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

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

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER S. WHOLESALE MARKETS

16 TAC §25.503

The Public Utility Commission of Texas (commission) proposes amendments to §25.503, relating to oversight of wholesale market participants. The proposed amendments will update the process used by the commission to select the entity to monitor wholesale market reliability-related requirements for Electric Reliability Council of Texas (ERCOT). Specifically, the proposed amendments will broaden the pool of candidates eligible to serve as the reliability monitor for the ERCOT wholesale market. The proposed amendments will also make other minor changes.

Growth Impact Statement

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

(1) the proposed rule will not create a government program and will not eliminate a government program;

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

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

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

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

(6) the proposed rule will not expand, limit, or repeal an existing regulation;

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

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

Fiscal Impact on Small and Micro-Businesses and Rural Communities

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

Takings Impact Analysis

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

Fiscal Impact on State and Local Government

David Smeltzer, Agency Counsel, Rules Division, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the sections.

Public Benefits

Mr. Smeltzer has also determined that for each year of the first five years the proposed section is in effect, the anticipated public benefits expected as a result of the adoption of the proposed rule will be a broadening of the pool of candidates eligible to serve as reliability monitor. This increased competition will result in a more efficient process used by the commission to monitor market participants' compliance with wholesale market reliability requirements. There will be no probable economic cost to persons required to comply with the rule under Texas Government Code §2001.024(a)(5).

Local Employment Impact Statement

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

Costs to Regulated Persons

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

Public Hearing

The commission staff will conduct a public hearing on this rulemaking on September 4, 2020, if requested in accordance with Texas Government Code §2001.029. In light of the pending public emergency related to the coronavirus disease (COVID-19), this public hearing will be conducted remotely. The request for a public hearing must be received by August 27, 2020. If no request for public hearing is received and the commission staff cancels the hearing, it will file in this project a notification of the cancellation of the hearing prior to the scheduled date for the

hearing. If a request for public hearing is received, commission staff will file in this project instructions on how a member of the public can participate in the hearing remotely.

Public Comments

Comments on the proposed amendment may be filed through the interchange on the commission's website as long as the commission's order filed in Docket No. 50664, *Issues Related to the State of Disaster for Coronavirus Disease 2019,* is in effect. Should the commission's order entered into in Docket No. 50664 no longer be in effect, then parties may file written comments by submitting sixteen copies to the commission's filing clerk at 1701 North Congress Avenue, Austin, Texas or mailed to P.O. Box 13326, Austin, TX 78711-3326, by August 27, 2020. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to modify the proposed rule on adoption. All comments should refer to project number 50602.

Statutory Authority

This amendment is proposed under §14.002 of the Public Utility Regulatory Act, Tex. Util. Code (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, §39.151, which grants the commission authority to adopt and enforce rules concerning reliability of the regional electrical network. Section 39.151 further provides that the commission may delegate to an independent organization responsibilities for establishing or enforcing such rules, which are subject to commission oversight and review.

Cross reference to statutes: Public Utility Regulatory Act §§ 14.002 and 39.151.

§25.503. Oversight of Wholesale Market Participants.

(a) Purpose. The purpose of this section is to establish the standards that the commission will apply in monitoring the activities of entities participating in the wholesale electricity markets, including markets administered by the Electric Reliability Council of Texas (ERCOT), and enforcing the Public Utility Regulatory Act (PURA) and ERCOT procedures relating to wholesale markets. The standards contained in this rule are necessary to:

(1) - (8) (No change.)

(9) prescribe ERCOT's role in enforcing ERCOT procedures relating to the reliability of the regional electric network and accounting for the production and delivery among generators and all other market participants[~~,~~] and monitoring and obtaining compliance with operating standards within the ERCOT regional network.

(b) (No change.)

(c) Definitions. The following words and terms when used in this section [~~shall~~] have the following meaning, unless the context indicates otherwise:

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

(3) ERCOT procedures--Documents that contain the scheduling, operating, planning, reliability, and settlement procedures, standards, and criteria that are public and in effect in the ERCOT power region, including the ERCOT Protocols, [~~and~~] ERCOT Operating Guides, and Other Binding Documents as amended from time to time but excluding ERCOT's internal administrative procedures. The Protocols generally govern when there are inconsistencies between the Protocols and the Operating Guides, except when ERCOT staff, consistent with subsection (i) of this section, determines that a provision contained in the Operating Guides is technically superior for the efficient and reliable operation of the electric network.

(4) - (8) (No change.)

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

(f) Duties of market entities.

(1) Each market participant must [~~shall~~] be knowledgeable about ERCOT procedures.

(2) A market participant must [~~shall~~] comply with ERCOT procedures and any official interpretation of the Protocols issued by ERCOT or the commission.

(A) (No change.)

(B) A market participant appealing an official interpretation of the Protocols or seeking an amendment to the Protocols must [~~shall~~] comply with the Protocols unless and until the interpretation is officially changed or the amendment is officially adopted.

(C) (No change.)

(3) Whenever the Protocols require that a market participant make its "best effort" or a "good faith effort" to meet a requirement, or similar language, the market participant must [~~shall~~] act in accordance with the requirement unless:

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

(4) (No change.)

(5) The commission staff may request information from a market participant concerning a notification of failure to comply with a Protocol requirement or official interpretation of a requirement, or honor a formal commitment to ERCOT. The market participant must [~~shall~~] provide a response that is detailed and reasonably complete, explaining the circumstances surrounding the alleged failure, and must [~~shall~~] provide documents and other materials relating to such alleged failure to comply. The response must [~~shall~~] be submitted to the commission staff within five business days of a written request for information, unless commission staff agrees to an extension.

(6) A market participant's bids of energy and ancillary services must [~~shall~~] be from resources that are available and capable of performing, and must [~~shall~~] be feasible within the limits of the operating characteristics indicated in the resource plan, as defined in the Protocols, and consistent with the applicable ramp rate, as specified in the Protocols.

(7) All statements, data and information provided by a market participant to market publications and publishers of surveys and market indices for the computation of an industry price index must [~~shall~~] be true, accurate, reasonably complete, and must [~~shall~~] be consistent with the market participant's activities, subject to generally accepted standards of confidentiality and industry standards. Market participants must [~~shall~~] exercise due diligence to prevent the release of materially inaccurate or misleading information.

(8) A market entity has an obligation to provide accurate and factual information and must [~~shall~~] not submit false or misleading information, or omit material information, in any communication with ERCOT or with the commission. Market entities must [~~shall~~] exercise due diligence to ensure adherence to this provision throughout the entity.

(9) A market participant must [~~shall~~] comply with all reporting requirements governing the availability and maintenance of a generating unit or transmission facility, including outage scheduling reporting requirements. A market participant must [~~shall~~] immediately notify ERCOT when capacity changes or resource limitations occur that materially affect the availability of a unit or facility, the anticipated operation of its resources, or the ability to comply with ERCOT dispatch instructions.

(10) A market participant must [~~shall~~] comply with requests for information or data by ERCOT as specified by the Protocols or ERCOT instructions within the time specified by ERCOT instructions, or such other time agreed to by ERCOT and the market participant.

(11) When a Protocol provision or its applicability is unclear, or when a situation arises that is not contemplated under the Protocols, a market entity seeking clarification of the Protocols must [~~shall~~] use the Nodal Protocol Revision Request (NPRR) [~~(PRR)~~] process provided in the Protocols. If the NPRR [~~PRR~~] process is impractical or inappropriate under the circumstances, the market entity may use the process for requesting formal Protocol clarifications or interpretations described in subsection (i) of this section. This provision is not intended to discourage day to day informal communication between market participants and ERCOT staff.

(12) A market participant operating in the ERCOT markets or a member of the ERCOT staff who identifies a provision in the ERCOT procedures that produces an outcome inconsistent with the efficient and reliable operation of the ERCOT-administered markets must [~~shall~~] call the provision to the attention of ERCOT staff and the appropriate ERCOT subcommittee. All market participants must [~~shall~~] cooperate with the ERCOT subcommittees, ERCOT staff, and the commission staff to develop Protocols that are clear and consistent.

(13) A market participant must [~~shall~~] establish and document internal procedures that instruct its affected personnel on how to implement ERCOT procedures according to the standards delineated in this section. Each market participant must [~~shall~~] establish clear lines of accountability for its market practices.

(g) Prohibited activities. Any act or practice of a market participant that materially and adversely affects the reliability of the regional electric network or the proper accounting for the production and delivery of electricity among market participants is considered a "prohibited activity." The term "prohibited activity" in this subsection excludes acts or practices expressly allowed by the Protocols or by official interpretations of the Protocols and acts or practices conducted in compliance with express directions from ERCOT or commission rule or order or other legal authority. The term "prohibited activity" includes, but is not limited to, the following acts and practices that have been found to cause prices that are not reflective of competitive market forces or to adversely affect the reliability of the electric network:

(1) A market participant must [~~shall~~] not schedule, operate, or dispatch its generating units in a way that creates artificial congestion.

(2) A market participant must [~~shall~~] not execute pre-arranged offsetting trades of the same product among the same parties, or through third party arrangements, which involve no economic risk and no material net change in beneficial ownership.

(3) A market participant must [~~shall~~] not offer reliability products to the market that cannot or will not be provided if selected.

(4) A market participant must [~~shall~~] not conduct trades that result in a misrepresentation of the financial condition of the organization.

(5) A market participant must [~~shall~~] not engage in fraudulent behavior related to its participation in the wholesale market.

(6) A market participant must [~~shall~~] not collude with other market participants to manipulate the price or supply of power, allocate territories, customers or products, or otherwise unlawfully restrain competition. This provision should be interpreted in accordance with federal and state antitrust statutes and judicially-developed standards under such statutes regarding collusion.

(7) A market participant must [~~shall~~] not engage in market power abuse. Withholding of production, whether economic withholding or physical withholding, by a market participant who has market power, constitutes an abuse of market power.

(h) (No change.)

(i) Official interpretations and clarifications regarding the Protocols. A market entity seeking an interpretation or clarification of the Protocols must [~~shall~~] use the NPRR [~~PRR~~] process contained in the Protocols whenever possible. If an interpretation or clarification is needed to address an unforeseen situation and there is not sufficient time to submit the issue to the NPRR [~~PRR~~] process, a market entity may seek an official Protocol interpretation or clarification from ERCOT in accordance with this subsection.

(1) ERCOT must [~~shall~~] develop a process for formally addressing requests for clarification of the Protocols submitted by market participants or issuing official interpretations regarding the application of Protocol provisions and requirements. ERCOT must [~~shall~~] respond to the requestor within ten business days of ERCOT's receipt of the request for interpretation or clarification with either an official Protocol interpretation or a recommendation that the requestor take the request through the NPRR [~~PRR~~] process.

(2) ERCOT must [~~shall~~] designate one or more ERCOT officials who will be authorized to receive requests for clarification from, and issue responses to market participants, and to issue official interpretations on behalf of ERCOT regarding the application of Protocol provisions and requirements.

(3) The designated ERCOT official must [~~shall~~] provide a copy of the clarification request to commission staff upon receipt. The ERCOT official must [~~shall~~] consult with ERCOT operational or legal staff as appropriate and with commission staff before issuing an official Protocol clarification or interpretation.

(4) The designated ERCOT official may decide, in consultation with the commission staff, that the language for which a clarification is requested is ambiguous or for other reason beyond ERCOT's ability to clarify, in which case the ERCOT official shall inform the requestor, who may take the request through the NPRR [~~PRR~~] process provided for in the Protocols.

(5) All official Protocol clarifications or interpretations that ERCOT issues in response to a market participant's formal request or upon ERCOT's own initiative must [~~shall~~] be sent out in a market bulletin with the appropriate effective date specified to inform all market participants, and a copy of the clarification or interpretation must [~~shall~~] be maintained in a manner that is accessible to market participants. Such response must [~~shall~~] not contain information that would identify the requesting market participant.

(6) (No change.)

(j) Role of ERCOT in enforcing operating standards. ERCOT must [~~shall~~] monitor material occurrences of non-compliance with ERCOT procedures, which means [~~shall mean~~] occurrences that have the potential to impede ERCOT operations[~~,~~] or represent a risk to system reliability. Non-compliance indicators monitored by ERCOT must

[~~shall~~] include, but are [~~shall~~] not [~~be~~] limited to, material occurrences of failing resource performance measures as established by ERCOT, failure to follow dispatch instructions within the required time, failure to meet ancillary services obligations, failure to submit mandatory bids or offers, and other instances of non-compliance of a similar magnitude.

(1) ERCOT must [~~shall~~] keep a record of all such material occurrences of non-compliance with ERCOT procedures and must [~~shall~~] develop a system for tracking recurrence of such material occurrences of non-compliance.

(2) ERCOT must [~~shall~~] promptly provide information to and respond to questions from market participants to allow the market participant to understand and respond to alleged material occurrences of non-compliance with ERCOT procedures. However, this requirement does not relieve the market participant's operator from responding to the ERCOT operator's instruction in a timely manner and shall not be interpreted as allowing the market participant's operator to argue with the ERCOT operator as to the need for compliance.

(3) ERCOT must [~~shall~~] keep a record of the resolution of such material occurrences of non-compliance and of remedial actions taken by the market participant in each instance.

(4) ERCOT must [~~shall~~] promptly provide information to and respond to questions posed by the Reliability Monitor and the commission.[~~:~~]

(5) ERCOT must [~~shall~~] provide to the Reliability Monitor and the commission the support and cooperation the commission determines is necessary for the Reliability Monitor and the commission to perform their functions.

(k) Responsibilities of the Reliability Monitor. The Reliability Monitor must [~~shall~~] gather and analyze information and data as needed for its reliability monitoring activities. The Reliability Monitor works under the direction and supervision of the commission. The Reliability Monitor must [~~shall~~] protect confidential information and data in accordance with the confidentiality standards established in PURA, the ERCOT protocols, commission rules, and other applicable laws. The requirements related to the level of protection to be afforded information protected by these laws and rules are incorporated into this section. The duties and responsibilities of the Reliability Monitor may include, but are not limited to:

(1) Monitoring, investigating, auditing, and reporting to the commission regarding compliance with reliability-related ERCOT procedures, including Protocols, [~~and~~] Operating Guides, and Other Binding Documents, the reliability-related provisions of the commission's rules, and reliability-related provisions of PURA by market entities [~~Market Entities~~];

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

(l) Selection of the Reliability Monitor. The commission may select [~~and ERCOT shall contract with~~] an entity [~~selected by the commission~~] to act as the commission's Reliability Monitor. [~~The Reliability Monitor shall be independent from ERCOT and is not subject to the supervision of ERCOT with respect to its monitoring and investigative activities.~~] In selecting the Reliability Monitor, the commission must consider whether the Reliability Monitor satisfies the following criteria:

(1) Independence, objectivity, and the absence of potential conflicts of interest [~~Independent, objective, and without conflicts of interest~~];

(2) (No change.)

(3) Familiarity with the ERCOT Region and [~~demonstrated~~] understanding of [~~in~~] reliability-related ERCOT protocols, procedures, and other operating standards;

(4) Ability [~~Demonstrated ability~~] to manage confidential information appropriately; and

(5) Cost effectiveness.

(m) Funding of the Reliability Monitor. ERCOT must [~~shall~~] fund the operations of Reliability Monitor from the fee authorized by PURA §39.151.

(n) Standards for record keeping.

(1) A market participant who schedules through a qualified scheduling entity (QSE) that submits schedules to ERCOT on behalf of more than one market participants must [~~shall~~] maintain records to show scheduling, offer, and bidding information for all schedules, offers, and bids that its QSE has submitted to ERCOT on its behalf, by interval.

(2) All market participants and ERCOT must [~~shall~~] maintain records relative to market participants' activities in the ERCOT-administered markets to show:

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

(3) After the effective date of this section, all records referred to in this subsection except verbally dispatch instructions (VDIs) must [~~shall~~] be kept for a minimum of three years from the date of the event. ERCOT must [~~shall~~] keep VDI records for a minimum of two years. All records must [~~shall~~] be made available to the commission for inspection upon request.

(4) A market participant must [~~shall~~], upon request from the commission, provide the information referred to in this subsection to the commission, and may, if applicable, provide it under a confidentiality agreement or protective order pursuant to §22.71(d) of this title (relating to Filing of Pleadings, Documents, and Other Material).

(o) Investigation. The commission staff may initiate an informal fact-finding review based on a complaint or upon its own initiative to obtain information regarding facts, conditions, practices, or matters that it may find necessary or proper to ascertain in order to evaluate whether any market entity has violated any provision of this section.

(1) (No change.)

(2) If the market entity asserts that the information requested by commission staff is confidential, the information must [~~shall~~] be provided to commission staff as confidential information related to settlement negotiations or other asserted bases for confidentiality pursuant to §22.71(d)(4) of this title.

(3) (No change.)

(4) If, as a result of its investigation, commission staff determines that there is evidence of a violation of this section by a market entity, the commission staff may request that the commission initiate appropriate enforcement action against the market entity. A notice of violation requesting administrative penalties or disgorgement of excess revenues must [~~shall~~] comply with the requirements of §22.246 of this title (relating to Administrative Penalties). Adjudication of a notice of violation requesting both an administrative penalty and disgorgement of excess revenues may be conducted within a single contested case proceeding. Additionally, for alleged violations that have been reviewed in the informal procedure established by this subsection, the commission staff must [~~shall~~] include as part of its prima facie case:

(A) - (C) (No change.)

(D) a statement that the staff has concluded that the market entity failed to demonstrate, in the course of the investigation, the applicability of an exclusion or affirmative defense under subsection (h) of this section.

(5) - (7) (No change.)

(p) Remedies. If the commission finds that a market entity is in violation of this section, the commission may seek or impose any legal remedy it determines appropriate for the violation involved, provided that the remedy of disgorgement of excess revenues will [~~shall~~] be imposed for violations and continuing violations of PURA §39.157 and may be imposed for other violations of this section.

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

Filed with the Office of the Secretary of State on July 31, 2020.

TRD-202003126
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: September 13, 2020
For further information, please call: (512) 936-7244

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PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 33. LICENSING
SUBCHAPTER E. APPLICATION REVIEW AND PROTESTS

16 TAC §§33.50 - 33.63

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes new §§33.50 - 33.63, relating to application review and protests.

Background and Summary of Basis for the Proposed Rules

In 2019, the Texas Legislature adopted amendments to Alcoholic Beverage Code §11.43 and added new §11.431 and §11.432 (Acts, 86th Tex. Leg. R.S. (2019)). New §11.43(j) requires the agency to adopt rules to implement the application review and protest process including establishing reasonable timelines, identifying the roles and responsibilities of all parties involved in the process, and identifying potential avenues for mediation or informal dispute resolution. Additionally, the legislation made the following changes to the agency's process for protesting an application for a license or permit: (1) Protests will only come from external parties, not from TABC staff; (2) the agency is required to either deny or approve an application (rather than the current process of pursuing an agency-initiated protest; (3) an agency denial of an application triggers due process, outlined in §11.43 of the Alcoholic Beverage Code, with appeals to be heard by the State Office of Administrative Hearings (SOAH) first with a final opportunity for appeal at district court; and (4) all protests that move forward through the contested case process will be heard by SOAH; county judges will no longer have a role in the protest process.

The legislature required TABC to adopt rules implementing these statutory provisions by December 31, 2020.

Section by Section Discussion

The commission proposes to create a new Subchapter E, Application Review and Protests, within Chapter 33 to contain the proposed new rules.

§33.50 Purpose and Authority

The commission proposes new §33.50 to explain that the purpose of the rules in the new subchapter is to implement provisions of the Alcoholic Beverage Code related to application review and protests and that the adoption of the rules is authorized by those statutes.

§33.51 Definitions

The commission proposes new §33.51 to provide definitions of terms used in the subchapter.

§33.52 Computation of Time

Several rules in the proposed new subchapter contain deadlines for filing documents with the commission and for commission action. The commission proposes new §33.52 to clarify how days will be counted to determine deadlines. The proposed rule tracks the analogous rule in the Texas Rules of Civil Procedure.

§33.53 Applicable Rules

If adopted, the proposed new rules will become effective on December 31, 2020. The commission proposes new §33.53 to clarify that the new rules will apply only to an application received on or after the effective date of the rules. When an application is "received" is defined in proposed new §35.51.

§33.54 Delegation of Application Approvals

The commission proposes new §33.54 to specify that the commission delegates to the executive director or their designee the authority to approve an application that is uncontested. An application is uncontested if no valid protests have been filed or if all valid protests have been withdrawn. Pursuant to this delegation, no commission vote or other action will be required for uncontested applications.

§33.55 Conditional Approval

New commission rules proposed pursuant to statutory changes would require that a period of 15 days pass after an application is received before the permit is issued in order to allow time for interested parties to review the application and file protests. The commission proposes new §33.55 to provide that the executive director may, for a compelling reason, grant conditional approval of an application allowing the applicant to operate prior to the expiration of the 15-day period for protests filings. If a valid protest is timely filed, the proposed rule provides that the conditional approval will be revoked. Finally, the proposed rule provides that the applicant operates at its own risk of loss during that 15-day period, and that the commission will refund application fees to an applicant who fails to obtain the license or permit after conditional approval.

§33.56 Alternative Dispute Resolution

The commission proposes new §33.56 to provide for alternative dispute resolution in contested disciplinary matters. The proposed rule provides that parties may agree to use a mediator employed by SOAH or a private mediator. It specifies procedures for selection of a private mediator; requires that a private mediator agree to be subject to time limits imposed by the executive director, administrative law judge, or applicable law or rule; and provides for equal division of the costs of a private media-

tor among parties that are not governmental entities. Finally, the proposed rule requires all mediators to follow the ethical guidelines of the Alternative Dispute Resolution Section of the State Bar of Texas.

§33.57 Application Withdrawn

The commission proposes new §33.57 to provide that an applicant for a license or permit may withdraw its application at any time before the license or permit is issued or renewed or the application is denied. The rule provides that if an applicant fails to respond to agency requests for additional application information or application fees within ten days, the agency may consider the application withdrawn by the applicant. The proposed rule provides that an application that has been withdrawn may be refiled at any time and that withdrawal of an application does not trigger additional due process rights.

§33.58 Management Review

The commission proposes new §33.58 to provide by rule for management review related to a license or permit, premises address, or person. This is a method by which the agency notates in its records an issue of concern related to a license or permit, premises address, or person and when a license or permit application is filed related to that license or permit, premises address, or person, the agency addresses the issue of concern prior to issuing the license, permit, or renewal of the license or permit. The rule provides that the issue leading to the management review notation must be resolved and the notation removed before issuance of the license, permit, or renewal. It further provides that an applicant for a renewal of a license or permit may continue to operate under its existing license or permit until the management review issue is resolved. Finally, the rule prohibits a license or permit holder from surrendering its license or permit while management review is pending so that surrender is not used to remove the license or permit, premises address, or person from the agency's jurisdiction during an active investigation.

§33.59 Denial of Application after Referral of Protest for Hearing

The commission proposes new §33.59 to lay out procedures when a valid protest is referred to SOAH for a hearing while commission review and investigation related to the application is ongoing, and the executive director subsequently identifies a reason or reasons to recommend denial of the application. The proposed rule provides that in this circumstance, the application will be remanded from SOAH and set for commission consideration of the executive director's recommendation to deny the application, as required by Alcoholic Beverage Code §11.43(g).

The proposed rule requires the executive director to provide notice to protestants that the executive director is recommending denial of the application; that the case is being remanded to the agency for further processing; that unless the applicant requests a hearing on the recommendation for denial, the application will be set for commission consideration of the executive director's request for denial; and that if the applicant does request a hearing on the recommendation for denial or the commission declines to deny the application, the application will be referred back to SOAH for a hearing in which the protestants remain parties.

The proposed rule limits potential commission action on the executive director's recommendation for denial of an application when a valid protest has resulted in referral to SOAH to either denying the application or referring the matter back to SOAH. The commission may not grant a license or permit under these specific circumstances so as to preserve the protestant(s) right to a hearing.

§33.60 Request for Hearing on Recommendation of Application Denial

The commission proposes new §33.60 to lay out procedures for an applicant to request a hearing on the executive director's recommendation for denial of its application. The proposed rule requires the executive director to provide notice to an applicant of a recommendation for denial of its application. The applicant may then file with the commission a written request for an administrative hearing within 30 days of the date on the notice. The proposed rule provides a U.S. Mail address and electronic mail address for filing the hearing request. The proposed rule reiterates the statutory requirement that the executive director refer the matter to SOAH for a hearing if the applicant files a timely hearing request. If the applicant does not file a timely hearing request, the proposed rule states that the recommendation for denial of the application will be set for commission consideration at the next available regular commission meeting.

§33.61 Commission Action on Contested Applications

The commission proposes new §33.61 to lay out procedures following the issuance of a SOAH decision on a contested application. The proposed rule requires the executive director to place all proposals for decision on the commission's consent agenda, as a default action. If the commission approves by consent a proposal for decision recommending approval of an application and issuance of the license or permit, the proposed rule directs the executive director to issue the license or permit. The proposed rule requires the executive director to remove a proposal for decision from the consent agenda and set it for individual consideration at the request of the presiding officer of the commission or at least two other commission members. This option is available to the commissioners in the event that the presiding officer of the commission or at least two other commission members wish to modify or reject the proposal for decision or discuss the matter in an open meeting.

§33.62 Filing a Protest of a License or Permit Application

The commission proposes new §33.62 to lay out requirements for filing a valid protest of an application for a license or permit or a renewal of a license or permit. The proposed rule specifies that a protest must be filed by a person with legal standing to protest the application under the Alcoholic Beverage Code, in writing, before the deadline for filing (timely), by mailing or emailing to specific designated addresses, and that it must include all information required.

The proposed rule requires that in order to be timely, a protest of an application for a new license or permit must be filed between 60 days prior to the date the commission declares the application complete, as shown in the public database, and 15 days after. For a renewal application, a protest is timely filed if it is filed within the 60 days prior to expiration of the license or permit.

The proposed rule requires that a protest filed by a member of the public include the following information: the first and last name and physical address of the property of the person filing the protest; the approximate distance of the person's home from the premises that are the subject of the application; contact information for the protestant, and all reasonable grounds the protestant wishes to raise in protest of the application. A protest by a government official must include the name of the official, office, and

contact information; a description of the geographic limits of the official's jurisdiction; and the basis or bases for the protest.

The proposed rule provides that a protest that fails to meet any of the above rule requirements may be rejected.

§33.63 Withdrawal of Protest

The commission proposes new §33.63 to provide that a person may withdraw his or her protest at any time, and that the withdrawal must not include any conditions upon which withdrawal is based. The proposed rule provides a U.S. mail and electronic mail addresses to which withdrawals must be sent, and requests that protestants also send a copy of their withdrawal to the applicant. Finally, the proposed rule authorizes the executive director to issue a license or permit for which all valid protests have been withdrawn.

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed rules will be in effect, there are no foreseeable economic implications anticipated for the agency or for other units of state or local government as a result of the administration or enforcement of the proposed rules. This rulemaking may decrease agency expenditures due to the executive director's recommendation for denial of problematic applications rather than the current extended and work-intensive process of pursuing internal protests by the agency.

The proposed rules will not have any material adverse fiscal or regulatory impacts on rural communities. The rules will apply statewide and have the same effect in rural communities as in urban communities. Likewise, the proposed rules will not adversely affect a local economy in a material way, and no adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the new rules. A small business regulatory flexibility analysis is not required because the proposed rules will not adversely affect a small or micro-business in a material way.

Ms. Horton has determined that for each year of the first five years that the proposed rules will be in effect, the public will benefit because the rules will establish reasonable timelines, identify the roles and responsibilities of all parties involved in the process, and provide for alternative dispute resolution in disputes with the agency. The public will also benefit from clear provisions for due process in legal proceedings involving the agency.

This paragraph constitutes the commission's government growth impact statement for the proposed rules. The analysis addresses the first five years the proposed amendments would be in effect. The proposed rules neither create nor eliminate a government program. The proposed rules do not require the creation of new employee positions or the elimination of existing employee positions. The agency anticipates that the provisions of this rule will be absorbed using existing agency resources. Implementation of the proposed rules requires neither an increase nor a decrease in future legislative appropriations to the commission. The proposed rules do not increase or decrease fees paid to the agency. The proposed rules create new regulations because they constitute new state agency statements of general applicability that implement, interpret, or prescribe law or policy and describe procedures and practice requirements of a state agency. The proposed rules do not expand, limit, or repeal an existing regulation because they are all new rules. The proposed rules neither increase nor decrease the number of individuals subject to any existing rule's applicability. The proposed rules are not anticipated to have any impact on the state's economy.

Comments on the proposed rules may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, by facsimile transmission to (512) 206-3498, or by email to rules@tabc.texas.gov. Written comments will be accepted for 30 days following publication in the *Texas Register.*

The staff of the commission will hold a public hearing to receive oral comments on the proposed new rules on August 25, 2020, at 10:00 a.m. in the commission meeting room at commission headquarters, located at 5806 Mesa Drive in Austin, Texas. The commission has designated this hearing as the appropriate forum to make oral comments under Government Code §2001.029. DUE TO PUBLIC HEALTH CONCERNS RELATED TO COVID-19, THIS HEARING WILL BE HELD BY VIDEOCONFERENCE ONLY. Interested persons should visit the TABC's public website prior to the meeting date to receive further instructions or call Shana Horton, Rules Attorney, at (512) 206-3451.

The proposed new rules are authorized by Alcoholic Beverage Code §11.43, which requires the Texas Alcoholic Beverage Commission to adopt rules implementing the application review and protest process including reasonable timelines, identifying the roles and responsibilities of all parties involved in the process, and identifying potential avenues for mediation or informal dispute resolution.

No other rules or statutes are affected by the proposed rules.

§33.50. Purpose and Authority.

This subchapter implements and is authorized by Alcoholic Beverage Code §§11.43 through 11.432.

§33.51. Definitions.

The following terms have the following meanings when used in this subchapter:

(1) "Commission" - the Texas Alcoholic Beverage Commission as an agency of the State of Texas, and not to the Commissioners, either individually or as a body.

(2) "Complaint" - a written expression of concern regarding a person or business that holds or has applied for a TABC license or permit, or a person or business that the complainant believes is violating the Alcoholic Beverage Code or laws related to alcoholic beverages. Complaints are handled according to §31.11 (relating to Resolution and Information on Complaints). A complaint is not a request for a contested case hearing, does not itself initiate a legal proceeding, and does not afford any legal rights or party status to the complainant. Any person can file a complaint at any time.

(3) "Protest" - a written request for an administrative contested case hearing in which the protestant will participate as a party and present evidence to a trier of fact to prove that a license or permit should not be issued or renewed as proposed. A protest will only be granted if filed by a person with legal standing and supported by reasonable grounds.

(4) "Reasonable grounds" - allegations or concerns regarding a matter within the commission's jurisdiction that are supported by credible evidence or information, and includes the circumstances described in Alcoholic Beverage Code §§11.46 through 11.481, 61.42 through 61.46, and 61.50.

(5) "Received" - An application for a new license or permit or a renewal is considered received on the date the commission updates

its public database to show the application as pending. An application is designated as pending only when the application is complete, meaning that the commission has received all required information and fees.

(6) "SOAH" - the State Office of Administrative Hearings.

(7) "Uncontested" - An application is uncontested if no valid protests have been timely filed or if all valid protests have been withdrawn.

§33.52. Computation of Time.

(a) When used in this subchapter, the word "days" refers to calendar days, unless otherwise specified.

(b) When computing periods of time prescribed or allowed in this chapter:

(1) the day of the act, event, or default from which the designated time period begins to run is not counted; and

(2) the last day of the time period is counted, unless it is a day on which the TABC's headquarters in Austin is closed, in which case the time period will end on the next day the TABC's headquarters is open.

§33.53. Applicable Rules.

Unless otherwise indicated, an application for a license or permit is subject to the rules in effect as of the date the application is received.

§33.54. Delegation of Application Approvals.

The commission delegates to the executive director or their designee the authority to approve an uncontested license or permit application pursuant to Alcoholic Beverage Code §11.43(d).

§33.55. Conditional Approval.

(a) Unless the exception in subsection (b) of this section applies, the commission shall not issue a new license or permit until 15 days have elapsed since the commission updated its public database to show the application as pending.

(b) If the executive director determines that there is a compelling reason to issue a license or permit before 15 days have elapsed since the commission updated its public database to show the application as pending, the executive director may grant conditional approval of the license or permit. If no valid protests are filed at the end of the 15-day period, the license or permit becomes approved by operation of law. If one or more valid protests are filed before the time period for filing protests has expired, the conditional approval is revoked and the executive director shall provide notice of the revocation to the applicant.

(c) An applicant who chooses to proceed with operations while subject to a conditional approval does so at its own risk of loss in the event that the conditional approval is revoked and it fails to obtain the necessary license or permit. An applicant who fails to obtain the necessary permit following conditional approval will have its applications fees refunded in full.

§33.56. Alternative Dispute Resolution.

(a) At any time prior to or during a contested case hearing, any party in a disciplinary matter may request referral to alternative dispute resolution (ADR).

(b) Parties may agree to mediate a dispute through a mediator employed by the State Office of Administrative Hearings or through a private mediator. Mediation through SOAH is subject to SOAH's rules for mediation (Title 1 Texas Administrative Code); the Administrative Procedure Act (Tex. Gov't Code Ch. 2001); laws relating to SOAH administrative procedure in Tex. Gov't Code Ch. 2003; and Tex. Gov't Code Ch. 2009, relating to ADR for use by governmental bodies.

(c) If the parties elect to use a private mediator:

(1) the participants must unanimously agree to use a private mediator;

(2) the participants must unanimously agree to the selection of the person to serve as the mediator; and

(3) the mediator must agree to be subject to all time limits imposed by the executive director, the administrative law judge, statute, or regulation.

(d) If a private mediator is used, the costs for the services of the mediator shall be apportioned equally among the participants, unless otherwise agreed upon in writing by the participants, and shall be paid directly to the mediator. In no event, however, shall any such costs be apportioned to a governmental subdivision or entity.

(e) All mediators in commission mediation proceedings shall subscribe to the ethical guidelines for mediators adopted by the ADR Section of the State Bar of Texas.

§33.57. Application Withdrawn.

(a) An applicant may withdraw its application at any time prior to issuance or renewal of the license or permit that is the subject of the application or the denial of the application.

(b) If an applicant fails to respond to requests from the TABC for additional information or for remittance of a license or permit fee within ten (10) business days of the request, the TABC may consider the application withdrawn by the applicant.

(c) An application that is withdrawn is not considered denied and may be refiled at any time. Withdrawal of an application, whether affirmatively by the applicant or due to the applicant's failure to respond to requests for information or fees, does not trigger the right to appeal or any other due process rights.

§33.58. Management Review.

(a) At any time, the executive director or person to whom he or she delegates authority may place a management review on a license or permit, address, or person so that upon receipt of an application, an issue of concern within the agency's jurisdiction is addressed.

(b) An application remains pending until the management review is resolved and removed.

(c) A license or permit holder may continue to operate under its current license or permit while a management review related to its renewal application is pending.

(d) A license or permit holder may not surrender its existing license or permit while it is subject to a management review but may withdraw its renewal application.

§33.59. Denial of Application after Referral of Protest for Hearing.

(a) In the event that a valid protest results in referral for hearing under Alcoholic Beverage Code §11.43(f) and that the executive director subsequently identifies at least one legal ground to deny the application, the executive director shall request that the application be remanded to the commission from the State Office of Administrative Hearings and upon remand, shall recommend to the commission that the application be denied, as required by Alcoholic Beverage Code §11.43(g).

(b) Concurrent with the request for remand from SOAH, the executive director shall provide notice to each protestant that:

(1) the executive director will be recommending denial of the application to the commission;

(2) the case will be remanded to TABC for processing under §11.43(g), *et seq.;*

(3) if the applicant does not request a hearing on the denial recommendation, the application will be sent to the commission for a vote on denial; and

(4) if the applicant requests a hearing on the denial recommendation or the commission declines to deny the permit, the application shall be referred to SOAH for a hearing in which the protestant(s) are parties.

(c) If the executive director recommends to the commission that an application be denied and a valid protest has been referred for hearing and not withdrawn, the commission may only deny the application or refer it back to SOAH for a hearing on the previously referred protest(s).

§33.60. Request for Hearing on Recommendation of Application Denial.

(a) If the executive director recommends denial of an application for a license or permit, notice of the recommendation shall be transmitted to the applicant by the commission.

(b) An applicant may request an administrative hearing on the executive director's denial recommendation by filing a written request for hearing with the commission within thirty (30) days of the date on the notice of the denial recommendation.

(c) A request for hearing under this section must be filed by mail to Texas Alcoholic Beverage Commission, ATTN: Clerk, P.O. Box 13127, Austin, Texas, 78711 or by electronic mail to clerk@tabc.texas.gov.

(d) If the applicant files a timely request for hearing, the executive director will refer the application to SOAH for a hearing pursuant to Alcoholic Beverage Code §11.43(h).

(e) If the applicant does not file a timely request for hearing, the recommendation for denial of the application will be set for consideration by the commission at the next available regular commission meeting.

§33.61. Commission Action on Contested Applications.

(a) This section applies to the application review process in Alcoholic Beverage Code §11.43(h) and §61.31(b).

(b) Except as provided by subsection (c) of this section, the executive director shall place all proposals for decision issued by an administrative law judge under Alcoholic Beverage Code §11.43(h) on a consent agenda for commission vote. If the commission votes to approve a contested application by consent, the executive director shall issue the license or permit.

(c) The executive director shall set a proposal for decision issued by an administrative law judge under Alcoholic Beverage Code §11.43(h) for individual consideration on the commission's regular agenda at the request of:

(1) the presiding officer of the commission; or

(2) at least two commission members.

§33.62. Filing a Protest of a License or Permit Application.

(a) A protest of a license or permit application must be:

(1) filed by a person or persons with legal standing to contest the issuance or renewal of the license or permit under Alcoholic Beverage Code §§11.431, 11.432, 61.313, or 61.314;

(2) timely filed according to subsection (b) of this section;

(3) in writing;

(4) submitted in at least one of the following manners:

(A) through the TABC's online protest tool, if available;

(B) by mailing either a completed TABC protest form, available on the TABC website, or a letter that meets the requirements of subsection (c) of this section to the Texas Alcoholic Beverage Commission, ATTN: Licensing Protest Coordinator, P.O. Box 13127, Austin, Texas, 78711; or

(C) by e-mailing either a completed TABC protest form, available on the TABC website, or a letter that meets the requirements of subsection (c) of this section to the protest email address for the TABC Region in which the applicant premises is located, as follows:

(i) Protests_Reg1@tabc.texas.gov

(ii) Protests_Reg2@tabc.texas.gov

(iii) Protests_Reg3@tabc.texas.gov

(iv) Protests_Reg4@tabc.texas.gov; or

(v) Protests_Reg5@tabc.texas.gov; and

(5) complete, including all information required by this rule.

(b) A protest must be filed within the following time limits:

(1) For an application for an original license or permit or a change of location under Alcoholic Beverage Code §11.08, a protest is timely if it is filed between 60 days prior to and 15 days after the date the commission deems the application complete. When an application is deemed complete, the commission will update its public database to show the application as pending.

(2) For an application for renewal of a license or permit, a protest is timely filed if it is filed within 60 days prior to the expiration date of the license or permit, up to the expiration date.

(c) A protest filed by a member of the public must include the following elements:

(1) the first and last name and physical address of the property of the person or persons filing the protest;

(2) the approximate distance of the person's home from the premises or proposed premises;

(3) contact information for the person filing; and

(4) all reasonable grounds that are the basis for the protest.

(d) A protest filed by a government official must include the following elements:

(1) the name of the official, the office held, and contact information;

(2) a description of the geographic limits of the official's jurisdiction; and

(3) the basis or bases for the protest.

(e) A protest that fails to meet any of the requirements of this rule may be rejected. A person whose protest is rejected may refile the protest with corrections to meet the rule requirements within the time period prescribed by subsection (b) of this section and/or refile the concerns as a complaint at any time, according to §31.10 (relating to Filing a Complaint). The determination of the validity of a protest

is not a contested case subject to the Texas Administrative Procedure Act (Tex. Gov't Code Ch. 2001).

§33.63. Withdrawal of Protest.

(a) A protestant may withdraw their protest at any time prior to the commission's final decision. Withdrawal of a protest may not be subject to any conditions.

(b) A withdrawal of a protest must be submitted in writing to the Texas Alcoholic Beverage Commission, ATTN: Licensing Protest Coordinator, P.O. Box 13127, Austin, Texas, 78711, or to the protest email address for the TABC Region in which the applicant premises is located, as follows:

(1) Protests_Reg1@tabc.texas.gov

(2) Protests_Reg2@tabc.texas.gov

(3) Protests_Reg3@tabc.texas.gov

(4) Protests_Reg4@tabc.texas.gov; or

(5) Protests_Reg5@tabc.texas.gov.

(c) The protestant should also transmit a copy of the withdrawal to the applicant.

(d) If all protests have been withdrawn, the executive director may grant the application and issue the license or permit, subject to other applicable statutes or rules.

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

Filed with the Office of the Secretary of State on July 30, 2020.

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Shana Horton
Rules Attorney
Texas Alcoholic Beverage Commission
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For further information, please call: (512) 206-3451

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CHAPTER 45. MARKETING PRACTICES

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes the repeal of Chapter 45, Marketing Practices, §§45.1 - 45.19, 45.41 - 45.51, 45.71 - 45.91, 45.94, and 45.96 (subchapters A - C), effective Dec. 31, 2020. New §§45.1 - 45.50 (subchapters A - E), relating to registration of alcoholic beverage products, are proposed concurrently with the proposal of these repeals.

Background and Summary of Basis for the Proposed Rules

In 2019, the Texas Legislature adopted House Bill 1545, which amended Alcoholic Beverage Code (Code) §§101.67 and 101.671 and added §101.6701. These statutes bring Texas alcoholic beverage label requirements more in line with the requirements for Certificates of Label Approval (COLAs) issued by the United States Alcohol and Tobacco Tax and Trade Bureau (TTB). The TABC must adopt rules implementing these statutory provisions by their effective date, December 31, 2020.

Commission staff determined that the most efficient way to execute the required rule overhaul is to repeal the existing applicable subchapters and replace them with a new set of rules organized in a more intuitive and streamlined manner. The commission proposes that these repeals become effective on Dec. 31, 2020, concurrent with the effective date of the proposed replacement rules.

Fiscal Note: Costs to State and Local Government

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed repeals will be in effect, they are not expected to have a significant fiscal impact upon the agency. There are no foreseeable economic implications anticipated for other units of state or local government due to the proposed repeals.

Rural Communities Impact Assessment

The proposed repeals will not have any material adverse fiscal or regulatory impacts on rural communities. The repeals will apply statewide and have the same effect in rural communities as in urban communities. Likewise, the proposed repeals will not adversely affect a local economy in a material way.

Small Business and Micro-Business Assessment/Flexibility Analysis

No material fiscal implications are anticipated for small or micro-businesses due to the proposed repeals. Some small and micro-businesses will see their net fees paid decrease because the requirement to pay separately for different containers has been eliminated. For example, a producer who used to pay $25 each for label approvals for a 12-ounce can, 12-ounce bottle, and 16-ounce can of a malt beverage, for a total of $75, would pay only one $25 fee for all three container types and sizes under the proposed rule.

Takings Impact Assessment

The proposed repeals do not affect a taking of private real property, as described by the Attorney General Paxton's Private Real Property Rights Preservation Act Guidelines. The rulemaking would impose no burdens on private real property because it neither relates to, nor has any impact on, the use or enjoyment of private real property and there is no reduction in value of property as a result of this rulemaking.

Public Benefits and Costs

Ms. Horton has determined that for each year of the first five years that the proposed repeals would be in effect, the public would benefit due to faster processing times for product registration, allowing a greater variety of products to reach the consumer market in an expeditious manner. Additionally, regulated entities will benefit from a much more streamlined agency procedure for registration of new products by spending less time and energy in application processes and getting new products to market quickly. There is no increase in costs to the public.

Government Growth Impact Statement

This paragraph constitutes the commission's government growth impact statement for the proposed repeals. The analysis addresses the first five years the proposed amendments would be in effect. The proposed repeals neither create nor eliminate a government program. The proposed repeals do not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the proposed repeals requires neither an increase nor a decrease in future legislative appropriations to the commission. The proposed rules are not expected to result in a significant change in fees paid to the agency. The proposed repeals do not create new regulations; rather, they decrease the number of regulations related to product registration by more than half. The proposed repeals do not

expand the applicability of any rules or increase the number of individuals subject to existing rules' applicability beyond current rule requirements.

The proposed repeals are not anticipated to have any material impact on the state's overall economy. The repeals are part of an effort that will streamline the production registration process, adding to the state's advantages of a business-friendly environment and large customer base for alcoholic beverage manufacturers.

Comments on the proposed repeals may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, by facsimile transmission to (512) 206-3498, or by email to *rules@tabc.texas.gov.* Written comments will be accepted for 30 days following publication in the *Texas Register.*

The staff of the commission will hold a public hearing to receive oral comments on the proposed repeals on August 25, 2020, at 10:00 a.m. in the commission meeting room at commission headquarters, located at 5806 Mesa Drive in Austin, Texas. The commission has designated this hearing as the appropriate forum to make oral comments under Government Code §2001.029. DUE TO PUBLIC HEALTH CONCERNS RELATED TO COVID-19, THIS HEARING WILL BE HELD BY VIDEOCONFERENCE ONLY. Interested persons should visit the TABC's public website prior to the meeting date to receive further instructions or call Shana Horton, Rules Attorney, at (512) 206-3451.

SUBCHAPTER A. REGISTRATION AND ADVERTISING OF DISTILLED SPIRITS

16 TAC §§45.1 - 45.19

Statutory Authority

The proposed repeals are authorized by Alcoholic Beverage Code §5.31, which authorizes the TABC to prescribe and publish rules necessary to carry out the provisions of the code, and §§101.67(f) and 101.671(d), which require the agency to adopt rules establishing procedures for accepting federal COLAs for product registration, registering alcoholic beverage products that are not eligible to receive a COLA issued by the TTB, registering alcoholic beverage products during periods when the TTB has ceased processing applications for COLAs (e.g., a federal government shutdown), and accepting proof that a permittee is the primary American source of supply of a product or brand.

The proposed repeals implement §§101.67(f) and 101.671(d), Alcoholic Beverage Code.

The proposed repeals do not impact any other statutes or rules.

§45.1. Authority and Scope.
§45.2. Definition.
§45.3. Alteration of Labels.
§45.4. Bottle Cartons, Booklets, and Leaflets.
§45.5. Labels: Prohibited Practices.
§45.6. Container and Fill Standards Required.
§45.7. Standard Liquor Bottles.
§45.8. Standards of Fill.
§45.9. Design and Fill Exceptions.
§45.10. Withdrawal from Customs Custody.
§45.11. Advertising: Standards Required.
§45.12. Advertisement Defined.
§45.13. Advertising: Mandatory Statements.
§45.14. Advertising: Lettering.
§45.15. Advertising: Prohibited Statements.
§45.16. Damaged Stock.
§45.17. Intrastate Bottling.
§45.18. Exhibiting Authority.
§45.19. Certificate of Registration.

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

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Shana Horton
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Texas Alcoholic Beverage Commission
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SUBCHAPTER B. REGISTRATION AND ADVERTISING OF WINE

16 TAC §§45.41 - 45.51

Statutory Authority

The proposed repeals are authorized by Alcoholic Beverage Code §§101.67(f) and 101.671(d), which require the commission by rule to establish procedures for: (1) accepting federal certificates of label approval for registration of alcoholic beverage products; (2) registering alcoholic beverage products that are not eligible to receive a certificate of label approval issued by the United States Alcohol and Tobacco Tax and Trade Bureau; (3) registering alcoholic beverage products during periods when the United States Alcohol and Tobacco Tax and Trade Bureau has ceased processing applications for a certificate of label approval; and (4) accepting proof that a permittee is the primary American source of supply of a product or brand.

The repeals implement Alcoholic Beverage Code §§101.67(f) and 101.671(d).

The proposed repeals do not impact any other statutes or rules.

§45.41. Authority and Scope.
§45.42. Definitions.
§45.43. Coined Names.
§45.44. Containers.
§45.45. Certificate of Registration.
§45.46. Label: Prohibited Statements.
§45.47. Customs Custody.
§45.48. Advertising.
§45.49. Advertising: Prohibited Statements.
§45.50. Examination.
§45.51. Illicit Beverage.

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

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Shana Horton
Rules Attorney
Texas Alcoholic Beverage Commission
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SUBCHAPTER C. STANDARDS OF IDENTITY FOR MALT BEVERAGES

16 TAC §§45.71 - 45.91, 45.94, 45.96

Statutory Authority

The proposed repeals are authorized by Alcoholic Beverage Code §§101.67(f) and 101.671(d), which require the commission by rule to establish procedures for: (1) accepting federal certificates of label approval for registration of alcoholic beverage products; (2) registering alcoholic beverage products that are not eligible to receive a certificate of label approval issued by the United States Alcohol and Tobacco Tax and Trade Bureau; (3) registering alcoholic beverage products during periods when the United States Alcohol and Tobacco Tax and Trade Bureau has ceased processing applications for a certificate of label approval; and (4) accepting proof that a permittee is the primary American source of supply of a product or brand.

The repeals implement Alcoholic Beverage Code §§101.67(f) and 101.671(d).

The proposed repeals do not impact any other statutes or rules.

§45.71. Definitions.
§45.72. Authority and Scope.
§45.73. Label: General.
§45.74. Misbranding.
§45.75. Mandatory Label Information for Malt Beverages.
§45.76. Brand Names.
§45.77. Class and Type.
§45.78. Name and Address.
§45.79. Alcoholic Content.
§45.80. Net Contents.
§45.81. General Requirements for Malt Beverages.
§45.82. Prohibited Practices.
§45.83. Label Approval and Release.
§45.84. Relabeling.
§45.85. Approval of Labels.
§45.86. Exhibiting Certificates to Representatives of the Commission.
§45.87. Advertisement Defined.
§45.88. Advertisement: Mandatory Statement.
§45.89. Advertisement: Legibility of Requirements.
§45.90. Advertisement: Prohibited Statements.
§45.91. Exports.
§45.94. Verification Regarding Use of Facilities.
§45.96. Brewpubs.

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

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Shana Horton
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CHAPTER 45. MARKETING PRACTICES

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes new Chapter 45, Marketing Practices, §§45.1 - 45.12, 45.20 - 45.27, 45.30, 45.40 - 45.43, and 45.50 (subchapters A - E), relating to registration of alcoholic beverage products. The repeal of existing §§45.1 - 45.19, 45.41 - 45.51, 45.71 - 45.91, 45.94, and 45.96 (subchapters A - C) is proposed concurrently with this rulemaking package.

Background and Summary of Basis for the Proposed Rules

In 2019, the Texas Legislature adopted House Bill 1545, which amended Alcoholic Beverage Code (Code) §§101.67 and 101.671 and added §101.6701. These statutes bring Texas alcoholic beverage label requirements more in line with the requirements for Certificates of Label Approval (COLAs) issued by the United States Alcohol and Tobacco Tax and Trade Bureau (TTB).

Code §§101.67(f) and 101.671(d) require the agency to adopt rules establishing procedures for:

1. accepting federal COLAs for product registration;

2. registering alcoholic beverage products that are not eligible to receive a COLA issued by the TTB;

3. registering alcoholic beverage products during periods when the TTB has ceased processing applications for COLAs (e.g., a federal government shutdown); and

4. accepting proof, such as a letter of authorization, that a permittee is the primary American source of supply of the product or brand.

The TABC must adopt rules implementing these statutory provisions by their effective date, December 31, 2020.

Commission staff determined that the most efficient way to execute the required rule overhaul is to repeal the existing applicable subchapters and replace them with a new set of rules organized in a more intuitive and streamlined manner. Some rules did not require changes and have been migrated into the most logical place in the new rule subchapters. Current Chapter 45, subchapters D and E were not affected by the legislation, have not been altered, and will be re-designated as subchapters F and G. Where current rules referenced the commission "administrator," that term has been updated to "executive director," consistent with the Code and other commission rules.

The commission proposes that these rules become effective on December 31, 2020, concurrent with the repeal of the current rules.

Section by Section Discussion

Subchapter A: General Provisions

§45.1. Statutory Authority and Applicability.

The commission proposes new §45.1 to provide the statutory basis for new subchapters A - E (§§45.1 - 45.12, 45.20 - 45.27, 45.30, 45.40 - 45.43, 45.50) and specify those types of alcohol products to which the chapter does not apply.

§45.2. Definitions.

The commission proposes new §45.2 to provide definitions of terms used in Chapter 45.

§45.3. General Prohibition.

The commission proposes new §45.3 to provide a clear and concise rule prohibiting persons from importing into the state, manufacturing and offering for sale, or distributing or selling an alcoholic beverage product in Texas in a manner that does not comply with all applicable requirements in Chapter 45.

§45.4. Product Registration Required.

The commission proposes new §45.4 to provide a clear and concise general product registration requirement for alcoholic beverage products in Texas with the exception of products sold: (1) in compliance with Code §101.6701 by holders of brewer's permits and manufacturer's licenses authorized to sell directly to consumers under Code §§12.052 or 62.122; (2) by holders of brewpub licenses except for malt beverages sold under the authority of Code §§74.08 or a distributor under 74.09; and (3) pursuant to out-of-state winery direct shipper's permits under Chapter 54 of the Code. This requirement and the exceptions currently exist across other statutes and/or rules.

§45.5. Denial of Product Registration.

The commission proposes new §45.5 to provide a list of the reasons the commission can deny an application for product registration for any alcoholic beverage type (additional reasons for denial of a malt beverage product registration are listed in a later rule). These reasons are: (1) the product label does not meet applicable federal requirements; (2) registration of the product would create a cross-tier violation; (3) the label includes a statement, design, device, or representation that is obscene or indecent; (4) the commission determines the product would create a public safety concern; or (5) the commission determines the product violates any other section of the Code. The proposed rule further specifies that if a registration application is denied, the applicant may not import, manufacture, or sell the product using the denied label.

§45.6. Revocation of Registration.

The commission proposes new §45.6 to provide that the commission may revoke product registration if the registration was granted due to an error; if new information arises that would cause the agency to deny the application; or if the label was issued on contingency that the applicant fulfill certain conditions, and the conditions were not fulfilled.

§45.7. Time Limitation for Processing Product Registration Application.

The commission proposes new §45.7 to add to the commission's rules the new requirement of Code §101.67(e) that the commission either approve or deny a product registration application within 30 days of receipt. The proposed rule further clarifies that an application is only "received" when all required information and fees have been received by the commission.

§45.8. Protest.

The commission proposes new §45.8 to add to the commission's rules the provision of Code §101.67 that an applicant whose product registration application with a valid COLA is either not acted upon within the 30-day time limit or is denied has the right to a hearing before the State Office of Administrative Hearings. The rule would further provide procedures for requesting such a hearing, including a 10-day deadline to file the request from either the notification of application denial or the expiration of the 30-day period for the commission to act.

§45.9. Withdrawal of Application.

The commission proposes new §45.9 to provide that an applicant may withdraw its application at any time before the application is either granted or denied.

§45.10. Application Fee.

The commission proposes new §45.10 contain the application fee of $25 (the current fee) and require that the fee be paid at the time the application is filed. The various rule provisions that previously contained the $25 fee and requirement for payment at the time of application separately for different alcoholic beverage types will be contemporaneously repealed.

§45.11. When Reapplication is Required.

The commission proposes new §45.11 to outline the circumstances in which a product registration is no longer valid and an applicant must submit a new registration application to the commission. The proposed rule would require a new application for registration for a product with a COLA any time a change is made to the label that would require reapplication with the TTB for the COLA. Changes on the TTB's list of allowable changes that do not require reregistration are listed in the rule. Finally, the proposed rule requires currently-registered products eligible for a COLA to obtain a COLA and reapply for registration, but allows a two and one-half year grace period from the effective date of this proposed rule to reapply for those particular products. The grace period allows time for producers to sell current inventory, design a new label, obtain a COLA, and print new labels. For those producers for whom that time period is not adequate to use up already printed containers, the rule provides that the executive director may issue a temporary Certificate of Registration to allow the necessary additional time.

§45.12. Application Procedures During Interruption of Federal Agency Operations.

The commission proposes new §45.12 to lay out procedures for the agency to continue registering products that would normally require a COLA from the TTB at times when the TTB is not issuing COLAs, such as during a federal government shutdown. This rule is required by new §101.67(f)(3) of the Code. During such times, the proposed rule provides that the commission will apply TTB COLA and COLA exemption standards to applications received and will register (or exempt), on a provisional basis, products that meet those standards.

The proposed rule would require a product with a provisional registration to apply for and receive a COLA within 30 days of the TTB resuming processing COLA applications, then re-apply for registration with the commission within 30 days of receiving the federal COLA. A provisional registration would expire on the 31st day after the TTB resumes processing COLA applications, unless the applicant has filed an application with the TTB, in which case the provisional registration remains in effect until 30 days after the federal COLA is issued to allow time for the applicant to re-apply with the commission and register the product. If the

TTB denies an applicant's COLA or exemption application, the proposed rule would require the applicant to notify the commission of that denial within five days of receipt of the denial. The TTB's denial of an application for a COLA may result in the revocation of the provisional product registration.

Subchapter B: Enforcement

§45.20. Exhibiting Certificates to Representatives of the Commission.

The commission proposes to move the content of existing §45.86 (related to malt beverages) to new §45.20. New §45.20 would apply to all types of alcoholic beverages and therefore provides the analogous requirement for distilled spirits in current §45.18. Both §45.18 and §45.86 would be repealed concurrent with the effectiveness of this rule. The rule states that it is unlawful for a person to fail or refuse to exhibit a TTB COLA or other commission product registration upon request by an authorized commission representative. The current rules cited contain this requirement for distilled spirits and malt beverages, but the requirement appears to have been inadvertently omitted in the current subchapter regarding wine. In its new position within the enforcement rules subchapter, the rule would apply to all three categories of alcoholic beverages. This does not represent a practical difference for regulated entities, however, as analogous federal rules require the same (27 C.F.R. §4.51).

§45.21. Examination and Testing of Product.

The commission proposes to move the content of current §45.50(a) to new §45.21. Section 45.50 would be repealed concurrent with the effectiveness of this rule. The rule authorizes the agency to take samples of alcoholic beverages for examination whenever deemed necessary by the executive director and provides that examinations may include any chemical or physical determinations for the measurement of contents, the detection of alteration, and lack of conformity to standards of identity, quality, and purity, as set forth in the code and the rules of the commission. The current rule cited contains this requirement for wine, but the requirement appears to have been inadvertently omitted in the current subchapters regarding distilled spirits and malt beverages. In its new position within the enforcement rules subchapter, the rule would apply to all three categories of alcoholic beverages.

§45.22. Additional Provisions for the Examination of Wine.

The commission proposes to move current §45.50(b), (c), and (d) to new §45.22. These subsections are unchanged and continue to apply only to wine. Section 45.50 would be repealed concurrent with the effectiveness of this rule.

§45.23. Alteration of Labels.

The commission proposes to move the content of current §45.3 and §45.73(c)(1), prohibiting the alteration of labels, to new §45.23. Sections 45.3 and 45.73 would be repealed concurrent with the effectiveness of this rule. The current rules cited contain this requirement for distilled spirits and malt beverages, but the requirement appears to have been inadvertently omitted in the current subchapter regarding wine. In its new position within the enforcement rules subchapter, the rule would apply to all three categories of alcoholic beverages. This does not represent a practical difference for regulated entities, however, as analogous federal rules require the same for wine (27 C.F.R. §4.30(b)).

§45.24. Records Retention.

The commission proposes new §45.24 to require producers of alcoholic beverages to retain records of lab analyses of contents of each registered product, including alcohol content, until the product is no longer in the stream of commerce in Texas. The records would have to be maintained in a way that they can be provided to the agency upon request. This new rule is necessary for the agency to protect public health and safety and to ensure products are accurately represented to the public, ensuring the quality and purity of alcoholic beverages.

§45.25. Damaged Stock.

The commission proposes to move the content of current §45.16 to new §45.25. The content of the rule is unchanged. Section 45.16 would be repealed concurrent with the effectiveness of this rule.

§45.26. Intrastate Bottling.

The commission proposes to move the content of current §45.17 to new §45.26. The content of the rule is unchanged. Section 45.17 would be repealed concurrent with the effectiveness of this rule.

§45.27. Illicit Beverage.

The commission proposes to move the content of current §45.51 to new §45.27 clarifying that the applies not only to wine but to all types of alcoholic beverages under the statutory definition of "illicit beverage" in Code §1.04(4). The rule would categorize any alcoholic beverage or container that does not meet the Chapter 45 rule requirements as an illicit beverage subject to seizure without a warrant. The rule would further authorize the executive director to dispose of alcoholic beverages seized as a result of accidental shipment or other reasonable mistake and require that all alcoholic beverages that cannot meet the required standards of purity be destroyed.

Subchapter C: Specific Requirements for Distilled Spirits

§45.30. Certificate of Registration for a Distilled Spirit Product.

The commission proposes new §45.30 to provide product registration requirements specifically required for distilled spirits only, as these requirements differ slightly between the three basic classes of alcoholic beverages.

The proposed rule would prohibit shipping into the state or selling a distilled spirit product without first obtaining a Certificate of Registration issued by the commission, as provided by Code §101.671(a). It would also require that an applicant for a Certificate of Registration for a distilled spirit hold either a commission-issued distiller's and rectifier's permit or a nonresident seller's permit. The proposed rule would require that an application include the COLA issued by the TTB, a complete application form, and the application fee per Code §101.671(c).

The proposed rule would move existing §45.19(d) related to providing a legible copy of the COLA, actual label, or exact color copy of the label, without change, to §45.30(d). Section 45.19(d) would be repealed concurrent with the effective date of proposed rule §45.30(d).

Subchapter D: Specific Requirements for Malt Beverages

§45.40. Certificate of Registration for a Malt Beverage Product.

The commission proposes new §45.40 to provide product registration requirements specifically required for malt beverages only, as these requirements differ slightly between the three basic classes of alcoholic beverages. The rule would prohibit ship-

ping into or selling in Texas any malt beverage product without first obtaining a Certificate of Registration from the commission. It would require that an applicant for a Certificate of Registration for a malt beverage hold a brewer's permit, non-resident brewer's permit, manufacturer's license, non-resident manufacturer's license, or brewpub license issued by the commission, and allow holders of a non-resident manufacturer's agent's permit or non-resident brewer's agent's permit to file applications on behalf of any of the other listed license or permit holders.

The proposed rule provides application requirements for malt beverages for which a COLA has been issued and those not eligible for a COLA. For malt beverages with a COLA, the application must include a legible copy of the COLA, as required by Code §101.67(a), an actual label or exact color copy of the beverage label, and all other information required by the commission's application form. For a product not eligible for the COLA, the applicant must provide the actual label or an exact color copy, a copy of the TTB formulation, and all other information required by the commission's application form. Additionally, the proposed rule would require those malt beverages ineligible for a COLA to comply with all applicable federal laws and regulations, which are enumerated in the rule.

§45.41. Additional Reasons for Denial of Registration of a Malt Beverage Product.

The commission proposes new §45.41 to include reasons beyond those listed in §45.5 that the commission may deny an application for registration of a malt beverage product. Subsections 45.41(a)(1) and (2) would be migrated without substantive changes from current §45.73(e) and (f). Subsections 45.41(a)(3) and (b) would be migrated without substantive changes from current §45.96(b)(5) and (6). Current §45.73(e) and (f) and §45.96(b)(5) and (6) would be repealed concurrent with the effective date of these proposed rules.

§45.42. Misbranding.

The commission proposes to move current §45.74(3) to new §45.42 without changes. The requirements of current §45.74(1) and (2) are proposed to be incorporated into new §45.5 because they are generally applicable to all three categories of alcoholic beverages. Current §45.74 would be repealed concurrent with the effective date of these proposed rules.

§45.43. Verification Regarding Use of Facilities.

The commission proposes to move current §45.94 to new §45.43 without changes. Current §45.94 would be repealed concurrent with the effective date of these proposed rules.

Subchapter E: Specific Requirements for Wine

§45.50. Certificate of Registration for Wine.

The commission proposes new §45.50 to provide product registration requirements specifically required for wine only, as these requirements differ slightly between the three basic classes of alcoholic beverages.

The proposed rule would prohibit shipping into the state or selling a wine without first obtaining a Certificate of Registration issued by the commission, as provided by Code §101.671(a). It would also require that an applicant for a Certificate of Registration for a wine hold either a commission-issued winery permit or a non-resident seller's permit. The proposed rule would require that an application include the COLA issued by the TTB, a complete application form, and the application fee per Code §101.671(c).

The proposed rule provides application requirements for wines for which a COLA has been issued and those not eligible for a COLA. For wines with a COLA, the application must include a legible copy of the COLA, as required by Code §101.671, an actual label or exact color copy of the beverage label, and all other information required by the commission's application form. For a wine not eligible for a COLA, the applicant must provide the actual label or an exact color copy, a copy of the TTB formulation, and all other information required by the commission's application form. Additionally, the proposed rule would require those wines ineligible for a COLA to comply with all applicable federal laws and regulations, which are enumerated in the rule.

Fiscal Note: Costs to State and Local Government

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed rules will be in effect, the proposed rules are not expected to have a significant fiscal impact upon the agency. While the agency expects for the number of registration applications to decrease, the impact is difficult to project under the current unprecedented economic conditions. It may become necessary to reevaluate the registration fee when more data is available to maintain revenue neutrality. There are no foreseeable economic implications anticipated for other units of state or local government due to the administration or enforcement of the proposed rules.

Rural Communities Impact Assessment

The proposed rules will not have any material adverse fiscal or regulatory impacts on rural communities. The rules will apply statewide and have the same effect in rural communities as in urban communities. Likewise, the proposed rules will not adversely affect a local economy in a material way.

Small Business and Micro-Business Assessment/Flexibility Analysis

No material fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the new rules. Some small and micro-businesses will see their net fees paid decrease because the requirement to pay separately for different containers has been eliminated. For example, a producer who used to pay $25 each for label approvals for a 12-ounce can, 12-ounce bottle, and 16-ounce can of a malt beverage, for a total of $75, would pay only one $25 fee for all three container types and sizes under the proposed rule. Because the proposed rules will not impact small and micro-businesses in a material way, a Small Business and Micro-Business Assessment/Flexibility Analysis is not required.

Takings Impact Assessment

The proposed rules do not affect a taking of private real property, as described by the Attorney General Paxton's Private Real Property Rights Preservation Act Guidelines. The rulemaking would impose no burdens on private real property because it neither relates to, nor has any impact on, the use or enjoyment of private real property and there is no reduction in value of property as a result of this rulemaking.

Public Benefits and Costs

Ms. Horton has determined that for each year of the first five years that the proposed rules would be in effect, the public would benefit due to faster processing times for product registration, allowing a greater variety of products to reach the consumer market in an expeditious manner. Additionally, regulated entities will benefit from a much more streamlined agency procedure for reg-

istration of new products by spending less time and energy in application processes and getting new products to market quickly. There is no increase in costs to the public.

Government Growth Impact Statement

This paragraph constitutes the commission's government growth impact statement for the proposed rules. The analysis addresses the first five years the proposed amendments would be in effect. The proposed rules neither create nor eliminate a government program. The proposed rules do not require the creation of new employee positions or the elimination of existing employee positions. The agency anticipates that the provisions of this rule will be absorbed using existing agency resources. Implementation of the proposed rules requires neither an increase nor a decrease in future legislative appropriations to the commission. The proposed rules are not expected to result in a significant change in fees paid to the agency. Several of the proposed rules create new regulations because they constitute new state agency statements of general applicability that implement, interpret, or prescribe law or policy and describe procedures and practice requirements of a state agency. Other proposed rules re-adopt current rules in a new place or combine current rules in order to streamline the rule chapter. The proposed rules do not expand the applicability of any rules or increase the number of individuals subject to the existing rules' applicability beyond the current rule requirements or analogous federal requirements, as noted in the Section by Section analysis, above.

The new rules are proposed concurrently with the repeal of current rules §§45.1 - 45.19, 45.41 - 45.51, 45.71 - 45.91, 45.94, and 45.96. However, many of the rules proposed to be repealed are re-adopted or combined with other rules in order to streamline and optimize the new chapter. Rules that are proposed to be repealed and not re-adopted or otherwise incorporated into the proposed new rules are proposed for repeal as required to implement House Bill 1545 (86th Tex. Leg. R.S., 2019).

The proposed rules are not anticipated to have any material impact on the state's overall economy. Adopting standards that are equivalent to the federal government's and streamlining the application process add to the advantages of the state's business-friendly environment and large customer base as reasons for alcoholic beverage manufacturers to locate or expand within Texas.

Comments on the proposed rules may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, by facsimile transmission to (512) 206-3498, or by email to *rules@tabc.texas.gov.* Written comments will be accepted for 30 days following publication in the *Texas Register.*

The staff of the commission will hold a public hearing to receive oral comments on the proposed new rules on August 25, 2020, at 10:00 a.m. in the commission meeting room at commission headquarters, located at 5806 Mesa Drive in Austin, Texas. The commission has designated this hearing as the appropriate forum to make oral comments under Government Code §2001.029. DUE TO PUBLIC HEALTH CONCERNS RELATED TO COVID-19, THIS HEARING WILL BE HELD BY VIDEOCONFERENCE ONLY. Interested persons should visit the TABC's public website prior to the meeting date to receive further instructions or call Shana Horton, Rules Attorney, at (512) 206-3451.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §§45.1 - 45.12

The proposed new rules are authorized by Alcoholic Beverage Code §§101.67(f) and 101.671(d), which require the agency to adopt rules establishing procedures for accepting federal COLAs for product registration, registering alcoholic beverage products that are not eligible to receive a COLA issued by the TTB, registering alcoholic beverage products during periods when the TTB has ceased processing applications for COLAs (e.g., a federal government shutdown), and accepting proof that a permittee is the primary American source of supply of a product or brand.

The proposed rules do not impact any other statutes or rules.

§45.1. Statutory Authority and Applicability.

(a) This chapter implements Alcoholic Beverage Code §§101.67 and 101.671, which provide for the registration of alcoholic beverage products with the state.

(b) This chapter does not apply to:

(1) distilled spirits for export or for industrial use;

(2) wine produced pursuant to §109.21, Alcoholic Beverage Code;

(3) wine that is to be exported in bond;

(4) malt beverages in bond; or

(5) malt beverages manufactured for sale exclusively outside this state.

§45.2. Definitions.

When used in this chapter, the terms listed below shall have the following meanings:

(1) Alcoholic beverage--Alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted, including distilled spirits, malt beverages, and wine, as defined herein.

(2) Ale--Any malt beverage containing more than 4.0% of alcohol by weight. In this chapter, "malt liquor" and "ale" have the same meaning.

(3) Applicant--A person who submits an application with the commission to register an alcoholic beverage product.

(4) Bottler--Any person who places alcoholic beverages in containers.

(5) Brand label--The label carrying, in the usual distinctive design, the brand name of the alcoholic beverage.

(6) Brewpub--A holder of a brewpub license under Chapter 74 of the Alcoholic Beverage Code.

(7) Code--The Texas Alcoholic Beverage Code.

(8) COLA--A certificate of label approval issued by the United States Alcohol and Tobacco Tax and Trade Bureau pursuant to 27 CFR Ch. I, Subch. A, Part 13.

(9) Commission--The state agency, the Texas Alcoholic Beverage Commission; this term is not intended to refer to the agency's commissioners sitting as a deliberative body.

(10) Container--Any can, bottle, barrel, keg, cask, tank car, or other closed receptacle, irrespective of size or of the material from which made, for use for the sale of malt alcoholic beverages. This provision does not in any way relax or modify §1.04(18) of the Alcoholic Beverage Code.

(11) Distilled spirits--Alcohol, ethyl alcohol, hydrated oxide of ethyl, spirits of wine, whiskey, rum, brandy, gin, other distilled

spirits, and any liquor produced in whole or in part by the process of distillation, including all mixtures and dilutions thereof.

(12) Malt beverage--A beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, of malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human consumption.

(13) Malt liquor--Any malt beverage containing more than 4.0% of alcohol by weight. In this chapter, "malt liquor" and "ale" have the same meaning.

(14) Person--A natural person or association of natural persons, trustee, receiver, partnership, corporation, organization, or the manager, agent, servant, or employee of any of them.

(15) Producer--A manufacturer of all classes of alcoholic beverages or a nonresident seller that is the primary American source of supply for purposes of §37.10 of the Code.

(16) TTB--The United States Alcohol and Tobacco Tax and Trade Bureau or its successor agency.

(17) Wine--A product obtained from the alcoholic fermentation of juice of sound ripe grapes, fruits, berries, or honey, and includes wine coolers and other alcoholic beverages made in the manner of wine, including sparkling and carbonated wine, vermouth, cider, sake, and perry.

§45.3. General Prohibition.

No person may ship or import into the state, manufacture and offer for sale, or distribute or sell an alcoholic beverage product in this state in a manner that does not comply with all applicable requirements of this chapter.

§45.4. Product Registration Required.

(a) Except as provided by subsection (b) of this section, no alcoholic beverage product may be shipped or imported into the state, manufactured and offered for sale, or distributed or sold in the state until the product is registered with the commission.

(b) Product registration is not required for products sold:

(1) in compliance with Code §101.6701 by holders of brewer's permits and manufacturer's licenses authorized to sell directly to consumers under Code §§12.052 or 62.122;

(2) by holders of brewpub licenses except for malt beverages sold under the authority of Code §§74.08 or a distributor under 74.09; and

(3) pursuant to out-of-state winery direct shipper's permits under Chapter 54 of the Code.

§45.5. Denial of Product Registration.

(a) The commission may deny an application for product registration for one or more of the following reasons:

(1) the product label does not meet applicable federal requirements;

(2) registration of the product would create a cross-tier violation;

(3) the label includes a statement, design, device, or representation that is obscene or indecent;

(4) the commission determines the product would create a public safety concern; or

(5) the commission determines the product violates any other section of the Code.

(b) If the commission denies an application to register a product, the applicant is prohibited from shipping or importing into or within the state, manufacturing or offering for sale, or distributing or selling the product in the state using the denied label.

§45.6. Revocation of Registration.

The commission may revoke product registration at any time if the registration was granted in error; if the commission receives new information supporting a denial under §45.5 of this title; or if the registration was issued subject to conditions and the conditions were not satisfied by the deadline.

§45.7. Time Limitation for Processing Product Registration Application.

(a) Not later than the 30th day after the date the commission receives an application for registration of a product under this section, the commission shall either approve or deny the registration application.

(b) For purposes of this chapter, an application is received only when all required information has been received by the commission. An incomplete application is not considered received.

§45.8. Protest.

(a) If the commission denies the application for a product with a valid COLA or fails to act on the application within the time required by §45.7 of this title, the applicant is entitled to an administrative hearing before the State Office of Administrative Hearings.

(b) To request a hearing under this chapter, the applicant must file a written request for hearing with the commission within ten (10) business days of:

(1) receiving notification from the commission that product registration has been denied; or

(2) the expiration of the time limit for commission action, if the commission has not either approved or denied the application.

§45.9. Withdrawal of Application.

An applicant may unconditionally withdraw their application for product registration at any time prior to product registration or issuance of a notification of denial.

§45.10. Application Fee.

(a) The fee for an application for registration under this chapter is $25 and shall be paid at the time the application is filed.

(b) An applicant for product registration under this chapter is not entitled to a refund of the application fee for any reason.

§45.11. When Reapplication is Required.

(a) For products registered with the commission using a federal COLA, any change to the label or product that requires issuance of a new COLA requires reapplication for product registration with the commission.

(b) For products registered with the commission that are not eligible for a federal COLA, any change to the label or product requires reapplication for product registration with the commission, except for the following permissible label revisions:

(1) Deleting any non-mandatory label information, including text, illustrations, graphics, and ingredients;

(2) Repositioning any label information, including text, illustrations, and graphics;

(3) Changing the color of the background or text, the shape, or the proportionate size of labels;

(4) Changing the type size or font or make appropriate changes to the spelling (including punctuation marks and abbreviations) of words;

(5) Changing the type of container or net contents statement;

(6) Adding, deleting, or changing optional information referencing awards, medals or a rating or recognition provided by an organization as long as the rating or recognition reflects simply the opinion of the organization and does not make a specific substantive claim about the product or its competitors;

(7) Adding, deleting, or changing holiday or seasonal-themed graphics, artwork, or salutations;

(8) Adding, deleting, or changing promotional sponsorship-themed graphics, logos, artwork, dates, event locations or other sponsorship-related information; and

(9) Adding, deleting or changing references to a year or date.

(c) Not later than September 1, 2023, producers of products registered with the commission prior to December 31, 2020, must reapply for commission registration of any such product that will be shipped or imported into the state, manufactured and offered for sale, or distributed or sold on or after September 1, 2023, unless granted an exception under subsection (d) of this section.

(d) The executive director may issue a temporary Certificate of Registration containing an expiration date at the request of a producer demonstrating that the producer requires additional time beyond September 1, 2023, to use up products bearing labels approved by the commission and printed before December 31, 2020.

§45.12. Application Procedures During Interruption of Federal Agency Operations.

(a) In the event of a federal government shutdown or other interruption in service that prevents the TTB from issuing COLAs, the commission shall evaluate applications using the federal standards required for the applicant to receive a COLA or the federal exemption from the COLA requirements, if applicable.

(b) If the applicant meets the applicable federal standards, the commission shall register the product on a provisional basis.

(c) An applicant whose product has been registered with the state on a provisional basis shall apply for a COLA or any applicable federal exemption from COLA requirements within 30 days of the resumption of services of the TTB.

(d) The provisional registration with the state shall expire automatically on the 31st day after the resumption of services of the TTB, unless the applicant has timely filed an application with the TTB. If the applicant timely filed an application with the TTB, the applicant's provisional registration shall continue in effect either:

(1) if the TTB denies the applicant's COLA or exemption application, until the notice of that denial is issued by the TTB; or

(2) if the TTB issues the COLA or grants the exemption, until 30 days after the COLA or exemption is issued.

(e) If the TTB grants the COLA or exemption application, the applicant must re-apply with the commission for product registration within 30 calendar days of receipt of the federal COLA or exemption.

(f) If the TTB denies the COLA or exemption application, the applicant shall notify the commission within five calendar days of receipt of the denial. The commission may revoke the provisional product registration in the event of COLA or exemption denial by the TTB.

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

Filed with the Office of the Secretary of State on July 30, 2020.

TRD-202003095
Shana Horton
Rules Attorney
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: September 13, 2020
For further information, please call: (512) 206-3451

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SUBCHAPTER B. ENFORCEMENT

16 TAC §§45.20 - 45.27

The proposed new rules are authorized by Alcoholic Beverage Code §§101.67(f) and 101.671(d), which require the agency to adopt rules establishing procedures for accepting federal COLAs for product registration, registering alcoholic beverage products that are not eligible to receive a COLA issued by the TTB, registering alcoholic beverage products during periods when the TTB has ceased processing applications for COLAs (e.g., a federal government shutdown), and accepting proof that a permittee is the primary American source of supply of a product or brand.

The proposed rules do not impact any other statutes or rules.

§45.20. Exhibiting Certificates to Representatives of the Commission.

It shall be unlawful for any person to fail or refuse to exhibit, upon demand or request by any authorized representative of the commission, the certificate of approval as issued by the United States Department of the Treasury or the executive director.

§45.21. Examination and Testing of Product.

Samples of alcoholic beverages shall be taken for examination by representatives of the commission whenever deemed necessary by the executive director. Examinations may include any chemical or physical determinations for the measurement of contents, the detection of alteration, and lack of conformity to standards of identity, quality, and purity, as set forth in the Code and the rules of the commission.

§45.22. Additional Provisions for Examination of Wine.

(a) It shall be unlawful for any producer or bottler of wine to accept as a return or to purchase or to use any container permanently branded or imprinted with the name of another producer or bottler of any alcoholic beverage.

(b) The alcoholic content requirements set forth in this section shall not apply to sacramental or altar wines where ecclesiastical regulations limit the alcoholic content to not more than 18% by volume--provided, however, that such wines shall be labeled as "Sacramental" or "Altar" wines.

(c) It shall be unlawful for any permittee to bring into this state, store, sell, or possess for the purpose of sale, any bottles of wine which are not protected from tampering or contamination by being sealed with seals of a type which must be irreparably mutilated or destroyed before the bottle can be opened. Such seals shall not be made of paper.

§45.23. Alteration of Labels.

No person may alter, mutilate, destroy, obliterate, or remove any mark, brand, or label on an alcoholic beverage product held for sale in this state except:

(1) as authorized by Texas law; and

(2) the executive director may, on written application, permit additional labeling or relabeling of bottled alcoholic beverages with labels covered by certificates of label approval that comply with the requirements of this subchapter and with state law.

§45.24. Records Retention.

(a) Producers of alcoholic beverage products registered in this state shall retain records of laboratory analyses of the contents of each registered product, including tests of alcohol content.

(b) Producers shall maintain records under this section in a manner that they can be made available upon request of the commission.

(c) Producers shall maintain records under this section until the product is no longer in the stream of commerce in the state of Texas.

§45.25. Damaged Stock.

No distilled spirits may be sold or possessed for the purpose of sale in this state which have had fire, smoke, or water damage to the label, container, or contents, unless so authorized by the executive director.

§45.26. Intrastate Bottling.

It shall be unlawful for any distiller, rectifier, or other bottler of distilled spirits in this state to bottle or remove such distilled spirits from his premises unless he has first procured a certificate of label approval, or clearance of export procedure, from the executive director.

§45.27. Illicit Beverage.

(a) Any alcoholic beverage or container of which does not meet all the requirements of this chapter shall be an illicit beverage and subject to seizure without a warrant.

(b) The executive director may authorize such disposition as facts and circumstances may warrant of any alcoholic beverage that has been seized as the result of an accidental shipment or other reasonable mistake.

(c) All alcoholic beverages which cannot be restored to meet the standards of purity shall be destroyed.

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

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Shana Horton
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Texas Alcoholic Beverage Commission
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SUBCHAPTER C. SPECIFIC REQUIREMENTS FOR DISTILLED SPIRITS

16 TAC §45.30

The proposed new rule is authorized by Alcoholic Beverage Code §§101.67(f) and 101.671(d), which require the agency to adopt rules establishing procedures for accepting federal COLAs for product registration, registering alcoholic beverage products that are not eligible to receive a COLA issued by the TTB, registering alcoholic beverage products during periods when the TTB has ceased processing applications for COLAs (e.g., a federal government shutdown), and accepting proof that a permittee is the primary American source of supply of a product or brand.

The proposed rule does not impact any other statutes or rules.

§45.30. Certificate of Registration for a Distilled Spirit Product.

(a) No distilled spirit may be shipped into the state or sold within the state without a Certificate of Registration issued by the commission.

(b) An applicant for a Certificate under this section must hold a distiller's and rectifier's permit or a Nonresident Seller's Permit issued by the commission.

(c) An applicant must submit an application to register a distilled spirit on the prescribed commission form. The application must contain the following:

(1) the product COLA issued by the TTB;

(2) all information required to complete the application form; and

(3) the application fee.

(d) A legible copy of the COLA must be included with the application. If the COLA is not legible, an actual label that is affixed to the distilled spirit as shipped or sold, or an exact color copy of a label must be included with the application.

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

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SUBCHAPTER D. SPECIFIC REQUIREMENTS FOR MALT BEVERAGES

16 TAC §§45.40 - 45.43

The proposed new rules are authorized by Alcoholic Beverage Code §§101.67(f) and 101.671(d), which require the agency to adopt rules establishing procedures for accepting federal COLAs for product registration, registering alcoholic beverage products that are not eligible to receive a COLA issued by the TTB, registering alcoholic beverage products during periods when the TTB has ceased processing applications for COLAs (e.g., a federal government shutdown), and accepting proof that a permittee is the primary American source of supply of a product or brand.

The proposed rules do not impact any other statutes or rules.

§45.40. Certificate of Registration for a Malt Beverage Product.

(a) No malt beverage may be shipped into the state or sold within the state without a Certificate of Registration issued by the commission.

(b) An applicant for a Certificate under this section must hold a brewer's permit, non-resident brewer's permit, manufacturer's license, non-resident manufacturer's license, or brewpub license issued by the commission.

(c) Persons holding a non-resident manufacturer's agent's permit or non-resident brewer's agent's permit may file an application for a Certificate of Registration on behalf of a holder of a permit or license listed in subsection (b) of this section.

(d) An applicant must submit an Application to Register a Malt Beverage on the form prescribed by the commission along with the application fee to the commission. The application must contain the following:

(1) If the product is eligible for a COLA:

(A) legible copy of the COLA;

(B) an actual label that is affixed to the malt beverage as shipped or sold, or a legible exact color copy of a label; and

(C) all information required to complete the application form.

(2) If the product is not eligible for a COLA:

(A) an actual label that is affixed to the malt beverage as shipped or sold, or a legible exact color copy of the label;

(B) TTB formulation; and

(C) all information required to complete the application form.

(e) Labels for beverages that meet the definition of malt beverage but are ineligible for a COLA must also comply with 21 C.F.R. Part 101; 27 C.F.R. Parts 16 and 25; 21 U.S.C. §§341-350; 26 U.S.C. Ch. 51; and 27 U.S.C. §215.

§45.41. Additional Reasons for Denial of Registration of a Malt Beverage Product.

(a) In addition to the provisions of §45.5 of this title, the commission may deny registration for a malt beverage for the following reasons:

(1) the label filed with the application by a brewer's or non-resident brewer's permittee or a manufacturer's or non-resident manufacturer's licensee:

(A) indicates by any statement, design, device, or representation that the malt beverage is brewed or bottled for any retailer permittee or licensee or any private club registration permittee; or

(B) includes the name, tradename, or trademark of any retailer permittee or licensee or any private club registration permittee;

(2) the brand of malt beverages by a brewer's or non-resident brewer's permittee or a manufacturer's or non-resident manufacturer's licensee is exclusive to the holder of a license or permit authorizing the retail sale or service of malt beverages, or exclusive to retail licensees or permittees under common ownership, control, or management, to the exclusion of other retail licensees or permittees; or

(3) with the exception of the brewpub licensee's name, tradename or trademark, the label filed by a brewpub licensee:

(A) indicates by any statement, design, device, or representation that the malt beverage is brewed or bottled for any retailer permittee or licensee or for any private club registration permittee (other than the brewpub licensee label applicant itself, an entity under common ownership with it, or an entity with the same name or tradename as it); or

(B) includes the name, tradename, or trademark of any retailer permittee or licensee or for of any private club registration permittee (other than the brewpub licensee label applicant itself, an entity under common ownership with it, or an entity with the same name or tradename as it).

(b) Nothing in this subchapter or in Alcoholic Beverage Code Chapter 74 authorizes a brewpub licensee to engage in contract brewing or alternating brewery proprietorship arrangements, and its facilities may not be used to provide such arrangements or engage in such activities, which are authorized only for holders of permits under Alcoholic Beverage Code Chapters 12 or 13 and holders of licenses under Alcoholic Beverage Code Chapters 62 or 63.

§45.42. Misbranding.

Malt beverages in containers shall be deemed to be misbranded if the container has blown, branded, or burned therein the name or other distinguishing mark of any person engaged in business as a manufacturer, brewer, wholesaler, distributor, bottler, or importer, of malt beverages, or of any other person, except the person whose name is required to appear on the brand label.

§45.43. Verification Regarding Use of Facilities.

On or before September 1 of each year, each holder of a permit issued under Alcoholic Beverage Code Chapter 12 or 13 or a license issued under Alcoholic Beverage Code Chapter 62 or 63 shall verify to the commission, on a form promulgated by the commission, that no brewing or manufacturing facility owned or controlled by the permit or license holder is used to produce malt beverages primarily for a specific Texas retailer or the retailer's Texas affiliates.

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

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Shana Horton
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SUBCHAPTER E. SPECIFIC REQUIREMENTS FOR WINE

16 TAC §45.50

The proposed new rule is authorized by Alcoholic Beverage Code §§101.67(f) and 101.671(d), which requires the agency to adopt rules establishing procedures for accepting federal COLAs for product registration, registering alcoholic beverage products that are not eligible to receive a COLA issued by the TTB, registering alcoholic beverage products during periods when the TTB has ceased processing applications for COLAs (e.g., a federal government shutdown), and accepting proof that a permittee is the primary American source of supply of a product or brand.

The proposed rule does not impact any other statutes or rules.

§45.50. Certificate of Registration for Wine.

(a) No wine may be shipped into the state or sold within the state without a Certificate of Registration issued by the commission.

(b) An applicant for a Certificate under this section must hold a Winery or a Nonresident Seller's Permit issued by the commission.

(c) An applicant must submit an Application to Register a Wine on the form prescribed by the commission along with the application fee to the commission. The application must contain the following:

(1) If the product is eligible for a COLA:

(A) legible copy of the COLA;

(B) an actual label that is affixed to the wine as shipped or sold, or a legible exact color copy of a label; and

(C) all information required to complete the application form.

(2) If the product is not eligible for a COLA:

(A) an actual label that is affixed to the wine as shipped or sold, or a legible exact color copy of the label;

(B) TTB formulation; and

(C) all information required to complete the application form.

(d) Wines with an alcohol content of at least 0.5% but less than 7% are ineligible for a COLA and must adhere to the labeling requirements contained in 21 C.F.R. Part 101; 27 C.F.R. Parts 16, 24, and 27; 21 U.S.C. §§341-350; 26 U.S.C. Ch. 51; and 27 U.S.C. §215.

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

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TITLE 22. EXAMINING BOARDS

PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS

CHAPTER 138. COMPLIANCE AND PROFESSIONALISM FOR SURVEYORS

SUBCHAPTER A. INDIVIDUAL AND SURVEYOR COMPLIANCE

22 TAC §§138.1, 138.5, 138.7, 138.9, 138.11, 138.13 - 138.15, 138.17

The Texas Board of Professional Engineers and Land Surveyors (Board) proposes new rules to 22 Texas Administrative Code, Chapter 138, Compliance and Professionalism for Land Surveyors, specifically §§138.1, 138.5, 138.7, 138.9, 138.11, 138.13 - 138.15, and 138.17 regarding the renewal process and continuing education for professional land surveyors in Texas. These proposed changes are referred to as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 22 Texas Administrative Code Chapter 138 implement Texas Occupations Code, Chapter 1001, the Texas Engineering Practice Act, and Occupations Code, Chapter 1071, the Professional Land Surveying Practices Act.

The proposed rules implement necessary changes as required by House Bill (HB) 1523, 86th Legislature, Regular Session (2019), related to the merger of operations of the Texas Board of Professional Engineers and the Texas Board of Professional Land Surveying (TBPLS) into the Texas Board of Professional Engineers and Land Surveyors (TBPELS).

As required by HB 1523, the operations of the two agencies have been merged into one, including the registration and renewal of professional land surveyor registrations. The previous agency rules (22 Texas Administrative Code, Chapters 661 and 664), related to renewal of registrations and continuing education requirements for professional land surveyors, have been merged into Chapter 138 per the guidance of the Secretary of State. These rules have been formatted to be similar to the licensure rules for engineers (Chapter 137) and edited for format and clarity.

SECTION-BY-SECTION SUMMARY

The proposed rules create a new §138.1 concerning license and registration holder titles that are permitted by Occupations Code 1071 and proper title designation for registrants in inactive status.

The proposed rules create a new §138.5 concerning notification to the board of contact, employment, or criminal conviction changes in conformance with Chapter 663 of the surveying rules.

The proposed rules create a new §138.7 concerning the registration renewal and expiration process, including renewal period, fees, and continuing education requirement, in conformance with the requirements of Chapter 1001 and 1071.

The proposed rules create a new §138.9 concerning the registration renewal process for individuals licensed or registered in another jurisdiction, which includes U.S. military members. This section provides the late fees and continuing education requirement, in conformance with the requirements of Chapter 1001 and 1071. This rule also states that the board cannot renew a person's license or registration if the board is notified by the Office of the Attorney General (OAG) that the person is delinquent on child support, unless the OAG certifies that the person has satisfied the requirements of the Texas Family Code pertaining to child support.

The proposed rules create a new §138.11 concerning the registration renewal process for former Texas licensees and registrants who have practiced in another state and are reapplying for licensure or registration in Texas. This proposal includes late fees and continuing education requirement, in conformance with Chapter 1001 and 1071. It removes a barrier to licensure and registration by eliminating the examination requirement in certain circumstances.

The proposed rules create a new §138.13 concerning the inactive status process for registrants in conformance with Occupations Code 1001 and surveying rules in Chapter 661.

The proposed rules create a new §138.14 concerns the process for a registrant or licensee to voluntarily surrender a registration or license.

The proposed rules create a new §138.15 concerning the process to replace a printed license or certificate in conformance with Occupations Code 1071.

The proposed rules create a new §138.17 concerning continuing education requirements for registered and licensed land surveyors, including acceptable activities and the total number of hours required, in conformance with Chapter 1071 and surveying rules Chapter 664. The board removed the requirement for pre-approval of continuing education courses and a registration requirement for continuing education providers to streamline the process and reduce costs for providers and registrants.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Dr. Lance Kinney, Ph.D., P.E., Executive Director for the Board, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state or local government as a result of enforcing or administering the proposed rule. These proposed rules impose no additional costs. HB 1523 transferred regulatory authority from TBPLS to TBPELS, and these rules merely reflect the transfer of authority.

Dr. Kinney has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rule.

LOCAL EMPLOYMENT IMPACT STATEMENT

Dr. Kinney has determined that the proposed rules will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

PUBLIC BENEFITS

Dr. Kinney has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be clear requirements for the efficient and effective registration and renewal of land surveyor licenses and clear requirements for continuing education by TBPELS in accordance with HB 1523 and Texas Occupations Code chapters 1001 and 1071.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Dr. Kinney has determined that for each year of the first five-year period the proposed rules are in effect, the rules related to registration do not make substantive changes to the registration renewal process and have no additional costs for registrants or the agency.

FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

There will be no adverse effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Since the agency has determined that the proposed rules will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules.

HB 1532 transferred the regulation of land surveying to TBPELS, and these rules reflect a transfer of that regulatory authority from the former Texas Board of Professional Engineers to the TBPELS out any growth in government. Therefore, for each year of the first five years the proposed rules are in effect, the agency has determined the following:

1. The proposed rules do not create or eliminate a government program.

2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.

3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

4. The proposed rules do not require an increase, but will result in a small (<$5000) decrease in fees paid to the agency related to the registration of continuing education courses. This will not have an adverse impact on the overall agency budget.

5. The proposed rules do not create a new regulation.

6. The proposed rules do not expand, limit, or repeal a regulation except as provided by HB 1532 which transferred the regulation of land surveying to the TBPELS, and these rules reflect a transfer of that regulatory authority from the former Board of Professional Land Surveying to the TBPELS.

7. The proposed rules do not increase the number of individuals subject to the rule's applicability.

8. The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

The Board has determined that no private real property interests are affected by the proposed rules and the proposed rules do not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed rules do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

ENVIRONMENTAL RULE ANALYSIS

The Board has determined that the proposed rules are not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure; thus, the Board asserts the proposed rules are not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the Board asserts preparation of an environmental impact analysis, as provided by §2001.0225, is not required.

PUBLIC COMMENTS

Any comments or request for a public hearing may be submitted, no later than 30 days after the publication of this notice,

to Lance Kinney, Ph.D., P.E., Executive Director, Texas Board of Professional Engineers, 1917 S. Interstate 35, Austin, Texas 78741, faxed to his attention at (512) 440-0417 or sent by email to rules@engineers.texas.gov.

STATUTORY AUTHORITY

The rules are proposed pursuant to Texas Occupations Code §§1001.101 and 1001.202, which authorize the Board to regulate engineering and land surveying and make and enforce all rules and regulations and bylaws consistent with the Act and Texas Occupations Code §1071 as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practices of engineering and land surveying in this state. They are also proposed pursuant to Texas Occupations Code §1001.204, which authorizes the Board to assess fees under Texas Occupations Code chapter 1071 including, but not limited to, registration fees. The provision in §138.9(d), pertaining to extension of time to renew the license or registration for military members, is authorized by Texas Occupations Code §55.003. The provision in §138.9(f), pertaining to license or registration holders with delinquent child support, is authorized by Texas Family Code §232.0135. The provision in §138.9, relating to late renewal by military members, is authorized by Texas Occupations Code §55.002. Section 138.17, which outlines the continuing education requirements, is authorized by Texas Occupations Code §1071.305, which permits the Board to promulgate continuing professional education rules. No other codes, articles, or statutes are affected by this proposal.

§138.1. License Holder Designations.

(a) Pursuant to §1071.002 and §1071.251 of the Surveying Act, a Registered Professional Land Surveyor may use the following terms when representing himself or herself to the public:

(1) "registered professional land surveyor";

(2) "registered land surveyor";

(3) "registered surveyor";

(4) "professional land surveyor";

(5) "professional surveyor"; or

(6) any combination of words with or variation of the terms listed in paragraphs (1) - (5) of this subsection.

(b) Pursuant to §1071.002 and §1071.251 of the Surveying Act, a Licensed State Land Surveyor may use the following terms when representing himself or herself to the public:

(1) "licensed state land surveyor"; or

(2) "licensed state surveyor".

(c) Certificates, seals, and other official documentation showing earlier terminology shall be considered valid for all purposes.

(d) License holders who have placed their license in an inactive status pursuant to §138.13 of this chapter (relating to Inactive Status) may use the terms in subsections (a) or (b) of this section but must include the term "inactive" or "retired" in conjunction with the designation.

§138.5. Notification of Name Change, Address Change, Employer Change, and Criminal Convictions.

(a) Each license or registration holder shall notify the board in writing not later than 30 days after a change in the person's legal name, personal mailing address, or employment status.

(b) A notice informing the board of a change in employment status shall include, as applicable, the:

(1) full legal trade or business name of the association or employment;

(2) physical location and mailing address of the business;

(3) telephone number of the business office;

(4) type of business (corporation, assumed name, partnership, or self-employment through use of own name);

(5) legal relationship and position of responsibility within the business; and

(6) effective date of this change.

(c) Each license or registration holder shall notify the board in writing not later than 30 days after a misdemeanor or felony criminal conviction, or any sanction is imposed against a licensee by another state's surveying board.

§138.7. License or Registration Expiration and Renewal.

(a) A license or registration holder must renew the license annually to continue to practice land surveying under the provisions of the Surveying Act. If the license or registration renewal requirements are not met by the expiration date of the license or registration, the license or registration shall expire and the license or registration holder may not engage in surveying activities that require a license or registration until the renewal requirements have been met.

(b) Pursuant to §1001.275 of the Act, the board will mail a renewal notice to the last recorded address on file with the board of each license or registration holder at least 30 days prior to the date a person's license or registration is to expire. Regardless of whether the renewal notice is received, the license or registration holder has the sole responsibility to pay the required renewal fee together with any applicable late fees at the time of payment.

(c) A license or registration holder may renew a license or registration by submitting:

(1) the required annual renewal fee. Payment may be made by personal, company, or other checks drawn on a United States bank (money order or cashier's check), or by electronic means, payable in United States currency;

(2) the continuing education program documentation as required in §138.17 of this chapter (relating to Continuing Education Program) to the board prior to the expiration date of the license; and

(3) documentation of submittal of fingerprints for criminal history record check as required by §1001.277 of the Act, unless previously submitted to the board.

(d) Licenses and registrations will expire on December 31.

(e) A license holder who, at the time of his or her annual renewal, has any unpaid administrative penalty owed to the Board or who has failed to comply with any term or condition of a Consent Order, Agreed Board Order, or a Final Board Order shall not be allowed to renew his or her license or registration to practice surveying until such time as the administrative penalty is paid in full or the term or condition is satisfied unless otherwise authorized by the Consent Order, Agreed Board Order, or a Final Board Order.

§138.9. Renewal for Expired License or Registration.

(a) A license or registration holder may renew a license or registration that has expired for 90 days or less by submitting to the board the required annual renewal fee, a late renewal fee and the continuing

professional education documentation as required in §138.17 of this chapter (relating to Continuing Professional Education).

(b) A license or registration holder may renew a license or registration that has expired for more than 90 days but less than one year by submitting to the board the required annual renewal fee, a late renewal fee and the continuing professional education documentation as required in §138.17 of this chapter.

(c) A license or registration holder may renew a license or registration that has expired for more than one year but less than two years by submitting to the board the required annual renewal fee, a late renewal fee and the continuing professional education documentation as required in §138.17 of this chapter for each delinquent year or part of a year.

(d) A license or registration which has been expired for two years may not be renewed, but the former license holder may apply for a new license or registration as provided in the current Surveying Act and applicable board rules. Military service members, as defined in Texas Occupations Code, §55.001(4), may be granted up to two years of additional time to renew a license or registration.

(e) Annual renewal fees or late renewal fees will not be refunded unless incorrect fee was assessed through a documented procedural error by Board staff.

(f) In strict accordance with the provisions of the Texas Family Code, Chapter 232, pertaining to delinquent child support, if a license or registration holder's name has been provided by the OAG (Office of the Attorney General) as being in default of child support, the board shall not renew the license or registration of the license or registration holder on the renewal date following such notification. The board shall not renew or reinstate said license or registration unless the OAG certifies the individual has satisfied the requirements of the Texas Family Code, Chapter 232.

(g) Pursuant to Texas Occupations Code Chapter 55, a license or registration holder is exempt from any penalty imposed in this section for failing to renew the license or registration in a timely manner if the license or registration holder provides adequate documentation, including copies of orders, to establish to the satisfaction of the board that the license or registration holder failed to renew in a timely manner because the license or registration holder was serving as a military service member as defined in Texas Occupations Code, §55.001(4).

§138.11. Expiration and Licensed or Registered in Another Jurisdiction.

(a) A person formerly licensed or registered to practice land surveying in Texas who has moved to another state may apply for a land surveying license or registration in Texas if he or she has been practicing surveying in the other state as a licensed or registered land surveyor for at least two years prior to the date of application

(b) A person meeting the criteria in subsection (a) of this section is exempt from examination requirements.

(c) To apply for renewal, the former license or registration holder meeting the criteria in subsection (a) of this section, must fill out an out-of-state renewal application form, submit documentation demonstrating licensure or registration in the other state, pay a renewal fee that is equal to two times the normally required renewal fee for the license or registration, and submit documentation demonstrating compliance with the continuing education program requirements for an expired license or registration as prescribed in §138.17 of this chapter (relating to Continuing Education Program).

(d) Any license or registration issued to a former Texas license or registration holder under this section shall be assigned a new serial number.

§138.13. Inactive Status.

(a) A license or registration holder may request in writing to change the status of the license or registration to "inactive" at any time. A license or registration holder whose license or registration is inactive may not practice surveying. A license or registration holder who has requested inactive status shall not receive any refunds for licensing or registration fees previously paid to the board.

(b) A license or registration holder whose license or registration is inactive must pay an annual fee as established by the board at the time of the renewal. If the inactive renewal fee is not paid by the date a person's license or registration is to expire, the inactive renewal fee for the expired license or registration shall be increased in the same manner as for an active license or registration renewal fee.

(c) A license holder whose license is inactive is not required to:

(1) comply with the continuing professional education requirements adopted by the board; or

(2) take an examination for reinstatement to active status.

(d) To return to active status, a license or registration holder whose license or registration is inactive must:

(1) submit a request in writing for reinstatement to active status;

(2) pay the fee for annual renewal, as applicable;

(3) provide documentation of submittal of fingerprints for criminal history record check as required by §1001.277 of the Act, unless previously submitted to the board; and

(4) comply with the continuing professional education requirements for inactive license or registration holders returning to practice as prescribed in §138.17 of this chapter (relating to Continuing Professional Education).

(e) A license or registration holder may claim inactive status and return to active status only once during the year period determined by the renewal schedule of the license or registration. If a license or registration holder claims inactive status and returns to active status during the same annual renewal period, the license or registration holder shall comply with the full continuing professional education requirements for that year.

(f) A license or registration holder claiming inactive status may use any term allowed for an active license or registration holder followed by the term "Inactive" or "Retired" on business cards, stationery and other forms of correspondence. Failure to note inactive status in this manner is a violation of the Acts and board rules and is grounds for disciplinary action by the board.

(g) A license or registration holder on inactive status may provide a reference statement for an applicant for licensure or registration.

(h) Offering or performing surveying services to the public while the license or registration is inactive is a violation of the inactive status and is grounds for disciplinary action by the board.

§138.14. Voluntary Surrender of License or Registration.

(a) A license or registration holder who does not wish to maintain a license or registration, the legal guardian of the license or registration holder, or other legal representative of the license or registration holder may voluntarily surrender the license or registration by submitting a request in writing provided that the license or registration holder:

(1) is in good standing; and

(2) does not have an enforcement case pending before the board.

(b) A license or registration that has been voluntarily surrendered may not be renewed. A license or registration holder who has voluntarily surrendered a license or registration may apply for a new license or registration.

§138.15. Replacement of Printed Licenses or Certificates.

Each license or registration holder will be issued a printed license or registration certificate. A license or registration holder may obtain a new printed license or registration certificate to replace any certificate lost, destroyed, or mutilated or obtain a certificate in a new design by submitting a request in a format prescribed by the Board. Replacement license or registration certificates will reflect the original serial number of the license or registration certificate.

§138.17. Continuing Education.

(a) Each license or registration holder shall meet the Continuing Education (CE) requirements for professional development as a condition for license or registration renewal.

(b) Terms used in this section are defined as follows:

(1) Professional Development Hour (PDH)--A contact hour (clock hour) of CE activity. PDH is the basic unit for CE reporting.

(2) Continuing Education Unit (CEU)--Unit of credit customarily used for continuing education courses. One continuing education unit equals 10 hours of class in an approved continuing education course.

(3) College/Unit Semester/Quarter Hour--Credit for course in ABET-approved program or other related college course.

(4) Course/Activity--Any qualifying course or activity with a clear purpose and objective which will maintain, improve, or expand the skills and knowledge relevant to the license or registration holder's field of practice.

(5) Self-directed study--Time spent engaging in professional development that is not otherwise identified in this rule. (Examples include, but are not limited to: reading/reviewing trade magazines or books, watching tutorials, and viewing other online content.)

(c) Every license or registration holder is required to obtain 12 PDH units during the renewal period year.

(d) A minimum of 3 PDH units per renewal period must be in the area of professional ethics, roles and responsibilities of professional surveying, or review of the Acts and Board Rules. PDH units carried forward may not be counted to meet the professional ethics requirement.

(e) If a license or registration holder exceeds the annual requirement in any renewal period, a maximum of 9 PDH units may be carried forward into the subsequent renewal period. Professional Development Hours must not be anticipated and cannot be used for more than one renewal period.

(f) PDH units may be earned as follows:

(1) Successful completion or auditing of college credit courses.

(2) Successful completion of continuing education courses, either offered by a professional or trade organization, university or college, or offered in-house by a corporation, other business entity, professional or technical societies, associations, agencies, or organizations, or other groups.

(3) Successful completion of correspondence, on-line, televised, videotaped, and other short courses/tutorials.

(4) Presenting or attending seminars, in-house courses, workshops, or professional or technical presentations made at meetings, conventions, or conferences sponsored by a corporation, other business entity, professional or technical societies, associations, agencies, or organizations, or other groups.

(5) Teaching or instructing as listed in paragraphs (1) through (4) of this subsection.

(6) Authoring published papers, articles, books, or accepted licensing or registration examination items.

(7) Active participation in professional or technical societies, associations, agencies, or organizations, including:

(A) Serving as an elected or appointed official;

(B) Serving on a committee of the organization; and

(C) Serving in other official positions.

(8) U.S. Patents issued.

(9) Engaging in self-directed study.

(10) Active participation in educational outreach activities involving K-12 or higher education students.

(11) A passing score on the Principles and Practice of Surveying examination in accordance with §134.73 of this title (relating to Examination Results and Analysis).

(g) All activities described in subsection (f) of this section shall be relevant to the practice of professional land surveying and may include educational, technical, ethical, or managerial content.

(h) The conversion of other units of credit to PDH units is as follows:

(1) 1 College or unit semester hour--15 PDH.

(2) 1 College or unit quarter hour--10 PDH.

(3) 1 Continuing Education Unit--10 PDH.

(4) 1 Hour of professional development in course work, seminars, or professional or technical presentations made at meetings, conventions, or conferences--1 PDH.

(5) 1 Hour of professional development through self-directed study--1 PDH (Not to exceed 4 PDH).

(6) Each published paper, article, or book--10 PDH.

(7) Active participation in professional or technical society, association, agency, or organization--1 PDH (Not to exceed 5 PDH per organization).

(8) Active participation in educational outreach activities--1 PDH (Not to exceed 3 PDH).

(9) Each U.S. patent issued--15 PDH.

(10) Other activities shall be credited at 1 PDH for each hour of participation in the activity.

(11) A passing score on the Principles and Practice of Surveying examination in accordance with §134.73 of this title - 9 PDH.

(i) Determination of Credit.

(1) The board shall be the final authority with respect to whether a course or activity meets the requirements of these rules.

(2) The board shall not pre-approve or endorse any CE activities. It is the responsibility of each license or registration holder to assure that all PDH credits claimed meet CE requirements.

(3) Credit for college or community college approved courses will be based upon course credit established by the college.

(4) Credit for seminars and workshops will be based on one PDH unit for each hour of attendance. Attendance at programs presented at professional and/or technical society meetings will earn PDH units for the actual time of each program.

(5) Credit for self-directed study will be based on one PDH unit for each hour of study and is not to exceed 4 PDH per renewal period. Credit determination for self-directed study is the responsibility of the license or registration holder and subject to review as required by the board.

(6) Credit determination for activities described in subsection (h)(4) of this section is the responsibility of the license or registration holder and subject to review as required by the board.

(7) Credit for activity described in subsection (h)(7) of this section requires that a license or registration holder serve as an officer of the organization, actively participate in a committee of the organization, or serve in other official positions. PDH credits are not earned until the end of each year of service is completed.

(8) Teaching credit is valid for teaching a course or seminar for the first time only.

(j) The license or registration holder is responsible for maintaining records to be used to support credits claimed. Records required include, but are not limited to:

(1) a log showing the type of activity claimed, sponsoring organization, location, duration, instructor's or speaker's name, and PDH credits earned; and

(2) attendance verification records in the form of completion certificates or other documents supporting evidence of attendance.

(k) The license or registration holder must certify that CE requirements have been satisfied for that renewal year with the renewal application and fee.

(l) CE records for each license or registration holder must be maintained for a period of three years by the license holder.

(m) CE records for each license or registration holder are subject to audit by the board or its authorized representative.

(1) Copies must be furnished, if requested, to the board or its authorized representative for audit verification purposes.

(2) If upon auditing a license or registration holder, the board finds that the activities cited do not fall within the bounds of educational, technical, ethical, or professional management activities related to the practice of surveying; the board may require the license or registration holder to acquire additional PDH as needed to fulfill the minimum CE requirements.

(n) A license or registration holder may be exempt from the continuing education requirements for one of the following reasons listed in paragraphs (1) - (4) of this subsection:

(1) New license holders shall be exempt for their first renewal period if the Principles and Practice of surveying exam was taken within 1 calendar year of the license or registration issuance date.

(2) A license or registration holder serving on active duty and deployed outside the United States, its possessions and territories, in or for the military service of the United States for a period of time exceeding one hundred twenty (120) consecutive days in a year shall be exempt from obtaining the continuing education hours required during that year.

(3) License or registration holders experiencing physical disability, illness, or other extenuating circumstances as reviewed and approved by the board may be exempt. Supporting documentation must be furnished to the board.

(4) License or registration holders who list their status as "Inactive" and who further certify that they are not providing professional surveying services in Texas shall be exempt from the continuing education hours required.

(5) Exemptions must be claimed at the time of renewal.

(o) A license or registration holder may bring an inactive license to active status by obtaining all delinquent PDH units and submitting copies of CE records demonstrating compliance to the board or its authorized representative for verification purposes. If the total number required to become current exceeds 24 units, then 24 units shall be the maximum number required, and hours acquired must be within the two years prior to reactivation.

(p) Noncompliance:

(1) If a license or registration holder does not certify that CE requirements have been met for a renewal period, the license or registration shall be considered expired and subject to late fees and penalties.

(2) Failure to comply with CE reporting requirements as listed in this section is a violation of board rules and shall be subject to sanctions.

(3) A determination by audit that CE requirements have been falsely reported shall be considered to be misconduct and will subject the license or registration holder to disciplinary action.

(4) If found to be noncompliant, the board may require additional audits of the license or registration holder.

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

Filed with the Office of the Secretary of State on July 31, 2020.

TRD-202003131
Lance Kinney
Executive Director
Texas Board of Professional Engineers and Land Surveyors
Earliest possible date of adoption: September 13, 2020
For further information, please call: (512) 440-3080

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TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 370. HUMAN TRAFFICKING RESOURCE CENTER

26 TAC §370.1

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §370.1, concerning Human Trafficking Prevention Training Requirements.

BACKGROUND AND PURPOSE

The purpose of the proposal is to establish the review, approval, and update process of the list of human trafficking prevention training courses approved by the Executive Commissioner, pursuant to Texas Occupations Code, §116.002. The proposed rule also defines key terms and the time prescribed for a health care practitioner to successfully complete a training course on human trafficking prevention.

The proposal is necessary to comply with Texas Occupations Code, §§116.001, 116.002, and 116.003, which require HHSC to approve, post, and update a list of human trafficking prevention training courses for certain health care practitioners.

HHSC proposes the new rule as the result of House Bill (H.B.) 2059, 86th Legislature, Regular Session, 2019. H.B. 2059 requires the Executive Commissioner to approve training courses on human trafficking prevention, including at least one that is available without charge. It also requires the Executive Commissioner to post the list of approved training courses on the agency website and to update the list of approved trainings as necessary. The bill requires an HHSC rule to define the time allowed for health care practitioners to successfully complete a training course from the approved list.

SECTION-BY-SECTION SUMMARY

Proposed new §370.1(a) defines terms used in the section.

Proposed new §370.1(b) establishes that a course must meet the human trafficking prevention training standards established by HHSC, in order to be approved by the Executive Commissioner.

Proposed new §370.1(c) lists the categories of minimum standards that must be met for a training course to be approved.

Proposed new §370.1(d) defines the time prescribed for a health care practitioner to complete an approved human trafficking prevention training course. It also confirms that at least one approved course will be available free of charge.

Proposed new §370.1(e) states that the complete description of the human trafficking prevention training standards and approval process is posted on the HHSC website.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rule will be in effect, enforcing or administering the rule does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rule will be in effect:

(1) the proposed rule will not create a government program;

(2) implementation of the proposed rule will not affect the number of HHSC employee positions;

(3) implementation of the proposed rule will result in no assumed change in future legislative appropriations;

(4) the proposed rule will not affect fees paid to HHSC;

(5) the proposed rule will create a new rule;

(6) the proposed rule will not expand, limit, or repeal existing rules;

(7) the proposed rule will not change the number of individuals subject to the rules; and

(8) the proposed rule will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rule does not apply to small or micro-businesses, or rural communities.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Dee Budgewater, Deputy Executive Commissioner for Health, Developmental and Independence Services, has determined that for each year of the first five years the rule is in effect the public benefit will be that health care practitioners who provide direct patient care will be trained in human trafficking prevention efforts, which will increase the number of potential victims of human trafficking identified and treated throughout the state. This will decrease the overall incidence of human trafficking and improve the health and safety of the public.

Trey Wood has also determined that for the first five years the rule is in effect, there could be anticipated economic costs to persons who are required to comply with the proposed rule. The proposed rule requires a completed course for each health care practitioner license renewal, as defined by each licensing entity, and at least one training to be available to practitioners free of charge. There is already a federally-approved course (SOAR) that is free. Practitioners also have the flexibility in choosing a course for completion, including SOAR, and any other free courses for future licensing renewals. HHSC does not have sufficient information to determine which courses health care practitioners will be required to take and potential licensing entity costs to add these requirements. As a result, HHSC does not have sufficient information to estimate costs to comply.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to *HHSRulesCoordinationOffice@hhsc.state.tx.us.*

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register.* Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on

the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R034" in the subject line.

STATUTORY AUTHORITY

The proposed new section 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, and Texas Occupations Code §§116.002, which directs the Executive Commissioner of HHSC to develop and approve required human trafficking training courses.

§370.1. Human Trafficking Prevention Training Requirements.

(a) The following terms, when used in this chapter, have the following meanings unless the context clearly indicates otherwise:

(1) Health care practitioner--An individual who holds a license, certificate, permit, or other authorization, issued under Title 3 of the Texas Occupations Code, to engage in a health care profession and provides direct patient care.

(2) Direct patient care--The act of providing direct delivery of care and services to patients and clients in a health care setting described under Title 3 of the Texas Occupations Code.

(b) For a human trafficking prevention training course to become approved by the Executive Commissioner, or designee, the course must meet the human trafficking training standards established by the Health and Human Services Commission.

(c) The human trafficking prevention training course, at a minimum, must include:

(1) types of human trafficking, including definitions;

(2) vulnerability factors;

(3) health impact;

(4) identification;

(5) assessment;

(6) response; and

(7) resources.

(d) Health care practitioners must complete an approved human trafficking prevention training course for each license renewal, within the full license term as defined by each licensing entity. At least one approved course will be available without charge.

(e) A complete description of the human trafficking prevention training standards and training approval process is posted on the HHSC website.

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

Filed with the Office of the Secretary of State on July 31, 2020.

TRD-202003124

Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: September 13, 2020
For further information, please call: (512) 776-2460

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 39. PUBLIC NOTICE
SUBCHAPTER H. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §39.403

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §39.403.

Background and Summary of the Factual Basis for the Proposed Rule

This rulemaking would streamline the regulation for pre-injection units (PIUs) associated with injection wells by removing redundant requirements for registering or permitting PIUs under 30 TAC Chapter 331. PIUs are above-ground waste management units associated with an injection well and can include equipment and structures such as tanks, surface impoundments, filters, pumps, and piping used for storage and processing of waste prior to injection into an injection well.

The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells is inconsistent with the regulation of the same types of units under the TCEQ solid waste management program. PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells must be authorized by a permit or registration. The same types of units used to store or process industrial nonhazardous, noncommercial waste not disposed in an injection well do not require authorization by a permit or registration. The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are also inconsistent with the United States Environmental Protection Agency's (EPA) Underground Injection Control (UIC) Program. The EPA does not regulate nonhazardous PIUs under the UIC Program.

Additionally, PIUs managing waste generated from *in situ* mining of uranium are redundantly regulated under TCEQ's radioactive substance rules. PIUs that store or process waste generated from *in situ* mining of uranium disposed in an injection well must be authorized by an injection well permit. The design, construction, operation and closure of these PIUs is also regulated under the radioactive material license.

Consistent with other commission rules and EPA regulations, the proposed rulemaking would amend and repeal rules for PIUs associated with nonhazardous, noncommercial injection wells to remove the requirements to permit or register PIUs under Chapter 331 and would result in a streamlined UIC permit application process.

Although the permitting and registration requirements for PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are proposed to be amended and re-

pealed, the PIUs will still be regulated under either the TCEQ solid waste regulations or the TCEQ radioactive substance regulations. Owners of PIUs used to store or process industrial solid waste must still comply with the notification requirements in 30 TAC §335.6. Owners of PIUs used to store or process waste generated from *in situ* mining of uranium must still comply with the radioactive materials licensing requirements of 30 TAC Chapter 336.

As part of this rulemaking, the commission is also proposing corresponding revisions to 30 TAC Chapter 50, Action on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; and Chapter 331, Underground Injection Control.

Section Discussion

The commission proposes various stylistic, non-substantive changes, such as grammatical corrections. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§39.403, Applicability

The commission proposes to amend §39.403 by deleting §39.403(c)(6) and renumbering the subsequent paragraph accordingly. Because the commission is eliminating the provisions in §331.17 that address the registration of PIUs, the reference in current §39.403(c)(6) to PIU registrations is no longer necessary. This amendment of §39.403 would improve the ease of use of this rule by removing the reference to a type of authorization that will no longer be required in commission rules. No substantive changes to public notice requirements are made by this amendment.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

This rulemaking addresses necessary changes in order to eliminate the reference in Chapter 39 to the PIU registrations.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated will be improved readability and compliance with state law. The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

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

Rural Communities Impact Assessment

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

Small Business and Micro-Business Assessment

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

Small Business Regulatory Flexibility Analysis

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

Government Growth Impact Statement

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

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment to §39.403 is procedural in nature and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Rather, this rulemaking removes a reference to an authorization that will no longer be available so that there is no confusion regarding the applicable rules for public notice for certain permit applications.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. The proposed amendment to §39.403 does not exceed an express requirement of state law or a requirement of a delegation agreement and was not developed solely under the general powers of the agency but is authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in

the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

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

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendment of §39.403 does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The proposed rule does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

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

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

Submittal of Comments

Written comments may be submitted to Ms. Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov.* Electronic comments may be submitted at: *https://www6.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-022-331-WS. The comment period closes on September 15, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at *https://www.tceq.texas.gov/rules/propose_adopt.html.* For further information, please contact Tamara Young, Underground Injection Control Permits Section, (512) 239-6582.

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

§39.403. Applicability.

(a) Permit applications that are declared administratively complete on or after September 1, 1999 are subject to Subchapters H - J, L, and M of this chapter (relating to Applicability and General Provisions; Public Notice of Solid Waste Applications; Public Notice of Water Quality Applications and Water Quality Management Plans; Public Notice of Injection Well and Other Specific Applications; and Public Notice for Radioactive Material Licenses). All consolidated permit applications are subject to Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits).

(1) Explanation of applicability. Subsection (b) of this section lists all the types of applications to which Subchapters H - J, L, and M of this chapter apply. Subsection (c) of this section lists certain types of applications that would be included in the applications listed in subsection (b) of this section, but that are specifically excluded. Subsection (d) of this section specifies that only certain sections apply to applications for radioactive materials licenses. Subsection (e) of this section lists the types of applications for which public notice is not required.

(2) Explanation of organization. Subchapter H of this chapter contains general provisions that may apply to all applications under Subchapters H - M of this chapter. Additionally, in Subchapters I - M of this chapter, there is a specific subchapter for each type of application. Those subchapters contain additional requirements for each type of application, as well as indicating which parts of Subchapter H of this chapter must be followed.

(3) Types of applications. Unless otherwise provided in Subchapters G - M of this chapter, public notice requirements apply to applications for new permits and applications to amend, modify, or renew permits.

(b) As specified in those subchapters, Subchapters H - J, L, and M of this chapter apply to notices for:

(1) applications for municipal solid waste, industrial solid waste, or hazardous waste permits under Texas Health and Safety Code (THSC), Chapter 361;

(2) applications for wastewater discharge permits under Texas Water Code (TWC), Chapter 26, including:

(A) applications for the disposal of sewage sludge or water treatment sludge under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation); and

(B) applications for individual permits under Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations);

(3) applications for underground injection well permits under TWC, Chapter 27, or under THSC, Chapter 361;

(4) applications for production area authorizations or exempted aquifers under Chapter 331 of this title (relating to Underground Injection Control);

(5) contested case hearings for permit applications or contested enforcement case hearings under Chapter 80 of this title (relating to Contested Case Hearings);

(6) applications for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), except as provided in subsection (d) of this section;

(7) applications for consolidated permit processing and consolidated permits processed under TWC, Chapter 5, Subchapter J, and Chapter 33 of this title (relating to Consolidated Permit Processing); and

(8) Water Quality Management Plan updates processed under TWC, Chapter 26, Subchapter B.

(c) Regardless of the applicability of subsection (b) of this section, Subchapters H - M of this chapter do not apply to the following actions and other applications where notice or opportunity for contested case hearings are otherwise not required by law:

(1) applications for authorizations under Chapter 321 of this title (relating to Control of Certain Activities by Rule), except for applications for individual permits under Chapter 321, Subchapter B of this title;

(2) applications for registrations and notifications under Chapter 312 of this title;

(3) applications under Chapter 332 of this title (relating to Composting);

(4) applications for minor modifications of Texas Pollutant Discharge Elimination System permits under §305.62(c)(3) of this title (relating to Amendments), except as provided by §39.551 of this title (relating to Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge);

(5) applications for registration and notification of sludge disposal under §312.13 of this title (relating to Actions and Notice); or

[~~(6) applications for registration of pre-injection units for nonhazardous, noncommercial, underground injection wells under §331.17 of this title (relating to Pre-injection Units Registration); or~~]

(6) [~~(7)~~] applications listed in Subchapter P of this chapter (relating to Other Notice Requirements).

(d) Applications for radioactive materials licenses under Chapter 336 of this title are not subject to §39.405(c) and (e) of this title (relating to General Notice Provisions); §§39.418 - 39.420 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit; Notice of Application and Preliminary Decision; and Transmittal of the Executive Director's Response to Comments and Decision); and certain portions of §39.413 of this title (relating to Mailed Notice) that are not listed in §39.705 of this title (relating to Mailed Notice for Radioactive Material Licenses).

(e) Public notice is not required for the following:

(1) applications for the correction or endorsement of permits under §50.145 of this title (relating to Corrections of Permits);

(2) permittees' voluntary requests for suspension or revocation of permits under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(3) applications for special collection route permits under §330.7(c)(2) of this title (relating to Permit Required); or

(4) applications for minor modifications of underground injection control permits under §305.72 of this title (relating to Underground Injection Control (UIC) Permit Modifications at the Request of the Permittee).

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2678

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CHAPTER 50. ACTION ON APPLICATIONS AND OTHER AUTHORIZATIONS
SUBCHAPTER F. ACTION BY THE COMMISSION

30 TAC §50.113

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §50.113.

Background and Summary of the Factual Basis for the Proposed Rule

This rulemaking would streamline the regulation for pre-injection units (PIUs) associated with injection wells by removing redundant requirements for registering or permitting PIUs under 30 TAC Chapter 331. PIUs are above-ground waste management units associated with an injection well and can include equipment and structures such as tanks, surface impoundments, filters, pumps, and piping used for storage and processing of waste prior to injection into an injection well.

The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells is inconsistent with the regulation of the same types of units under the TCEQ solid waste management program. PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells must be authorized by a permit or registration. The same types of units used to store or process industrial nonhazardous, noncommercial waste not disposed in an injection well do not require authorization by a permit or registration. The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are also inconsistent with the United States Environmental Protection Agency's (EPA) Underground Injection Control (UIC) Program. The EPA does not regulate nonhazardous PIUs under the UIC Program.

Additionally, PIUs managing waste generated from *in situ* mining of uranium are redundantly regulated under TCEQ's radioactive substance rules. PIUs that store or process waste generated from *in situ* mining of uranium disposed in an injection well must be authorized by an injection well permit. The design, construction, operation and closure of these PIUs are also regulated under the radioactive material license.

Consistent with other commission rules and EPA regulations, the proposed rulemaking would amend and repeal rules for PIUs associated with nonhazardous, noncommercial injection wells to remove the requirements to permit or register PIUs under Chapter 331 and would result in a streamlined UIC permit application process.

Although the permitting and registration requirements for PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are proposed to be amended and repealed, the PIUs will still be regulated under either the TCEQ solid waste regulations or the TCEQ radioactive substance regulations. Owners of PIUs used to store or process industrial solid waste must still comply with the notification requirements in 30 TAC §335.6. Owners of PIUs used to store or process waste generated from *in situ* mining of uranium must still comply with the radioactive materials licensing requirements of 30 TAC Chapter 336.

As part of this rulemaking, the commission is also proposing corresponding revisions to 30 TAC Chapter 39, Public Notice; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; and Chapter 331, Underground Injection Control.

Section Discussion

The commission proposes various stylistic, non-substantive changes, such as grammatical corrections. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§50.113, Applicability and Action on Application

The commission proposes to amend §50.113 by deleting §50.113(d)(7) and renumbering subsequent paragraphs accordingly. Because the commission is eliminating the provisions in §331.17 that address the registration of PIUs, the reference in current §50.113(d)(7) to PIU registrations is no longer necessary. This amendment of §50.113 would improve the ease of use of this applicability rule by removing the reference to a type of authorization that will no longer be required in commission rules. No substantive changes to public participation requirements are made by this amendment.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

This rulemaking removes the reference in Chapter 50 relating to the registration of PIUs because that reference is no longer necessary.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated will be improved readability and the removal of inconsistencies with the regulations of PIUs.

The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

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

Rural Communities Impact Assessment

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

Small Business and Micro-Business Assessment

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

Small Business Regulatory Flexibility Analysis

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

Government Growth Impact Statement

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

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment to §50.113 is procedural in nature and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Rather, this rulemaking removes a reference to an authorization that will no longer be available so that there is no confusion regarding the applicable rules for commission action on certain permit applications.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt

a rule solely under the general authority of the commission. The proposed amendment to §50.113 does not exceed an express requirement of state law or a requirement of a delegation agreement and was not developed solely under the general powers of the agency but is authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

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

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendment of §50.113 does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The proposed rule does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

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

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

Submittal of Comments

Written comments may be submitted to Ms. Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov*. Electronic comments may be submitted at: *https://www6.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-022-331-WS. The comment period closes on September 15, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at *https://www.tceq.texas.gov/rules/propose_adopt.html*. For further information, please contact Tamara Young, Underground Injection Control Permits Section, (512) 239-6582.

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

§50.113. Applicability and Action on Application.

(a) Applicability. This subchapter applies to applications that are declared administratively complete on or after September 1, 1999.

(b) This chapter does not create a right to a contested case hearing where the opportunity for a contested case hearing does not exist under other law.

(c) After the deadline for filing a request for reconsideration or contested case hearing under §55.201 of this title (relating to Requests for Reconsideration or Contested Case Hearing), the commission may act on an application without holding a contested case hearing or acting on a request for reconsideration, if:

(1) no timely request for reconsideration or hearing has been received;

(2) all timely requests for reconsideration or hearing have been withdrawn, or have been denied by the commission;

(3) a judge has remanded the application because of settlement; or

(4) for applications under Texas Water Code, Chapters 26 and 27 and Texas Health and Safety Code, Chapters 361 and 382, the commission finds that there are no issues that:

(A) involve a disputed question of fact;

(B) were raised during the public comment period; and

(C) are relevant and material to the decision on the application.

(d) Without holding a contested case hearing, the commission may act on:

(1) an application for any air permit amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted;

(2) an application for any initial issuance of an air permit for an electric generating facility;

(3) an application for a hazardous waste permit renewal under §305.631(a)(8) of this title (relating to Renewal);

(4) an application for a wastewater discharge permit renewal or amendment under Texas Water Code, §26.028(d), unless the commission determines that an applicant's compliance history as determined under Chapter 60 of this title (relating to Compliance History) raises issues regarding the applicant's ability to comply with a material term of its permit;

(5) an application for a Class I injection well permit used only for the disposal of nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals under Texas Water Code, §27.021, concerning Permit for Disposal of Brine

from [~~From~~] Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(6) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under Texas Water Code, §27.023, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

[~~(7) an application for pre-injection unit registration under §331.17 of this title (relating to Pre-Injection Units Registration);~~]

(7) [~~(8)~~] an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018; and

(8) [~~(9)~~] other types of applications where a contested case hearing request has been filed but no opportunity for hearing is provided by law.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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CHAPTER 55. REQUESTS FOR RECONSIDERATION AND CONTESTED CASE HEARINGS; PUBLIC COMMENT

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §55.101 and §55.201.

Background and Summary of the Factual Basis for the Proposed Rules

This rulemaking would streamline the regulation for pre-injection units (PIUs) associated with injection wells by removing redundant requirements for registering or permitting PIUs under 30 TAC Chapter 331. PIUs are above-ground waste management units associated with an injection well and can include equipment and structures such as tanks, surface impoundments, filters, pumps, and piping used for storage and processing of waste prior to injection into an injection well.

The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells is inconsistent with the regulation of the same types of units under the TCEQ solid waste management program. PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells must be authorized by a permit or registration. The same types of units used to store or process industrial nonhazardous, noncommercial waste not disposed in an injection well do not require authorization by a permit or registration. The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are also inconsistent with the United States Environmental Protection Agency's (EPA) Underground Injection Control (UIC) Program. The EPA does not regulate nonhazardous PIUs under the UIC Program.

Additionally, PIUs managing waste generated from *in situ* mining of uranium are redundantly regulated under TCEQ's radioactive substance rules. PIUs that store or process waste generated from *in situ* mining of uranium disposed in an injection well must be authorized by an injection well permit. The design, construction, operation and closure of these PIUs is also regulated under the radioactive material license.

Consistent with other commission rules and EPA regulations, the proposed rulemaking would amend and repeal rules for PIUs associated with nonhazardous, noncommercial injection wells to remove the requirements to permit or register PIUs under Chapter 331 and would result in a streamlined UIC permit application process.

Although the permitting and registration requirements for PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are proposed to be amended and repealed, the PIUs will still be regulated under either the TCEQ solid waste regulations or the TCEQ radioactive substance regulations. Owners of PIUs used to store or process industrial solid waste must still comply with the notification requirements in 30 TAC §335.6. Owners of PIUs used to store or process waste generated from *in situ* mining of uranium must still comply with the radioactive materials licensing requirements of 30 TAC Chapter 336.

As part of this rulemaking, the commission is also proposing corresponding revisions to 30 TAC Chapter 39, Public Notice; Chapter 50, Action on Applications and Other Authorizations; and Chapter 331, Underground Injection Control.

Section by Section Discussion

The commission proposes various stylistic, non-substantive changes, such as grammatical corrections. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§55.101, Applicability

The commission proposes to amend §55.101 by deleting §55.101(g)(11) and renumbering subsequent paragraphs accordingly. Because the commission is eliminating the provisions in §331.17 that address the registration of PIUs, the reference in current §55.101(g)(11) to PIU registrations is no longer necessary. This amendment of §55.101 would improve the ease of use of this applicability rule by removing the reference to a type of authorization that will no longer be required in commission rules. No substantive changes to public participations requirements are made by this amendment.

§55.201, Requests for Reconsideration or Contested Case Hearing

The commission proposes to amend §55.201 by deleting §55.201(i)(8) and renumbering subsequent paragraphs accordingly. Because the commission is eliminating the provisions in §331.17 that address the registration of PIUs, the reference in current §55.201(i)(8) to PIU registrations is no longer necessary. This amendment of §55.201 would improve the ease of use of this rule which identifies types of commission authorization that are not subject to a right to a contested case hearing by

removing the reference to PIU registrations that will no longer be required in commission rules. No substantive changes to public notice requirements are made by this rulemaking.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

This rulemaking removes provisions in Chapter 55 that reference the registration of PIUs because the references are no longer necessary.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be improved readability and the removal of inconsistencies with the regulations of PIUs.

The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

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

Rural Communities Impact Assessment

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

Small Business and Micro-Business Assessment

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

Small Business Regulatory Flexibility Analysis

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

Government Growth Impact Statement

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

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to §55.101 and §55.201 are procedural in nature and are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor do they affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Rather, this rulemaking removes references to an authorization that will no longer be available so that there is no confusion regarding the applicable rules for public participation for certain permit applications.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. The proposed amendments to §55.101 and §55.201 do not exceed an express requirement of state law or a requirement of a delegation agreement and were not developed solely under the general powers of the agency but are authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

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

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments of §55.101 and §55.201 do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The proposed rulemaking does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

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

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

Submittal of Comments

Written comments may be submitted to Ms. Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov.* Electronic comments may be submitted at: *https://www6.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-022-331-WS. The comment period closes on September 15, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at *https://www.tceq.texas.gov/rules/propose_adopt.html.* For further information, please contact Tamara Young, Underground Injection Control Permits Section, (512) 239-6582.

SUBCHAPTER D. APPLICABILITY AND DEFINITIONS

30 TAC §55.101

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

§55.101. Applicability.

(a) This subchapter and Subchapters E - G of this chapter (relating to Public Comment and Public Meetings; Requests for Reconsideration or Contested Case Hearing; and Requests for Contested Case Hearing and Public Comment on Certain Applications) apply to permit applications that are declared administratively complete on or after September 1, 1999, as specified in subsections (b) - (g) of this section.

(b) This subchapter and Subchapters E - G of this chapter apply to public comments, public meetings, hearing requests, and requests for reconsideration.

(c) This subchapter and Subchapters E and F of this chapter apply only to applications filed under Texas Water Code (TWC), Chapters 26, 27, and 32 and Texas Health and Safety Code (THSC), Chapters 361 and 382.

(d) Subchapter G of this chapter applies to all applications other than those listed in subsection (e) of this section and other than those filed under TWC, Chapters 26, 27, and 32 and THSC, Chapters 361 and 382.

(e) This subchapter and Subchapters E and F of this chapter apply to applications for amendment, modification, or renewal of air quality permits that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may not seek further public comment or hold a public hearing under the procedures provided by §39.419 of this title (relating to Notice of Application and Preliminary Decision), §55.156 of this title (relating to Public Comment Processing), and Subchapter F of this chapter for such applications. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(f) This subchapter and Subchapters E - G of this chapter do not apply to hearing requests related to:

(1) applications for emergency or temporary orders;

(2) applications for temporary or term permits for water rights;

(3) air quality exemptions from permitting and permits by rule under Chapter 106 of this title (relating to Permits by Rule) except for construction of concrete batch plants which are not temporarily located contiguous or adjacent to a public works project;

(4) applications for Class I injection well permits used only for the disposal of nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals under TWC, §27.021, concerning Permit for Disposal of Brine <u>from</u> [~~From~~] Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(5) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under TWC, §27.025, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals; and

(6) applications where the opportunity for a contested case hearing does not exist under other laws.

(g) This subchapter and Subchapters E - G of this chapter do not apply to:

(1) applications for sludge registrations and notifications under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation);

(2) applications for authorization under Chapter 321 of this title (relating to Control of Certain Activities by Rule) except for applications for individual permits under Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations);

(3) applications for registrations under Chapter 330 of this title (relating to Municipal Solid Waste);

(4) applications for registrations and notifications under Chapter 332 of this title (relating to Composting);

(5) applications under TWC, §11.036 or §11.041. The maximum expected duration of a hearing on an application referred to the State Office of Administrative Hearings (SOAH) under this provision shall be no longer than one year from the first day of the preliminary hearing, unless otherwise directed by the commission. The issues to be considered in a SOAH hearing on an application subject to this provision are all those issues that are material and relevant under the law;

(6) applications under Chapter 122 of this title (relating to Federal Operating Permits Program);

(7) applications for initial issuance of voluntary emissions reduction permits under THSC, §382.0519;

(8) applications for initial issuance of permits for electric generating facility permits under Texas Utilities Code, §39.264;

(9) air quality standard permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(10) applications for multiple plant permits under THSC, §382.05194; and

[(11) applications for pre-injection unit registrations under §331.17 of this title (relating to Pre-Injection Units Registration); and]

(11) [(12)] applications where the opportunity for a contested case hearing does not exist under other laws.

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

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SUBCHAPTER F. REQUESTS FOR RECONSIDERATION OR CONTESTED CASE HEARING

30 TAC §55.201

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

§55.201. Requests for Reconsideration or Contested Case Hearing.

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's decision and response to comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

(b) The following may request a contested case hearing under this chapter:

(1) the commission;

(2) the executive director;

(3) the applicant; and

(4) affected persons, when authorized by law.

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment, and, for applications filed on or after September 1, 2015, must be based only on the requestor's timely comments.

(d) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) for applications filed:

(A) before September 1, 2015, list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; or

(B) on or after September 1, 2015, list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request.

To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and

(5) provide any other information specified in the public notice of application.

(e) Any person, other than a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title (relating to Definitions), may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

(f) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request reconsideration or a contested case hearing shall be treated as public comment.

(g) Procedures for late filed public comments, requests for reconsideration, or contested case hearing are as follows.

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk shall accept a request for reconsideration or contested case hearing, or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file.

(2) The commission may extend the time allowed to file a request for reconsideration, or a request for a contested case hearing.

(h) Any person, except the applicant, the executive director, the public interest counsel, and a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title, who was provided notice as required under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

(i) Applications for which there is no right to a contested case hearing include:

(1) a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title;

(3) any air permit application for the following:

(A) initial issuance of an electric generating facility permit;

(B) permits issued under Chapter 122 of this title (relating to Federal Operating Permits Program);

(C) a permit issued under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review) that would authorize only emissions of greenhouse gases as defined in §101.1 of this title (relating to Definitions); or

(D) amendment, modification, or renewal of an air application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

(4) hazardous waste permit renewals under §305.65(8) of this title (relating to Renewal);

(5) an application, under Texas Water Code, Chapter 26, to renew or amend a permit if:

(A) the applicant is not applying to:

(i) increase significantly the quantity of waste authorized to be discharged; or

(ii) change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant public comment has been given; and

(E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit;

(6) an application for a Class I injection well permit used only for the disposal of nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals under Texas Water Code, §27.021, concerning Permit for Disposal of Brine from Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(7) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under Texas Water Code, §27.025, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

~~[(8) an application for a pre-injection unit registration under §331.17 of this title (relating to Pre-injection Units Registration);]~~

(8) [~~(9)~~] an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018;

(9) [~~(10)~~] other types of applications where a contested case hearing request has been filed, but no opportunity for hearing is provided by law; and

(10) [~~(11)~~] an application for a production area authorization, except as provided in accordance with §331.108 of this title (relating to Opportunity for a Contested Case Hearing on a Production Area Authorization Application).

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

Filed with the Office of the Secretary of State on July 31, 2020.

TRD-202003111
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: September 13, 2020
For further information, please call: (512) 239-2678

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CHAPTER 331. UNDERGROUND INJECTION CONTROL

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§331.2, 331.5, 331.7, 331.47, 331.64, and 331.121, and the repeal of §331.17 and §331.18.

Background and Summary of the Factual Basis for the Proposed Rules

This rulemaking would streamline the regulation for pre-injection units (PIUs) associated with injection wells by removing redundant requirements for registering or permitting PIUs under 30 TAC Chapter 331. PIUs are above-ground waste management units associated with an injection well and can include equipment and structures such as tanks, surface impoundments, filters, pumps, and piping used for storage and processing of waste prior to injection into an injection well.

The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells is inconsistent with the regulation of the same types of units under the TCEQ solid waste management program. PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells must be authorized by a permit or registration. The same types of units used to store or process industrial nonhazardous, noncommercial waste not disposed in an injection well do not require authorization by a permit or registration. The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are also inconsistent with the United States Environmental Protection Agency's (EPA) Underground Injection Control (UIC) Program. The EPA does not regulate nonhazardous PIUs under the UIC Program.

Additionally, PIUs managing waste generated from *in situ* mining of uranium are redundantly regulated under TCEQ's radioactive substance rules. PIUs that store or process waste generated from *in situ* mining of uranium disposed in an injection well must be authorized by an injection well permit. The design, construction, operation and closure of these PIUs is also regulated under the radioactive material license.

Consistent with other commission rules and EPA regulations, the proposed rulemaking would amend and repeal rules for PIUs associated with nonhazardous, noncommercial injection wells to remove the requirements to permit or register PIUs under Chapter 331 and would result in a streamlined UIC permit application process.

Although the permitting and registration requirements for PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are proposed to be amended and repealed, the PIUs will still be regulated under either the TCEQ solid waste regulations or the TCEQ radioactive substance regulations. Owners of PIUs used to store or process industrial solid waste must still comply with the notification requirements in 30 TAC §335.6. Owners of PIUs used to store or process waste generated from *in situ* mining of uranium must still comply with the radioactive materials licensing requirements of 30 TAC Chapter 336, Radioactive Substance Rules.

As part of this rulemaking, the commission is also proposing corresponding revisions to 30 TAC Chapter 39, Public Notice; Chapter 50, Action on Applications and Other Authorizations; and Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment.

Section by Section Discussion

The commission proposes various stylistic, non-substantive changes, such as grammatical corrections or cross-references. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§331.2, Definitions

The commission proposes to amend §331.2(2)(D) to remove the text "pre-injection units for processing or storage of waste" from the definition of "Activity" and re-letter the subsequent subparagraph accordingly. Section 331.7(a) requires all injection wells and activities to be authorized by an individual permit. This proposed amendment removes PIUs from the definition of "Activity", thus removing PIUs from the requirement to be authorized by an individual permit.

§331.5, Prevention of Pollution

The commission proposes to amend §331.5(c) to remove the text "which are required to be authorized by permit or registration under §331.7(d) of this title (relating to Permit Required)." This proposed amendment removes the text referencing the requirement for PIUs to be authorized by permit or registration. The proposed amendment does not remove the requirement for PIUs to be designed, constructed, operated, maintained, monitored, and closed in a manner that prevents pollution.

§331.7, Permit Required

The commission proposes to amend §331.7(a) to correct a cross-reference as a result of the proposed removal of §331.7(d).

The commission proposes to amend §331.7 by removing subsection (d) and re-lettering subsequent subsections accordingly. This proposed amendment removes the requirement for PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells to be authorized by a permit or registration.

§331.17, Pre-injection Units Registration

The commission proposes to repeal §331.17. This proposed repeal removes the approval guidelines, registration procedures, and design criteria for registration of PIUs associated with Class I and Class V nonhazardous, noncommercial injection wells.

§331.18, Registration Application, Processing, Notice, Comment, Motion to Overturn

The commission proposes to repeal §331.18. This proposed repeal removes the application requirements, processing requirements, notice requirements, major and minor amendment requirements, and public comment and motion to overturn requirements for registration of PIUs associated with Class I and Class V nonhazardous, noncommercial injection wells.

§331.47, Pond Lining

The commission proposes to amend §331.47(a) to remove the text "Except as provided in subsection (b) of this section, all", and "as approved by the executive director or as required by permits." The proposed rulemaking amends §331.47(a) by removing the reference to subsection (b). This proposed amendment also removes the reference to executive director approval or permitting of the liner for ponds and surface impoundments. This proposed amendment does not remove the requirement for ponds or surface impoundments to be lined with clay or an artificial liner.

The commission proposes to amend §331.47 by removing subsection (b). This proposed amendment removes the requirement for surface impoundments managing nonhazardous, noncommercial Class 1 industrial waste associated with Class I and Class V nonhazardous, noncommercial injection wells to meet the design standards in 30 TAC Chapter 217, Design Criteria for Domestic Wastewater Systems. The design standards for domestic wastewater systems are not applicable to surface impoundments managing nonhazardous, noncommercial Class 1 industrial waste and are not consistent with the standards for surface impoundments and ponds in Chapter 331 and 30 TAC Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste.

§331.64, Monitoring and Testing Requirements

The commission proposes to amend §331.64(g)(1) and (3) to update incorrect cross-references.

§331.121, Class I Wells

The commission proposes to amend §331.121(a)(2) to update a cross-reference as a result of the proposed removal of §331.121(a)(2)(R).

The commission proposes to amend §331.121(a)(2)(K) to remove the text "and Pre-injection units, except that pre-injection units registered under the provisions of §331.17 of this title (relating to Pre-injection Units Registration) shall be considered under that section." This proposed amendment removes the requirement for the commission to consider the engineering drawings of PIUs before issuing a Class I injection well permit.

The commission proposes to amend §331.121(a)(2)(Q) to remove the text "under this chapter." This proposed amendment removes the reference to PIU authorizations under Chapter 331. PIUs are regulated under Chapter 335 and Chapter 336.

The commission proposes to amend §331.121 by removing subsection (a)(2)(R). This proposed amendment removes the requirement for the commission to consider information demonstrating PIU compliance with the design criteria in Chapter 217.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

This rulemaking proposes to amend and repeal permitting and registration regulations for PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells, eliminate the inconsistencies with the TCEQ solid waste program requirements, remove the redundancies with the TCEQ radioactive substance requirements, and result in a streamlined UIC permit application process.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be improved readability, and the removal of inconsistencies and duplicate regulations for PIUs.

The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

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

Rural Communities Impact Assessment

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

Small Business and Micro-Business Assessment

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

Small Business Regulatory Flexibility Analysis

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

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and would not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does remove certain duplicative regulations. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rules should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking removes registration requirements for PIUs and are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Existing requirements for the management of solid waste in Chapter 335 or management of by-product material in Chapter 336 are not changed by this rulemaking.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. The proposed rules do not exceed an express requirement of state law or a requirement of a delegation agreement as there are no express requirements for the registration of PIUs. These rules were not developed solely under the general powers of the agency but are authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

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

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The proposed rulemaking does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. The proposed rulemaking removes requirements for the registration of PIUs. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The proposed rulemaking does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

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

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

Submittal of Comments

Written comments may be submitted to Ms. Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov.* Electronic comments may be submitted at: *https://www6.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-022-331-WS. The comment period closes on September 15, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at *https://www.tceq.texas.gov/rules/propose_adopt.html.* For further information, please contact Tamara Young, Underground Injection Control Permits Section, (512) 239-6582.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§331.2, 331.5, 331.7

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102 which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendments are proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

§331.2. Definitions.

General definitions can be found in Chapter 3 of this title (relating to Definitions). The following words and terms, when used in this chapter, have the following meanings.

(1) Abandoned well--A well which has been permanently discontinued from use or a well for which, after appropriate review and evaluation by the commission, there is no reasonable expectation of a return to service.

(2) Activity--The construction or operation of any of the following:

(A) an injection well for disposal of waste;

(B) an injection or production well for the recovery of minerals;

(C) a monitor well at a Class III injection well site; or

[~~(D) pre-injection units for processing or storage of waste; or~~]

(D) [~~(E)~~] any other class of injection well regulated by the commission.

(3) Affected person--Any person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the proposed injection operation for which a permit is sought.

(4) Annulus--The space in the wellbore between the injection tubing and the long string casing and/or liner.

(5) Annulus pressure differential--The difference between the annulus pressure and the injection pressure in an injection well.

(6) Aquifer--A geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

(7) Aquifer recharge project--A project involving the intentional recharge of an aquifer by means of an injection well authorized under this chapter or other means of infiltration, including actions designed to:

(A) reduce declines in the water level of the aquifer;

(B) supplement the quantity of groundwater available;

(C) improve water quality in an aquifer;

(D) improve spring flows and other interactions between groundwater and surface water; or

(E) mitigate subsidence.

(8) Aquifer restoration--The process used to achieve or exceed water quality levels established by the commission for a permit/production area.

(9) Aquifer storage and recovery--The injection of water into a geologic formation, group of formations, or part of a formation that is capable of underground storage of water for later retrieval and beneficial use.

(10) Aquifer storage and recovery injection well--A Class V injection well used for the injection of water into a geologic formation as part of an aquifer storage and recovery project.

(11) Aquifer storage and recovery production well--A well used for the production of water from a geologic formation as part of an aquifer storage and recovery project.

(12) Aquifer storage and recovery project--A project involving the injection of water into a geologic formation for the purpose of subsequent recovery and beneficial use by the project operator.

(13) Area of review--The area surrounding an injection well described according to the criteria set forth in §331.42 of this title (relating to Area of Review) or in the case of an area permit, the project area plus a circumscribing area the width of which is either 1/4 mile or a number calculated according to the criteria set forth in §331.42 of this title.

(14) Area permit--A permit that authorizes the construction and operation of two or more similar injection, production, or monitoring wells used in operations associated with Class III well activities within a specified area.

(15) Artificial liner--The impermeable lining of a pit, lagoon, pond, reservoir, or other impoundment, that is made of a synthetic material such as butyl rubber, chlorosulfonated polyethylene, elasticized polyolefin, polyvinyl chloride (PVC), other manmade materials, or similar materials.

(16) Baseline quality--The parameters and their concentrations that describe the local groundwater quality of an aquifer prior to the beginning of injection operations.

(17) Baseline well--A well from which groundwater is analyzed to define baseline quality in the permit area (regional baseline well) or in the production area (production area baseline well).

(18) Bedded salt--A geologic formation, group of formations, or part of a formation consisting of non-domal salt that is layered and may be interspersed with non-salt sedimentary materials such as anhydrite, shale, dolomite, and limestone. The salt layers themselves often contain significant impurities.

(19) Bedded salt cavern disposal well--A well or group of wells and connecting storage cavities which have been created by solution mining, dissolving or excavation of salt bearing deposits or other geological formations and subsequently developed for the purpose of disposal of nonhazardous drinking water treatment residuals.

(20) Blanket material or blanket pad--A fluid placed within a salt cavern that is lighter than the water in the cavern and will not dissolve the salt or any mineral impurities that may be contained within the salt. The function of the blanket is to prevent unwanted leaching of the salt cavern roof, prevent leaching of salt from around the cemented casing, and to protect the cemented casing from internal corrosion. Blanket material typically consists of crude oil, mineral oil, or some fluid possessing similar noncorrosive, nonsoluble, low density properties. The blanket material is placed between the salt cavern's outermost hanging string and innermost cemented casing.

(21) Buffer area--The area between any mine area boundary and the permit area boundary.

(22) Caprock--A geologic formation typically overlying the crest and sides of a salt stock. The caprock consists of a complex assemblage of minerals including calcite ($CaCO_3$), anhydrite ($CaSO_4$), and accessory minerals. Caprocks often contain lost circulation zones characterized by rock layers of high porosity and permeability.

(23) Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(24) Casing--Material lining used to seal off strata at and below the earth's surface.

(25) Cement--A substance generally introduced as a slurry into a wellbore which sets up and hardens between the casing and borehole and/or between casing strings to prevent movement of fluids within or adjacent to a borehole, or a similar substance used in plugging a well.

(26) Cementing--The operation whereby cement is introduced into a wellbore and/or forced behind the casing.

(27) Cesspool--A drywell that receives untreated sanitary waste containing human excreta, and which sometimes has an open bottom and/or perforated sides.

(28) Commercial facility--A Class I permitted facility, where one or more commercial wells are operated.

(29) Commercial underground injection control (UIC) Class I well facility--Any waste management facility that accepts,

for a charge, hazardous or nonhazardous industrial solid waste for disposal in a UIC Class I injection well, except a captured facility or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(30) Commercial well--An underground injection control Class I injection well which disposes of hazardous or nonhazardous industrial solid wastes, for a charge, except for a captured facility or a facility that accepts waste only from facilities owned or effectively controlled by the same person.

(31) Conductor casing or conductor pipe--A short string of large-diameter casing used to keep the top of the wellbore open during drilling operations.

(32) Cone of influence--The potentiometric surface area around the injection well within which increased injection zone pressures caused by injection of wastes would be sufficient to drive fluids into an underground source of drinking water or freshwater aquifer.

(33) Confining zone--A part of a formation, a formation, or group of formations between the injection zone and the lowermost underground source of drinking water or freshwater aquifer that acts as a barrier to the movement of fluids out of the injection zone.

(34) Contaminant--Any physical, biological, chemical, or radiological substance or matter in water.

(35) Control parameter--Any physical parameter or chemical constituent of groundwater monitored on a routine basis used to detect or confirm the presence of mining solutions in a designated monitor well. Monitoring includes measurement with field instrumentation or sample collection and laboratory analysis.

(36) Desalination brine--The waste stream produced by a desalination operation containing concentrated salt water, other naturally occurring impurities, and additives used in the operation and maintenance of a desalination operation.

(37) Desalination concentrate--Same as desalination brine.

(38) Desalination operation--A process which produces water of usable quality by desalination.

(39) Disposal well--A well that is used for the disposal of waste into a subsurface stratum.

(40) Disturbed salt zone--Zone of salt enveloping a salt dome cavern, typified by increased values of permeability or other induced anomalous conditions relative to undisturbed salt which lies more distant from the salt dome cavern, and is the result of mining activities during salt dome cavern development and which may vary in extent through all phases of a cavern including the post-closure phase.

(41) Drilling mud--A heavy suspension used in drilling an injection well, introduced down the drill pipe and through the drill bit.

(42) Drinking water treatment residuals--Materials generated, concentrated or produced as a result of treating water for human consumption.

(43) Drywell--A well, other than an improved sinkhole or subsurface fluid distribution system, completed above the water table so that its bottom and sides are typically dry except when receiving fluids.

(44) Enhanced oil recovery project (EOR)--The use of any process for the displacement of oil from the reservoir other than primary recovery and includes the use of an immiscible, miscible, chemical, thermal, or biological process. This term does not include pressure maintenance or water disposal projects.

(45) Excursion--The movement of mining solutions, as determined by analysis for control parameters, into a designated monitor well.

(46) Existing injection well--A Class I well which was authorized by an approved state or United States Environmental Protection Agency-administered program before August 25, 1988, or a well which has become a Class I well as a result of a change in the definition of the injected waste which would render the waste hazardous under §335.1 of this title (relating to Definitions).

(47) Fluid--Material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

(48) Formation--A body of rock characterized by a degree of lithologic homogeneity which is prevailingly, but not necessarily, tabular and is mappable on the earth's surface or traceable in the subsurface.

(49) Formation fluid--Fluid present in a formation under natural conditions.

(50) Fresh water--Water having bacteriological, physical, and chemical properties which make it suitable and feasible for beneficial use for any lawful purpose.

(A) For the purposes of this chapter, it will be presumed that water is suitable and feasible for beneficial use for any lawful purpose only if:

(i) it is used as drinking water for human consumption; or

(ii) the groundwater contains fewer than 10,000 milligrams per liter (mg/L) total dissolved solids; and

(iii) it is not an exempted aquifer.

(B) This presumption may be rebutted upon a showing by the executive director or an affected person that water containing greater than or equal to 10,000 mg/L total dissolved solids can be put to a beneficial use.

(51) General permit--A permit issued under the provisions of this chapter authorizing the disposal of nonhazardous desalination concentrate and nonhazardous drinking water treatment residuals as provided by Texas Water Code, §27.025.

(52) Groundwater--Water below the land surface in a zone of saturation.

(53) Groundwater protection area--A geographic area (delineated by the state under federal Safe Drinking Water Act, 42 United States Code, §300j-13) near and/or surrounding community and non-transient, non-community water systems that use groundwater as a source of drinking water.

(54) Hazardous waste--Hazardous waste as defined in §335.1 of this title (relating to Definitions).

(55) Improved sinkhole--A naturally occurring karst depression or other natural crevice found in carbonate rocks, volcanic terrain, and other geologic settings which has been modified by man for the purpose of directing and emplacing fluids into the subsurface.

(56) Individual permit--A permit, as defined in the Texas Water Code (TWC), §27.011 and §27.021, issued by the commission or the executive director to a specific person or persons in accordance with the procedures prescribed in the TWC, Chapter 27 (other than TWC, §27.025).

(57) Injection interval--That part of the injection zone in which the well is authorized to be screened, perforated, or in which the waste is otherwise authorized to be directly emplaced.

(58) Injection operations--The subsurface emplacement of fluids occurring in connection with an injection well or wells, other than that occurring solely for construction or initial testing.

(59) Injection well--A well into which fluids are being injected. Components of an injection well annulus monitoring system are considered to be a part of the injection well.

(60) Injection zone--A formation, a group of formations, or part of a formation that receives fluid through a well.

(61) In service--The operational status when an authorized injection well is capable of injecting fluids, including times when the well is shut-in and on standby status.

(62) Intermediate casing--A string of casing with diameter intermediate between that of the surface casing and that of the smaller long-string or production casing, and which is set and cemented in a well after installation of the surface casing and prior to installation of the long-string or production casing.

(63) Large capacity cesspool--A cesspool that is designed for a flow of greater than 5,000 gallons per day.

(64) Large capacity septic system--A septic system that is designed for a flow of greater than 5,000 gallons per day.

(65) Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(66) Liner--An additional casing string typically set and cemented inside the long string casing and occasionally used to extend from base of the long string casing to or through the injection zone.

(67) Long string casing or production casing--A string of casing that is set inside the surface casing and that usually extends to or through the injection zone.

(68) Lost circulation zone--A term applicable to rotary drilling of wells to indicate a subsurface zone which is penetrated by a wellbore, and which is characterized by rock of high porosity and permeability, into which drilling fluids flow from the wellbore to the degree that the circulation of drilling fluids from the bit back to ground surface is disrupted or "lost."

(69) Mine area--The area defined by a line through the ring of designated monitor wells installed to monitor the production zone.

(70) Mine plan--A plan for operations at a mine, consisting of:

(A) a map of the permit area identifying the location and extent of existing and proposed production areas; and

(B) an estimated schedule indicating the sequence and timetable for mining and any required aquifer restoration.

(71) Monitor well--Any well used for the sampling or measurement with field instrumentation of any chemical or physical property of subsurface strata or their contained fluids. The term "monitor well" shall have the same meaning as the term "monitoring well" as defined in Texas Water Code, §27.002.

(A) Designated monitor wells are those listed in the production area authorization for which routine water quality sampling or measurement with field instrumentation is required.

(B) Secondary monitor wells are those wells in addition to designated monitor wells, used to delineate the horizontal and vertical extent of mining solutions.

(C) Pond monitor wells are wells used in the subsurface surveillance system near ponds or other pre-injection units.

(72) Motor vehicle waste disposal well--A well used for the disposal of fluids from vehicular repair or maintenance activities including, but not limited to, repair and maintenance facilities for cars, trucks, motorcycles, boats, railroad locomotives, and airplanes.

(73) Native groundwater--Groundwater naturally occurring in a geologic formation.

(74) New injection well--Any well, or group of wells, not an existing injection well.

(75) New waste stream--A waste stream not permitted.

(76) Non-commercial facility--A Class I permitted facility which operates only non-commercial wells.

(77) Non-commercial underground injection control (UIC) Class I well facility--A UIC Class I permitted facility where only non-commercial wells are operated.

(78) Non-commercial well--An underground injection control Class I injection well which disposes of wastes that are generated on-site, at a captured facility or from other facilities owned or effectively controlled by the same person.

(79) Notice of change (NOC)--A written submittal to the executive director from a permittee authorized under a general permit providing changes to information previously provided to the agency, or any changes with respect to the nature or operations of the facility, or the characteristics of the waste to be injected.

(80) Notice of intent (NOI)--A written submittal to the executive director requesting coverage under the terms of a general permit.

(81) Off-site--Property which cannot be characterized as on-site.

(82) On-site--The same or geographically contiguous property which may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which the owner controls and to which the public does not have access, is also considered on-site property.

(83) Out of service--The operational status when a well is not authorized to inject fluids, or the well itself is incapable of injecting fluids for mechanical reasons, maintenance operations, or well workovers or when injection is prohibited due to the well's inability to comply with the in-service operating standards of this chapter.

(84) Permit area--The area owned or under lease by the permittee which may include buffer areas, mine areas, and production areas.

(85) Plugging--The act or process of stopping the flow of water, oil, or gas into or out of a formation through a borehole or well penetrating that formation.

(86) Point of injection--For a Class V well, the last accessible sampling point prior to fluids being released into the subsurface environment.

(87) Pollution--The contamination of water or the alteration of the physical, chemical, or biological quality of water:

(A) that makes it harmful, detrimental, or injurious:

(i) to humans, animal life, vegetation, or property; or

(ii) to public health, safety, or welfare; or

(B) that impairs the usefulness or the public enjoyment of the water for any lawful and reasonable purpose.

(88) Pre-injection units--The on-site above-ground appurtenances, structures, equipment, and other fixtures including the injection pumps, filters, tanks, surface impoundments, and piping for wastewater transmission between any such facilities and the well that are or will be used for storage or processing of waste to be injected, or in conjunction with an injection operation.

(89) Production area--The area defined by a line generally through the outer perimeter of injection and recovery wells used for mining.

(90) Production area authorization--An authorization, issued under the terms of a Class III injection well area permit, approving the initiation of mining activities in a specified production area within a permit area, and setting specific conditions for production and restoration in each production area within an area permit.

(91) Production well--A well used to recover uranium through *in situ* [~~in situ~~] solution recovery, including an injection well used to recover uranium. The term does not include a well used to inject waste.

(92) Production zone--The stratigraphic interval extending vertically from the shallowest to the deepest stratum into which mining solutions are authorized to be introduced.

(93) Project operator--A person holding an authorization by rule, individual permit, or general permit to undertake an aquifer storage and recovery project or an aquifer recharge project.

(94) Public water system--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances as defined in §290.38 of this title (relating to Definitions).

(95) Radioactive waste--Any waste which contains radioactive material in concentrations which exceed those listed in 10 Code of Federal Regulations Part 20, Appendix B, Table II, Column 2, and as amended.

(96) Recharge injection well--A Class V injection well used for the injection of water into a geologic formation for an aquifer recharge project, including an improved sinkhole or cave connected to an aquifer.

(97) Registered Well--A well registered in accordance with the requirements of §331.221 of this title (relating to Registration of Wells).

(98) Restoration demonstration--A test or tests conducted by a permittee to simulate production and restoration conditions and verify or modify the fluid handling values submitted in the permit application.

(99) Restored aquifer--An aquifer whose local groundwater quality, within a production area, has, by natural or artificial processes, returned to the restoration table values established in accordance with the requirements of §331.107 of this title (relating to Restoration).

(100) Salt cavern--A hollowed-out void space that has been purposefully constructed within a salt formation, typically by means of solution mining by circulation of water from a well or wells connected to the surface.

(101) Salt cavern disposal well--For the purposes of this chapter, regulations of the commission, and not to underground injection control (UIC) Class II or UIC Class III wells in salt caverns regulated by the Railroad Commission of Texas, a salt cavern disposal well is a type of UIC Class I injection well used:

(A) to solution mine a waste storage or disposal cavern in naturally occurring salt; and/or

(B) to inject nonhazardous, industrial, or municipal waste into a salt cavern for the purpose of storage or disposal of the waste.

(102) Salt dome--A geologic structure that includes the caprock, salt stock, and deformed strata surrounding the salt stock.

(103) Salt dome cavern confining zone--A zone between the salt dome cavern injection zone and all underground sources of drinking water and freshwater aquifers, that acts as a barrier to movement of waste out of a salt dome cavern injection zone, and consists of the entirety of the salt stock excluding any portion of the salt stock designated as an underground injection control (UIC) Class I salt dome cavern injection zone or any portion of the salt stock occupied by a UIC Class II or Class III salt dome cavern or its disturbed salt zone.

(104) Salt dome cavern injection interval--That part of a salt dome cavern injection zone consisting of the void space of the salt dome cavern into which waste is stored or disposed of, or which is capable of receiving waste for storage or disposal.

(105) Salt dome cavern injection zone--The void space of a salt dome cavern that receives waste through a well, plus that portion of the salt stock enveloping the salt dome cavern, and extending from the boundaries of the cavern void outward a sufficient thickness to contain the disturbed salt zone, and an additional thickness of undisturbed salt sufficient to ensure that adequate separation exists between the outer limits of the injection zone and any other activities in the domal area.

(106) Salt stock--A geologic formation consisting of a relatively homogeneous mixture of evaporite minerals dominated by halite (NaCl) that has migrated from originally tabular beds into a vertical orientation.

(107) Sanitary waste--Liquid or solid waste originating solely from humans and human activities, such as wastes collected from toilets, showers, wash basins, sinks used for cleaning domestic areas, sinks used for food preparation, clothes washing operations, and sinks or washing machines where food and beverage serving dishes, glasses, and utensils are cleaned.

(108) Septic system--A well that is used to emplace sanitary waste below the surface, and is typically composed of a septic tank and subsurface fluid distribution system or disposal system.

(109) Stratum--A sedimentary bed or layer, regardless of thickness, that consists of generally the same kind of rock or material.

(110) Subsurface fluid distribution system--An assemblage of perforated pipes, drain tiles, or other similar mechanisms intended to distribute fluids below the surface of the ground. This definition includes subsurface area drip dispersal systems as defined in §222.5 of this title (relating to Definitions).

(111) Surface casing--The first string of casing (after the conductor casing, if any) that is set in a well.

(112) Temporary injection point--A method of Class V injection that uses push point technology (injection probes pushed into

the ground) for the one-time injection of fluids into or above an underground source of drinking water.

(113) Total dissolved solids--The total dissolved (filterable) solids as determined by use of the method specified in 40 Code of Federal Regulations Part 136, as amended.

(114) Transmissive fault or fracture--A fault or fracture that has sufficient permeability and vertical extent to allow fluids to move between formations.

(115) Underground injection--The subsurface emplacement of fluids through a well.

(116) Underground injection control--The program under the federal Safe Drinking Water Act, 42 United States Code, Part C, including the approved Texas state program.

(117) Underground source of drinking water--An "aquifer" or its portions:

(A) which supplies drinking water for human consumption; or

(B) in which the groundwater contains fewer than 10,000 milligrams per liter total dissolved solids; and

(C) which is not an exempted aquifer.

(118) Upper limit--A parameter value established by the commission in a permit/production area authorization which when exceeded indicates mining solutions may be present in designated monitor wells.

(119) Verifying analysis--A second sampling and analysis or measurement with instrumentation of control parameters for the purpose of confirming a routine sample analysis or measurement which indicated an increase in any control parameter to a level exceeding the upper limit. Mining solutions are assumed to be present in a designated monitor well if a verifying analysis confirms that any control parameter in a designated monitor well is present in concentration equal to or greater than the upper limit value.

(120) Well--A bored, drilled, or driven shaft whose depth is greater than the largest surface dimension, a dug hole whose depth is greater than the largest surface dimension, an improved sinkhole, or a subsurface fluid distribution system but does not include any surface pit, surface excavation, or natural depression.

(121) Well injection--The subsurface emplacement of fluids through a well.

(122) Well monitoring--The measurement by on-site instruments or laboratory methods of any chemical, physical, radiological, or biological property of the subsurface strata or their contained fluids penetrated by the wellbore.

(123) Well stimulation--Several processes used to clean the well bore, enlarge channels, and increase pore space in the injection interval, thus making it possible for fluid to move more readily into the formation including, but not limited to, surging, jetting, and acidizing.

(124) Workover--An operation in which a down-hole component of a well is repaired, the engineering design of the well is changed, or the mechanical integrity of the well is compromised. Workovers include operations such as sidetracking, the addition of perforations within the permitted injection interval, and the addition of liners or patches. For the purposes of this chapter, workovers do not include well stimulation operations.

§331.5. Prevention of Pollution.

(a) No permit or authorization by rule shall be allowed where an injection well causes or allows the movement of fluid that would result in the pollution of an underground source of drinking water. A permit or authorization by rule shall include terms and conditions reasonably necessary to protect fresh water from pollution.

(b) Persons authorized to conduct underground injection activities under this chapter shall address unauthorized discharges of chemicals of concern (COCs) from associated tankage and equipment according to the requirements of Chapter 350 of this title (relating to the Texas Risk Reduction Program).

(c) Pre-injection units [~~which are required to be authorized by permit or registration under §331.7(d) of this title (relating to Permit Required),~~] must be designed, constructed, operated, maintained, monitored, and closed so as not to cause:

(1) the discharge or imminent threat of discharge of waste into or adjacent to the waters in the state without obtaining specific authorization for such a discharge from the commission;

(2) the creation or maintenance of a nuisance; or

(3) the endangerment of the public health and welfare.

§331.7. Permit Required.

(a) Except as provided in §331.9 of this title (relating to Injection Authorized by Rule) and by subsections (d) and (e) [~~(d) - (f)~~] of this section, all injection wells and activities must be authorized by an individual permit.

(b) For Class III *in situ* [~~in situ~~] uranium solution mining wells, Frasch sulfur wells, and other Class III operations under commission jurisdiction, an area permit authorizing more than one well may be issued for a defined permit area in which wells of similar design and operation are proposed. The wells must be operated by a single owner or operator. Before commencing operation of those wells, the permittee may be required to obtain a production area authorization for separate production or mining areas within the permit area.

(c) The owner or operator of a large capacity septic system, a septic system which accepts industrial waste, or a subsurface area drip dispersal system, as defined in §222.5 of this title (relating to Definitions) must obtain a wastewater discharge permit in accordance with Texas Water Code, Chapter 26 or Chapters 26 and 32, and Chapter 305 of this title (relating to Consolidated Permits), and must submit the inventory information required under §331.10 of this title (relating to Inventory of Wells Authorized by Rule).

[~~(d) Pre-injection units for Class I nonhazardous, noncommercial injection wells and Class V injection wells permitted for the disposal of nonhazardous waste must be either authorized by a permit issued by the commission or registered in accordance with §331.17 of this title (relating to Pre-Injection Units Registration). The option of registration provided by this subsection shall not apply to pre-injection units for Class I injection wells used for the disposal of byproduct material, as that term is defined in Chapter 336 of this title (relating to Radioactive Substance Rules). Pre-injection units for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals are not subject to authorization by registration but are subject to authorization by an individual permit or under the general permit issued under Subchapter L of this chapter (relating to General Permit Authorizing Use of a Class I Injection Well to Inject Nonhazardous Desalination Concentrate or Nonhazardous Drinking Water Treatment Residuals).~~]

(d) [~~(e)~~] The commission may issue a general permit under Subchapter L of this chapter. The commission may determine that an injection well and the injection activities are more appropriately reg-

ulated under an individual permit than under a general permit based on findings that the general permit will not protect ground and surface fresh water from pollution due to site-specific conditions.

(e) [(f)] Regardless of subsection (a) of this section, an injection well authorized by the Railroad Commission of Texas to use nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes does not require a permit from the commission. The use or disposal of radioactive material under this subsection is subject to the applicable requirements of Chapter 336 of this title.

(f) [(g)] Permits issued before September 1, 2007 for Class III wells for uranium mining will expire on September 1, 2012 unless the permit holder submits an application for permit renewal under §305.65 of this title (relating to Renewal) before September 1, 2012. Any holders of permits for Class III wells for uranium mining issued before September 1, 2007 who allow those permits to expire by not submitting a permit renewal application by September 1, 2012 are not relieved from the obligations under the expired permit or applicable rules, including obligations to restore groundwater and to plug and abandon wells in accordance with the requirements of the permit and applicable rules.

(g) [(h)] Class V injection wells associated with an aquifer storage and recovery (ASR) project or an aquifer recharge project may be authorized by individual permit, general permit, or by rule. The executive director will notify a groundwater conservation district of an ASR project proposed to be authorized by rule that is located within the jurisdictional boundary of that groundwater conservation district.

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

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30 TAC §331.17, §331.18

Statutory Authority

The repeals are proposed under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the repeals are proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

§331.17. Pre-injection Units Registration.
§331.18. Registration Application, Processing, Notice, Comment, Motion to Overturn.

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

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SUBCHAPTER C. GENERAL STANDARDS AND METHODS

30 TAC §331.47

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

§331.47. Pond Lining.

[(a)] All [Except as provided in subsection (b) of this section, all] holding ponds, emergency overflow ponds, emergency storage ponds, or other surface impoundments associated with, or part of the pre-injection units associated with underground injection wells shall be lined with clay or an artificial liner [as approved by the executive director or as required by permit], and shall in addition, conform to any applicable requirements of Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste).

[(b) All surface impoundments for nonhazardous, noncommercial Class 1 industrial waste associated with Class I nonhazardous, noncommercial injection wells, or Class V injection wells permitted for the disposal of nonhazardous waste, shall meet the design standards contained in Chapter 217 of this title (relating to Design Criteria for Domestic Wastewater Systems) which apply to surface impoundments.]

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

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SUBCHAPTER D. STANDARDS FOR CLASS I WELLS OTHER THAN SALT CAVERN SOLID WASTE DISPOSAL WELLS

30 TAC §331.64

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102 which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

§331.64. Monitoring and Testing Requirements.

(a) Applicability. Subsections (b) - (j) of this section apply to all Class I wells except for those Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals.

(b) Injection fluids shall be sampled and analyzed with a frequency sufficient to yield representative data of their characteristics.

(1) The owner or operator shall develop and follow an approved written waste analysis plan that describes the procedures to be carried out to obtain a detailed chemical and physical analysis of a representative sample of the waste, including the quality assurance procedures used. At a minimum, the plan shall specify:

(A) the parameters for which the waste will be analyzed and the rationale for the selection of these parameters;

(B) the test methods that will be used to test for these parameters; and

(C) the sampling method that will be used to obtain a representative sample of the waste to be analyzed.

(2) The owner or operator shall repeat the analysis of the injected wastes as described in the waste analysis plan and when process or operating changes occur that may significantly alter the characteristics of the waste stream.

(3) The owner or operator shall conduct continuous or periodic monitoring of selected parameters as required by the executive director.

(4) The owner or operator shall assure that the plan remains accurate and the analyses remain representative.

(c) Pressure gauges shall be installed and maintained, at the wellhead, in proper operating conditions at all times on the injection tubing and on the annulus between the tubing and long-string casing, and/or annulus between the tubing and liner.

(d) Continuous recording devices shall be installed, used, and maintained in proper operating condition at all times to record injection tubing pressures, injection flow rates, injection fluid temperatures, injection volumes, tubing-long string casing annulus pressure and volume, and any other data specified by the permit. The instruments shall be housed in weatherproof enclosures. The owner or operator shall also install and use:

(1) automatic alarm and automatic shutoff systems, designed to sound and shut-in the well when pressures and flow rates or other parameters approved by the executive director exceed a range and/or gradient specified in the permit; or

(2) automatic alarms designed to sound when the pressures and flow rates or other parameters approved by the executive director exceed a rate and/or gradient specified in the permit, in cases where the owner or operator certifies that a trained operator will be on location and able to immediately respond to alarms at all times when the well is operating.

(3) If an automatic alarm or shutdown is triggered, the owner or operator shall immediately investigate as expeditiously as possible the cause of the alarm or shutoff. If, upon investigation, the well appears to be lacking mechanical integrity, or if monitoring otherwise indicates that the well may be lacking mechanical integrity, the owner or operator shall:

(A) cease injection of waste fluids unless authorized by the executive director to continue or resume injection;

(B) take all necessary steps to determine the presence or absence of a leak; and

(C) notify the executive director within 24 hours after the alarm or shutdown.

(4) If the loss of mechanical integrity is discovered by monitoring or during periodic mechanical integrity testing, the owner or operator shall:

(A) immediately cease injection of waste fluids;

(B) take all steps reasonably necessary to determine whether there may have been a release of hazardous wastes or hazardous waste constituents into any unauthorized zone;

(C) notify the executive director within 24 hours after the loss of mechanical integrity is discovered;

(D) notify the executive director when injection can be expected to resume; and

(E) restore and demonstrate mechanical integrity to the satisfaction of the executive director prior to resuming injection of waste fluids.

(5) Whenever the owner or operator obtains evidence that there may have been a release of injected wastes into an unauthorized zone:

(A) the owner or operator shall immediately cease injection of waste fluids; and

(i) notify the executive director within 24 hours of obtaining such evidence;

(ii) take all necessary steps to identify and characterize the extent of any release;

(iii) propose a remediation plan for executive director review and approval;

(iv) comply with any remediation plan specified by the executive director;

(v) implement any remediation plan approved by the executive director; and

(vi) where such release is into an underground source of drinking water (USDW) [~~a USDW~~] or freshwater aquifer currently serving as a water supply, within 24 hours, notify the local health authority, place a notice in a newspaper of general circulation, and send notification by mail to adjacent landowners;

(B) the executive director may allow the operator to resume injection prior to completing cleanup action if the owner or operator demonstrates that the injection operation will not endanger USDWs or freshwater aquifers.

(e) Mechanical integrity testing.

(1) The integrity of the long string casing, injection tube, and annular seal shall be tested annually by means of an approved pressure test with a liquid or gas and whenever there has been a well workover. The integrity of the bottom-hole cement shall be tested annually by means of an approved radioactive tracer survey. A radioactive tracer survey may be required after workovers that have the potential to damage the cement within the injection zone.

(2) A temperature log, noise log, oxygen activation log, or other approved log shall be required by the executive director at least once every five years to test for fluid movement along the borehole.

(3) A casing inspection, casing evaluation, or other approved log shall be run whenever the owner or operator conducts a workover in which the injection string is pulled, unless the executive director waives this requirement due to well construction or other factors which limit the test's reliability, or based upon the satisfactory results of a casing inspection log run within the previous five years. The executive director may require that a casing inspection log be run every five years, if there is sufficient reason to believe the integrity of the long string casing of the well may be adversely affected by naturally occurring or man-made events.

(4) The executive director may allow the use of a test to demonstrate mechanical integrity other than those listed in paragraph (1) of this subsection with the written approval of the administrator of the United States Environmental Protection Agency (EPA) or his authorized representative. To obtain approval, the executive director shall submit a written request to the EPA administrator, which shall set forth the proposed test and all technical data supporting its use. The EPA administrator shall approve the request if it will reliably demonstrate the mechanical integrity of wells for which its use is proposed. Any alternate method approved by the EPA administrator shall be published in the *Federal Register* and may be used unless its use is restricted at the time of approval by the EPA administrator.

(f) Any wells within the area of review selected for the observation of water quality, formation pressure, or any other parameter, shall be monitored at a frequency sufficient to protect USDWs [~~underground sources of drinking water (USDWs)~~] and fresh or surface water.

(g) Corrosion monitoring.

(1) Corrosion monitoring of well materials shall be conducted quarterly. Test materials shall be the same as those used in the injection tubing, packer, and long string casing, and shall be continuously exposed to the waste fluids with the exception of when the well is taken out of service. The owner or operator shall demonstrate that the waste stream will be compatible with the well materials with which the waste is expected to come into contact, and to submit to the executive director a description of the methodology used to make that determination. Compatibility for purposes of this requirement is established if contact with injected fluids will not cause the well materials to fail to satisfy any design requirement imposed under §331.62(a)(1) [~~§331.62(1)~~] of this title (relating to Construction Standards). Testing shall be by:

(A) placing coupons of the well construction materials in contact with the waste stream; or

(B) routing the waste stream through a loop constructed with the material used in the well; or

(C) using an alternative method approved by the executive director.

(2) The test shall use materials identical to those used in the construction of the well, and those materials must be continuously exposed to the operating pressures and temperatures (measured at the wellhead) and flow rates of the injection operation; and

(3) The owner or operator shall monitor the materials for loss of mass, thickness, cracking, pitting and other signs of corrosion on a quarterly basis to ensure that the well components meet the minimum standards for material strength and performance set forth in §331.62(a)(1) [~~§331.62(1)~~] of this title.

(4) Corrosion monitoring may be waived by the executive director if the injection well owner or operator satisfactorily demonstrates, before authorization to conduct injection operations, that the waste streams will not be corrosive to the well materials with which the waste is expected to come into contact throughout the life of the well. The demonstration shall include a description of the methodology used to make that determination.

(h) Ambient monitoring.

(1) Based on a site-specific assessment of the potential for fluid movement from the well or injection zone and on the potential value of monitoring wells to detect fluid movement, the executive director shall require the owner or operator to develop a monitoring program. When prescribing a monitoring system, the executive director may also require:

(A) Continuous monitoring for pressure changes in the first aquifer overlying the confining zone. When a monitor well is installed, the owner or operator shall, on a quarterly basis, sample the aquifer and analyze for constituents specified by the executive director;

(B) the use of indirect, geophysical techniques to determine the position of the waste front, the water quality in a formation designated by the executive director, or to provide other site-specific [~~site specific~~] data;

(C) periodic monitoring of the ground water quality in the first aquifer overlying the injection zone;

(D) periodic monitoring of the ground water quality in the lowermost USDW; and

(E) any additional monitoring necessary to determine whether fluids are moving into or between USDWs.

(2) The pressure buildup in the injection zone shall be monitored annually, including at a minimum, a shut down of the well for a time sufficient to conduct a valid observation of the pressure fall-off curve.

(i) Any other monitoring and testing requirements which the executive director determines to be necessary including, but not limited to, monitoring for seismic activity.

(j) The owner or operator shall submit information demonstrating to the satisfaction of the executive director that the waste stream and its anticipated reaction products will not alter the permeability, thickness, or other relevant characteristics of the confining or injection zones such that they would no longer meet the requirements specified in §331.121(c) of this title (relating to Class I Wells).

(k) Class I Wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals shall comply with the following monitoring and testing requirements:

(1) Monitoring requirements. Monitoring requirements shall, at a minimum, include:

(A) The analysis of the injected fluids with sufficient frequency to yield representative data of their characteristics;

(B) Installation and use of continuous recording devices to monitor injection pressure, flow rate and volume, and the pressure on the annulus between the tubing and the long string of casing;

(C) Installation and use of monitoring wells within the area of review if required by the executive director, to monitor any migration of fluids into and pressure in the USDW [~~underground sources of drinking water~~]. The type, number and location of the wells, the parameters to be measured, and the frequency of monitoring must be approved by the executive director;

(D) A demonstration of mechanical integrity pursuant to paragraph (4) of this subsection at least once every five years during the life of the well; and

(E) The type, number and location of wells within the area of review to be used to monitor any migration of fluids into and pressure in the USDW [~~underground sources of drinking water~~], the parameters to be measured and the frequency of monitoring.

(2) When the executive director determines that an injection well lacks mechanical integrity pursuant to paragraph (4) of this subsection, the executive director shall give written notice of his determination to the owner or operator. Unless the executive director requires immediate cessation, the owner or operator shall cease injection into the well within 48 hours of receipt of the executive director's determination. The executive director may allow plugging of the well in accordance with the requirements of §331.46 of this title (relating to Closure Standards) or require the owner or operator to perform such additional construction, operation, monitoring, reporting and corrective action as is necessary to prevent the movement of fluid into or between USDWs caused by the lack of mechanical integrity. The owner or operator may resume injection upon receipt of written notification from the executive director that the owner or operator has demonstrated mechanical integrity under paragraph (4) of this subsection.

(3) The executive director may allow the owner or operator of a well which lacks mechanical integrity under paragraph (4) of this subsection to continue or resume injection if the owner or operator has made a satisfactory demonstration that there is no movement of fluid into or between USDWs.

(4) Mechanical Integrity Testing. An injection well has mechanical integrity if:

(A) There is no significant leak in the casing, tubing or packer; and

(B) There is no significant fluid movement into an USDW [~~underground source of drinking water~~] through vertical channels adjacent to the injection well bore.

(5) One of the following methods shall be used to evaluate the absence of significant leaks under paragraph (4)(A) of this subsection:

(A) Following an initial pressure test, monitoring of the tubing-casing annulus pressure with sufficient frequency to be representative, as determined by the executive director, while maintaining an annulus pressure different from atmospheric pressure measured at the surface; or

(B) Pressure test with liquid or gas.

(6) The results of a temperature or noise log must be used to determine the absence of significant fluid movement under paragraph (4)(B) of this subsection.

(7) The executive director may allow the use of a test to demonstrate mechanical integrity other than those listed in paragraph (5)(A) and (B) of this subsection with the written approval of the executive director. To obtain approval, the permittee shall submit a written request to the executive director, which shall set forth the proposed test and all technical data supporting its use. The executive director shall approve the request if it will reliably demonstrate the mechanical integrity of wells for which its use is proposed.

(8) In conducting and evaluating the tests enumerated in this section or others to be allowed by the executive director, the owner or operator and the executive director shall apply methods and standards generally accepted in the industry. When the owner or operator reports the results of mechanical integrity tests to the executive director, he shall include a description of the test(s) and the method(s) used. In making his evaluation, the executive director shall review monitoring and other test data submitted since the previous evaluation.

(9) The executive director may require additional or alternative tests if the results presented by the owner or operator under §331.64(k)(5) of this title (relating to Monitoring and Testing Requirements) are not satisfactory to the executive director to demonstrate that there is no movement of fluid into or between USDWs resulting from the injection activity.

(10) Ambient monitoring.

(A) Based on a site-specific assessment of the potential for fluid movement from the well or injection zone and on the potential value of monitoring wells to detect such movement, the executive director shall require the owner or operator to develop a monitoring program. At a minimum, the executive director shall require monitoring of the pressure buildup in the injection zone annually, including a shut down of the well for a time sufficient to conduct a valid observation of the pressure fall-off curve.

(B) When prescribing a monitoring system the executive director may also require:

(i) Continuous monitoring for pressure changes in the first aquifer overlying the confining zone. When such a well is installed, the owner or operator shall, on a quarterly basis, sample the aquifer and analyze for constituents specified by the executive director;

(ii) The use of indirect, geophysical techniques to determine the position of the waste front, the water quality in a formation designated by the executive director, or to provide other site-specific [~~site specific~~] data;

(iii) Periodic monitoring of the ground water quality in the first aquifer overlying the injection zone;

(iv) Periodic monitoring of the ground water quality in the lowermost USDW; and

(v) Any additional monitoring necessary to determine whether fluids are moving into or between USDWs.

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

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SUBCHAPTER G. CONSIDERATION PRIOR TO PERMIT ISSUANCE

30 TAC §331.121

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

§331.121. Class I Wells.

(a) The commission shall consider the following before issuing a Class I Injection Well Permit:

(1) all information in the completed application for permit;

(2) all information in the Technical Report submitted with the application for permit in accordance with §305.45(a)(8) of this title (relating to Contents of Application for Permit). Subparagraphs (A) - (Q) [~~(A)~~ - ~~(R)~~] of this paragraph apply to all Class I wells except those Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Information to be considered includes, but is not limited to:

(A) a map showing the location of the injection well for which a permit is sought and the applicable area of review. Within the area of review, the map must show the number, or name, and location of all producing wells, injection wells, abandoned wells, dry holes, surface bodies of water, springs, mines (surface and subsurface), quarries, water wells, and other pertinent surface features, including residences and roads. The map should also show faults, if known or suspected. Only information of public record is required to be included on this map;

(B) a tabulation of all wells within the area of review which penetrate the injection zone or confining zone, and for salt dome cavern disposal wells, the salt dome cavern injection zone, salt dome cavern confining zone and caprock. Such data shall include a description of each well's type, construction, date drilled, location, depth, record of plugging and/or completion, and any additional information the executive director may require;

(C) the protocol followed to identify, locate, and ascertain the condition of abandoned wells within the area of review which penetrate the injection or the confining zones;

(D) maps and cross-sections indicating the general vertical and lateral limits of underground sources of drinking water (USDWs) and freshwater aquifers, their positions relative to the injection formation and the direction of water movement, where known, in each USDW or freshwater aquifer which may be affected by the proposed injection;

(E) maps, cross-sections, and description of the geologic structure of the local area;

(F) maps, cross-sections, and description of the regional geologic setting;

(G) proposed operating data:

(i) average and maximum daily injection rate and volume of the fluid or waste to be injected over the anticipated life of the injection well;

(ii) average and maximum injection pressure;

(iii) source of the waste streams;

(iv) an analysis of the chemical and physical characteristics of the waste streams;

(v) for salt dome cavern waste disposal, the bulk waste density, permeability, porosity, and compaction rate, as well as the individual physical characteristics of the wastes and transporting media;

(vi) for salt dome cavern waste disposal, the results of tests performed on the waste to demonstrate that the waste will remain solid under cavern conditions; and

(vii) any additional analyses which the executive director may reasonably require;

(H) proposed formation testing program to obtain an analysis of the chemical, physical, and radiological characteristics of formation fluids, and other information on the injection zone and confining zone;

(I) proposed stimulation program, if needed;

(J) proposed operation and injection procedures;

(K) engineering drawings of the surface and subsurface construction details of the injection well [~~and pre-injection units, except that pre-injection units registered under the provisions of §331.17 of this title (relating to Pre-injection Units Registration) shall be considered under that section~~];

(L) contingency plans, based on a reasonable worst-case [~~worst case~~] scenario, to cope with all shut-ins; loss of cavern integrity, or well failures so as to prevent migration of fluid into any USDW;

(M) plans (including maps) for meeting the monitoring requirements of this chapter, such plans shall include all parameters, test methods, sample methods, and quality assurance procedures necessary and used to meet these requirements;

(N) for wells within the area of review which penetrate the injection zone or confining zone but are not adequately constructed, completed, or plugged, the corrective action proposed to be taken;

(O) construction procedures including a cementing and casing program, contingency cementing plan for managing lost circulation zones and other adverse subsurface conditions, well materials specifications and their life expectancy, logging procedures, deviation checks, and a drilling, testing, and coring program;

(P) delineation of all faults within the area of review, together with a demonstration, unless previously demonstrated to the commission or to the United States Environmental Protection Agency, that the fault is not sufficiently transmissive or vertically extensive to allow migration of hazardous constituents out of the injection zone; and

(Q) the authorization status [~~under this chapter~~] of the pre-injection units for the injection well.[~~; and~~]

[~~(R) information demonstrating compliance with the applicable design criteria of Chapter 217 of this title (relating to Design Criteria for Domestic Wastewater Systems), for pre-injection units associated with Class I nonhazardous, noncommercial injection wells.~~]

(3) This paragraph applies to those Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Information to be considered includes, but is not limited to:

(A) a map showing the injection well(s) for which a permit is sought and the applicable area of review. Within the area of review, the map must show the number, or name, and location of all producing wells, dry holes, surface bodies of water, springs, mines (surface and subsurface), quarries, water wells and other pertinent surface features including residences and roads. The map should also show faults, if known or suspected. Only information of public record is required to be included on this map;

(B) a tabulation of data on all wells within the area of review that penetrate into the proposed injection zone. Such data shall include a description of each well's type, construction, date drilled, location, depth, record of plugging and/or completion, and any additional information the executive director may require;

(C) a topographic map (or other map if a topographic map is unavailable) extending one mile beyond the property boundaries of the source depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, and other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant within a quarter mile of the facility property boundary;

(D) maps and cross sections indicating the general vertical and lateral limits of all USDW [~~underground sources of drinking water~~] within the area of review, their position relative to the injection formation and the direction of water movement, where known, in each USDW [~~underground source of drinking water~~] which may be affected by the proposed injection;

(E) maps and cross sections detailing the geologic structure of the local area;

(F) generalized maps and cross sections illustrating the regional geologic setting;

(G) proposed operating data:

(i) average and maximum daily rate and volume of the fluid to be injected;

(ii) average and maximum injection pressure; and

(iii) source and an analysis of the chemical, physical, radiological and biological characteristics of injection fluids;

(H) proposed formation testing program to obtain an analysis of the chemical, physical and radiological characteristics of and other information on the receiving formation;

(I) proposed stimulation program;

(J) proposed injection procedure;

(K) schematic or other appropriate drawings of the surface and subsurface construction details of the well;

(L) contingency plans to cope with all shut-ins or well failures so as to prevent migration of fluids into any USDW [~~underground source of drinking water~~];

(M) plans (including maps) for meeting the monitoring requirements in §331.64 of this title (relating to Monitoring and Testing Requirements);

(N) for wells within the area of review which penetrate the injection zone but are not properly completed or plugged, the corrective action proposed to be taken under §331.45(2)(G) of this title (relating to Executive Director Approval of Construction and Completion); and

(O) construction procedures including a cementing and casing program, logging procedures, deviation checks, and a drilling, testing, and coring program; and

(4) whether the applicant will assure, in accordance with Chapter 37, Subchapter Q of this title (relating to Financial Assurance for Underground Injection Control Wells), the resources necessary to close, plug, abandon, and if applicable, provide post-closure care for the well and/or waste disposal cavern as required;

(5) the closure plan, corrective action plan, and post-closure plan submitted in the technical report accompanying the permit application; except that a post-closure plan is not required for those Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals; and

(6) any additional information required by the executive director for the evaluation of the proposed injection well.

(b) In determining whether the use or installation of an injection well is in the public interest under Texas Water Code, §27.051(a)(1), the commission shall also consider:

(1) the compliance history of the applicant in accordance with Texas Water Code, §27.051(e) and §281.21(d) of this title (relating to Draft Permit, Technical Summary, Fact Sheet, and Compliance History);

(2) whether there is a practical, economic and feasible alternative to an injection well reasonably available to manage the types and classes of hazardous waste;

(3) if the injection well will be used for the disposal of hazardous waste, whether the applicant will maintain liability coverage for bodily injury and property damage to third parties that is caused by sudden and nonsudden accidents in accordance with Chapter 37 of this title (relating to Financial Assurance); and

(4) that any permit issued for a Class I injection well for disposal of hazardous wastes generated on site requires a certification by the owner or operator that:

(A) the generator of the waste has a program to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to economically practicable; and

(B) injection of the waste is that practicable method of disposal currently available to the generator which minimizes the present and future threat to human health and the environment.

(c) The commission shall consider the following minimum criteria for siting before issuing a Class I injection well permit for all Class I wells except those Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. For Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals, only paragraph (1) of this subsection applies.

(1) All Class I injection wells shall be sited such that they inject into a formation that is beneath the lowermost formation containing, within 1/4 mile of the wellbore, a USDW or freshwater aquifer.

(2) The siting of Class I injection wells shall be limited to areas that are geologically suitable. The executive director shall determine geologic suitability based upon:

(A) an analysis of the structural and stratigraphic geology, the hydrogeology, and the seismicity of the region;

(B) an analysis of the local geology and hydrogeology of the well site, including, at a minimum, detailed information regarding stratigraphy, structure, and rock properties, aquifer hydrodynamics, and mineral resources; and

(C) a determination that the geology of the area can be described confidently and that limits of waste fate and transport can be accurately predicted through the use of analytical and numerical models.

(3) Class I injection wells shall be sited such that:

(A) the injection zone has sufficient permeability, porosity, thickness, and areal extent to prevent migration of fluids into USDWs or freshwater aquifers;

(B) the confining zone:

(i) is laterally continuous and free of transecting, transmissive faults or fractures over an area sufficient to prevent the movement of fluids into a USDW or freshwater aquifer; and

(ii) contains at least one formation of sufficient thickness and with lithologic and stress characteristics capable of preventing initiation and/or propagation of fractures.

(4) The owner or operator shall demonstrate to the satisfaction of the executive director that:

(A) the confining zone is separated from the base of the lowermost USDW or freshwater aquifer by at least one sequence of permeable and less permeable strata that will provide an added layer of protection for the USDW or freshwater aquifer in the event of fluid movement in an unlocated borehole or transmissive fault; or

(B) within the area of review, the piezometric surface of the fluid in the injection zone is less than the piezometric surface of the lowermost USDW or freshwater aquifer, considering density effects, injection pressures, and any significant pumping in the overlying USDW or freshwater aquifer; or

(C) there is no USDW or freshwater aquifer present;

(D) the commission may approve a site which does not meet the requirements in subparagraphs (A), (B), or (C) of this paragraph if the owner or operator can demonstrate to the commission that because of the geology, nature of the waste, or other considerations, that abandoned boreholes or other conduits would not cause endangerment of USDWs, and fresh or surface water.

(d) The commission shall also consider the following additional information, which must be submitted in the technical report of the application as part of demonstrating that the facility will meet the performance standard in §331.162 of this title (relating to Performance Standard), before issuing a salt dome cavern Class I injection well permit:

(1) a thorough characterization of the salt dome to establish the geologic suitability of the location, including:

(A) data and interpretation from all appropriate geophysical methods (such as well logs, seismic surveys, and gravity surveys), subject to the approval of the executive director, necessary to:

(i) map the overall geometry of the salt dome, including all edges and any suspected overhangs of the salt stock;

(ii) demonstrate the existence of a minimum distance of 500 feet between the boundaries of the proposed salt dome cavern injection zone and the boundaries of the salt stock;

(iii) define the composition and map the top and thickness of the sedimentary rock units between the caprock and surface, including the flanks of the salt stock;

(iv) define the composition and map the top and thickness of the caprock overlying the salt stock;

(v) map the top of the salt stock;

(vi) calculate the movement and the salt loss rate of the salt stock;

(vii) define any other caverns and other uses of the salt dome, and address any conditions that may result in potential adverse impact on the salt dome; and

(viii) satisfy any other requirement of the executive director necessary to demonstrate the geologic suitability of the location;

(B) a surface-recorded three-dimensional seismic survey, subject to the following minimum requirements:

(i) the lateral extent of the survey will be determined by the executive director; and

(ii) the survey must provide information as part of demonstrating that the location is geologically suitable for the purpose of meeting the performance standard in §331.162 of this title;

(C) identification of any unusual features, such as depressions or lineations observable at the land surface or within or detectable within the subsurface, which may be indicative of underlying anomalies in the caprock or salt stock, which might affect construction, operation, or closure of the cavern;

(D) the petrology of the caprock, salt stock, and deformed strata; and

(E) for strata surrounding the salt stock, information on their nature, structure, hydrodynamic properties, and relationships to USDWs, including a demonstration that the proposed salt dome cavern injection zone will not be in or above a formation which within 1/4 mile of the salt dome cavern injection zone contains a USDW;

(2) establishment of a pre-development baseline for subsidence and groundwater monitoring, over the area of review;

(3) characterization of the predicted impact of the proposed operations on the salt stock, specifically the extent of the disturbed zone;

(4) demonstration of adequate separation between the outer limits of the injection zone and any other activities in the domal area. The thickness of the disturbed zone, as well as any additional safety factors will be taken into consideration; and

(5) the commission will consider the presence of salt cavern storage activities, sulfur mining, salt mining, brine production, oil and gas activity, and any other activity which may adversely affect or be affected by waste disposal in a salt cavern.

(e) Information requirements for Class I hazardous waste injection well permits.

(1) The following information is required for each active Class I hazardous waste injection well at a facility seeking an underground injection control permit:

(A) dates well was operated; and

(B) specification of all wastes that have been injected in the well, if available.

(2) The owner or operator of any facility containing one or more active hazardous waste injection wells must submit all available information pertaining to any release of hazardous waste or constituents from any active hazardous waste injection well at the facility.

(3) The owner or operator of any facility containing one or more active Class I hazardous waste injection wells must conduct such preliminary site investigations as are necessary to determine whether a release is occurring, has occurred, or is likely to have occurred.

(f) Interim Status under the Resource Conservation Recovery Act (RCRA) for Class I hazardous waste injection wells. The minimum state standards which define acceptable injection of hazardous waste during the period of interim status are set out in this chapter. The issuance of an underground injection well permit does not automatically terminate RCRA interim status. A Class I well's interim status does, however, automatically terminate upon issuance of a RCRA permit for that well, or upon the well's receiving a RCRA permit-by-rule under §335.47 of this title (relating to Special Requirements for Persons Eligible for a Federal Permit by Rule). Thus, until a Class I well injecting hazardous waste receives a RCRA permit or RCRA permit-by-rule, the well's interim status requirements are the applicable requirements imposed under this chapter, including any requirements imposed in the underground injection control permit.

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

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