

(C) have received compensation under a contract for consulting or other services with the acquiring or selling utility, or executed a contract for consulting or other services with the acquiring or selling utility, within the year preceding the date the utility valuation expert is selected.

(3) The commission's executive director or the executive director's designee will base the selection of utility valuation experts on the following:

(A) Qualifications of the utility valuation expert.

(B) Availability of the utility valuation expert during the required time frame.

(C) Absence of conflicts of interest described in paragraph (2) of this subsection.

(D) Other factors relevant to a utility valuation expert's ability to perform an appraisal under this section.

(4) The acquiring utility must contract directly with the selected utility valuation experts and the commission will not be a party to the contract. Subsection (k)(2) of this section, which limits the amount of transaction and closing costs that may be recovered in rates, does not apply to the fees for service agreed to in the contract. If the acquiring utility and any of the utility valuation experts selected under subsection (e)(1) of this subsection are unable to reach agreement on the terms and conditions for performing the appraisal, including the amount of the service fee, the acquiring utility or utility valuation expert may submit a request for selection of a different utility valuation expert under the control number designated for that purpose. If the commission's executive director or the executive director's designee selects a different utility valuation expert, the time period for all utility valuation expert to submit a report under subsection (f)(5) of this section begins when the different utility valuation expert is selected.

(f) Determination of fair market value.

(1) The three utility valuation experts selected under subsection (e) of this section jointly must retain a licensed engineer to conduct an assessment of the tangible assets of the selling utility or the facilities to be sold to the acquiring utility.

(A) The engineer may not be or have been within one year preceding the date the service contract is executed a director, officer, or employee of the acquiring utility or the selling utility or an immediate family member of a director, officer, or employee of the acquiring utility or the selling utility.

(B) The engineer must provide the following information to the valuation experts:

(i) Qualifications that demonstrate the engineer's ability to provide the requested assessment;

(ii) The engineer's fees for other similar assessments; and

(iii) Other relevant information requested by the utility valuation experts.

(C) The engineer's assessment must include a separate assessment for each type of facility based on the applicable National Association of Regulatory Utility Commissioners (NARUC) account for the facility.

(D) The fee charged by the engineer must be shared and paid equally by the three utility valuation experts and may be included as part of the utility valuation expert compensation under subsection (k) of this section.

(2) Each utility valuation expert must perform an independent appraisal of the selling utility, including the valuation of intangible assets as appropriate, in compliance with Uniform Standards of Professional Appraisal Practice, using the cost, market, and income approaches in accordance with subsections (g) - (i) of this section.

(3) The appraisal must not take into account the original sources of funding, including developer contributions or customer contributions in aid of construction, for any of the utility plant that is assessed by the engineer or the utility valuation experts.

(4) The appraisal must not take into account the purchase price negotiated by the acquiring utility and the selling utility or methodologies or process used to arrive at the purchase price.

(5) Each utility valuation expert must submit a completed report to the acquiring utility and the selling utility no later than 120 days after the date the commission's executive director or the executive director's designee selects the utility valuation expert under subsection (e) of this section. Before the submission of the report, the acquiring and selling utilities must review the report for mathematical and factual errors, and notify the utility valuation expert of any mathematical any factual errors they identify. The utility valuation expert may promptly revise the report in response to the utilities' notification.

(6) The ratemaking rate base established under this section will be the rate base for the system or facilities acquired in the transaction. Nothing in this section alters the requirements for multiple system consolidation in §24.25(k) of this title, relating to Form and Filing of Tariffs.

(g) Cost approach.

(1) A cost approach appraisal performed under this section must be based on one of the following:

(A) the investment required to replace or reproduce future service capability; or

(B) the original cost of the facilities as adjusted for depreciation.

(2) A cost approach appraisal performed under this section must:

(A) incorporate the results of the assessment performed by the engineer selected under subsection (f)(1) of this section;

(B) exclude from consideration overhead costs, future improvements, and going concern value; and

(C) use a consistent rate of inflation for all classes of assets unless use of different rates is reasonably justified.

(h) Income approach.

(1) An income approach appraisal performed under this section must be based on one of the following:

(A) capitalization of earnings or cash flow; or

(B) the discounted cash flow method.

(2) An income approach appraisal performed under this section must exclude consideration of the following:

(A) going concern value;

(B) future capital improvements; and

(C) erosion of cash flow or erosion on return.

(3) An income approach appraisal performed under this section must be supported by the following:

(A) an explanation of how the capitalization rate was calculated, if a capitalization rate was used;

(B) an explanation of the basis for the discount rates used; and

(C) an explanation of the capital structure, cost of equity and cost of debt used.

(i) Market approach.

(1) A market approach appraisal performed under this section must be based on the following:

(A) the current connection count of the selling utility at the time of the appraisal;

(B) use of a proxy group that includes companies that have made acquisitions that were not based on a fair market valuation methodology; or

(C) comparable sales that did not include the value of future capital improvement projects in the selling price.

(2) A market approach appraisal performed under this section must not consider the following:

(A) a net book financials multiplier or speculative growth adjustments;

(B) the value of future capital improvement projects; or

(C) a value or adjustment for the goodwill of the selling utility.

(j) Contents of utility valuation expert report. A report submitted under paragraph (f)(5) of this section must include:

(1) a copy of the service contract executed by the utility valuation expert and the acquiring and selling utilities;

(2) the fee charged by the utility valuation expert along with documentation supporting the amount of the fee;

(3) a copy of the engineer's report, including a detailed list of the utility plant assessed by the engineer;

(4) an explanation of how the cost, market, and income approaches were incorporated into the calculation of the fair market value of the selling utility or the selling utility's facilities; and

(5) a notarized affidavit stating that:

(A) the appraisals described in the report were conducted in compliance with the most recent edition of the Uniform Standards of Professional Appraisal Practice;

(B) the utility valuation expert will not derive material or financial benefit from the sale other than the fee for services rendered;

(C) the utility valuation expert is not currently and was not within the year preceding the date of the contract for service executed between the utility valuation expert and the acquiring and selling utilities, a director, officer, or employee of the acquiring utility or the selling utility or an immediate family member of a director, officer, or employee of the acquiring utility or the selling utility; and

(D) the utility valuation expert did not receive compensation under a contract for consulting or other services with the acquiring utility or selling utility, or execute a contract for consulting or other services with the acquiring or selling utility, within the year preceding the date the utility valuation expert was selected to perform the appraisal that is the subject of the report.

(k) Transaction and closing costs.

(1) A fee paid to a utility valuation expert to perform an appraisal under subsection (f) of this section may be included in the transaction and closing costs associated with a transaction approved under §24.239 of this title, relating to Sale, Transfer, Merger, Consolidation, Acquisition, Lease or Rental.

(2) The commission will review the transaction and closing costs, including fees paid to utility valuation experts, in the rate case in which the acquiring utility requests rate recovery of those costs. The fee amounts included in transaction and closing costs that are recoverable in the acquiring utility's rates may not exceed the lesser of:

(A) five percent of the fair market value; or

(B) the fee amounts approved by the commission in the rate case in which the acquiring utility requests rate recovery of the transaction and closing costs.

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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PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 35. ENFORCEMENT

SUBCHAPTER A. TRANSPORTATION OF LIQUOR

16 TAC §35.7

The Texas Alcoholic Beverage Commission adopts new 16 TAC §35.7 without changes to the proposed text as published in the June 5, 2020, issue of the *Texas Register* (45 TexReg 3717). The rule will not be republished.

In 2019, the 86th Texas Legislature passed Senate Bill 1450 which amended the Alcoholic Beverage Code to allow holders of certain mixed beverage permits to deliver alcohol to off-premise locations along with food orders. The bill also created the consumer delivery permit, which authorizes its holders to employ or contract with delivery drivers to deliver alcoholic beverages from retail locations to consumers (new Tex. Alco. Bev. Code Ch. 57).

The legislature provided that a consumer delivery permit holder may use a software application in deliveries of alcohol to the consumer to qualify for certain limitations on liability under the new consumer delivery permit. It directed the TABC to adopt minimum standards for such software applications (Tex. Alco. Bev. Code §57.09(a)(2)). New rule §35.7 provides the minimum standards for alcohol delivery compliance software applications, including features designed to ensure that alcoholic beverages are not delivered to persons who are intoxicated or under the age of 21 and ascertain whether a particular type of alcoholic beverage can be delivered legally to the consumer's address (wet/dry status). An applicant or permit holder may request an evaluation of its software application from the TABC, which will provide an opinion as to its compliance with the requirements of the rule; however, pre-approval is not required.

No comments were received.

The new rule is authorized by Alcoholic Beverage Code §57.09(a)(2), which requires the Texas Alcoholic Beverage Commission (commission) to establish minimum requirements for alcoholic beverage delivery software applications.

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 July 30, 2020.

TRD-202003093
Shana Horton
Rules Attorney
Texas Alcoholic Beverage Commission
Effective date: August 19, 2020
Proposal publication date: June 5, 2020
For further information, please call: (512) 206-3451

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 74. CURRICULUM REQUIREMENTS

SUBCHAPTER AA. COMMISSIONER'S RULES ON COLLEGE AND CAREER READINESS

19 TAC §74.1003

The Texas Education Agency (TEA) adopts an amendment to §74.1003, concerning commissioner's rules on college and career readiness. The amendment is adopted without changes to the proposed text as published in the February 14, 2020 issue of the *Texas Register* (45 TexReg 988) and will not be republished. The adopted amendment specifies that, beginning in the

2019-2020 school year, the list of industry-based certifications to be used for public school accountability will be provided in the annually adopted accountability manual.

REASONED JUSTIFICATION: Section 74.1003 defines the list of industry-based certifications that are recognized for the purpose of accounting for students who earn industry certifications in the public school accountability system.

The list included as a figure in subsection (a) applied to the 2017-2018 school year. The adopted amendment specifies that the figure in subsection (a) also applies to the 2018-2019 school year.

An updated list of recognized industry certifications has been approved by the commissioner of education for implementation in the 2019-2020 academic year. The adopted amendment adds a new subsection (b) to state that, beginning in the 2019-2020 school year, the list of approved industry-based certifications affecting public school accountability will be provided in the accountability manual adopted annually in 19 TAC §97.1001, Accountability Rating System.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began February 14, 2020, and ended March 16, 2020. Following is a summary of public comments received and corresponding agency responses.

Comment: The Texas School Alliance (TSA) and an educator expressed support for including the industry-based certification list in the annually adopted accountability manual.

Response: The agency agrees that it is beneficial for the industry-based certification list to be included in the annually adopted accountability manual.

Comment: An individual recommended adding specific industry certifications not already included on the list of industry-based certifications.

Response: This comment is outside the scope of the proposed rulemaking. Industry-based certifications must be approved through an evaluation process conducted biennially.

Comment: An educator recommended adding specific industry certifications not already included on the list of industry-based certifications.

Response: This comment is outside the scope of the proposed rulemaking. Industry-based certifications must be approved through an evaluation process conducted biennially.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code, §39.053, which requires the commissioner to adopt a set of indicators of the quality of learning and achievement.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §39.053.

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 August 3, 2020.

TRD-202003132

Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: August 23, 2020
Proposal publication date: February 14, 2020
For further information, please call: (512) 475-1497

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 57. FISHERIES

SUBCHAPTER N. STATEWIDE RECREATIONAL AND COMMERCIAL FISHING PROCLAMATION

The Texas Parks and Wildlife Commission in a duly noticed meeting on May 21, 2020 adopted amendments to §§57.973, 57.981, 57.992, 57.993, and 57.997, concerning the Statewide Recreational and Commercial Fishing Proclamations. Section 57.981 and §57.992 are adopted with changes to the proposed text as proposed in the February 21, 2020, issue of the *Texas Register* (45 TexReg 1171). The rules will be republished. Sections 57.973, 57.993, and 57.997 are adopted without changes to the proposed text and will not be republished.

The change to §57.981, concerning Bag, Possession, and Length Limits for recreational fishing, and §57.992, Bag, Possession, and Length Limits for commercial fishing, implement a delayed effective date for provisions affecting both the recreational and commercial flounder fishery. The department proposed a closed season for all take of flounder from November 1 through December 14, to take effect September 1, 2020. The commission adopted the proposed rules but deferred effectiveness until September 1, 2021.

The amendment to §57.973, concerning Devices, Means and Methods adds a section of Brushy Creek (Williamson County) to the list of locations where game and non-game fishes can only be taken by pole and line and would limit anglers to the use of no more than two pole-and-line devices at the same time. The stream segment affected by the proposed amendment is from the Brushy Creek Reservoir dam downstream to the Williamson/Milam county line (approximately 50 miles). Brushy Creek Reservoir currently is subject to this regulation. A survey of anglers who use both the reservoir and creek waters determined that both waters are heavily used, and some anglers fished both in one day. The amendment standardizes regulations on the reservoir and the creek downstream, which should simplify compliance and enforcement. Additionally, the cities surrounding these water bodies recently have experienced rapid population growth and restriction of harvest methods to pole and line would serve to limit the harvest of some fishes such as sunfish, which could benefit the overall fish community and the angling experience.

The amendment to §57.981, concerning Bag, Possession and Length Limits, implements changes to harvest regulations for largemouth bass, crappie, and catfish on multiple locations.

The amendment to §57.981 modifies harvest regulations for largemouth bass on Moss Lake (Cooke County), replacing the current regulation (14-inch minimum length limit and five-fish daily bag limit) with a 16-inch maximum length limit and providing an exception for temporary possession of bass 24 inches or greater for possible submission to the department's Share-Lunker program. Moss Lake is a 1,140-acre impoundment located in near Gainesville. The bass fishery at the reservoir currently consists of largemouth and spotted bass, but angler creel surveys indicate largemouth bass are the most sought-after species. While bass are relatively abundant in the reservoir, electrofishing surveys indicate that very few legal-size (14 inches) largemouth bass are present in the population. Although surveys indicate few legal-size largemouth bass, the reservoir does support some large bass, with a few exceeding eight pounds. Spotted bass are abundant, with few exceeding 14 inches in length and samples consist mostly of fish less than 12 inches in length. Spotted bass compete with largemouth bass for forage and contribute to an overabundance of bass less than 12 inches in length. Implementation of a 16-inch maximum length limit on largemouth bass would allow anglers to harvest the abundant smaller fish that potentially could be causing fewer bass to reach larger sizes. Since some anglers have difficulty in distinguishing spotted bass from largemouth bass, opening harvest to all small bass will allow anglers to harvest both species without differentiation.

The amendment to §57.981 also modifies harvest regulations for largemouth bass on Brushy Creek Reservoir and blue and channel catfish in the section of Brushy Creek (both in Williamson County) mentioned previously in this rulemaking. Harvest of largemouth bass in the reservoir is low. The current 18-inch minimum length limit is not benefitting the bass population and implementation of a 14-inch minimum length limit will have little impact. As noted previously in this rulemaking with respect to proposed changes to device restrictions, the standardization of regulations between the reservoir and Brushy Creek will enhance compliance and enforcement.

Additionally, the amendment replaces the current harvest regulations for blue and channel catfish for Brushy Creek Reservoir (12-inch minimum length limit and 25-fish daily bag limit) with a five-fish daily bag limit and no minimum length limit. This type of regulation is appropriate in high-use situations, such as smaller urban water bodies, to allow anglers to harvest some fish while distributing the available harvest to as many anglers as possible. Replacing the current regulation will result in standardization of regulations and beneficial harvest reduction.

The amendment to §57.981 also modifies harvest regulations for black and white crappie for Lake Nasworthy, which is a 1,380-acre reservoir in San Angelo (Tom Green County). The reservoir has a relatively stable water level for West Texas and abundant shoreline access. The crappie population in Lake Nasworthy has long been characterized by high abundance, slow growth, below average condition, and poor size structure. Slower growth results in fewer crappie reaching legal size, as most crappie die of natural causes before growing large enough to be harvested. The combination of these factors negates any advantages to the population structure that could be derived from the use of a minimum length limit (MLL). Understandably, anglers are dissatisfied with lack of harvestable sized fish in the reservoir and have expressed support for modifying harvest regulations to allow for some take of crappie less than 10 inches in length. An increased harvest of smaller crappie may reduce overcrowding, improve fish condition, and increase angler satisfaction.

The amendment to §57.981 also makes changes to the harvest regulations for blue, channel, and flathead catfish on Lake Texoma (Cooke and Grayson counties) and the Texas waters of the Red River from the dam on Lake Texoma (Denison Dam) downstream to Shawnee Creek. Harvest regulations on Lake Texoma, a 74,686-acre reservoir that straddles the Texas/Oklahoma border, are implemented cooperatively by TPWD and the Oklahoma Department of Wildlife Conservation (ODWC). Currently, harvest regulations for game fishes are the same on both sides on the reservoir. However, some harvest regulations on the Red River below Lake Texoma differ from those on the reservoir and from Texas statewide harvest regulations. With the goal of standardizing regulations on both sides of Lake Texoma and the waters of the Red River below the Denison Dam while maintaining angling opportunities, the amendment alters harvest regulations for blue, channel, and flathead catfish in the Texas waters of Lake Texoma and the Red River from Denison Dam downstream to Shawnee Creek. For blue and channel catfish, the amendment eliminates the minimum length limit and allows the harvest of one blue catfish 30 inches or greater. For flathead catfish, the amendment eliminates the minimum length limit and impose a five-fish daily bag limit.

The amendment also eliminates a time constraint on a special regulation governing the harvest of alligator gar on Falcon International Reservoir (Starr and Zapata counties). The department conducted a comprehensive study at the reservoir in 2014 to obtain the biological information necessary to make management recommendations for alligator gar. In 2015, the Texas Parks and Wildlife Commission implemented a bag limit of five alligator gar on the reservoir, directed staff to monitor the alligator gar population to determine any negative effects of the five-fish daily bag, and placed an expiration date on the special provision of September 1, 2020. Monitoring data from the reservoir continues to support the determination that the Falcon Reservoir alligator gar population can be sustained under the five-fish daily bag. Therefore, the amendment continues the effectiveness of the special provision.

Finally, the amendment alters recreational harvest regulations for flounder. On the basis of pronounced downward trends in fishery independent data (bag seines, bay trawls, gill nets) which showed declines in catch-per-unit-effort (abundance), and declining commercial and recreational landings, the department has determined that measures must be implemented to protect and replenish spawning stock biomass in the fishery. Recent department fishery-independent gill net survey monitoring data for both the fall and the spring have shown decreases in catch rates of 60% or greater compared to historic long-term data trends. Additionally, other fishery-independent data (bag seines and bay trawls) also show similar declining trends. These independent data collections target flounder at different points in the life cycle and thus provide a measure of recruitment (bag seines), sub-adults (bay trawls) and adults (gill nets).

Lower levels of recruitment observed in fisheries-dependent bag seines may also be impacted by the warmer water temperatures experienced in the bays and gulf in more recent years. Research into the cultivation of flounder has shown that optimal larval survival of flounder is dependent on a very narrow range of temperatures from 16° C - 20° C (60.8° F - 68.0° F) for the first three weeks after spawn (usually in November to December). Current flounder harvest regulations consist of a 14-inch minimum length, a five-fish daily bag and possession limit for recreational take, and a 30-fish commercial daily bag and possession limit for commercial take, except for during the period from Novem-

ber 1-December 14, when there is a two-fish daily bag and possession limit for both recreational and commercial take. During the month of November, means of take is limited to pole-and-line only. The amendment increases the minimum length limit to 15 inches, effective September 1, 2020, and closes the season from November 1 - December 14 beginning in 2021 for both commercial and recreational harvest. At 14 inches, approximately 50% of female flounder are sexually mature. At 15 inches, over 90% of females are sexually mature. Reducing flounder harvest prior to and during the fall migration will increase escapement of adults to the Gulf and can increase the potential spawning population and therefore increase recruitment. Additionally, the increase in minimum size will allow more females to reach sexual maturity and spawn before being harvested. Since most of the flounder harvest is comprised of females and occurs during spawning, the amendment is projected to increase spawning stock biomass.

The amendment to §57.992, concerning Bag, Possession, and Length Limits, alters commercial harvest regulations for flounder, for the same reasons presented earlier in this preamble in the discussion of recreational harvest regulations for flounder.

The amendment to §57.993, concerning Commercial Harvest Report, clarifies reporting requirements. The department has determined that the rule as currently worded does not make clear that certain licensees are required to report all aquatic products taken under the respective licenses, not just the portion of aquatic product that is sold subsequent to landing. The purpose of the rule is to give the department accurate harvest data on various species, which is then used to inform the department's management decisions on those species. Obviously, if the entirety of commercial harvest is not reported the department's management decisions could be affected.

The amendment to §57.997, concerning Fishing Guide License Requirements, affects provisions concerning licensing requirements for the Paddle Craft All-Water Guide License. The amendment removes existing language concerning the successful completion of the "Four Star Leader Sea Kayak" training from the British Canoe Union and "Coastal Kayak Day Trip Leading" from the American Canoe Association and replaces it with "paddle craft leading course from the American Canoe Association or a department-approved organization." The training courses referenced in the current rule no longer exist, and the department seeks to use a generic reference to avoid having to engage in rulemaking each time a course is discontinued or renamed.

Inland Fisheries

The department received 19 comments opposing adoption of the portion of the proposed amendment to §57.981 that affects harvest regulations for largemouth bass on Moss Lake in Cooke County. Of those comments, seven articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that the proposed length limit will drive tournament anglers from the lake. The department disagrees with the comment and responds that department survey data indicate approximately 10 percent of the angling on pressure on Moss Lake is tournament-related, which suggests that the majority of angling effort there is not a result of tournaments. The department also notes that catch-weigh-and-release for oversize fish is lawful. No changes were made as a result of the comment.

One commenter opposed adoption and stated that increasing the maximum length limit will not result in "people taking fish home." The department disagrees with the comment and responds that the removal of the minimum length limit for largemouth bass will allow more bass to be harvested, which is one of the goals of the regulation change. No changes were made as a result of the comment.

One commenter opposed adoption and stated that rule will decrease harvest and cause the proliferation of smaller fish. The department disagrees with the comment and responds that the rule is expected to result in the increased harvest of smaller spotted and largemouth bass, and the decreased abundance of smaller bass should allow remaining largemouth bass to grow to larger lengths. No changes were made as a result of the comment.

One commenter opposed adoption and stated that spotted bass and small largemouth bass are abundant in the reservoir and the department should increase stocking efforts. The department disagrees with the comment and responds that the rules are intended to redirect harvest to spotted bass populations that compete with largemouth bass, which should result in larger largemouth bass over time. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be a minimum length limit. The department disagrees with the comment and responds that the removal of smaller fish from the population structure is desirable. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule should require largemouth bass greater than 24 inches in length to be kept alive and weighed, but bass smaller than 24 inches in length to be released immediately. The department disagrees with the comment and responds that although the regulation does prohibit the retention of largemouth bass of greater than 16 inches in length, it allows but does not require the temporary retention of largemouth bass of greater than 24 inches in length for potential inclusion in the department's ShareLunker program. The department does not believe that participation in the ShareLunker program should be mandatory. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the bag limit for largemouth bass should be lowered to three. The department disagrees with the comment and responds that this fishery is characterized by high interspecific competition, which can be most efficiently addressed by redirecting harvest towards smaller largemouth bass and other species.

The department received 293 comments supporting adoption of the proposed amendment.

The department received 54 comments opposing adoption of the proposed amendments to §57.973 and §57.981 concerning harvest and gear regulations for largemouth bass and catfish on Brushy Creek Lake and Brushy Creek in Williamson County. Of those comments, 26 articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Ten commenters opposed adoption and stated that cast nets should be allowed to catch minnows. The department disagrees with the comment and responds that heavy utilization of these waterbodies makes it necessary to restrict gears to pole-and-line only in order to maintain the overall population structure neces-

sary to support quality angling. No changes were made as a result of the comment.

Six commenters opposed adoption and stated that the minimum length limit for largemouth bass should remain at 18 inches. The department disagrees with the comment and responds that currently few bass are being harvested, and as is typical of many bass fisheries in Texas with a 14-inch minimum length limit, harvest is also low. Decreasing the limit from 18 to 14 inches should not have a measurable impact bass abundance in the lake. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the rule prohibits children from catching minnows and is elitist or caters to the "fly-fishing elite." The department disagrees with the comment and responds that the department does not consider children who catch minnows simply for the outdoor experience to be criminally culpable and that law enforcement discretion is warranted, and that pole-and-line restriction is not motivated by any bias towards specific gears, but rather toward improving the quality of angling in the face of intense utilization. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that there are plenty of minnows in the creek. The department disagrees with the comment and responds that heavy utilization of the waters in question impacts many different species and that artificial baits and natural baits acquired from other sources are not believed to be difficult to obtain. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department is taking people's rights away. The department disagrees with the comment and responds that the commission is charged with protecting and conserving public resources for the enjoyment of present and future generations and that allowing the degradation of that resource to the point of nonexistence is a dereliction of that duty. No charges were made as a result of the comment.

One commenter opposed adoption and stated that lowering the length limit will have a devastating effect on the quality of fish and that the current limit is not well posted or advertised at the lake or in the Outdoor Annual. The commenter also stated that undersized fish are being harvested on a regular basis. The department disagrees that the rule will harm the quality of the fishery. As is typical of many bass fisheries in Texas, harvest of bass from Brushy Creek Lake is also low. Population abundance of bass in the lake does not appear to be impacted by legal or unlawful harvest at this time. Additionally, the department notes that it is the responsibility of the angler to be familiar with regulations in effect on any water body, that those regulations are not difficult to locate in department publications, that the department's website, law enforcement offices, and biologists are readily available to answer questions, and that people who harvest fish unlawfully are subject to criminal prosecution. No changes were made as a result of the comment.

One commenter opposed adoption and stated that cast netting is a skill and practice since the beginning of time and the department should instead be "going after industrial polluters." The department disagrees that investigation of environmental crimes would accomplish the goals of the regulations as adopted. No changes were made as a result of the comment.

One commenter opposed adoption and stated that all passive gears should be prohibited. The department disagrees with the comment and responds that there are rules in place to prevent the deleterious effects of passive gears. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the restrictions would be more beneficial if employed only on the segment of Brushy Creek between U.S. 183 and F.M. 1460 because that segment is where the public access and best water availability and quality is. The department disagrees with the comment and responds that restricting the effect of the rule to the small stream segment between U.S. 183 and F.M. 1460 at the upper reaches of Brushy Creek would not result in the desired population impacts downstream. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule would eliminate the only place to get bait for 20 miles. The department disagrees with the comment and responds that bait is readily available at many locations in the area. No changes were made as a result of the comment.

The department received 665 comments supporting adoption of the proposed amendments.

The department received 24 comments opposing adoption of the portion of the proposed amendment to §57.981 concerning harvest regulations for crappie on Lake Nasworthy in Tom Green County. Of those comments, three articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that all fish harvested at under 10 inches in length will never be over 10 inches in length and that the rule will reduce opportunity to catch fish in general. The department disagrees with the comment and responds that the crappie population in Lake Nasworthy has long been characterized by high abundance, slow growth, below average condition, and poor size structure. Slower growth results in fewer crappie reaching legal size, as most crappie die of natural causes before growing large enough to be harvested. The combination of these factors negates any advantages to the population structure that could be derived from the use of a minimum length limit. The department also notes that regulations regarding crappie do not affect other fishing opportunities. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be a maximum length "to allow trophy fish to reproduce." The department disagrees with the comment and responds that a maximum length limit will not address the high abundance that makes it difficult for crappie to reach the current minimum length limit. No changes were made as a result of the comment.

One commenter opposed adoption and stated that removing the minimum length limit will encourage overfishing of an already vulnerable population. The department disagrees with the comment and responds that crappie are abundant on the lake, and removal of fish could address that issue by reducing competition and allowing for greater growth. No changes were made as a result of the comment.

The department received 254 comments supporting adoption of the proposed amendment.

The department received 14 comments opposing adoption of the proposed amendment to §57.981, concerning blue, channel, and flathead catfish on Lake Texoma and the Red River in Cooke and Grayson counties. Of those comments, three articulated a specific reason or rationale for opposing adoption. Those

comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that all passive gears should be prohibited. The department disagrees with the comment and responds that there are rules in place to prevent the deleterious effects of passive gears. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the minimum length limit should stay as it is to give the fish a chance to grow and spawn. The department disagrees with the comment and responds that the goal of the proposed rule is to standardize regulation with Oklahoma to make enforcement and compliance easier, but the regulation is not expected to result in negative impacts to populations or population structures. No changes were made as a result of the comment.

One commenter opposed adoption and stated that Texas should adopt a statewide catfish regulation similar to that in effect in Louisiana. The department disagrees with the comment and responds the department is charged with a statutory duty to protect and conserve public fisheries resources for the enjoyment and use of present and future generations of Texans and that adopting Louisiana catfish regulations (100 catfish in any combination, including 25 undersized, hoop nets legal) would not serve that goal. No changes were made as a result of the comment.

The department received 244 comments supporting adoption of the proposed amendment.

The department received 17 comments opposing adoption of the proposed amendment to §57.981 concerning alligator gar on Falcon Reservoir in Zapata County. Of those comments, three articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that all passive gears should be prohibited and there should be a limit on size and number for the take of all gar species. The department disagrees with the comment and responds that there are rules in place to prevent the deleterious effects of passive gears and that restrictions in the form of bag and size limits are imposed when and where necessary, based on the specifics of biological necessity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the resource cannot withstand a five-fish daily bag limit. The department disagrees with the comment and responds that angler effort directed at gar on the reservoir is not intense enough to result in negative population impacts with a five-fish daily bag limit. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the bag limit should be reduced. The department disagrees with the comment and responds that resource monitoring data indicate that the current five-fish daily bag limit is sustainable. No changes were made as a result of the comment.

The department received 238 comments supporting adoption of the proposed amendment.

Coastal Fisheries - Flounder

General

Five hundred eighty-nine commenters expressed support for adoption of the rules as proposed. Four hundred fourteen commenters expressed opposition to adoption of the rules as proposed either in general or to certain portions of the rules, with some commenters expressing more than one area of opposition.

Eighty-four commenters opposed adoption and stated preferences for various combinations of minimum length (16 inches, 17 inches, 18 inches) and bag limits (one per day year-round, two per day year-round, three per day year-round), with closures (October to February, October to December, November only, Thanksgiving to January, November and December, November and half of December, December only, and so on), without closures, and various combinations of bag limits and gear restrictions during certain months (no gigging during closure, no commercial harvest during closure, take by pole and line only during closure, etc.). The department disagrees with the comments and responds that the rules as adopted represents what the department believes is the appropriate balance between the biological necessity to protect the fishery and the interests of various recreational and commercial user groups while minimizing disruptions and conflicts to the greatest extent possible in that context. No changes were made as a result of the comments to the actual regulation proposals, but the implementation date of the closure timeframe was delayed from Sept. 1, 2020 to Sept. 1, 2021.

Twenty-four commenters opposed adoption and stated that flounder should be designated a game fish. The department disagrees with the comment and responds that designation as a game fish under current rules would prevent the harvest of flounder by any means other than pole and line, which the department believes is not necessary to manage the species at the current time. The department also notes that designation as a game fish does not limit the commission's authority to prescribe whatever means and methods restrictions it deems necessary to properly manage a species. No changes were made as a result of the comments.

Thirteen commenters opposed adoption and stated that the Coastal Conservation Association should not be allowed to dictate regulations. The department agrees with the comment and responds that the Coastal Conservation Association played no role in the formulation of the proposed rules, and the department's recommendations are based on the best available science and strive to balance the interests of various recreational and commercial groups. No changes were made as a result of the comments.

Eleven commenters opposed adoption and stated, variously, that there should be a one, two, or three-fish daily bag limit, but no closure. The department disagrees with the comments and responds that manipulation of the bag limit, in and of itself, is insufficient as a method to timely stabilize flounder populations. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the department is biased against recreational anglers. The department disagrees with the comments and responds that in addition to having a statutory duty to protect and conserve public resources, the department also has a duty to equitably distribute opportunity to various types of users, when it can be done responsibly and within the tenets of sound biological management. The department believes the rules as adopted equitably balance the interests of enthusiasts of various means of take while meeting the goal of the rules, which is to restore spawning stock biomass in the flounder fishery. No changes were made as a result of the comments.

Length Limits

Twenty-three commenters opposed adoption and stated that the current 14-inch minimum length limit should be retained. The department disagrees with the comments and responds that increasing the minimum length limit is necessary to protect younger females, allowing a larger percentage of them to reach maturity and increase spawning biomass. No changes were made as a result of the comments.

Fifteen commenters opposed adoption and stated that there should be a slot limit for flounder, with one of the commenters expressing a desire for a slot limit only during the annual flounder migration, another for the rules to allow the retention of one oversize flounder, and another stating the need for an oversize flounder tag. The department disagrees with the comments and responds that a slot limit would not achieve desired management results of the proposed changes at this time. The department's goal is to ensure that females reach sexual maturity. The increase in minimum size to 15 inches will allow females to reach maturity and have an opportunity to spawn. Because a significant portion of the flounder fishery is the recreational and commercial gig fishery, further increases in minimum size limits will not be efficacious if there is a high percentage of misidentification of legal size fish due to the subsequent release mortality that would occur. Additional release mortality would also occur with the hook and line fishery as well since fish would have a greater timeframe to be caught before reaching the legal size limit. While a slot limit would provide additional protection to females above the maximum size limit, since flounder reach maturity relatively quickly and are fairly short-lived, a slot limit was not considered as a preferred approach to further protecting the spawning biomass at this time. No changes were made as a result of the comments.

Twelve commenters opposed adoption and stated that increasing the minimum size limit will threaten female flounder. The department disagrees with the comments and responds that increasing the minimum size limit is intended to ensure that most female flounder are sexually mature at harvest and to give female flounder additional spawning potential. No changes were made as a result of the comments.

One commenter opposed adoption and stated that increasing the minimum size limit for flounder threatens male flounder. The department disagrees with the comment and responds that female flounder comprise most of the harvest and the increase in minimum size limit is less likely, rather than more likely, to negatively impact males, which generally do not exceed 14 inches in length. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules should allow the retention of one oversize flounder in November and December if taken by pole and line. The department disagrees with the comment and responds that neither the current rule nor the rule as adopted stipulates a maximum size requirement. The current bag limit during the closure timeframe is already set at two fish and by allowing the take of one fish over a certain size, the benefits of the proposed closure would be reduced. Both release mortality as well as taking of fish during the closure would not lead to the anticipated benefits needed to ensure an increase in spawning potential.

Closures

Sixty-seven commenters opposed adoption and stated that there should be no closed season for flounder, adding, variously, that the proposed closure is too drastic, knee-jerk, going too far, or overreach. The department disagrees with the comments and responds that although the proposed closure has been deferred for a year, it remains necessary in order to address the long-term population declines observed in the data. Closures are by definition significant actions that should be implemented so as to achieve the greatest effect in the smallest timeframe. The department has concluded that a six-week closure is the minimum time span necessary to stabilize the flounder fishery with the least amount of inconvenience to anglers. No changes were made as a result of the comments.

Seven commenters opposed adoption and stated that the proposed closure should be for the entire months of November and December and should apply only to commercial fishing. The department disagrees with the comments and responds that in addition to having a statutory duty to protect and conserve public resources, the department also has a duty to equitably distribute opportunity to various types of users, when it can be done responsibly and within the tenets of sound biological management. The department believes that the rules, as adopted, equitably balance the interests of enthusiasts of various means of take while meeting the goal of the rules, which is to restore spawning stock biomass in the flounder fishery. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there should be a one-year closure of the flounder fishery. The department disagrees with the comment and responds that a one-year closure would not be sufficient to stabilize or reverse flounder population declines. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department did not furnish any explanation of the parameters for discontinuing the proposed closure. The department agrees with the comment and responds that given the department's mission, restrictions will be eliminated when they are no longer biologically necessary. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season should be closed in alternating years until stocks are recovered. The department disagrees with the comment and responds that a complete closure in alternating years would result in unnecessary disruptions to users without providing the benefits of the rules as adopted. No changes were made as a result of the comment.

One commenter opposed adoption and stated that closures should be based on water temperature. The department disagrees with the comment and responds that the logistical challenges of monitoring water temperatures along the entirety of the Texas coast and communicating resultant closures to the public make this suggestion infeasible. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be a two-year closure of the commercial flounder fishery. The department disagrees with the comments and responds that in addition to having a statutory duty to protect and conserve public resources, the department also has a duty to equitably distribute opportunity to various types of users, when it can be done responsibly and within the tenets of sound biological management. The department believes that rules as adopted equitably balance the interests of recreational and commercial anglers while meeting the goal of the rules, which is to restore spawning stock biomass in the flounder fishery. No changes were made as a result of the comments.

Gear

Twenty-three commenters opposed adoption and stated that gigging is responsible for flounder declines and should be limited or eliminated. The department disagrees with the comments and responds that in addition to having a statutory duty to protect and conserve public resources, the department also has a duty to equitably distribute opportunity to various types of users, when it can be done responsibly and within the tenets of sound biological management. In balancing the interests of various user groups and the methods of take used by each, the department believes that the rules as adopted will equitably distribute opportunity while meeting management goals, which are to restore spawning stock biomass in the flounder fishery. No changes were made as a result of the comments.

Fourteen commenters opposed adoption and stated that gigging should be prohibited. The department disagrees with the comments and responds that the decline in spawning stock biomass is additive with respect to all methods of take, regardless of efficiency. The department believes that such a change would exert too drastic a reduction of opportunity. In balancing the interests of various user groups and the methods of take used by each, the department believes that the rules as adopted will equitably distribute opportunity while meeting management goals. No changes were made as a result of the comments.

Ten commenters opposed adoption and stated that guided gigging parties are responsible for flounder declines and that guided gigging parties should be limited or prohibited. The department disagrees with the comment and responds that previous research indicates the hook and line fishery harvests a larger proportion of flounder. Additionally, the bag and possession limits and associated benefits to spawning stock biomass are modeled using the department's best estimates of fishing effort, fishing success, and population status. Each person who purchases a license is entitled to the bag limit of flounder prescribed by law, irrespective of who may be accompanying them. No changes were made as a result of the comments.

Six commenters opposed adoption and stated that gigging should be allowed only by wading and not from boats. The department disagrees with the comment and responds that in addition to the primary obligation of biologically protecting fisheries, the department also has an obligation to equitably distribute opportunity among user groups. The department believes that the rules as adopted equitably balance the interests of enthusiasts of various means of take while meeting the goal of the rules, which is to restore spawning stock biomass in the flounder fishery. The department also notes that impacts to the population are regulated by the bag limit, not the method of take. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that gigging should be prohibited for the entire months of November and December. The department disagrees with the comments and responds that in addition to having a statutory duty to protect and conserve public resources, the department also has a duty to equitably distribute opportunity to various types of users, when it can be done responsibly and within the tenets of sound biological management. The department believes that rules as adopted equitably balance the interests of enthusiasts of various means of take while meeting the goal of the rules, which is to restore spawning stock biomass in the flounder fishery. No changes were made as a result of the comments.

Two commenters opposed adoption and stated in various ways that the rules penalize or are biased against gigging. The department disagrees with the comment and responds that in addition to the department's duty to protect and conserve the resource, it has a responsibility to equitably distribute opportunity among various user groups. Therefore, no particular user group is favored over another. The department believes that rules as adopted equitably balance the interests of recreational and commercial anglers while meeting the goal of the rules, which is to restore spawning stock biomass in the flounder fishery. No changes were made as a result of the comments.

Commercial

Eighty-four commenters opposed adoption and stated that flounder declines are the result of excessive harvest by commercial fishing operations and that commercial harvest should be curtailed or eliminated. The department disagrees and believes the rules as adopted equitably balance the interests of recreational and commercial anglers while meeting the goal of the rules, which is to restore spawning stock biomass in the flounder fishery. No changes were made as a result of the comments.

Fourteen commenters opposed adoption and stated that flounder bycatch by shrimpers is responsible for flounder declines. The department disagrees with the comments and responds that the department's shrimping license buyback program has steadily decreased the impacts of flounder bycatch by bay shrimpers over the last two decades. In order to increase spawning opportunities in light of the fishery effort trends in the inshore shrimp fishery and in the flounder fishery, the rules needed to be directed toward the directed fishery to ensure greater spawning potential. No changes were made as a result of the comments.

Six commenters opposed adoption and stated that the season should be closed for time periods varying from one to five years for commercial flounder fishing effort, bay shrimping, and oystering. The department disagrees with the comments and responds that in addition to having a statutory duty to protect and conserve public resources, the department also has a duty to equitably distribute opportunity to various types of users, when it can be done responsibly and within the tenets of sound biological management. The department believes that rules as adopted equitably balance the interests of enthusiasts of various means of take while meeting the goal of the rules, which is to restore spawning stock biomass in the flounder fishery. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that the commercial bag limit should be the same as the recreational bag limit. The department disagrees with the comment and responds that in addition to having a statutory duty to protect and conserve public resources, the department also has a duty to equitably distribute opportunity to various types of users, when it can be done responsibly and within the tenets of sound biological management. The department believes that rules as adopted equitably balance the interests of recreational and commercial anglers while meeting the goal of the rules, which is to restore spawning stock biomass in the flounder fishery. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that there should be an aggregate bag limit for flounder on boats used by fishing guides to provide angling opportunity for paying customers. The department agrees with the comment and responds that current rules provide that the bag limit for a guided fishing party is equal

to the total number of persons in the boat licensed to fish or otherwise exempt from holding a license minus each fishing guide and fishing guide deckhand multiplied by the bag limit for each species harvested. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the 30-fish per day commercial bag limit for flounder should apply to all angling activities conducted in one day by a person who holds a commercial license, including fish taken by paying customers on guided trips. The department agrees with the comment and responds that the daily bag limit for harvest by commercial license does apply to the commercial license for the entire day. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should pay commercial fishing operators not to fish. The department disagrees with the comment. The commercial finfish license numbers are under a limited entry system, and there is a commercial license buyback in place to reduce fishing effort over the long-term. No changes were made as a result of the comment.

One commenter opposed adoption and stated that commercial licensees are allowed to keep fishing at night, when the recreational fishery is closed. The department disagrees with the comment and responds that there are no restrictions on the time of day that commercial and recreational angling may take place. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should designate zones where commercial activity is prohibited in order to protect spawning fish. The department disagrees with the comment and responds that flounder do not spawn in a single place at a single time, or even in a few places at a single time, or in known places at known times; they spawn in many locations at unpredictable times, making it problematic for a zone system to be effective. No changes were made as a result of the comment.

Enforcement

Fifteen commenters opposed adoption and stated that enforcement of existing regulations is insufficient, leading to "double bagging" and retention of undersized fish. The department disagrees with the comment and responds that regulations are obeyed by the vast majority of users, that unscrupulous persons who disregard the law do so consciously, and that when such persons are detected by department enforcement personnel, they are cited and prosecuted. No changes were made as a result of the comments.

Data

Thirty-one commenters opposed adoption and stated in various ways that flounder are plentiful. The department disagrees with the comments and responds that all scientific indices available to the department from both resource dependent and harvest dependent monitoring programs show flounder populations are experiencing a continued long-term declining trend. No changes were made as a result of the comments.

Eight commenters opposed adoption and stated that the department's data is flawed but offered no specific critique of methodology or design. The department disagrees with the comments and responds that the department's data collection efforts are robust, long-term, and scientifically valid. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department was not transparent with the data used to formulate the proposal. The department disagrees with the comment and responds that not only was the department transparent with data presentations at meetings prior to the rule proposals and public hearings to discuss the rule proposals, the department also made the data available to any requestor. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there was no data to support the department's proposal. The department disagrees with the comment and responds that there is more than ample data to support the department's management decisions regarding flounder. The department was transparent with data presentations at meetings prior to the rule proposals and public hearings regarding the rule proposals, and the department also made the data available to any requestor. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should get data from fishermen, not organizations. The department disagrees with the commenter and responds that the department relies upon resource dependent and harvest dependent datasets generated by scientifically valid methodologies to determine fisheries management decisions, not upon anecdotal information or opinion, regardless of the source. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department's data was incomplete. The commenter offered no further explanation. The department disagrees with the comment and responds that department data is more than sufficient for purposes of informing flounder management strategies. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the department's sampling efforts are not aimed specifically at flounder and such sampling as it relates to flounder is therefore accidental. The department disagrees with the comment and responds that the department's resource monitoring program has collected fishery independent data for over 40 years and that it provides a standardized, consistent view of the populations of coastal species. The department employs various types of sampling including gill nets, bag seines, and trawls to collect data on the relative abundance, size, and distribution of various life stages of a wide range of species of finfish in Texas coastal waters. Although gear types used for the resource monitoring program may not be specifically designed for capturing only flounder, their efficiency at landing flounder has remained constant through time. These data show a large, long-term relative decline in flounder populations. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department does not conduct angler surveys on flounder fishermen and flounder guides returning at night. The department agrees that the department does not conduct angler surveys on flounder fishermen and flounder guides returning at night, but the department collects mandatory commercial landings data that includes all landings, including fish landed at night. The department is confident that the current efforts effectively monitor trends in commercial and recreational flounder landings over time. Additionally, TPWD has collected fishery independent data for over 40 years that provides a standardized, consistent view of the populations of coastal species. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department's gill net surveys should be run parallel to the shore, not perpendicular, so it intercepts flounder going to and from the shore. The department disagrees with the comment and responds that setting gill nets perpendicular to the shoreline ensures a higher encounter rate because it is also perpendicular to the along-shore current and spans a broader depth zone than parallel sets. No changes were made as a result of the comment.

One commenter opposed adoption and stated that more studies are needed. The department disagrees with the comment and responds that department survey and sampling efforts are robust, continuous, and scientifically valid, and the long-term data trends indicate an unmistakable population decline in flounder abundance. No changes were made as a result of the comment.

Miscellaneous

Seven commenters opposed adoption and stated that once regulations are in place they are never removed. The department disagrees with the comments and responds that the department does not maintain unnecessary regulations. No changes were made as a result of the comments.

Five commenters opposed adoption and stated that there should be a "sunset" provision in the rules. The department disagrees with the comments and responds that a sunset provision is unnecessary because the regulations are based on the biology of the fishery; if circumstances justify changing opportunity, the department will do so. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that nature should be left alone. The department disagrees that doing nothing does not benefit natural systems and populations in the face of demonstrable human-caused negative impacts. No changes were made as a result of the comments.

Four commenters opposed adoption and stated in some manner that state regulations make it difficult to feed a family. The department disagrees with the comments and responds that the department regulates fisheries to ensure the sustainability of the resource for public use and enjoyment as well as to adopt rules when needed that equitably balance the interests of recreational and commercial anglers while meeting the goal of the rules. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that rules keep getting more restrictive. The department disagrees with the comment and responds that regulations are necessary to protect resources, especially those experiencing significant population declines. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that the department is taking away rights. The department disagrees with the comments and responds that fisheries resources are the property of the people of the state and the public has a right to enjoy the pursuit of those resources, but only under the laws established to protect and conserve the resource for the enjoyment of present and future generations. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that the department shouldn't eliminate a tradition. The department disagrees that the rules would eliminate a tradition and notes that tradition cannot supersede prudent and conscientious scientific management of a public resource. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the rules will have negative economic impact on businesses and communities. The department disagrees that the regulations themselves have any direct impact on local economies or communities. No changes were made as a result of the comments.

Two commenters opposed adoption and commented about the effectiveness of regulation, with one commenter stating that if regulations worked there would be more flounder and another that if the current regulations aren't effective, additional regulations won't be effective, either. The department disagrees with the comments and responds that the department has a statutory duty to protect and conserve flounder and that population declines would be much more pronounced in the absence of regulations. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the rules should be the same in waters shared with Louisiana. The department disagrees with the comments and responds that the department will implement resource management decisions in the best interests of the citizens of Texas. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the department stocks too many redfish that are eating flounder. The department disagrees with the comments and responds that previous research effort conducted by the department indicate redfish predation is not a significant component of overall flounder population declines. No changes were made as a result of the comments.

One commenter opposed adoption and stated that fees should be increased to fund stocking efforts. The department disagrees with the comment and responds that flounder declines cannot be reversed by stocking efforts alone. No changes were made as a result of the comment.

One commenter opposed adoption and stated that a person has the right to catch fish for food at any time. The department disagrees with the comment and responds that fish in public water are the property of the people of the state. The commission is charged by statute with establishing regulations governing the take of fish to ensure sustainable populations, and persons who violate those regulations commit a criminal act. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department has no right to interfere with a person's god-given right to fish. The department disagrees with the comment and responds that it has a statutory duty to protect and conserve public resources. No changes were made as a result of the comment.

One commenter opposed adoption and stated that "the state is taking our fish." The department disagrees with the comment and responds that fish in public waters are the property of the people of the state that are managed by the department on behalf of the people under a statutory duty to protect and conserve public resources. No changes were made as a result of the comment.

One commenter opposed adoption and stated that "a public resource should never be closed, the state wants more money, and the gulf should not be regulated." The department disagrees with the comment and responds that there is ample historic evidence that failure to adequately regulate the exploitation of public resources inevitably results in over harvest and population declines. There is no connection between department revenue

and the rules as adopted. No changes were made as a result of the comment.

One commenter opposed adoption and stated the department's proposal is tyranny. The department disagrees with the comment and responds that the rules as adopted were duly promulgated in accordance with the department's statutory authority and applicable statutory law and due process. No changes were made as a result of the comment.

One commenter opposed adoption and stated that public resource should not be exploited for profit. The department conditionally disagrees with the comment and responds that commercial exploitation of a public resource is acceptable provided there is not statutory prohibition of such exploitation and there is no danger of harm to the resource. No changes were made as a result of the comment.

One commenter opposed adoption and stated that Texas should follow Louisiana fishing regulations. The department disagrees with the comment and responds that the department will implement resource management decisions in the best interests of the citizens of Texas. No changes were made as a result of the comment.

One commenter opposed adoption and stated that people will just buy a Louisiana license and take up to 10 fish per day fishing the exact same waters. The department disagrees with the comment and responds that possession of fish taken in Texas waters in excess of Texas bag and possession limits is a criminal offense. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should create a boat permit for guides who take customers to catch flounder and use the revenue to pay for additional law enforcement. The department disagrees with the comment and responds that there is no statutory authority for such a permit. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there is no reason to fish any more. The department disagrees with the comment and responds that there are many species other than flounder that can be enjoyed. No changes were made as a result of the comment.

One commenter opposed adoption and stated that pollution causes flounder declines. The department disagrees that pollution alone is the causal factor or even a significant contributor to documented declines in flounder populations. No changes were made as a result of the comment.

One commenter opposed adoption and stated that once closure occurs it will never be rescinded. The department disagrees with the comment and responds that if the biological conditions necessitating the closure are eliminated, there would be cause to eliminate the closure in response. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that hook and line angling does not affect flounder populations. The department disagrees with the comment and responds that all methods of take exert an effect on populations, particularly those species that are concentrated during migration behaviors, and impacts from various gear types are additive. No changes were made as a result of the comments.

One commenter opposed adoption and stated that seasonal abnormal weather is the cause of flounder population declines. The department disagrees with the comment and responds that flounder populations have exhibited a declining trend for decades, which is not related to the occasional drought, hurricane, or other specific weather event. No changes were made as a result of the comment.

Commercial Reporting

One commenter opposed adoption and stated that guides should be required to participate in the department's trip ticket reporting program. The department disagrees with the comment. The trip-ticket program is a mandatory reporting system for commercial fishery licenses. No changes were made as a result of the comment.

Paddle Craft Guide Rules

Two hundred eight-five commenters expressed support for adoption of the rules as proposed. One hundred seventeen commenters expressed opposition to adoption of the rules as proposed either in general or to certain portions, with some commenters expressing more than one area of opposition.

Eight commenters opposed adoption and stated that people should not be required to obtain a guide license, take a course, or be certified in order to go paddling or to fish from paddle craft. The department agrees with the comments and responds that the rules do not apply to all paddle craft, just to those used by fishing guides. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there is nothing wrong with the current rule and additional burdens will not yield results. The department disagrees with the comment and responds that because the rule change is non-substantive, there is no additional burden. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there are too many permits and licenses and it is too hard to own a boat. The department disagrees with the comment and responds that the rule in question applies to the use of paddle craft by fishing guides and does not apply to boats. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule will affect access to water and negatively impact kayak guides by forcing clients to obtain licenses. The department disagrees with the comment and responds that the rule does not affect access to the water or the clients of kayak guides. No changes were made as a result of the comment.

One commenter opposed adoption and stated that if paddle craft licenses are required, power boat licenses should be required. The department disagrees with the comment and responds that the rule affects only fishing guides who use paddle craft. No changes were made as a result of the comment.

One commenter opposed adoption and stated that paddle craft should be prohibited in coastal waters. The department disagrees with the comment and responds that rule is related to training requirements for fishing guides who use paddle craft. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be no course requirements for paddle craft guides. The department disagrees with the comment and responds that the course provides paddle craft guides with training to address critical safety issues unique to the operation of paddle craft. No changes were made as a result of the comment.

One commenter opposed adoption and stated that additional fees are not acceptable. The department disagrees that the rule imposes a fee on any person. No changes were made as a result of the comment.

One commenter opposed adoption and stated that courses will not change behavior, but enforcement will. The department disagrees with the comment and responds that rule affects only the requirements for licensure of fishing guides who use paddle craft. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule is pointless. The department disagrees with the comment and responds that the training courses referenced in the current rule no longer exist and the department seeks to use a generic reference to avoid having to engage in rulemaking each time a course is discontinued or renamed. No changes were made as a result of the comment.

One commenter opposed adoption and stated that "certain age groups should be grandfathered." The department disagrees with the comment and responds that there is no justification for exempting classes of individuals based on age. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the requirements should be left as is because they are effective. The department disagrees with the comment but does agree the rules are effective. The rule is simply ensuring the requirements of the current rule can still be maintained through a shift to more generic references to appropriate courses. No changes were made as a result of the comment.

One commenter opposed adoption and stated that licenses should be abolished. The department neither agrees nor disagrees with the comment and responds that in this case, the paddling guide license is required by statute and that requirement cannot be eliminated by the commission. No changes were made as a result of the comment.

DIVISION 1. GENERAL PROVISIONS

31 TAC §57.973

Statutory Authority

The amendment is adopted under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess aquatic animal life in this state; the means, methods, and places in which it is lawful to take, or possess aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the aquatic animal life authorized to be taken or possessed; and the region, county, area, body of water, or portion of a county where aquatic animal life may be taken or possessed.

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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For further information, please call: (512) 389-4775

DIVISION 2. STATEWIDE RECREATIONAL FISHING PROCLAMATION

31 TAC §57.981

The amendment is adopted under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess aquatic animal life in this state; the means, methods, and places in which it is lawful to take, or possess aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the aquatic animal life authorized to be taken or possessed; and the region, county, area, body of water, or portion of a county where aquatic animal life may be taken or possessed.

§57.981. Bag, Possession, and Length Limits.

(a) For all wildlife resources taken for personal consumption and for which there is a possession limit, the possession limit shall not apply after the wildlife resource has reached the possessor's residence and is finally processed.

(b) The possession limit does not apply to fish in the possession of or stored by a person who has an invoice or sales ticket showing the name and address of the seller, number of fish by species, date of the sale, and other information required on a sales ticket or invoice.

(c) There are no bag, possession, or length limits on game or non-game fish, except as provided in this subchapter.

(1) Possession limits are twice the daily bag limit on game and non-game fish except as otherwise provided in this subchapter.

(2) For flounder, the possession limit is the daily bag limit.

(3) The bag limit for a guided fishing party is equal to the total number of persons in the boat licensed to fish or otherwise exempt from holding a license minus each fishing guide and fishing guide deckhand multiplied by the bag limit for each species harvested.

(4) A person may give, leave, receive, or possess any species of legally taken wildlife resource, or a part of the resource, that is required to have a tag or permit attached or is protected by a bag or possession limit, if the wildlife resource is accompanied by a wildlife resource document (WRD) from the person who took the wildlife resource, provided the person is in compliance with all other applicable provisions of this subchapter and the Parks and Wildlife Code. The properly executed WRD document shall accompany the wildlife resource until it reaches the possessor's residence and is finally processed. The WRD must contain the following information:

(A) the name, signature, address, and fishing license number, as required of the person who killed or caught the wildlife resource;

(B) the name of the person receiving the wildlife resource;

(C) a description of the wildlife resource (number and type of species or parts); and

(D) the location where the wildlife resource was killed or caught (name of ranch; area; lake, bay or stream; and county).

(5) Except as provided in subsection (d) of this section, the statewide daily bag and length limits shall be as follows.

(A) Amberjack, greater.

(i) Daily bag limit: 1.

(ii) Minimum length limit: 38 inches.

(iii) Maximum length limit: No limit.

(B) Bass:

(i) The daily bag limit for largemouth, smallmouth, spotted, Alabama, and Guadalupe is 5, in any combination.

(ii) Alabama, Guadalupe, and spotted.

(I) No minimum length limit.

(II) No maximum length limit.

(iii) Largemouth and smallmouth.

(I) Minimum length limit: 14 inches.

(II) No maximum length limit.

(iv) Striped (including hybrids and subspecies).

(I) Daily bag limit: 5 (in any combination).

(II) Minimum length limit: 18 inches.

(III) No maximum length limit.

(v) White.

(I) Daily bag limit: 25.

(II) Minimum length limit: 10 inches.

(III) No maximum length limit.

(C) Catfish:

(i) channel and blue (including hybrids and subspecies).

(I) Daily bag limit: 25 (in any combination).

(II) Minimum length limit: 12 inches.

(III) No maximum length limit.

(ii) flathead.

(I) Daily bag limit: 5.

(II) Minimum length limit: 18 inches.

(III) No maximum length limit.

(iii) gafftopsail.

(I) No daily bag limit.

(II) Minimum length limit: 14 inches.

(III) No maximum length limit.

(D) Cobia.

(i) Daily bag limit: 2.

(ii) Minimum length limit: 40 inches.

(iii) No maximum length limit.

(E) Crappie, black and white (including hybrids and subspecies).

(i) Daily bag limit: 25.

(ii) Minimum length limit: 10 inches.

(iii) No maximum length limit.

(F) Drum, black.

(i) Daily bag limit: 5.

(ii) Minimum length limit: 14 inches.

(iii) Maximum length limit: 30 inches.

(iv) One black drum over 52 inches may be retained per day as part of the five-fish bag limit.

(G) Drum, red.

(i) Daily bag limit: 3.

(ii) Minimum length limit: 20 inches.

(iii) Maximum length limit: 28 inches.

(iv) During a license year, one red drum over the stated maximum length limit may be retained when affixed with a properly executed Red Drum Tag, a properly executed Exempt Red Drum Tag or with a properly executed Duplicate Exempt Red Drum Tag and one red drum over the stated maximum length limit may be retained when affixed with a properly executed Bonus Red Drum Tag. Any fish retained under authority of a Red Drum Tag, an Exempt Red Drum Tag, a Duplicate Exempt Red Drum Tag, or a Bonus Red Drum Tag may be retained in addition to the daily bag and possession limit as stated in this section.

(H) Flounder: all species (including hybrids and subspecies).

(i) (No change.)

(ii) Minimum length limit: 15 inches.

(iii) (No change.)

(iv) During November, lawful means are restricted to pole-and-line only and the bag and possession limit for flounder is two. For the first 14 days in December, the bag and possession limit is two, and flounder may be taken by any legal means. On September 1, 2021, the provisions of this clause cease effect.

(v) Beginning September 1, 2021, the season for flounder is closed from November 1 through December 14 every year.

(I) Gar, alligator.

(i) Daily bag limit: 1.

(ii) No minimum length limit.

(iii) No maximum length limit.

(iv) During May, no person shall fish for, take, or seek to take alligator gar in that portion of Lake Texoma encompassed within the boundaries of the Hagerman National Wildlife Refuge or that portion of Lake Texoma from the U.S. 377 bridge (Willis Bridge) upstream to the I.H. 35 bridge.

(v) Any person who takes an alligator gar in the public waters of this state other than Falcon International Reservoir shall report the harvest via the department's website or mobile application within 24 hours of take.

(vi) Between one half-hour after sunset and one half-hour before sunrise, any lawful means other than lawful archery equipment and crossbow may be used to take an alligator gar in the portion of the Trinity River described in subsection (d)(1)(L)(ii) of this section,

except for persons selected for opportunity as provided in §57.972(j) of this title (relating to General Provisions).

(vii) Except for persons selected for opportunity as provided in §57.972(j) of this title, no person in the portion of the Trinity River described in subsection (d)(1)(L)(ii) of this section may take an alligator gar by means of lawful archery equipment or crossbow between one half-hour after sunset and one half-hour before sunrise, or possess an alligator gar taken by means of lawful archery equipment or crossbow between one half-hour after sunset and one half-hour before sunrise.

(J) Grouper.

(i) Black.

(I) Daily bag limit: 4.

(II) Minimum length limit: 24 inches.

(III) No maximum length limit.

(ii) Gag.

(I) Daily bag limit: 2.

(II) Minimum length limit: 24 inches.

(III) No maximum length limit.

(iii) Goliath. The take of Goliath grouper is prohibited.

(iv) Nassau. The take of Nassau grouper is prohibited.

(K) Mackerel.

(i) King.

(I) Daily bag limit: 3.

(II) Minimum length limit: 27 inches.

(III) No maximum length limit.

(ii) Spanish.

(I) Daily bag limit: 15.

(II) Minimum length limit: 14 inches.

(III) No maximum length limit.

(L) Marlin.

(i) Blue.

(I) No daily bag limit.

(II) Minimum length limit: 131 inches.

(III) No maximum length limit.

(ii) White.

(I) No daily bag limit.

(II) Minimum length limit: 86 inches.

(III) No maximum length limit.

(M) Mullet: all species (including hybrids, and subspecies).

(i) No daily bag limit.

(ii) No minimum length limit.

(iii) From October through January, no mullet more than 12 inches in length may be taken from public waters or possessed on board a vessel.

(N) Sailfish.

(i) No daily bag limit.

(ii) Minimum length limit: 84 inches.

(iii) No maximum length limit.

(O) Seatrout, spotted.

(i) Daily bag limit: 5.

(ii) Minimum length limit: 15 inches.

(iii) Maximum length limit: 25 inches.

(iv) Only one spotted seatrout greater than 25 inches may be retained per day. A spotted seatrout retained under this subclause counts as part of the daily bag and possession limit.

(P) Shark: all species (including hybrids and subspecies).

(i) all species other than the species listed in clauses (ii) - (iv) of this subparagraph:

(I) Daily bag limit: 1.

(II) Minimum length limit: 64 inches.

(III) No maximum length limit.

(ii) Atlantic sharpnose, blacktip, and bonnethead:

(I) Daily bag limit: 1.

(II) Minimum length limit: 24 inches.

(III) No maximum length limit.

(iii) great, scalloped, and smooth hammerhead:

(I) Daily bag limit: 1.

(II) Minimum length limit: 99 inches.

(III) No maximum length limit.

(iv) The take of the following species of sharks from the waters of this state is prohibited and they may not be possessed on board a vessel at any time:

(I) Atlantic angel;

(II) Basking;

(III) Bigeye sand tiger;

(IV) Bigeye sixgill;

(V) Bigeye thresher;

(VI) Bignose;

(VII) Caribbean reef;

(VIII) Caribbean sharpnose;

(IX) Dusky;

(X) Galapagos;

(XI) Longfin mako;

(XII) Narrowtooth;

(XIII) Night;

(XIV) Sandbar;

(XV) Sand tiger;

(XVI) Sevengill;

(XVII) Silky;

(XVIII) Sixgill;

(XIX) Smalltail;

(XX) Whale; and

(XXI) White.

(v) Except for the species listed in clause (ii) - (iv) of this subparagraph, sharks may be taken using pole and line, but must be taken by non-offset, non-stainless-steel circle hook when using natural bait.

(Q) Sheepshead.

(i) Daily bag limit: 5.

(ii) Minimum length limit: 15 inches.

(iii) No maximum length limit.

(R) Snapper.

(i) Lane.

(I) Daily bag limit: None.

(II) Minimum length limit: 8 inches.

(III) No maximum length limit.

(ii) Red.

(I) Daily bag limit: 4.

(II) Minimum length limit: 15 inches.

(III) No maximum length limit.

(IV) Red snapper may be taken using pole and line, but it is unlawful to use any kind of hook other than a circle hook baited with natural bait.

(iii) Vermilion.

(I) Daily bag limit: None.

(II) Minimum length limit: 10 inches.

(III) No maximum length limit.

(S) Snook.

(i) Daily bag limit: 1.

(ii) Minimum length limit: 24 inches.

(iii) Maximum length limit: 28 inches.

(T) Tarpon.

(i) Daily bag limit: 1.

(ii) Minimum length limit: 85 inches.

(iii) No maximum length limit.

(U) Triggerfish, gray.

(i) Daily bag limit: 20.

(ii) Minimum length limit: 16 inches.

(iii) No maximum length limit.

(V) Tripletail.

(i) Daily bag limit: 3.

(ii) Minimum length limit: 17 inches.

(iii) No maximum length limit.

(W) Trout (rainbow and brown trout, including their hybrids and subspecies).

(i) Daily bag limit: 5 (in any combination).

(ii) No minimum length limit.

(iii) No maximum length limit.

(X) Walleye and Saugeye.

(i) Daily bag limit: 5.

(ii) No minimum length limit.

(iii) No maximum length limit.

(iv) Two walleye or saugeye of less than 16 inches may be retained.

(d) Exceptions to statewide daily bag, possession, and length limits shall be as follows:

(1) Freshwater species.

(A) Bass: largemouth, smallmouth, spotted, and Guadalupe (including their hybrids and subspecies). Devils River (Val Verde County) from State Highway 163 bridge crossing (Bakers Crossing) to the confluence with Big Satan Creek including all tributaries within these boundaries and all waters in the Lost Maples State Natural Area (Bandera County).

(i) Daily bag limit: 0.

(ii) No minimum length limit.

(iii) Catch and release only.

(B) Bass: largemouth and spotted.

(i) Caddo Lake (Marion and Harrison counties).

(I) Daily bag limit: 8 (in any combination with spotted bass).

(II) Minimum length limit: 14 - 18 inch slot limit (largemouth bass); no limit for spotted bass.

(III) It is unlawful to retain largemouth bass between 14 and 18 inches. No more than 4 largemouth bass 18 inches or longer may be retained. Possession limit is 10.

(ii) Toledo Bend Reservoir (Newton, Sabine, and Shelby counties).

(I) Daily bag limit: 8 (in any combination with spotted bass).

(II) Minimum length limit: 14 inches (largemouth bass); no limit for spotted bass. Possession limit is 10.

(iii) Sabine River (Newton and Orange counties) from Toledo Bend dam to a line across Sabine Pass between Texas Point and Louisiana Point.

(I) Daily bag limit: 8 (in any combination with spotted bass).

(II) Minimum length limit: 12 inches (largemouth bass); no limit for spotted bass. Possession limit is 10.

(C) Bass: largemouth.

(i) Chambers, Hardin, Galveston, Jefferson, Liberty (south of U.S. Highway 90), Newton (excluding Toledo Bend

Reservoir), and Orange counties including any public waters that form boundaries with adjacent counties.

(I) Daily bag limit: 5.

(II) Minimum length limit: 12 inches.

(ii) Lake Conroe (Montgomery and Walker counties).

(I) Daily bag limit: 5.

(II) Minimum length limit: 16 inches.

(iii) Lakes Bellwood (Smith County), Davy Crockett (Fannin County), Kurth (Angelina County), Mill Creek (Van Zandt County), Moss (Cooke), Nacogdoches (Nacogdoches County), Naconiche (Nacogdoches County), Purtis Creek State Park (Henderson and Van Zandt counties), and Raven (Walker).

(I) Daily bag limit: 5.

(II) Minimum length limit: 12 inches.

(iv) Lakes Bright (Williamson County), Casa Blanca (Webb County), Cleburne State Park (Johnson County), Fairfield (Freestone County), Gilmer (Upshur County), Marine Creek Reservoir (Tarrant County), Meridian State Park (Bosque County), Pflugerville (Travis County), Rusk State Park (Cherokee County), and Welsh (Titus County).

(I) Daily bag limit: 5.

(II) Minimum length limit: 18 inches.

(v) Bedford Boys Ranch Lake (Tarrant County), Buck Lake (Kimble County), Lake Kyle (Hays County), and Nelson Park Lake (Taylor County).

(I) Daily bag limit: 0.

(II) Minimum length limit: No limit.

(III) Catch and release only.

(vi) Lakes Alan Henry (Garza County), Grapevine (Denton and Tarrant counties), Jacksonville (Cherokee County), and O.H. Ivie Reservoir (Coleman, Concho, and Runnels counties).

(I) Daily bag limit: 5.

(II) Minimum length limit: No limit.

(III) It is unlawful to retain more than two bass of less than 18 inches in length.

(vii) Nasworthy (Tom Green).

(I) Daily bag limit: 5.

(II) Minimum length limit: 14 - 18 inch slot limit.

(III) It is unlawful to retain largemouth bass between 14 and 18 inches in length.

(viii) Lakes Athens (Henderson County), Bastrop (Bastrop County), Buescher State Park (Bastrop County), Houston County (Houston County), Joe Pool (Dallas, Ellis, and Tarrant counties), Lady Bird (Travis County), Murvaul (Panola County), Pinkston (Shelby County), Timpson (Shelby County), Walter E. Long (Travis County), and Wheeler Branch (Somervell County).

(I) Daily bag limit: 5.

(II) Minimum length limit: 14 - 21 inch slot limit.

(III) It is unlawful to retain largemouth bass between 14 and 21 inches in length. No more than 1 bass 21 inches or greater in length may be retained each day.

(ix) Lakes Fayette County (Fayette County), Fork (Wood Rains and Hopkins counties), Gibbons Creek Reservoir (Grimes County), and Monticello (Titus County).

(I) Daily bag limit: 5.

(II) Minimum length limit: 16 - 24 inch slot limit.

(III) It is unlawful to retain largemouth bass between 16 and 24 inches in length. No more than 1 bass 24 inches or greater in length may be retained each day.

(x) Lake Lakewood (Williamson County).

(I) Daily bag limit: 3.

(II) Minimum length limit: 18 inches.

(D) Bass: striped and white bass their hybrids and subspecies.

(i) Sabine River (Newton and Orange counties) from Toledo Bend dam to I.H. 10 bridge and Toledo Bend Reservoir (Newton, Sabine, and Shelby counties).

(I) Daily bag limit: 5.

(II) Minimum length limit: No limit.

(III) No more than 2 striped bass 30 inches or greater in length may be retained each day.

(ii) Lake Texoma (Cooke and Grayson counties).

(I) Daily bag limit: 10 (in any combination).

(II) Minimum length limit: No limit.

(III) No more than 2 striped or hybrid striped bass 20 inches or greater in length may be retained each day. Striped or hybrid striped bass caught and placed on a stringer in a live well or any other holding device become part of the daily bag limit and may not be released. Possession limit is 20.

(iii) Red River (Grayson County) from Denison Dam downstream to and including Shawnee Creek (Grayson County).

(I) Daily bag limit: 5 (in any combination).

(II) Minimum length limit: No limit.

(III) Striped bass caught and placed on a stringer in a live well or any other holding device become part of the daily bag limit and may not be released.

(iv) Trinity River (Polk and San Jacinto counties) from the Lake Livingston dam downstream to the F.M. 3278 bridge.

(I) Daily bag limit: 2 (in any combination).

(II) Minimum length limit: 18 inches.

(E) Bass: white. Lakes Caddo (Harrison and Marion counties), Texoma (Cooke and Grayson counties), and Toledo Bend (Newton Sabine and Shelby counties) and Sabine River (Newton and Orange counties) from Toledo Bend dam to I.H. 10 bridge.

(i) Daily bag limit: 25.

(ii) Minimum length limit: No limit.

(F) Carp: common. Lady Bird Lake (Travis County).

(i) Daily bag limit: No limit.

(ii) Minimum length limit: No limit.

(iii) It is unlawful to retain more than one common carp of 33 inches or longer per day.

(G) Catfish: blue. Lakes Lewisville (Denton County), Richland-Chambers (Freestone and Navarro counties), and Waco (McLennan County).

(i) Daily bag limit: 25 (in any combination with channel catfish).

(ii) Minimum length limit: 30-45-inch slot limit.

(iii) It is unlawful to retain blue catfish between 30 and 45 inches in length. No more than one blue catfish 45 inches or greater in length may be retained each day.

(H) Catfish: channel and blue catfish, their hybrids and subspecies.

(i) Lake Kyle (Hays County).

(I) Daily bag limit: 0.

(II) Minimum length limit: No limit.

(III) Catch and release and only.

(ii) Lake Livingston (Polk, San Jacinto, Trinity, and Walker counties).

(I) Daily bag limit: 50 (in any combination).

(II) Minimum length limit: 12 inches.

(iii) Trinity River (Polk and San Jacinto counties) from the Lake Livingston dam downstream to the F.M. 3278 bridge.

(I) Daily bag limit: 10 (in any combination).

(II) Minimum length limit: 12 inches.

(III) No more than 2 channel or blue catfish 24 inches or greater in length may be retained each day.

(iv) Lakes Kirby (Taylor County) and Palestine (Cherokee, Anderson, Henderson, and Smith counties).

(I) Daily bag limit: 50 (in any combination).

(II) Minimum length limit: No limit.

(III) No more than five catfish 20 inches or greater in length may be retained each day.

(IV) Possession limit is 50.

(v) Lakes Caddo (Harrison and Marion counties) and Toledo Bend (Newton Sabine and Shelby counties) and the Sabine River (Newton and Orange counties) from Toledo Bend dam to the I.H. 10 bridge.

(I) Daily bag limit: 50 (in any combination).

(II) Minimum length limit: No limit.

(III) No more than five catfish 30 inches or greater in length may be retained each day.

(IV) Possession limit is 50.

(vi) Lake Texoma (Cooke and Grayson counties) and the Red River (Grayson County) from Denison Dam to and including Shawnee Creek (Grayson County).

(I) Daily bag limit: 15 (in any combination). (II) Minimum length limit: No limit

(III) No more than one blue catfish 30 inches or greater in length may be retained each day.

(vii) Brushy Creek (Williamson County) from the Brushy Creek Reservoir dam downstream to the Williamson/Milam county line, Canyon Lake Project #6 (Lubbock County), North Concho River (Tom Green County) from O.C. Fisher Dam to Bell Street Dam, and South Concho River (Tom Green County) from Lone Wolf Dam to Bell Street Dam.

(I) Daily bag limit: 5 (in any combination).

(II) Minimum length limit: No limit.

(viii) Community fishing lakes.

(I) Daily bag limit: 5 (in any combination).

(II) Minimum length limit: No limit.

(ix) Bellwood (Smith County), Dixieland (Cameron County), and Tankersley (Titus County).

(I) Daily bag limit: 5 (in any combination).

(II) Minimum length limit: 12 inches.

(x) Lake Tawakoni (Hunt, Rains, and Van Zandt counties).

(I) Daily bag limit: 25 (in any combination).

(II) Minimum length limit: No limit.

(III) No more than seven blue or channel catfish 20 inches or greater may be retained each day, and of these, no more than two can be 30 inches or greater in length.

(I) Catfish: flathead.

(i) Lake Texoma (Cooke and Grayson counties) and the Red River (Grayson County) from Denison Dam to and including Shawnee Creek (Grayson County).

(I) Daily bag limit: 5.

(II) Minimum length limit: No limit

(ii) Lakes Caddo (Harrison and Marion counties) and Toledo Bend (Newton, Sabine, and Shelby) and the Sabine River (Newton and Orange counties) from Toledo Bend dam to the I.H. 10 bridge.

(I) Daily bag limit: 10.

(II) Minimum length limit: 18 inches.

(III) Possession limit: 10.

(J) Crappie: black and white crappie their hybrids and subspecies.

(i) Caddo Lake (Harrison and Marion counties), Toledo Bend Reservoir (Newton Sabine and Shelby counties), and the Sabine River (Newton and Orange counties) from Toledo Bend dam to the I.H. 10 bridge.

(I) Daily bag limit: 25 (in any combination).

(II) Minimum length limit: No limit.

(ii) Lake Fork (Wood, Rains, and Hopkins counties) and Lake O' The Pines (Camp, Harrison, Marion, Morris, and Upshur counties).

(I) Daily bag limit: 25 (in any combination).

(II) Minimum length limit: 10 inches.

(III) From December 1 through the last day in February there is no minimum length limit. All crappie caught during this period must be retained.

(iii) Lake Texoma (Cooke and Grayson counties).

(I) Daily bag limit: 37 (in any combination).

(II) Minimum length limit: 10 inches.

(III) Possession limit is 50.

(iv) Lake Nasworthy (Tom Green County).

(I) Daily bag limit: 25 (in any combination).

(II) Minimum length limit: No limit.

(III) Possession limit is 50.

(K) Drum, red. Lakes Braunig and Calaveras (Bexar County), Coleto Creek Reservoir (Goliad and Victoria counties), and Fairfield (Freestone County).

(i) Daily bag limit: 3.

(ii) Minimum length limit: 20.

(iii) No maximum length limit.

(L) Gar, alligator.

(i) Falcon International Reservoir (Starr and Zapata counties).

(I) Daily bag limit: 5.

(II) No minimum length limit.

(III) No maximum length limit.

(ii) On the Trinity River and all tributary waters from the I-30 bridge in Dallas County downstream through Anderson, Ellis, Freestone, Henderson, Houston, Kaufman, Leon, Liberty, Madison, Navarro, Polk, San Jacinto, Trinity, and Walker counties to the I-10 bridge in Chambers County, including the East Fork of the Trinity River and all tributaries upstream to the Lake Ray Hubbard dam, the maximum length limit is 48 inches, except for persons selected by a department-administered drawing authorizing the take of a gar in excess of 48 inches in length.

(iii) During May, no person shall fish for, take, or seek to take alligator gar in that portion of Lake Texoma encompassed within the boundaries of the Hagerman National Wildlife Refuge or that portion of Lake Texoma from the U.S. 377 bridge (Willis Bridge) upstream to the I.H. 35 bridge.

(M) Shad gizzard and threadfin. Trinity River below Lake Livingston (Polk and San Jacinto counties).

(i) Daily bag limit: 500 (in any combination).

(ii) No minimum length limit.

(iii) Possession limit: 1000 (in any combination).

(N) Sunfish: all species. Lake Kyle (Hays County).

(i) Daily bag limit: 0.

(ii) Minimum length limit: No limit.

(iii) Catch and release and only.

(O) Trout: rainbow and brown trout (including hybrids and subspecies).

(i) Guadalupe River (Comal County) from the second bridge crossing on the River Road upstream to the easternmost bridge crossing on F.M. 306.

(I) Daily bag limit: 1.

(II) Minimum length limit: 18 inches.

(ii) Guadalupe River (Comal County) from the easternmost bridge crossing on F.M. 306 upstream to 800 yards below the Canyon Lake dam.

(I) Daily bag limit: 5.

(II) Minimum length limit: 12 - 18 inch slot limit.

(III) It is unlawful to retain trout between 12 and 18 inches in length. No more than one trout 18 inches or greater in length may be retained each day.

(P) Walleye. Lake Texoma (Cooke and Grayson counties).

(i) Daily bag limit: 5.

(ii) Minimum length limit: 18.

(2) Saltwater species. There are no exceptions to the provisions established in subsection (c)(5) 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.

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Colette Barron-Bradsby
Acting General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

DIVISION 3. STATEWIDE COMMERCIAL FISHING PROCLAMATION

31 TAC §§57.992, 57.993, 57.997

The amendments are adopted under the authority of Parks and Wildlife Code, §47.004, which authorizes the commission to adopt rules governing the issuance and use of a resident fishing guide license, including rules creating separate resident fishing guide licenses for use in saltwater and freshwater.

§57.992. Bag, Possession, and Length Limits.

(a) The possession limit applies to all aquatic animal life in the possession of or stored by any person, but does not apply to aquatic animal life that has been lawfully obtained and for which a person possesses an invoice or sales ticket showing the name and address of the seller or person from whom the aquatic animal life was obtained, the amount of aquatic animal life by number and species, date of the sale, and any other information required on a sales ticket or invoice.

(b) There are no bag, possession, or length limits on game fish, non-game fish, or shellfish, except as otherwise provided in this subchapter.

(1) Possession limits are twice the daily bag limit on game fish, non-game fish, and shellfish, except as provided in this subchapter.

(2) For flounder, the possession limit is the daily bag limit.

(3) The bag limit for a guided fishing party is equal to the total number of persons in the boat licensed to fish or otherwise exempt from holding a license minus each fishing guide and fishing guide deckhand multiplied by the bag limit for each species harvested.

(4) The statewide daily bag and length limits for commercial fishing shall be as follows.

(A) Amberjack, greater.

(i) Daily bag limit: 1.

(ii) Minimum length: 34 inches.

(iii) Maximum length limit: No limit.

(B) Catfish.

(i) channel and blue (including hybrids and subspecies).

(I) Daily bag limit: 25 (in any combination).

(II) Minimum length limit: 14 inches.

(III) No maximum length limit.

(ii) Gaffstopsail.

(I) No daily bag limit.

(II) Minimum length limit: 14 inches.

(III) No maximum length limit.

(C) Cobia.

(i) Daily bag limit: 2.

(ii) Minimum length limit: 40 inches.

(iii) No maximum length limit.

(D) Drum, black.

(i) Daily bag limit: None.

(ii) Minimum length limit: 14 inches.

(iii) Maximum length limit: 30 inches.

(E) Flounder: all species (including hybrids and subspecies).

(i) Daily bag limit: 30. Possession limit is equal to the daily bag limit.

(ii) Minimum length limit: 15 inches.

(iii) No maximum length limit.

(iv) During November, lawful means are restricted to pole-and-line only and the bag and possession limit for flounder is two. For the first 14 days in December, the bag and possession limit is two, and flounder may be taken by any legal means. On September 1, 2021, the provisions of this clause cease effect.

(v) Beginning September 1, 2021, the season for flounder is closed from November 1 through December 14 every year.

(F) Gar, alligator.

(i) Daily bag limit:

(I) On Falcon International Reservoir: 5.

(II) Remainder of the state: 1.

(ii) No minimum length limit.

(iii) No maximum length limit except that on the Trinity River and all tributary waters from the I-30 bridge in Dallas County downstream through Anderson, Ellis, Freestone, Henderson, Houston, Kaufman, Leon, Liberty, Madison, Navarro, Polk, San Jacinto, Trinity, and Walker counties to the I-10 bridge in Chambers County, including the East Fork of the Trinity River and all tributaries upstream to the Lake Ray Hubbard dam, the maximum length limit is 48 inches.

(iv) During May, no person shall fish for, take, or seek to take alligator gar in that portion of Lake Texoma encompassed within the boundaries of the Hagerman National Wildlife Refuge or that portion of Lake Texoma from the U.S. 377 bridge (Willis Bridge) upstream to the I.H. 35 bridge.

(v) any person who takes an alligator gar in the public waters of this state other than Falcon International Reservoir shall report the harvest via the department's website or mobile application within 24 hours of take.

(vi) Between one half-hour after sunset and one half-hour before sunrise, any lawful means other than lawful archery equipment and crossbow may be used to take an alligator gar in the portion of the Trinity River described in subsection (d)(1)(L)(ii) of this section. In the portion of the Trinity River described in §57.981(d)(1)(L)(ii) of this title (relating to Bag, Possession and Length Limits), no person may take an alligator gar by means of lawful archery equipment or crossbow between one half-hour after sunset and one half-hour before sunrise, or possess an alligator gar taken by means of lawful archery equipment or crossbow between one half-hour after sunset and one half-hour before sunrise.

(G) Grouper.

(i) Black.

(I) Daily bag limit: 4.

(II) Minimum length limit: 24 inches.

(III) No maximum length limit.

(ii) Gag.

(I) Daily bag limit: 2.

(II) Minimum length limit: 24 inches.

(III) No maximum length limit.

(iii) Goliath. The take of Goliath grouper is prohibited.

(iv) Nassau. The take of Nassau grouper is prohibited.

(H) Mackerel.

(i) King.

(I) Daily bag limit: 3.

(II) Minimum length limit: 27 inches.

(III) No maximum length limit.

(ii) Spanish.

(I) Daily bag limit: 15.

(II) Minimum length limit: 14 inches.

(III) No maximum length limit.

(I) Mullet: all species (including hybrids, and subspecies).

(i) No daily bag limit.

(ii) No minimum length limit.

(iii) From October through January, no mullet more than 12 inches in length may be taken from public waters or possessed on board a vessel.

(J) Shark: all species (including hybrids and subspecies).

(i) all species other than the species listed in clauses (ii) - (iv) of this subparagraph:

(I) Daily bag limit: 1.

(II) Minimum length limit: 64 inches.

(III) No maximum length limit.

(ii) Atlantic sharpnose, blacktip, and bonnethead:

(I) Daily bag limit: 1.

(II) Minimum length limit: 24 inches.

(III) No maximum length limit.

(iii) great, scalloped, and smooth hammerhead:

(I) Daily bag limit: 1.

(II) Minimum length limit: 99 inches.

(III) No maximum length limit.

(iv) The take of the following species of sharks from the waters of this state is prohibited and they may not be possessed on board a vessel at any time:

(I) Atlantic angel;

(II) Basking;

(III) Bigeye sand tiger;

(IV) Bigeye sixgill;

(V) Bigeye thresher;

(VI) Bignose;

(VII) Caribbean reef;

(VIII) Caribbean sharpnose;

(IX) Dusky;

(X) Galapagos;

(XI) Longfin mako;

(XII) Narrowtooth;

(XIII) Night;

(XIV) Sandbar;

(XV) Sand tiger;

(XVI) Sevengill;

(XVII) Silky;

(XVIII) Sixgill;

(XIX) Smalltail;

(XX) Whale; and

(XXI) White.

(v) Except for the species listed in clause (ii) - (iv) of this subparagraph, sharks may be taken using pole and line, but must be taken by non-offset, non-stainless-steel circle hook when using natural bait.

(K) Sheepshead.

(i) Daily bag limit: No limit.

(ii) Minimum length limit: 15 inches.

(iii) No maximum length limit.

(L) Snapper.

(i) Lane.

(I) Daily bag limit: None.

(II) Minimum length limit: 8 inches.

(III) No maximum length limit.

(ii) Red.

(I) Daily bag limit: 4.

(II) Minimum length limit: 15 inches.

(III) No maximum length limit.

(IV) Red snapper may be taken using pole and line, but it is unlawful to use any kind of hook other than a circle hook baited with natural bait.

(iii) Vermilion.

(I) Daily bag limit: None.

(II) Minimum length limit: 10 inches.

(III) No maximum length limit.

(M) Triggerfish, gray.

(i) Daily bag limit: 20.

(ii) Minimum length limit: 16 inches.

(iii) No maximum length limit.

(N) Tripletail.

(i) Daily bag limit: 3.

(ii) Minimum length limit: 17 inches.

(iii) No maximum length limit.

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 40. SOCIAL SERVICES AND ASSISTANCE

PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 364. REQUIREMENTS FOR LICENSURE

40 TAC §§364.1 - 364.4

The Texas Board of Occupational Therapy Examiners adopts amendments to 40 Texas Administrative Code §364.1, Requirements for Licensure; §364.2, Initial License by Examination; §364.3, Temporary License; and §364.4, Licensure by Endorsement. The amendments to the sections are adopted to streamline and increase the efficiency of the Board's licensing processes, including through the use of digital technology, and to reduce potential burdens for applicants.

The amendments are adopted without changes to the proposed text as published in the June 19, 2020, issue of the *Texas Register* (45 TexReg 4163). The rules will not be republished.

The amendments to §364.1, §364.2, and §364.4 concern the application submission criteria required for the issuance of a license. An amendment to §364.1 will allow an applicant to submit the photograph required for initial licensure in electronic form. Amendments to §364.2 and §364.4 include adding provisions that will allow the Board to verify an applicant's history of licensure in occupational therapy, rather than routinely requiring that an applicant submit a verification of license from each state or territory of the U.S. in which the applicant is currently licensed or previously held a license. The amendments include that if the Board cannot verify the applicant's history of licensure, the applicant must submit a verification of license. The amendments concerning license verification will, therefore, result in applicants only being required to submit verifications for licenses that the Board cannot verify. Adopted amendments concerning similar requirements for the restoration of a license will also be submitted to the *Texas Register* for publication.

Additional amendments to §364.1, Requirements for Licensure, remove redundant language that already appears in another section of the Occupational Therapy Rules and include a further cleanup for consistency.

The amendments, in addition, include amendments to §364.3, Temporary License. Applicants for a temporary license must submit a Confirmation of Examination Registration and Eligibility to Examine form from the National Board for Certification in Occupational Therapy (NBCOT), which must be sent directly to the Board by NBCOT and which reflects the eligibility window in which the applicant will take the examination. Related provisions in the section include that this is a 90-day window. This examination eligibility window is set by NBCOT, which is the national testing entity recognized by the Board. The amendments remove the reference to 90 days with regard to that window and replace such with "eligibility." This change will ensure that the section will not specify a number of days that are determined by another entity, NBCOT, prior to sending the form to the Board.

The amendments to the section also include the removal of language regarding licensure in another country from §364.3(b). Board rule §364.3 requires that to be issued a temporary license, the applicant must meet all the provisions in §364.1, concerning requirements for licensure, and §364.2, concerning initial license by examination, and licensure in another country is not addressed in the sections with regard to an applicant's eligibility for licensure. To bring greater uniformity to the Occupational Therapy Rules and remove potential barriers to licensure for an applicant who would otherwise be eligible for a temporary license, the amendments include the removal of language from the provision that would prevent an applicant from obtaining a temporary license in Texas if the applicant has received a license in another country.

The current §364.3(b) also allows for temporary licensure as an occupational therapist to be available to an applicant for an occupational therapist license who has had a history of licensure or employment as an occupational therapy assistant; amendments to the section will, similarly, make temporary licensure as an occupational therapy assistant available to an applicant for an occupational therapy assistant license who has had a history of licensure or employment as an occupational therapist. The changes, likewise, are adopted to bring greater uniformity to the Occupational Therapy Rules and remove a potential barrier to temporary licensure for an applicant who otherwise would be eligible for such.

The amendments include additional cleanups to the sections.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Occupations Code §454.102, which authorizes the Board to adopt rules to carry out its duties under chapter 454. Specifically, the amendments to §364.1 and §364.2 are adopted under Texas Occupations Code §454.201, which requires a license under chapter 454 in order to practice occupational therapy, and adopted under Texas Occupation Code §454.202, which requires that the applicant for a license submit a written application to the Board in the form prescribed by the Board. The amendments to §364.3 are adopted under Texas Occupations Code §454.211, which authorizes the Board to provide for the issuance of a temporary license. The amendments to §364.4 are adopted under Texas Occupations Code §454.216, which authorizes the Board to issue a license by endorsement, requires that the applicant provide to the Board information regarding the status of any professional license that the applicant holds or has held in another jurisdiction, and requires the applicant to submit a current photograph that meets requirements for a United States passport.

No other statutes, articles, or codes are affected by these amendments.

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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Ralph A. Harper
Executive Director
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CHAPTER 367. CONTINUING EDUCATION

40 TAC §367.1

The Texas Board of Occupational Therapy Examiners adopts amendments to 40 Texas Administrative Code §367.1, Continuing Education. The amendments are adopted to add requirements concerning training on the prevention of human trafficking pursuant to House Bill 2059 of the 86th Regular Legislative Session in 2019. The amendments are adopted without changes to the proposed text as published in the June 19, 2020, issue of the *Texas Register* (45 TexReg 4166). The rule will not be republished.

House Bill 2059 requires that a health care practitioner successfully complete a training course on human trafficking prevention approved by the executive commissioner of the Health and Human Services Commission as a condition for license renewal. The Bill defines "health care practitioner" as an individual who provides direct patient care. The amendments to §367.1 and adopted amendments to other chapters of the Board rules will require the completion of human trafficking prevention training as condition for license renewal for all occupational therapy licensees. The amendments also pre-approve up to two contact hours for a human trafficking prevention training course and will allow a specific training course to be repeated for credit during a subsequent renewal period.

No comments were received regarding adoption of the amendments.

The amendments to §367.1 are adopted under Texas Occupations Code §454.102, which authorizes the Board to adopt rules to carry out its duties under chapter 454, and adopted under Texas Occupations Code §454.254, which authorizes the Board to require license holders to attend continuing education courses specified by the Board.

The amendments implement Texas Occupations Code §116.002 and §116.003, which require a health care practitioner to complete human trafficking prevention training as a condition of license renewal. No other statutes, articles, or codes are affected by these amendments.

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

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CHAPTER 370. LICENSE RENEWAL

40 TAC §370.2, §370.3

The Texas Board of Occupational Therapy Examiners adopts amendments to 40 Texas Administrative Code §370.2, Late Renewal, and §370.3, Restoration of a Texas License. The amendments are adopted to support the Board in streamlining and increasing the efficiency of its licensing processes, including through the use of digital technology, and reduce potential burdens for applicants. The amendments also cleanup and modify requirements for the renewal of an expired license and add human trafficking prevention training requirements pursuant to House Bill 2059 of the 86th Regular Legislative Session in 2019. The amendments are adopted without changes to the proposed text as published in the June 19, 2020, issue of the *Texas Register* (45 TexReg 4168). The rules will not be republished.

Amendments to §370.2 include as a cleanup the replacement of the current §370.2(a) with the simplified "A renewal application is late if all the required renewal materials do not bear a postmark or electronic time-stamp showing a date prior to the expiration of the license." An additional amendment to the section concerns removing the requirement that to renew a license expired for more than 90 days, but less than one year, the individual must submit copies of the continuing education documentation. This change will reduce requirements for a late renewal and streamline the late renewal process.

Amendments to §370.3 concern the renewal of a license expired one year or more, which, in the Occupational Therapy Rules, is referred to as the restoration of a license. Amendments to the section will allow an applicant to submit the photograph required for the restoration of a license in electronic form and allow the Board to verify an applicant's history of licensure in occupational therapy, rather than routinely requiring that an applicant submit a verification of license from each state or territory of the U.S. in which the applicant is currently licensed or previously held a license. The amendments include that if the Board cannot verify the applicant's history of licensure, the applicant must submit a verification of license. The amendments concerning license verification will, therefore, result in applicants only being required to submit verifications for licenses that the Board cannot verify. Adopted amendments in other sections concerning similar requirements for initial licensure will also be submitted to the *Texas Register* for publication.

A further amendment to §370.3 concerns reducing the number of continuing education hours required for the restoration of a license expired at least one year, but less than two years. Previously, the Occupational Therapy Rules required that to renew a license expired less than one year, the individual must complete thirty hours of continuing education. Recent amendments to other rule sections changed that amount to twenty-four hours. The changes to §370.3 are a cleanup to coincide with such changes by reducing the required continuing education hours for restoration from forty-five to thirty-six hours. The amendments include further cleanups.

An additional modification to the section includes that certain restoration requirements for an individual whose license is expired two years or more must be completed no more than two years prior to the submission of the application. The amendment is adopted to specify a time frame during which the requirements must be met in the corresponding subsection.

Further amendments to §370.3 concern adding provisions requiring that individuals complete training on the prevention of human trafficking as a requirement for license restoration. House Bill 2059 of the 86th Regular Legislative Session in 2019 requires that a health care practitioner successfully complete a training course on human trafficking approved by the executive commissioner of the Health and Human Services Commission as a condition for license renewal, and in the bill, "health care practitioner" refers to an individual who provides direct patient care. The amendments to §370.3 and further adopted amendments

to the Occupational Therapy Rules submitted for publication in the *Texas Register* will add the completion of this training as a requirement for license renewal for all occupational therapy licensees.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Occupations Code §454.102, which authorizes the Board to adopt rules to carry out its duties under chapter 454. Specifically, the amendments to §370.2 and §370.3 are adopted under Texas Occupations Code §454.252, which requires that a person whose license has been expired less than one year may renew the license by paying the renewal fee and late fee set by the Executive Council of Physical Therapy and Occupational Therapy Examiners and which authorizes the Board to reinstate a license expired one year or more. The amendments to §370.3 are adopted under Texas Occupations Code §454.253, which authorizes the Board to renew the expired license of an individual licensed in another state and the amendments to §370.3 are adopted under Texas Occupations Code §454.254, which authorizes the Board to require license holders to attend continuing education courses specified by the Board.

The amendments to §370.3 implement Texas Occupations Code §116.002 and §116.003, which require a health care practitioner to complete human trafficking prevention training as a condition of license renewal. No other statutes, articles, or codes are affected by these amendments.

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CHAPTER 371. INACTIVE AND RETIRED STATUS

40 TAC §371.1, §371.2

The Texas Board of Occupational Therapy Examiners adopts amendments to 40 Texas Administrative Code §371.1, Inactive Status, and §371.2, Retired Status. The amendments to the sections are adopted to cleanup and clarify the sections and to reduce the requirements to initiate retired status. In addition, amendments to §371.2 are adopted to add requirements concerning training on the prevention of human trafficking pursuant to House Bill 2059 of the 86th Regular Legislative Session in 2019. Cleanups and clarifications to the sections include amendments to provisions concerning fees to add greater uniformity and clarity to the manner in which such are referenced. The amendments are adopted without changes to the proposed text as published in the June 19, 2020, issue of the *Texas Register* (45 TexReg 4172). The rules will not be republished.

Amendments to §371.2 include changes concerning reducing the number of hours of continuing education required to initiate retired status. Rather than requiring that the individual complete the same number of continuing education hours required to renew an active or inactive status license, the amendments will instead require that to initiate retired status, the individual must complete six hours of continuing education, which is the number of hours required to renew a license already on retired status. This change will reduce potential barriers for licensees concerning the initiation of retired status. Concomitant with these changes, requirements to return a license to active status have been revised so that a licensee who has been on retired status less than one year must complete the remainder of continuing education hours required for the renewal of a license on active status.

Further amendments to §371.2 concern the addition of requirements concerning training on human trafficking. House Bill 2059 of the 86th Regular Legislative Session requires that a health care practitioner successfully complete a training course on human trafficking approved by the executive commissioner of the Health and Human Services Commission as a condition for license renewal, and in the bill, "health care practitioner" refers to an individual who provides direct patient care. The amendments to §371.2 and adopted amendments to other chapters of the Occupational Therapy Rules submitted for publication in the *Texas Register* will add the completion of this training as a requirement for license renewal for all occupational therapy licensees.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Occupations Code §454.102, which authorizes the Board to adopt rules to carry out its duties under chapter 454. Specifically, the amendments to §371.1 are adopted under Texas Occupations Code §454.212, which allows for the Board to provide for a license holder to place the holder's license on inactive status. Amendments to §371.2 are adopted under Texas Occupations Code §454.254, which authorizes the Board to require license holders to attend continuing education courses specified by the Board.

The amendments to §371.2 implement Texas Occupations Code §116.002 and §116.003, which require a health care practitioner to complete human trafficking prevention training as a condition of license renewal. The amendments to §371.2 implement Texas Occupations Code §112.051, which requires each licensing entity to adopt rules providing for reduced fees and continuing education requirements for a retired health care practitioner whose only practice is voluntary charity care. No other statutes, articles, or codes are affected by these amendments.

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