TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 26. PRACTICE AND PROCEDURE

SUBCHAPTER E. MEMORANDA OF UNDERSTANDING WITH OTHER STATE AGENCIES

13 TAC §26.25

The Texas Historical Commission adopts the repeal of §26.25, concerning Memorandum of Understanding with Texas Department of Transportation. Concurrently with this posting, an adopted replacement to §26.25 is posted in another section of the Texas Register. The repeal of §26.25 is adopted without changes to the proposed text published in the May 18, 2018, issue of the Texas Register (43 TexReg 3179). This repeal and the adopted replacement have been agreed upon by both the Texas Historical Commission (THC) and the Texas Department of Transportation (TxDOT) in order to update the current Memorandum of Understanding (MOU).

This repeal and the accompanying replacement are adopted to better explain both agencies' responsibilities. The changes include several administrative adjustments, including reorganization of the agreement. The adopted replacement also offers clarification of project activities relating to non-archeological historic properties, the addition of new definitions relating to archeological and non-archeological properties, and the addition of text relating to programmatic public outreach activities.

No comments were received regarding adoption of the rule replacement and the new rule.

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

The repeal is adopted under §191.052 of the Texas Natural Resources Code, which provides the THC with authority to promulgate rules to reasonably affect the purposes of Chapter 191.

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

Filed with the Office of the Secretary of State on July 27, 2018.

TRD-201803256

Mark Wolfe
Executive Director
Texas Historical Commission
Effective date: August 16, 2018
Proposal publication date: May 18, 2018
For further information, please call: (512) 463-8882

13 TAC §26.25

The Texas Historical Commission (hereafter referred to as the commission) adopts new §26.25 in Title 13, Part II, Subchapter E, Chapter 26 of the Texas Administrative Code (relating to Memorandum of Understanding with Texas Department of Transportation) to replace the current §26.25. The new §26.25 is adopted with changes to the proposed text published in the May 18, 2018, issue of the Texas Register (43 TexReg 3179) and will be republished. Concurrently with this posting, an adopted repeal of the current §26.25 is posted in another section of the Texas Register. The repeal and this adopted replacement have been agreed upon by both the Texas Historical Commission (THC) and the Texas Department of Transportation (TxDOT) in order to update the current Memorandum of Understanding (MOU).

This replacement is adopted to better explain both agencies’ responsibilities. The changes include several administrative adjustments, including reorganization of the agreement. The adopted replacement also offers clarification of project activities relating to non-archeological historic properties, the addition of new definitions relating to archeological and non-archeological properties, and the addition of text relating to programmatic public outreach activities.

No comments were received regarding adoption of the new rule.

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

The new rule is adopted under §191.052 of the Texas Natural Resources Code, which provides the THC with authority to promulgate rules to reasonably affect the purposes of Chapter 191.

§26.25. Memorandum of Understanding with Texas Department of Transportation.

(a) Purpose and Authority. This section contains the memorandum of understanding (MOU) entered into by the Texas Historical Commission (THC) and the Texas Department of Transportation (TxDOT) in accordance with Texas Government Code, §442.005 and §442.007; Texas Natural Resources Code, §191.052(f); and Transportation Code, §201.607. The purpose of this MOU is to provide a formal mechanism for expediting THC review of TxDOT’s transportation projects that potentially pose adverse effects on cultural resources. This MOU supersedes the previous MOU made effective on May 20, 2013.
(b) Applicability.

(1) Except as provided in paragraph (2) of this subsection, this section generally applies to:

(A) a transportation project for which an environmental review is being or will be performed under 43 TAC Chapter 2 (relating to Environmental Review of Transportation Projects); or

(B) any other type of project coordinated by TxDOT in compliance with the requirements of this section.

(2) Work in TxDOT right-of-way that is not associated with a project for which TxDOT is the project sponsor under 43 TAC §2.7 (relating to Texas Department of Transportation, Environmental Review of Transportation Projects, General Provisions) is the responsibility of the project sponsor and not of TxDOT (see Texas Natural Resources Code §191.0525). The project sponsor is responsible for coordinating directly with THC for such work. Examples of projects that will be coordinated by the non-TxDOT project sponsor directly with THC include but are not limited to:

(A) on-system highway projects funded entirely with local funds;

(B) utility relocations or installations within TxDOT right-of-way sponsored by other entities; and

(C) roadway and access connections sponsored by other entities.

(3) TxDOT transportation projects may be coordinated with THC outside the terms of this MOU with notification of THC.

(c) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Antiquities permit--A permit issued by THC in order to regulate the taking, alteration, damage, excavation, destruction, salvage, archeological survey, testing, excavation and study of State Antiquities Landmarks including prehistoric, historic and underwater archeological sites, and the preservation, rehabilitation, restoration, reconstruction, architectural investigation, hazard abatement, relocation, demolition, or new construction related to historic structures and buildings designated as a State Antiquities Landmark.

(2) Area of potential effects (APE)--The geographic space or spaces within which a project may cause changes in the character or use of historic properties, if any such properties exist.

(A) The area of potential effects for archeological properties will be confined to the limits of the proposed project right of way (including permanent and temporary easements), utility relocations designated by TxDOT, and project-specific locations designated by TxDOT. The area of potential effects also extends to the depth of impacts caused by the undertaking.

(B) The area of potential effects for non-archeological historic properties will be confined to the limits of the proposed project right of way (including permanent and temporary easements), utility relocations designated by TxDOT, and project-specific locations designated by TxDOT.

(3) Cultural resources--A general term referring to cemeteries; buildings; structures; objects; archeological sites, including shipwrecks; and districts more than 50 years of age with the potential to have significance in local, state, or national history.

(4) Effect--Alteration to the characteristics of a historic property qualifying it for formal designation as a State Antiquities Landmark.

(5) Eligibility--A property's eligibility for designation as a State Antiquities Landmark, as set forth in this chapter.

(6) Emergency Permit--A permit that may be used by TxDOT under certain emergency circumstances for the purposes of performing investigations prior to formal application for an antiquities permit.

(7) Historic property--Any prehistoric or historic district, site, building, structure, or object that meets the requirements for designation as a State Antiquities Landmark as set forth in this chapter.

(8) Minor widening--Roadway projects resulting in pavement profile widened to less than double their original width, resulting from adding travel/center-turn lanes or paved shoulders.

(9) Project-specific location--The location of specific material sources (e.g., base material, borrow and sand pits) and other sites used by a construction contractor for a specific project.

(10) State Antiquities Landmarks (SAL)--Both Archeological and Non-archeological historic properties that are designated as landmarks as defined in Subchapter D of the Antiquities Code of Texas (Texas Natural Resources Code, Chapter 191), or treated as landmarks under the interim protection described in §26.8(d) of this title (relating to Designation Procedures for Publicly Owned Landmarks), and identified in accordance with this chapter.

(11) THC--Texas Historical Commission.

(12) Transportation project--A project to construct, maintain or improve a highway, rest area, toll facility, aviation facility, public transportation facility, rail facility, ferry, or ferry landing. A transportation enhancement project funded under 23 USC 133(h) is also a transportation project.

(13) TxDOT--Texas Department of Transportation.

(d) Coordination Responsibilities.

(1) TxDOT. The coordination responsibilities of TxDOT under this MOU are defined as follows.

(A) All coordination required by this MOU shall be conducted by or through TxDOT's Environmental Affairs Division or its successor as established by TxDOT administration, unless the Environmental Affairs Division (or its successor) and THC agree in writing to allow other appropriate organizational units of TxDOT or other entities approved by the respective agencies to conduct the coordination.

(B) TxDOT shall not be a signatory to any permit issued by THC to another entity for work on a project funded or sponsored by such other entity.

(2) THC. The coordination responsibilities of THC under this MOU are to conduct any review required by this section in an efficient manner, to provide timely feedback to TxDOT about projects coordinated under this section, and to apply any funding provided by TxDOT solely to the review of TxDOT's projects in a manner that most efficiently streamlines THC's effective review and early coordination.

(e) Qualifications of Staff and Use of Consultants.

(1) All cultural resource investigations executed under the terms of this MOU shall be implemented by staff who meet the requirements for Professional personnel as designed and set forth in this chapter; or the Secretary of the Interior's Professional Qualification Standards 36 C.F.R Part 61, Appendix 6) and qualified and eligible to receive an Antiquities Permit.
(2) TxDOT has the right to perform cultural resource investigations using staff or consultants who meet the professional standards cited in paragraph (1) of this subsection.

(3) Cultural resource surveys, investigations, permit applications, and other work performed by consultants shall be coordinated with THC by or through TxDOT’s Environmental Affairs Division, or its successor as established by TxDOT administration, unless it and THC agree in writing to allow other appropriate organizational units of TxDOT or other entities approved by the respective agencies to coordinate the work.

(f) Projects Excluded from Review for Archeological Sites and Cemeteries.

(1) Projects with ground disturbance of less than 100 cubic yards of impacts to undisturbed sediments, by their nature and definition, do not have the potential to affect historic properties. Such projects do not require review of their potential project impacts on archeological resources or cemeteries by THC under this chapter or under this MOU. The following list provides examples of activities with this low level of new disturbance that do not require review of their potential impacts on archeological resources or cemeteries under this chapter or under this MOU:

(A) installation, repair, or replacement of fencing, signage, traffic signals, railroad warning devices, safety end treatments, cameras and intelligent highway system equipment;

(B) projects involving purchase or acquisition of land without associated ground-disturbing activities;

(C) routine structural maintenance and repair of bridges, highways, railroad crossings, picnic areas, and rest areas;

(D) in-kind repair, replacement of lighting, signals, curbs and gutters, and sidewalks;

(E) crack seal, overlay, milling, grooving, resurfacing, and restriping;

(F) replacement, upgrade, and repair of safety barriers, ditches, storm drains, and culverts;

(G) intersection improvements, including repair or replacement of overpasses, that require less than 0.5 acres of additional right of way at each intersection;

(H) placement of riprap to prevent erosion of waterway banks and bridge piers provided no ground disturbance is required;

(I) all maintenance work between a highway and an adjacent frontage road;

(J) installation of noise barriers or alterations to existing publicly owned buildings less than 50 years old, to provide for noise reduction except in potential or listed National Register districts;

(K) driveway and street connections;

(L) all work within interchanges and within medians of divided highways;

(M) all work between the flowlines of the ditches and channels and above the original line and grade;

(N) ditch and channel maintenance, provided removal of fill is above the original line and grade;

(O) repairs needed as a result of an event, natural or man-made, which causes damage to a designated state highway, resulting in an imminent threat to life or property of the traveling public or which substantially disrupts or may disrupt the orderly flow of traffic and commerce;

(P) the installation and modification of sidewalks (including the addition of American with Disabilities Act (ADA) ramps) except:

(i) sidewalk installations where the depth of impact exceeds one foot;

(ii) sidewalk and ADA ramp projects within the historic districts in the following cities or towns: Goliad, Rio Grande City, Roma, San Antonio, San Elizario, and San Ygnacio; and

(iii) sidewalk or ADA ramp projects within the limits of the following cities or towns: Anahuac, Nacogdoches, San Patricio, and Socorro;

(Q) routine maintenance projects;

(R) vegetation control

(S) traffic control; and/or

(T) routine painting and striping.

(2) Design changes for projects that have completed all applicable review and consultation where the new activities would have less than 100 cubic yards of impacts to undisturbed sediments do not require additional review or coordination.

(3) Projects that are exempt from project-specific review for compliance with this chapter and review under this MOU, as specified in paragraphs (1) and (2) of this subsection, are also exempt from compliance with other THC rules regarding project-specific investigations or coordination for potential impacts to cemeteries promulgated under Texas Health and Safety Code, §711.012(c), unless one of the following two conditions is present:

(A) pavement would be extended to within 15 feet of the boundary of a known cemetery founded earlier than 1955; or

(B) a project element would directly affect known burials.

(g) Procedures for Project Coordination when the Project Requires Review for Archeological Sites and Cemeteries.

(1) For projects subject to review for archeological sites and cemeteries under this MOU, TxDOT will evaluate the APE for potential project effects to archeological historic properties and to determine whether the APE contains cemeteries. TxDOT must make reasonable efforts and act in good faith when complying with this requirement.

(2) TxDOT may approve projects to proceed to construction without review by THC when TxDOT staff finds that the project will not affect archeological historic properties and the project APE will not contain cemeteries.

(3) TxDOT will submit projects to THC for review when TxDOT staff finds the project may affect archeological historic properties or the project APE contains cemeteries. TxDOT may, at its discretion, submit projects for THC review in cases where TxDOT staff finds that the project will not affect archeological historic properties, and the project APE does not contain cemeteries.

(4) In cases where TxDOT seeks comment from THC on proposed identification and/or evaluation methods, TxDOT will recommend one or more methods.

(5) In its request for review TxDOT will make one or more of the following findings, determinations, and recommendations:
(A) In cases where no archeological sites or cemeteries occur or are likely to occur in some or all of the APE, TxDOT will propose a finding of no effect in those portions of the APE and recommend that the project proceed to construction in those portions.

(B) In cases where an archeological site occurs within the APE but the portion of the site within the APE does not have characteristics that qualify it as an archeological historic property or is not likely to have such characteristics, TxDOT will propose a determination that the portion of the site in the APE is not an archeological historic property, find that the project will have no effect on archeological historic properties at the site location, and recommend that the project proceed to construction at the location of the site.

(C) In cases where the portion of a site within the APE has characteristics that qualify it as an archeological historic property, TxDOT will propose a determination that an archeological historic property occurs within the APE.

(D) In cases where the APE contains an archeological historic property or cemetery, TxDOT will either propose a finding that the project will have no adverse effect on the site or propose a finding that the project will have an adverse effect on the site.

(E) If a project will have an adverse effect on an archeological historic property or cemetery within the APE, TxDOT will also recommend to THC an appropriate means by which to resolve the adverse effect.

(i) The resolution of adverse effects may take one of the following forms:

(1) the avoidance of the site during construction;

(2) an alternative mitigation strategy, such as the preservation of a comparable site or the re-analysis of an existing collection;

(3) data recovery excavation or exhumation; or

(4) another form of resolution approved by THC.

(ii) In cases where data recovery is the selected means for resolving adverse effects, TxDOT will coordinate with THC at several stages during the data recovery process according to the following procedures, unless TxDOT and THC agree in writing to different procedures:

(1) TxDOT will submit an initial data recovery plan as part of a permit application for data recovery to THC for review.

(2) TxDOT will submit a brief report, documenting whether the fieldwork met the terms of the initial data recovery plan and justifying any deviation, to THC for review. When appropriate, TxDOT will recommend that the project be approved to proceed to construction and destruction of any remaining portion of the site within the APE.

(3) TxDOT will submit a revised data recovery plan, based on a preliminary review of field data and recovered materials, to THC for review. When appropriate, TxDOT will recommend that the revised plan be adopted for the completion of data recovery analysis and reporting.

(4) TxDOT will submit a draft data recovery report to THC for review. When appropriate, TxDOT will recommend that the report be accepted in partial satisfaction of the terms of the permit and in satisfaction of TxDOT's obligations for resolving the adverse effects of the project on the site.


(F) TxDOT will ensure that data recovery investigations do not begin before the State of Texas' legal right to ownership of the artifacts to be recovered has been secured.

(F) TxDOT will ensure that data recovery investigations do not begin before the State of Texas' legal right to ownership of the artifacts to be recovered has been secured.

(F) THC will respond within 20 calendar days of receipt of the TxDOT request for review, in accordance with and pursuant to the terms and conditions set out by an interagency contract executed by THC and TxDOT. This final response will include:

(i) a statement of concurrence or nonconcurrence with TxDOT's findings and recommendations;

(ii) a determination of site eligibility for all evaluated sites; and

(iii) any other comments relevant to the archeological sites or cemeteries which could be affected by the project.

(6) If THC does not respond within 20 calendar days, TxDOT may assume that THC concurs with TxDOT's findings, determinations, and recommendations and may proceed in accordance with the procedures required in this MOU.

(h) Background Studies for Archeological Sites and Cemeteries.

(1) For projects subject to review for archeological sites and cemeteries under this MOU, based on the results of background research, TxDOT will identify projects or portions of projects' APEs that require archeological field investigation.

(2) Eligibility determinations that TxDOT performs under this MOU will not require field investigations if sufficient background information exists to demonstrate that the portion of the site to be affected does not have potential research value.

(3) Determinations that TxDOT makes under this MOU regarding the presence of cemeteries in project APEs may be made through the use of maps, project-area photographs, or other background research.

(i) Permits for Archeological Sites and Cemeteries. THC shall issue antiquities permits for reconnaissance survey, intensive survey, monitoring, eligibility testing, exhumations, and emergencies to archeological staff at TxDOT under the following terms:

(1) The archeological staff of TxDOT's Environmental Affairs Division, or its successor as established by TxDOT administration, oversees the work.

(2) The work shall be completed in accordance with the provisions of the MOU.

(3) THC shall not require TxDOT to submit an antiquities permit application.

(4) In lieu of a permit application, TxDOT archeological staff shall notify THC in writing (by email or letter) of:

(A) the principal investigator;

(B) the investigation type and scope of work;

(C) the county in which the project will occur;

(D) the project name or identifier (site trinomial, if applicable); and

(E) the period of time for which the permit is desired.

(5) TxDOT staff may initiate work following notification of THC.

(6) THC shall issue a permit number within five business days of receiving the notification.
(7) TxDOT may revise the type of investigation based on observations made during the conduct of work as long as TxDOT provides to THC notification of the change prior to submission of the report.

(8) TxDOT may determine the appropriate amount of time a Principal Investigator will be in the field for a project based on the complexity of the project. TxDOT Principal Investigators will document their estimated proportion of field time in the corresponding reports of investigations.

(9) When conditions of natural disasters, man-made disasters, or post-review discovery necessitate immediate action, TxDOT may initiate work under an emergency permit without having first requested and received the permit number subject to each of the following conditions:

(A) TxDOT staff shall only conduct work under an emergency permit when archeological deposits are discovered during development or other construction projects or under conditions of natural or man-made disasters that necessitate immediate action to deal with the situation and findings.

(B) TxDOT will provide notification to THC to obtain the permit number within five working days of initiating the work.

(C) All categories of investigations can be authorized under an emergency permit, but an emergency permit will only be issued under emergency conditions where the investigations must be initiated or performed prior to notification under paragraph (4) of this subsection.

(10) THC shall consider the work conducted under the permit completed upon receipt of:

(A) one unbound report;

(B) two tagged pdf format reports on an archival quality CD or DVD, one containing all maps and locational information and one with maps and locational information redacted;

(C) a shape file of the project area subject to investigation; and

(D) a completed abstract form.

(11) The number of defaulted permits accrued by particular TxDOT staff while working for TxDOT shall not affect the issuance of additional permits to other TxDOT staff by THC for TxDOT projects.

(12) The inspection of a project APE or proposed APE for purposes of evaluating the kind of archeological investigation that may be required (scoping) shall not constitute an activity that requires a permit from THC when that activity does not result in a report to be coordinated under the terms of the MOU.

(13) All types of archeological investigations conducted by TxDOT but not covered by this section shall require submission of an antiquities permit application and adhere to the terms of the permit and this chapter with the exception that any permit issued to TxDOT under this paragraph, including data recovery permits, shall not include a requirement for project-specific outreach to be completed as part of the scope of work. TxDOT shall conduct public outreach at a program level regarding its activities under this MOU as specified in subsection (s).

(j) Surveys for Archeological Sites and Cemeteries.

(1) Surveys may be limited to an evaluation of existing impacts or stratigraphic integrity when these activities are sufficient to determine that any sites present are unlikely to be eligible.

(2) Eligibility determinations made by TxDOT under this MOU will not require further investigation if TxDOT demonstrates that the portion of the site to be affected is not likely to have sufficient integrity to be eligible.

(3) For portions of the APE where deposits may retain sufficient integrity for sites to be eligible, TxDOT survey methods will conform with THC’s Archeological Survey Standards, underwater survey standards promulgated in 13 TAC 28 (relating to Historic Shipwrecks), or with other appropriate methods, except as provided in subparagraphs (A) and (B) of this paragraph:

(A) TxDOT reserves the right to depart from published survey standards in cases where it deems appropriate.

(B) THC reserves the right to review non-standard procedures for their adequacy.

(4) Survey methods will be considered adequate for the identification of burials and cemetery boundaries when the portions of the APE within 25 feet of a known cemetery have been investigated and the survey included scraping to a depth adequate to determine whether grave shafts or burials occur in the APE.

(5) A survey to identify burials does not comprise an activity with the potential to cause an adverse effect to a historic property.

(k) Archeological Eligibility Testing Phase.

(1) Each of the following methods will be employed for test excavations:

(A) Mechanical trenches will be excavated and profiles documented in order to characterize the area’s potential for archeological deposits with sufficient integrity to be eligible to occur at the site.

(B) The extent of the site within the APE will be sampled through some combination of shovel-testing, column sampling, augering with an auger diameter of not less than 12 inches, surface collection, and geophysical prospection in order to characterize the distribution of archeological materials across the site.

(C) Additional units will be excavated and screened to evaluate site areas that appear to have the best potential for yielding important data with good integrity, based on the results of previous work.

(D) The materials analyzed will comprise those materials most likely to contribute important information about prehistory or history.

(E) TxDOT reserves the right to depart from these methods in cases where it deems appropriate and shall justify deviations in the report.

(F) Testing procedures conducted for underwater archeological investigations shall be coordinated and approved by THC Marine Archeology Program (MAP)

(2) Data from test excavation projects shall be made available to qualified researchers.

(i) Archeological Excavation and Data Recovery.

(1) When appropriate and established in the final research design approved by THC, TxDOT will develop public educational outreach projects for significant data recovery investigations.

(2) Data from data recovery projects shall be made available to qualified researchers.

(3) Research designs for underwater excavation and data recovery shall be reviewed and approved by the THC MAP.
(m) Exhumation.

(1) Exhumation is a form of investigation to resolve the adverse effects of a project on a cemetery.

(2) Exhumation efforts may be staged as a separate phase of work from burial identification. Following procedures set forth in Texas Health and Safety Code, Chapter 711, exhumation may begin once any required notifications of next of kin or other procedures required by Texas Health and Safety Code, Chapter 711 have been conducted.

(3) The following tasks represent a sufficient, reasonable and good faith effort to identify remains and any next of kin associated with burials in unknown or abandoned cemeteries:

(A) making inquiries through the local County Historical Commission;
(B) posting notices with local news outlets; and
(C) posting notices with local churches.

(4) An exhumation project is itself not a type of investigation that requires an outreach effort or curation of materials at a state-certified facility.

(n) Archeological Sites and Cemeteries found after Award of Contract.

(1) When potential historic properties are identified during implementation of a TxDOT project or unanticipated effects on historic properties are determined, work in the immediate area of the discovery shall cease, and TxDOT shall be notified of the discovery; if appropriate, security measures will be initiated to protect the discovery.

(2) TxDOT will notify the THC within 48 hours of the discovery.

(3) For unanticipated discoveries of archeological materials that do not contain human burials, TxDOT will undertake each of the following additional actions:

(A) TxDOT will verify that the discovery does not contain human burials. As necessary, TxDOT will obtain and perform this investigation under an emergency permit or other appropriate Antiquities Permit category.

(B) Upon confirmation that the discovery does not contain human burials, TxDOT may allow construction at the site to proceed.

(C) TxDOT shall complete or update a State of Texas Archeological Site Data Form based on the available information.

(D) TxDOT will find that the property comprises an archeological historic property.

(E) TxDOT will develop a mitigation proposal to resolve the adverse effects of the undertaking on the archeological historic property. This proposal shall not necessarily involve any further excavations at the historic property.

(F) The level of effort described in the proposal shall be commensurate with the nature of the resource, based on the available information.

(G) TxDOT will develop the proposal in coordination with THC and obtain the appropriate Antiquities Permit for this work.

(4) For unanticipated discoveries involving human burials, TxDOT shall follow the applicable requirements of the Health and Safety Code, Title 1, Section 711.

(A) Work may resume in areas outside the boundaries of the cemetery.

(B) Work may resume in a cemetery area if that cemetery has been removed in compliance with the applicable requirements of the Health and Safety Code, Title 1, Section 711.

(o) Standard Treatments for Particular Resource Types. Isolated wells or cisterns unassociated with other remains will be treated as follows:

(1) Isolated wells or cisterns that post-date 1900 A.D. do not warrant notification of THC or additional investigation. Removal or sealing of these features does not constitute an adverse effect.

(2) Isolated wells or cisterns that pre-date 1900 A.D. require research and documentation of their location, construction, condition, and original context. Upon completion of the research and documentation, these features may be backfilled and capped. These activities do not constitute an adverse effect.

(p) Artifact Recovery and Curation.

(1) Artifact recovery.

(A) Artifacts or analysis samples (such as soil samples) that are recovered from survey, testing, or data recovery investigations by TxDOT or their contracted agents that address the research questions must be cleaned, labeled, and processed in preparation for long-term curation unless the artifacts or samples are approved by THC for discard under this chapter and Chapter 29 of this title (relating to Management and Care of Artifacts and Collections).

(B) To ensure proper care and curation, recovery methods must conform to the applicable requirements of this chapter and Chapter 29 of this title.

(C) Artifacts recovered from underwater testing and data recovery projects require conservation as stated in §26.15 of this title and the conservation facility must be included in the permit application and data recovery plan.

(2) Artifact curation.

(A) TxDOT or its permitted contractor may temporarily house artifacts and samples during laboratory analysis and research, but upon completion of the analysis, artifacts and accompanying documentation must be transferred to a permanent curatorial facility in accordance with the terms of the antiquities permit.

(B) Artifacts and samples will be placed at an appropriate artifact curatorial repository which fulfills the applicable requirements of Chapter 29 of this title, as approved by THC. When appropriate, TxDOT will consult with THC to identify for disposal collections or portions of collections that do not have identifiable value for future research or public interpretation. Final approval regarding the disposition of collections will be made by THC.

(C) TxDOT is responsible for the curatorial preparation of all artifacts to be submitted for curation so that they are acceptable to the receiving curatorial repository and fulfill the applicable requirements of this chapter and Chapter 29 of this title, as approved by THC.

(q) Documentation for Archeological Sites and Cemeteries.

(1) Projects subject to review for archeological sites and cemeteries under this MOU will be documented by TxDOT in the manner described in this section. Documentation in the project file for each such project will include, at a minimum:

(A) a description of the project, defining the APE or the investigated portion of the APE in three dimensions;
(B) a project location map, plotting the project location on 7.5' Series USGS quadrangle maps;

(C) information regarding the setting that is relevant for the assessment of the integrity of any archeological sites within the APE;

(D) information on previously-recorded archeological sites in the project location;

(E) description and justification of the level of effort undertaken for the investigation; and

(F) results and recommendations.

(2) All TxDOT survey and testing reports will also include:

(A) description and justification of field methods, including the sampling strategy;

(B) description and quantification of any archeological materials identified;

(C) accurate plotting of any sites found on 7.5' Series USGS quadrangle maps;

(D) submission of electronic TexSite archeological site survey forms to the Texas Archeological Research Laboratory; and

(E) recommendations regarding whether any site merits further investigation.

(r) Quarterly Reports for Archeological Sites and Cemeteries. Reports will be submitted by TxDOT to THC at least once per quarter, within 60 business days after the end of the calendar quarter. The report will list all projects for which TxDOT has documented that no historic properties and cemeteries are present in the project's area of potential effect, and those projects that will have no adverse effects on archeological historic properties and cemeteries.

(s) Public Outreach Regarding Archeological Sites and Cemeteries

(1) TxDOT will conduct programmatic outreach in order to:

(A) broaden understanding of Texas archeology and history and TxDOT's role in studying these topics;

(B) capitalize on partnerships to reach more stakeholders and maximize outreach success;

(C) create opportunities to do outreach using content from many different projects; and

(D) use outreach to establish and maintain a link between TxDOT's public involvement and consultation efforts.

(2) The outreach program will take the following forms:

(A) TxDOT will develop and implement a communications plan;

(B) TxDOT will increase stakeholder outreach by conducting studies of existing and potential audiences, sharing information and opportunities with partners, partnering with other agencies on educational and outreach activities, and participating in conferences and events to raise awareness of TxDOT's work;

(C) TxDOT will create special projects or campaigns to support the goals of the program;

(D) TxDOT will streamline public involvement by working with other internal offices to identify and engage with parties who may wish to engage in consultation on FHWA undertakings under Section 106 of the National Historic Preservation Act; and

(E) TxDOT will monitor the effectiveness of its efforts and make appropriate adjustments to achieve the outreach goals.

(t) Projects Excluded from Review for Non-Archeological Historic Properties.

(1) For the purposes of this subsection, the term historic properties will refer only to non-archeological historic properties.

(2) Based on previous coordination outcomes, TxDOT and THC agree that the following types of routine roadway projects pose limited potential to affect historic properties:

(A) maintenance, repair, installation, or replacement, of transportation-related features, including fencing, signage, traffic signals, railroad warning devices, safety end treatments, cameras and intelligent highway system equipment, non-historic bridges, railroad crossings, lighting, curbs and gutters, safety barriers, ditches, storm drains, non-historic culverts, overpasses, channels, rip rap, and noise barriers;

(B) maintenance and in-kind repair of designated historic bridges, picnic areas, rest areas, roadside parks, and culverts;

(C) maintenance, repair, or replacement of roadway surfacing, including crack seal, overlay, milling, grooving, resurfacing, and restriping;

(D) maintenance, repair, reconfiguration, or correction of roadway geometrics, including intersection improvements and driveway and street connections;

(E) maintenance, repair, installation or modification of pedestrian and cycling-related features, including American with Disabilities Act ramps, trails, sidewalks, and bicycle and pedestrian lanes unless on historic properties protected as SAL, county courthouse, or by preservation easement or covenant;

(F) maintenance, repair, relocation, addition, or minor widening of roadway, highway, or freeway features, including turn bays, center turn lanes, shoulders, U-turn bays, right turn lanes, travel lanes, interchanges, medians, and ramps;

(G) maintenance, repair, replacement, or relocation of features at crossings of irrigation canals, including bridges, new vehicle crossings, bank reshaping, pipeline and standpipe components, canal conversion to below-grade siphons, and utilities;

(H) repairs needed as a result of an event, natural or man-made, which causes damage to a designated state highway, resulting in an imminent threat to life or property of the traveling public, or which substantially disrupts or may disrupt the orderly flow of traffic and commerce;

(I) design changes for projects that have completed all applicable review and consultation where the new project elements comprise only one or more of the activities listed in paragraph (2) of this subsection; and

(J) other kinds of undertakings jointly agreed to in writing by THC and TxDOT as not requiring review.

(3) For projects described in paragraph (2)(A) - (J) of this subsection, TxDOT qualified professional staff shall determine whether additional evaluation is required due to direct effects to historic properties. If no such evaluation is deemed necessary, such projects are determined to pose no effect on historic properties and do not require review by THC under this chapter or under this MOU.
(4) For review-exempt projects, documentation shall be limited to that maintained in TxDOT’s project files. THC may audit TxDOT files for specific projects upon request.

(u) Procedures for Project Coordination when the Project Requires Review for Non-Archeological Historic Properties.

(1) Historic properties. For the purposes of this subsection, the term historic properties will refer only to non-archaeological historic properties.

(2) Internal Review Projects. For projects subject to review for historic properties under this MOU, TxDOT qualified professional staff shall determine the presence or absence of historic properties in the area of potential effects. Such efforts should focus on the types of historic properties within public rights-of-way and other sensitive areas, including but not limited to historic bridges, historic road corridors, historic roadside parks and rest areas, historic Depression Era masonry culverts, historic districts, historic courthouse squares and other historic commercial zones. Project activities that TxDOT determines will have no effect or no adverse effect on historic properties may be internally reviewed by TxDOT and are approved for construction.

(3) Coordinated Projects. If TxDOT qualified professional staff determines that a project requires individual coordination with THC for a courthouse review, easement review, or antiquities permit or due to a potential adverse effect on historic properties, TxDOT shall submit that project to THC:

(A) THC will respond within 20 calendar days of receipt of TxDOT’s request for review, in accordance with the terms set out by an interagency contract adopted by THC and TxDOT, by indicating whether an affected historic property will require a historic structures permit for an SAL, whether THC intends to initiate an SAL nomination for the affected property, or whether additional consultation pursuant to a preservation easement or covenant will be required. If THC does not respond within 20 calendar days, TxDOT may assume THC’s concurrence with its determinations, and TxDOT may proceed with the project to construction; and

(B) in accordance with Texas Government Code §442.008 and §17.2 of this title (relating to Review of Work on County Courthouses), TxDOT will notify THC of any work affecting a county courthouse or its surrounding site, up to and including the curb. THC will respond within 20 calendar days of receipt of TxDOT’s notification by indicating whether a historic structures permit for an SAL or additional consultation pursuant to a preservation covenant or easement will be required.

(4) Documentation. For projects that are internally reviewed or individually coordinated under paragraphs (2) and (3) of this subsection, TxDOT will comply with the following project documentation requirements:

(A) For projects that are internally reviewed under paragraph (2) of this subsection, TxDOT shall retain all documentation in the project file and will provide documentation to the THC upon request with memos and basic project information submitted through the THC’s electronic review and compliance (eTRAC) system or other means as appropriate.

(B) For projects that are individually coordinated under paragraph (3) of this subsection, documentation submitted to THC will include:

(i) project description and scope;

(ii) project location map with delineation of the APE and location of historic properties;

(iii) methodology used to identify historic properties;

(iv) photographic and descriptive information for each identified property;

(v) justification for findings of historic properties, including setting, integrity, and contextual information;

(vi) justification of effects on historic properties, including evaluations, reports, and other information relevant to the findings by TxDOT; and

(vii) a description of efforts to avoid or minimize harm, mitigation, and commitments.

(v) Project File. TxDOT’s Environmental Compliance and Oversight System (ECOS) is the project file of record for each project coordinated under this MOU.

(w) Denial of Access. In cases where access to private land for conducting investigations is denied prior to the approval of the environmental review document, TxDOT will make a commitment to complete appropriate investigations once access is obtained, but prior to any construction related impacts.

(x) MOU to Govern TxDOT Procedures. TxDOT satisfies applicable THC requirements if it utilizes the procedures of this MOU in lieu of other applicable THC procedures. In cases where TxDOT is utilizing this MOU in lieu of other THC procedures, TxDOT must follow the requirements of this MOU.

(y) Project-Specific Agreements. Any project-specific agreements reached between TxDOT and THC regarding the evaluation or treatment of project effects shall be honored by both parties and shall supersede the requirements of this MOU. TxDOT and THC may deviate from the terms of the agreement only when both parties concur that the agreement requires revision.

(2) Continuous Improvement Agreement. TxDOT and THC agree to collaborate on improvements to their programs and development of innovative solutions for expedited review procedures. Such mechanisms may include using project outcomes to refine approaches to resource identification, evaluation, treatment methods, programmatic mitigation measures and interagency agreements that facilitate early coordination, and streamlining and expedited review of TxDOT’s transportation projects.

(aa) THC Review of TxDOT Project Files. THC may review TxDOT project files for specific undertakings carried out under this MOU. THC may recommend process improvements based on issues identified during the review.

(bb) Dispute Resolution. THC and TxDOT staff will be responsible for attempting to resolve any conflict between THC and TxDOT that results from the implementation of this section before elevating to agency management.

(cc) Review of MOU. This MOU shall be reviewed and updated as provided by law or by agreement between the parties. THC and TxDOT agree to convene every four years to review, update, or extend this agreement.

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

Filed with the Office of the Secretary of State on July 27, 2018.
TRD-201803257
PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 78. MOLD ASSESSORS AND REMEDIATORS

16 TAC §§78.58, 78.60, 78.62, 78.64, 78.70, 78.74, 78.80, 78.120, 78.130, 78.150

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 TexaS Administrative Code, Chapter 78, §§78.58, 78.60, 78.62, 78.64, 78.70, 78.74, 78.80, 78.120, 78.130 and 78.150, regarding the Mold Assessors and Remediators program, without changes to the proposed text as published in the April 20, 2018, issue of the Texas Register (43 TexReg 2327). The rules will not be reprinted.

The adopted rules implement House Bill 4007, 85th Legislature, Regular Session (2017), for the Mold Assessors and Remediators program, which allows the remediation contractor to provide the required photos of the remediation area to the property owner within ten days (formerly seven) after remediation. Additional changes are also made to the records retention policy and to continue to require a mycologist or microbiologist to oversee a mold analysis laboratory. The adopted rules are necessary to implement H.B. 4007 and to clarify and simply existing rules.

The adopted amendment to §78.58 corrects a cross reference.

The adopted amendments to §78.60 remove the requirement for records to be kept at a Texas office. The amendments also correct a cross reference.

The adopted amendments to §78.62 correct the rule to restore the longstanding requirement for oversight of mold analysis activity in all licensed laboratories.

The adopted amendments to §78.64 require applicants for training provider accreditation to identify their designated responsible persons consistent with longstanding practice interpreting §78.10(38) and with the same requirement imposed on licensed entities. The amendments also make editorial corrections.

The adopted amendment to §78.70 removes the requirement for records to be kept at a Texas office and work site locations.

The adopted amendments to §78.74 clarify and simplify the records retention requirements regarding the Mold Assessors and Remediators program. On-site record requirements are removed unmodified and placed in §78.120.

The adopted amendments to §78.80 remove unnecessary redundant language.

The adopted amendments to §78.120 insert unmodified on-site record requirements formerly located in §78.74 and make editorial corrections.

The adopted amendment to §78.130 corrects a cross reference.

The adopted amendment to §78.150 implements H.B. 4007 by increasing the time period during which a licensed mold remediation contractor or company must provide the property owner with required photographs.

The Texas Department of Licensing and Regulation (Department) drafted and distributed the proposed rules to persons.
Comment--One commenter recommends that the provisions in §78.62(c)(4) regarding qualifications of persons analyzing mold samples should be amended. The commenter suggests that persons analyzing mold samples should be required to have training in mold analysis or have at least three years of experience as a mold microscopist, but should not be required to have both. The commenter compares the qualifications to those in §78.62(c)(5) for the person overseeing mold analysis activity at the laboratory, who is required to have "an advanced academic degree or at least two years of experience in mold analysis."

Department Response--The requirements in §78.62(c)(4) for persons analyzing mold samples have been renumbered but no change has been made to the required qualifications, which include a bachelor's degree in microbiology or biology, training, and experience. The requirements for the qualifications of the mycologist or microbiologist overseeing mold analysis activity likewise are unchanged, but through the amendment are again made applicable to all laboratories seeking a mold analysis license. The Department has not yet clarified the rule to specify that the full-time mycologist or microbiologist must have an advanced academic degree, but this characteristic is commonly required in the industry for persons overseeing mold analysis laboratories. In keeping with industry minimums, the rule may be amended in the future to clarify that the person overseeing mold analysis activity at the laboratory must have both an advanced academic degree and at least two years of experience in mold analysis. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter recommends that the Pan American Aerobiology Certified Spore Analyst Level 1 credential be accepted as proof of competency for persons analyzing mold samples.

Department Response--The Department agrees that the rules provide for the approval of additional mold analysis training programs for persons analyzing mold samples. To date the Department has not received a request to evaluate other programs for equivalency to the training provided by the McCrone Research Institute specified in the rule, and therefore has not made any such determinations. A review of current requirements and practices, and comparability to other training programs, would be necessary to approve other training programs. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter observes that the requirements in §78.62(c)(4) for persons who analyze mold samples exclude industrial hygienists and engineers with bachelor of science degrees who have many years of experience from qualifying to read mold samples and tape lifts, including doing so in the field. The commenter notes that these individuals may read and sign mold sample results in New Mexico and in Mexico, and the rule should be amended to allow them to analyze mold samples in Texas. The commenter suggests that persons analyzing mold samples should be required to fulfill the requirement for a bachelor's degree or have the training and experience currently required, but all three qualifications should not be required.

Department Response--The requirements in §78.62(c)(4) for persons analyzing mold samples have been renumbered but no change has been made to the required qualifications. Therefore, the comments are outside the scope of this rulemaking. However; the Department is aware that the qualifications for various credentials in the mold program are in need of review and possible revision and invites stakeholders to provide input in that effort. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter recommends that the rule regarding personal protective equipment and containment requirements for mold remediation, §78.120, be amended to clarify that the remediation contractor must follow the remediation protocol for projects of less than 25 contiguous square feet.

Department Response--The noted rule sections have been renumbered but changes to the remediation requirements have not been proposed; therefore, the suggested changes are outside of the scope of this rulemaking. However, the Department agrees that the applicability of the rule should be clarified. The mold statute, Occupations Code Chapter 1958, is clear that a license is not required to perform mold remediation when the mold contamination affects a total surface area for the project of less than 25 contiguous square feet. The statute does not specify, however, whether a licensee performing such a remediation may do so without following the requirements of the mold statute and rules, as an unlicensed person could. The "Minimum Area Exemption" FAQ on the Department's mold website explains that licensees are never excused from the applicable requirements of the statute and rules, even when performing a remediation project where the mold contamination affects a total surface area of less than 25 contiguous square feet. At the time the rule was originally written the expectation was that these small projects would rarely be performed by licensees working under the mold rules, such that the rules' remediation requirements would seldom apply to these projects. This has proven to be true. The rule applicability was not changed when the mold program moved from the Department of State Health Services to the Department, but will be clarified by the Department in the future. The Department did not make any changes to the rules in response to this comment.

At its meeting held on July 20, 2018, the Commission adopted the proposed rules without changes as recommended by the Department.

The amendments are adopted under Texas Occupations Code, Chapters 51 and 1958, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 1958. No other statutes, articles, or codes are affected by the adoption.

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

Filed with the Office of the Secretary of State on July 30, 2018.

TRD-201803261
CHAPTER 89. VEHICLE BOOTING AND IMMOBILIZATION

16 TAC §§89.1, 89.10, 89.21 - 89.30, 89.40, 89.45 - 89.48, 89.65 - 89.73, 89.75 - 89.80, 89.90, 89.91, 89.100 - 89.103

The Texas Commission of Licensing and Regulation (Commission) adopts the repeal of existing rules at 16 Texas Administrative Code (TAC), Chapter 89, §§89.1, 89.10, 89.21 - 89.30, 89.40, 89.45 - 89.48, 89.65 - 89.73, 89.75 - 89.80, 89.90, 89.91, 89.100 - 89.103, regarding the Vehicle Booting and Immobilization program, without changes as noticed in the May 4, 2018, issue of the Texas Register (43 TexReg 2690).

The adopted repeal implements changes from Senate Bill 1501 and Senate Bill 2065, 85th Legislature, Regular Session (2017), which deregulates vehicle booting at the state level, with a transfer of regulatory authority to municipalities. The adopted repeal is necessary to implement Senate Bill 1501 and Senate Bill 2065.

The adopted repeal of §§89.1, 89.10, 89.21 - 89.30, 89.40, 89.45 - 89.48, 89.65 - 89.73, 89.75 - 89.80, 89.90, 89.91, and 89.100 - 89.103, deregulates vehicle booting at the state level.

The Texas Department of Licensing and Regulation (Department) drafted and distributed the proposed repeal to persons internal and external to the agency. The proposed repeal was published in the May 4, 2018, issue of the Texas Register (43 TexReg 2690). The Department did not receive any comments during the 30-day public comment period.

The Towing and Storage Advisory Board (Board) met on June 18, 2018, to discuss the proposed repeal. The Board recommended adopting the repeal without changes.

At its meeting on July 20, 2018, the Commission adopted the repeal without changes as recommended by the Board.

The repeal is adopted under Texas Occupations Code, Chapters 51 and 2308, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 2308. No other statutes, articles, or codes are affected by the proposal.

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

Filed with the Office of the Secretary of State on July 26, 2018.

TRD-201803203

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER AA. ACCOUNTABILITY AND PERFORMANCE MONITORING

19 TAC §97.1002

The Texas Education Agency (TEA) adopts new §97.1002, concerning accountability and performance monitoring. The new section is adopted with changes to the proposed text as published in the June 8, 2018 issue of the Texas Register (43 TexReg 3718). The new section adopts in rule an applicable excerpt of the 2018 Accountability Manual.

REASONED JUSTIFICATION. The TEA has adopted its academic accountability manual in rule since 2000. The accountability system evolves from year to year, so the criteria and standards for rating and acknowledging schools in the most current year differ to some degree over those applied in the prior year.

New 19 TAC §97.1002 adopts an excerpt of the 2018 Accountability Manual into rule as a figure. The excerpt, Chapter 10 of the 2018 Accountability Manual, describes the Hurricane Harvey Provision used to evaluate school districts, open-enrollment charter schools, and campuses affected by Hurricane Harvey. The provision provides specific criteria that school districts, open-enrollment charter schools, and campuses must meet in order to receive a Not Rated label due to the effects of Hurricane Harvey.

Campuses will be evaluated under the Hurricane Harvey Provision if they meet at least one of the following criteria.

Criterion 1: The campus identified 10 percent or more of enrolled students in either the October snapshot data or in weekly crisis code reports finalized on March 9, 2018, with crisis codes 5A, 5B, or 5C. Campus enrollment is based on October snapshot data.

Explanation: The intent of the crisis codes is to identify a student who (1) was enrolled or was eligible to enroll in a local educational agency (LEA) impacted by Hurricane Harvey and enrolled in a different LEA during the 2017-2018 school year (5A); (2) was enrolled or was eligible to enroll in an LEA impacted by Hurricane Harvey and enrolled in another campus in the same LEA during the 2017-2018 school year (5B); or (3) is identified as homeless because of Hurricane Harvey but has remained enrolled in his or her home campus during the 2017-2018 school year (5C). The crisis code criteria allows for accountability flexibility for those campuses with high numbers of students in one of the three referenced situations. TEA has determined that the academic accountability ratings for a campus that has at least 10 percent of
its students displaced by Hurricane Harvey may not accurately reflect campus performance.

Criterion 2: The campus reported that 10 percent or more of its teachers experienced homelessness due to Hurricane Harvey, as reported in the Homeless Survey announced February 14, 2018.

Explanation: Like crisis code 5C for students, the teacher homelessness indicator allows for accountability flexibility for campuses with a substantial number of teachers who were/are homeless due to Hurricane Harvey. TEA has determined that the academic accountability ratings for a campus that has at least 10 percent of its teachers displaced by Hurricane Harvey may not accurately reflect campus performance.

Criterion 3: The campus was reported to TEA as closed for 10 or more instructional days due to Hurricane Harvey.

Explanation: This criterion allows for flexibility for campuses with a substantial number of instructional days lost due to Hurricane Harvey. This provision is like provisions used in 2006 and 2009 for Hurricanes Rita and Ike. TEA has determined that the academic accountability ratings for a campus that was closed for at least 10 days because of Hurricane Harvey may not accurately reflect campus performance.

Criterion 4: The campus was reported to TEA as displaced due to Hurricane Harvey either because the student population was relocated to another geographic location at least through winter break or the student population was required to share its own campus facility with the students of another campus closed as a direct result of Hurricane Harvey at least through winter break.

Explanation: This criterion allows for accountability flexibility for campuses whose facilities were completely or partially damaged to a point where the campus was closed. This also includes campuses that shared facilities with another campus. In many instances, students were forced into classrooms and school hours that were not ideal conditions for teaching and learning to take place. TEA has determined that the academic accountability ratings of campuses whose entire student population was displaced by Hurricane Harvey may not accurately reflect campus performance. TEA has also determined that the academic accountability ratings of campuses that serve students displaced by Hurricane Harvey may not accurately reflect campus performance.

In response to public comment, Figure: 19 TAC §97.1002(a) was modified at adoption to update school district and open-enrollment charter school eligibility for the Hurricane Harvey Provision. The proposed figure stated that school districts and open-enrollment charter schools would be labeled Not Rated only if their eligible campuses were labeled Not Rated. At adoption, the language was updated to specify that school districts and open-enrollment charter schools are eligible to be labeled Not Rated if their campuses are eligible for the Hurricane Harvey Provision. School district and open-enrollment charter school eligibility is dependent on whether their campuses are eligible for the provision, not on whether their campuses are labeled Not Rated. As reflected on page 88 of the adopted figure, school districts and open-enrollment charter schools will be evaluated under the Hurricane Harvey Provision if they meet either of the following updated criteria.

Criterion 1: School districts and open-enrollment charter schools are eligible to be labeled Not Rated under the Hurricane Harvey Provision if all campuses within the school district or open-enrollment charter school are eligible for the Hurricane Harvey Provision.

Explanation: A school district or open-enrollment charter school should be eligible for the Hurricane Harvey Provision if all the campuses within the school district or open-enrollment charter school are eligible for at least one of the Hurricane Harvey accountability provisions. School district and open-enrollment charter school data is based on the accumulated data of all its campuses. If all those campuses are eligible for the Hurricane Harvey Provision, it is assumed that the school district or open-enrollment charter school would be eligible as well. TEA has determined that the academic accountability ratings of school districts and open-enrollment charter schools with all campuses eligible for the Hurricane Harvey Provision may not accurately reflect school district or open-enrollment charter school performance.

Criterion 2: If 10 percent or more of the school district or open-enrollment charter school’s students were reported on the October snapshot as enrolled in a campus eligible for the Hurricane Harvey Provision, the school district or open-enrollment charter school is eligible to be labeled Not Rated.

Explanation: This provision allows for accountability flexibility for school districts and open-enrollment charter schools with a substantial portion of students enrolled in campuses eligible for at least one of the allowable Hurricane Harvey provisions. School district and open-enrollment charter school outcomes are largely based on the accumulated outcomes of campuses. It is assumed that, to some degree, the Hurricane Harvey Provision eligible campuses could impact school district or open-enrollment charter school outcomes. TEA has determined it is reasonable for school districts and open-enrollment charter schools to be eligible for the Hurricane Harvey Provision in this situation. TEA has further determined that the academic accountability ratings for a school district or open-enrollment charter school that has at least 10 percent of its students displaced by Hurricane Harvey may not accurately reflect campus performance.

SUMMARY OF COMMENTS AND AGENCY RESPONSES. The public comment period on the proposal began June 8, 2018, and ended July 9, 2018. A public hearing on the proposed new section was held on June 22, 2018. Following is a summary of the public comments received and the corresponding agency responses.

Comment. La Porte Independent School District (ISD) and the Houston Federation of Teachers (HFT) commented that the Hurricane Harvey Provision does not consider communities affected by and coping with issues stemming from previous hurricanes. HFT commented that these factors may have impacted the validity of self-reported responses to homelessness by students, their families, and teachers. HFT encouraged the Texas Education Agency (TEA) to consider allowing an appeals process or extended time for school districts to triangulate data with other agencies to identify the subset of families that could be probed for further information. Following a request from the commissioner, La Porte ISD included additional quantitative measures that address their district’s concerns related to Hurricanes Ike and Harvey.

Agency Response. The agency disagrees. TEA collected, reviewed, and analyzed numerous data regarding the effects of Hurricane Harvey on students, teachers, staff, and facilities to make an appropriate decision about 2018 academic accountability ratings. Data reported through the Texas Student Data Sys-
Comment. HFT and one school district staff member expressed concern about the underreporting of storm-damaged communities and questioned the definition of homelessness as one of the self-reported criteria to assess hurricane-related issues affecting schools. The commenters noted that some students stayed in their homes during remediation and that poor home conditions should be considered.

Agency Response. The agency disagrees. Hurricane Harvey Provision criteria represent a substantial expansion to storm-related accountability adjustments when compared to prior storms in Texas. Data reported through TSDS PEIMS and special Hurricane Harvey collections were certified as accurate by the superintendent. Hurricane Harvey provision criteria represent a substantial expansion to storm-related accountability adjustments when compared to prior storms in Texas. The criterion referenced was developed based on the loss of instructional days as reported by school districts and open-enrollment charter schools.

Comment. One school district staff member asked if a school district’s campuses have to receive a Not Rated label for the district to be eligible. The commenter also asked about a situation in which all campuses are eligible but earn a Met Standard rating and the school district receives a D or F.

Agency Response. The agency provides the following clarification. In response to comments, Figure: 19 TAC §97.1002(a) was updated at adoption to include revised criteria for school districts and open-enrollment charter schools. Specifically, page 88 was modified to read, "School districts and open-enrollment charter schools are eligible to be labeled Not Rated under the Hurricane Harvey Provision if all campuses within the school district or open-enrollment charter school are eligible for the Hurricane Harvey Provision. Additionally, if 10 percent or more of the school district or open-enrollment charter school’s students were reported on the October snapshot as enrolled in a campus eligible for the Hurricane Harvey Provision, the school district or open-enrollment charter school is eligible to be labeled Not Rated."

Comment. Lamar CISD and the Texas School Alliance (TSA) commented that the 10 percent criterion is arbitrary and does not reflect the emotional stress experienced by the community and families due to Hurricane Harvey, a school district's size, or institutional differences such as 9.6 percent of students enrolled in a campus labeled Not Rated. TSA recommended that school districts, open-enrollment charter schools, and all campuses in the 47 counties identified by the Presidential Disaster Declaration receive a Not Rated label due to the widespread damage and trauma.

Agency Response. The agency disagrees. TEA collected, reviewed, and analyzed numerous data regarding the effects of Hurricane Harvey on students, teachers, staff, and facilities to make an appropriate decision about 2018 academic accountability ratings.

Comment. The Texas Charter Schools Association (TCSA) and one school district staff member commented that they fully support the state's Hurricane Harvey Provision for affected schools to be eligible for special evaluation in this year's state accountability system. TCSA noted that they appreciate TEA's detailed review of the impact of Hurricane Harvey on all individuals impacted, including the impact on students and teachers in Texas public schools. HFT commented that it agrees with the criterion which states, "The campus was reported to TEA as displaced due to Hurricane Harvey either because the student population was relocated to another geographic location at least through winter break or the student population was required to share its own campus facility with the students of another campus closed as a direct result of Hurricane Harvey at least through winter break."

Agency Response. The agency agrees.

Comment. Klein ISD, one school district staff member, and HFT commented that school districts may be penalized for trying to quickly return to normalcy after Hurricane Harvey. Lamar Consolidated Independent School District (CISD) commented that it was closed for nine instructional days and the tenth day happened to fall on Labor Day; therefore, the district would not meet the proposed criterion. One school district staff member recommended TEA reevaluate the 10-day criterion to include any school district or campus that lost a week or more of instructional days. Klein ISD recommended TEA reevaluate the 10-day criterion to include any school district or campus that missed multiple days due to Hurricane Harvey and its aftermath. HFT noted that such a technicality could have unintended consequences such as basing decisions related to returning to school on rule compliance rather than the needs of the community. HFT suggested that TEA phrase the criterion as an approximate of two weeks of instruction.

Agency Response. The agency disagrees. Hurricane Harvey Provision criteria represent a substantial expansion to storm-related accountability adjustments when compared to prior storms in Texas. The criterion referenced was developed based on the loss of instructional days as reported by school districts and open-enrollment charter schools.

Comment. Klein ISD, one school district staff member, and HFT commented that school districts may be penalized for trying to quickly return to normalcy after Hurricane Harvey. Lamar Consolidated Independent School District (CISD) commented that it was closed for nine instructional days and the tenth day happened to fall on Labor Day; therefore, the district would not meet the proposed criterion. One school district staff member recommended TEA reevaluate the 10-day criterion to include any school district or campus that lost a week or more of instructional days. Klein ISD recommended TEA reevaluate the 10-day criterion to include any school district or campus that missed multiple days due to Hurricane Harvey and its aftermath. HFT noted that such a technicality could have unintended consequences such as basing decisions related to returning to school on rule compliance rather than the needs of the community. HFT suggested that TEA phrase the criterion as an approximate of two weeks of instruction.

Agency Response. The agency disagrees. Hurricane Harvey Provision criteria represent a substantial expansion to storm-related accountability adjustments when compared to prior storms in Texas. The criterion referenced was developed based on the loss of instructional days as reported by school districts and open-enrollment charter schools.

Comment. Klein ISD, one school district staff member, and HFT commented that school districts may be penalized for trying to quickly return to normalcy after Hurricane Harvey. Lamar Consolidated Independent School District (CISD) commented that it was closed for nine instructional days and the tenth day happened to fall on Labor Day; therefore, the district would not meet the proposed criterion. One school district staff member recommended TEA reevaluate the 10-day criterion to include any school district or campus that lost a week or more of instructional days. Klein ISD recommended TEA reevaluate the 10-day criterion to include any school district or campus that missed multiple days due to Hurricane Harvey and its aftermath. HFT noted that such a technicality could have unintended consequences such as basing decisions related to returning to school on rule compliance rather than the needs of the community. HFT suggested that TEA phrase the criterion as an approximate of two weeks of instruction.
Comment. Lamar CISD commented on the requirement of a campus to be placed Improvement Required using all available data in order to be eligible for a Not Rated label. The commenter noted that for Hurricanes Katrina, Rita, and Ike, TEA excluded results for displaced students, and the 10 day rule was used to a final safety for campuses that were closed in case they were rated Unacceptable after the exclusions were applied. The commenter provided "Appendix K-Hurricane Ike" from the 2009 Accountability Manual and "Appendix L-Hurricanes Katrina and Rita" from the 2006 Accountability Manual as supporting attachments.

Agency Response. The agency disagrees. Hurricane Harvey Provision criteria represent a substantial expansion to storm-related accountability adjustments when compared to prior storms in Texas.

Comment. TSA agreed that the accountability ratings for a campus or a school district that meets at least one of the specific criteria may not accurately reflect school and/or district performance.

Agency Response. The agency agrees.

Comment. TSA agreed that for purposes of counting consecutive years of ratings, 2017 and 2019 will be considered consecutive for school districts, open-enrollment charter schools, and campuses receiving a Not Rated label in 2018 due to hurricane-related issues.

Agency Response. The agency agrees.

Comment. TSA agreed that campuses receiving a Not Rated label due to the Hurricane Harvey Provision should be included from the list of 2019-2020 Public Education Grant (PEG) campuses.

Agency Response. The agency agrees.

Comment. TSA agreed that the accountability ratings for a campus or a school district that meets at least one of the specific criteria may not accurately reflect school and/or district performance.

Agency Response. The agency agrees.

Comment. TSA and two school district staff members commented that the Hurricane Harvey Provision does not address federal accountability. TSA commented that it appears that a campus could be labeled Not Rated for 2018 state accountability and excluded from the 2019-2020 PEG list, yet possibly be identified for comprehensive or targeted interventions in 2019. The commenter noted that applying federal sanctions and interventions based on data that "may not accurately reflect school performance" is both unreasonable and unfair and recommended that if a campus receives a Not Rated label in the state accountability system due to the Hurricane Harvey Provision, then the school should also receive a Not Rated label in the federal accountability system. One school district staff member commented that there was precedent in applying for state and federal waivers from both Hurricanes Rita and Katrina, and affected schools should be free from sanctions across both state and federal accountability systems.

Agency Response. The agency disagrees. Identification for school improvement is a federal requirement. TEA is unable to waive identification this year or next year with the Hurricane Harvey Provision. The Hurricane Harvey Provision is only applicable to state accountability requirements.

STATUTORY AUTHORITY. The new section is adopted under Texas Education Code (TEC), §§39.052(a) and (b)(1)(A), which requires the commissioner to evaluate and consider the performance on achievement indicators, including those described in TEC, §39.053(c), when determining the accreditation status of each school district and open-enrollment charter school; TEC, §39.053, which requires the commissioner to adopt a set of performance indicators related to the quality of learning and achievement in order to measure and evaluate school districts and campuses; TEC, §39.054, which requires the commissioner to adopt rules to evaluate school district and campus performance and to assign a performance rating; TEC, §39.0541, which allows the commissioner to adopt indicators and standards under TEC, Subchapter C, at any time during a school year before the evaluation of a school district or campus; TEC, §39.0548, which requires the commissioner to designate campuses that meet specific criteria as dropout recovery schools and to use specific indicators to evaluate them; TEC, §39.055, which prohibits the use of assessment results and other performance indicators of students in a residential facility in state accountability; TEC, §39.151, which provides a process for a school district or an open-enrollment charter school to challenge an academic or financial accountability rating; TEC, §39.201, which requires the commissioner to award distinction designations to a campus or district for outstanding performance; TEC, §39.2011, which makes open-enrollment charter schools and campuses that earn an acceptable rating eligible for distinction designations; TEC, §39.202 and §39.203, which authorize the commissioner to establish criteria for distinction designations for campuses and districts; TEC, §29.081(e), (e-1), and (e-2), which defines criteria for alternative education programs for students at risk of dropping out of school and subjects those campuses to the performance indicators and accountability standards adopted for alternative education programs; and TEC, §12.104(b)(2)(L), which subjects open-enrollment charter schools to the rules adopted under public school accountability in TEC, Chapter 39.

CROSS REFERENCE TO STATUTE. The new section implements Texas Education Code (TEC), §§39.052(a) and (b)(1)(A); 39.053; 39.054; 39.0541; 39.0548; 39.055; 39.151; 39.201; 39.2011; 39.202; 39.203, 29.081(e), (e-1), and (e-2); and 12.104(b)(2)(L).


(a) In addition to the procedures in §97.1001 of this title (relating to Accountability Rating System), school districts, open-enrollment charter schools, and campuses impacted by Hurricane Harvey are
The amendments to §§13.31 - 13.34 update the rules to better conform to current statutory language of the Texas Occupations Code, Chapter 157, reduce unnecessary application requirements for practices seeking designation as practices serving medically underserved populations, and produce improved clarity and organization.

New §13.35 provides a mechanism by which DSHS can verify the continued designation eligibility of designated practices. The previous rules prior to this adoption were ambiguous and did not ensure that DSHS designations were updated biannually. Designated sites and state agencies that rely upon DSHS designations need guidance and assurance that DSHS designations are current.

New §13.51 and §13.52 establish data collection procedures mandated by Texas Health and Safety Code, Chapters 104 and 105. The data collection procedures in the new rules are currently in practice pursuant to the statute.

The repeal of §13.61 removes a rule rendered obsolete by statutory rescission of the Texas Education Code, §61.924.

**COMMENTS**

The 30-day comment period ended April 16, 2018.

During this period, DSHS received comments regarding the proposed rules from one commenter representing the APRN Alliance. A summary of comments relating to the rules and DSHS’s responses follows.

Comment: Regarding proposed §13.31 (Purpose and Scope), the commenter suggested amending proposed §13.31(a) to delete the language "Designated sites will be eligible for qualified advanced practice registered nurses and physician assistants to carry out prescription drug orders in accordance with rules developed by the Texas Board of Nursing and the Texas Medical Board" and replace with the language "Designated practice sites will not be limited by the physician to delegate ratio in §157.051(03)."

Response: DSHS agrees with the recommended deletion to encourage clarity in rule and better reflect the statute. However, DSHS disagrees with the proposed replacement language as it is redundant of the statute.


Response: DSHS disagrees with the recommended inclusion of reference to practices serving medically underserved populations that are not designated by DSHS. The more expansive definition proposed by the commenter is outside of the scope of the rule which is limited in implementing Texas Occupations Code, §157.051(11)(F).

**ADDITIONAL INFORMATION**

For further information, please call: (512) 776-6541.

**SUBCHAPTER C. DESIGNATION OF PRACTICES SERVING MEDICALLY UNDERSERVED POPULATIONS**

**25 TAC §§13.31 - 13.35**

**STATUTORY AUTHORITY**

The amendments and new section are adopted under Texas Occupations Code, §157.051, which authorizes the department to define medically underserved areas for sites at which advanced practice nurse practitioners and physician assistants may carry out prescription drug orders; Texas Health and Safety Code, §104.042, which authorizes the executive commissioner by rule to establish reasonable procedures for the collection of data by the department from health care facilities; Texas Health and Safety Code, §105.005, which authorizes the executive commissioner to adopt rules to govern the reporting and collection of data; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the
Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for administration of Health and Safety Code, Chapter 1001.

§13.31. Purpose and Scope.

(a) Purpose. The purpose of these sections is to implement the provisions in the Texas Occupations Code, §157.051(11)(F), by the establishment of program rules for the designation of practices serving medically underserved populations (Practice-MUPs).

(b) Scope. The scope of these sections is to describe the criteria and procedures that the Department of State Health Services (department) will use in designating Practice-MUPs. The criteria will apply to practices not already qualified under the other definitions of eligible practices identified in the Texas Occupations Code, §157.051(11).

(c) Administration. The department shall designate Practice-MUPs.

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

Filed with the Office of the Secretary of State on July 26, 2018.
TRD-201803243
Barbara L. Klein
General Counsel
Department of State Health Services
Effective date: August 15, 2018
Proposal publication date: March 16, 2018
For further information, please call: (512) 776-6541

SUBCHAPTER E. DATA COLLECTION

25 TAC §13.51, §13.52

The new sections are adopted under Texas Occupations Code, §157.051, which authorizes the department to define medically underserved areas for sites at which advanced practice nurse practitioners and physician assistants may carry out prescription drug orders; Texas Health and Safety Code, §104.042, which authorizes the executive commissioner by rule to establish reasonable procedures for the collection of data by the department from health care facilities; Texas Health and Safety Code, §105.005, which authorizes the executive commissioner to adopt rules to govern the reporting and collection of data; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for administration of Health and Safety Code, Chapter 1001.

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

Filed with the Office of the Secretary of State on July 26, 2018.
TRD-201803244

Barbara L. Klein
General Counsel
Department of State Health Services
Effective date: August 15, 2018
Proposal publication date: March 16, 2018
For further information, please call: (512) 776-6541

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 80. CONTESTED CASE HEARINGS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §80.4 and §80.252 without changes to the proposed text as published in the February 23, 2018, issue of the Texas Register (43 TexReg 1007) and, therefore, the sections will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2013, the 83rd Texas Legislature passed House Bill (HB) 1600 and Senate Bill (SB) 567, which became effective September 1,
2013. HB 1600 and SB 567 transferred from the TCEQ to the Public Utility Commission of Texas (PUC) the functions relating to the economic regulation of water and sewer utilities. HB 1600 and SB 567 amended Texas Water Code (TWC), §5.311(a), as it relates to the commission's authority to delegate to an administrative law judge (ALJ) of the State Office of Administrative Hearings (SOAH) the responsibility to issue interlocutory orders related to interim rates under TWC, Chapter 13. Amended TWC, §5.311(a), removes the commission's authority to delegate the issuance of interlocutory orders related to interim rates under TWC, Chapter 13. Because the commission adopts changes to §80.4 to implement HB 3735 and SB 1430 (85th Texas Legislature, 2017), the commission adopts in this same rulemaking to remove §80.4(c)(15), which implements HB 1600 and SB 567 (83rd Texas Legislature, 2013), to avoid open section conflicts under Texas Register publication requirements. The remainder of HB 1600 and SB 567 will be implemented in a separate rulemaking project (Rule Project Number 2013-057-291-OW).

In 2017, the 85th Texas Legislature passed HB 3735 and SB 1430, which became effective on September 1, 2017. SB 1430 amended the TWC as it relates to a requirement that the TCEQ provide an expedited procedure for acting on certain applications for an amendment to a water right by applicants that begin to use desalinated seawater. New TWC, §11.122(b-1), provides that an applicant has a right, under specified circumstances, to expedited consideration of an application to change the diversion point for their existing non-saline surface water right when the applicant begins using desalinated seawater. New TWC, §11.122(b-2), further requires the executive director or the commission to prioritize the technical review of such an application over the technical review of other applications that are not subject to TWC, §11.122(b-1). Finally, for a contested case hearing relating to an application under new TWC, §11.122(b-1), amended Texas Government Code, §2003.047(e-3) and (e-6), require the SOAH ALJ to complete a proceeding and provide a proposal for decision (PFD) to the commission not later than the 270th day after the date the matter was referred for a hearing. Amended Texas Government Code, §2003.047(e-3), allows the ALJ to extend a TWC, §11.122(b-1) proceeding by agreement of the parties with the approval of the ALJ; or by the ALJ if the judge determines that failure to extend the deadline would unduly deprive a party of due process or another constitutional right. Under existing Texas Government Code, §2003.047(e-4), for the purposes of Texas Government Code, §2003.047(e-3), a political subdivision has the same constitutional rights as an individual.

HB 3735 includes the same provisions described in SB 1430, which were added to HB 3735 in a Senate Committee Substitute. Other changes in HB 3735 are included in corresponding rulemakings under 30 TAC Chapters 295 and 297, published in this issue of the Texas Register.

The commission removes §80.4(c)(15) to implement the transfer of functions from the TCEQ to the PUC required by HB 1600 and SB 567 (83rd Texas Legislature, 2013). Further, the commission adopts amendments to Chapter 80, to implement the changes to the TCEQ contested case hearing process required by HB 3735 and SB 1430 (85th Texas Legislature, 2017).

In September 2017, the commission held an informal stakeholder meeting to solicit comments regarding the implementation of HB 3735 and SB 1430. While staff intends to strictly implement the legislation as the legislature intended, staff did ask for input from stakeholders on the following issues: How to implement SB 1430 and HB 3735, which require the TCEQ to provide an expedited procedure for certain amendments to water rights and also requires the executive director to prioritize the technical review of those applications over applications that are not subject to the expedited process? What should the "expedited process" look like? Is the expedited process for desalination permits in 30 TAC Chapter 295, Subchapter G, an appropriate model? What does "prioritize" mean? How does it harmonize (or not) with the priority system? Does prioritize mean to skip the line of priority? If yes, how should the commission consider/model the impacts that would not occur to water rights applications, but for the expedited applications jumping to the front of the priority line?

The executive director based these rules on consideration of the legislation and consideration of comments received from the stakeholders.


Section by Section Discussion

Chapter 80 sets forth the procedures for contested case hearings conducted on behalf of the TCEQ.

§80.4, Judges

Section 80.4, defines the authority and responsibilities of an ALJ that oversees a contested case hearing referred to SOAH by the TCEQ. The commission removes §80.4(c)(15), which pertains to the functions that transferred from the commission to the PUC in HB 1600 and SB 567 (83rd Texas Legislature, 2013). The subsequent paragraphs are renumbered accordingly. The commission adopts nonsubstantive amendments to renumbered §80.4(c)(16) and (17) to comply with Texas Register formatting requirements. The commission adopts §80.4(c)(18) which states that for applications subject to TWC, §11.122(b-1), an ALJ may extend the proceeding beyond 270 days after the first day of the preliminary hearing or on an earlier date specified by the commission if the judge determines that failure to grant an extension would unduly deprive a party of due process or another constitutional right; or by agreement of the parties with approval of the judge. The commission also amends §80.4(d) by adding the reference to renumbered subsection (c)(16), which was previously referenced as subsection (c)(17). The commission leaves in the reference to subsection (c)(18) in order to include the adopted paragraph in the list of paragraphs for which a political subdivision has the same constitutional rights as an individual. The commission adopts these amendments to implement Texas Government Code, §2003.047, as amended by HB 3735 and SB 1430 (85th Texas Legislature, 2017).

§80.252, Judge's Proposal for Decision

Section 80.252 sets forth the amount of time by which an ALJ must complete a contested case hearing referred to SOAH by the TCEQ and to submit a PFD to the commission. The commission amends §80.252(b) to add that applications not subject to TWC, §11.122(b-1) as well as applications filed before September 1, 2015, or applications not referred under TWC, §5.556 or §5.557 are governed by that subsection. The
commission also adopts nonsubstantive changes to §80.252(b) and (c) to comply with Texas Register formatting requirements. The commission adopts §80.252(d) which sets forth the timeline for conducting a contested case hearing and submitting a PFD for an application filed on or after September 1, 2017, and subject to TWC, §11.122(b-1). For these applications, adopted §80.252(d) directs the ALJ to file a written PFD with the chief clerk no later than 270 days after the first day of the preliminary hearing, the date specified by the commission, or the date to which the deadline was extended pursuant to Texas Government Code, §2003.047(e-3). Additionally, adopted §80.252(d) directs the ALJ to send a copy of the PFD by certified mail to the executive director and to each party. The subsequent subsections are re-lettered accordingly. The commission adopts these amendments to implement Texas Government Code, §2003.047, as amended by HB 3735 and SB 1430.

Final Regulatory Impact Analysis Determination

The commission reviewed this rulemaking under Texas Government Code, §2001.0225, "Regulatory Analysis of Major Environmental Rules," and determined that this rulemaking is not a "Major environmental rule." The legislature in 2013 enacted HB 1600 and SB 567, both of which amended TWC, §5.311(a). HB 1600 and SB 567 transferred from the TCEQ to the PUC the functions relating to the economic regulation of water and sewer utilities. HB 1600 and SB 567 amended TWC, §5.311(a) as it relates to the commission’s authority to delegate to an ALJ of SOAH the responsibility to issue interlocutory orders related to interim rates under TWC, Chapter 13. This rulemaking implements the change in TWC, §5.311(a).

The legislature in 2017 enacted HB 3735 and SB 1430, both of which amend Texas Government Code, §2003.047. HB 3735 and SB 1430 require the TCEQ to provide an expedited procedure for acting on certain applications for an amendment to a water right by certain applicants that use desalinated seawater. HB 3735, Section 6, and SB 1430, Section 2, amend Texas Government Code, §2003.047 to add that for amendments governed by TWC, §11.122(b-1), the PFD must be prepared no more than 270 days after the date the application is referred to SOAH. This rulemaking implements that statute.

In 2015, the legislature enacted HB 2031 (84th Texas Legislature), creating TWC, Chapter 18, which relates to marine seawater desalination, and HB 4097, creating TWC, §11.1405, relating to seawater desalination projects for industrial purposes. HB 2031 stated that the purpose of the new law was to remain economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. The legislature also stated that in this state, marine seawater is a potential new source of water for drinking and other beneficial uses, and that this state has access to vast quantities of marine seawater from the Gulf of Mexico. The legislature stated the purpose of HB 2031 was to "...streamline the regulatory process for and reduce the time required for and cost of marine seawater."

The purpose of the rulemaking is not "to protect the environment or reduce risks to human health from environmental exposure," in a way 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" (see Texas Government Code, §2001.0225(g)(3)). The specific intent of the rulemaking is to expedite the contested case hearing process for amendments to change diversion points when the holder of the water right begins using desalinated seawater and remove obsolete §80.4(c)(15), relating to the economic regulation of water and sewer utilities. Expediting the contested case hearing process is intended to encourage the use of desalinated water. The rulemaking expedites the contested case hearing process by placing a time limit on the preparation of a PFD at SOAH in contested cases of these amendments. As stated in HB 2031 (84th Texas Legislature, 2015), expediting the use of desalinated seawater supports development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits.

Even if this rulemaking was a "Major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225, for the requirement to prepare a full Regulatory Impact Analysis. This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a federal program, and is not adopted solely under the TCEQ's general rulemaking authority. This rulemaking is adopted to implement specific state statutes enacted in HB 1600 and SB 567 (83rd Texas Legislature, 2013) and HB 3735 and SB 1430 (85th Texas Legislature, 2017).

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

Takings Impact Assessment

The commission evaluated these adopted rules and performed analysis of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007 (see Texas Government Code, §2001.0225(g)(3)).

The specific purpose of these adopted rules is to encourage the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water by expediting the contested case hearing process for amendments to change diversion points when the holder of the water right begins using desalinated seawater and remove obsolete §80.4(c)(15), relating to the economic regulation of water and sewer utilities as those functions have transferred from the TCEQ to the PUC. In 2015, the legislature enacted requirements for expedited permitting for the diversion or transport of marine seawater under TWC, Chapter 18, and the diversion of seawater for industrial purposes under TWC, §11.1405.

These adopted rules would substantially advance this stated purpose by providing time limits on the preparation of PFDs in contested cases for amendments to change diversion points when the holder of the water right begins using desalinated seawater.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules because these rules do not impact private real property. This rulemaking removes §80.4(c)(15) and adds an expedited contested case hearing for amendments to change diversion points when the holder of the water right begins using desalinated seawater. The removal of §80.4(c)(15) is required due to the transfer of functions relating to the economic regulation of water and sewer utilities from the TCEQ to the PUC pursuant to HB 1600 and SB 567 (83rd Texas Legislature, 2013). The intent is to remove obsolete §80.4(c)(15), relating to the economic regulation of water and sewer utilities. Further, the changes to Chapter 80 provide that for these types of amendments, if there is a contested case, the ALJ must prepare a PFD no more than 270 days after the application is referred to SOAH and imple-
ment Texas Government Code, §2003.047. These amended rules are procedural in nature. The removal of §80.4(c)(15) and this expedited contested case hearing process for these amendments does not impact private real property rights.

Even if the rules were to impact real property rights, the commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules or the prior rules relating to the use of desalinated seawater, because these are actions taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. This action is exempt under Texas Government Code, §2007.003(b)(13). Lack of water for drinking and other essential purposes would be a health and safety crisis. This rulemaking could help to provide more drinking water and water for other essential purposes. There will be no or very minimal burden on private real property rights because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico. For marine seawater, there are no permanent water rights, real property rights, that have been granted for use of the water in the Gulf of Mexico. For seawater in a bay or arm of the Gulf of Mexico, very few water rights have been granted for this water. Diversions of seawater in a bay or arm of the Gulf of Mexico are also limited to industrial water. Water for municipal and domestic needs will not be taken from this part of the Gulf of Mexico.

In addition, the commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to the removal of §80.4(c)(15) based upon an exception to applicability in Texas Government Code, §2007.003(b)(5). The removal of §80.4(c)(15) is a discontinuance of the economic regulation of water and sewer utilities within the TCEQ, which provides a unilateral expectation that does not rise to the level of a recognized interest in private real property. Because the removal of §80.4(c)(15) falls within an exception under Texas Government Code, §2007.003(b)(5), Texas Government Code, Chapter 2007 does not apply to the removal of §80.4(c)(15).

Thus, Texas Government Code, Chapter 2007, does not apply to these adopted rules because these rules do not impact private real property, there is a public health and safety need for the rules, and the removal of §80.4(c)(15) falls within an exception under Texas Government Code, §2007.003(b)(5).

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the adopted amendment to Chapter 80 that implements changes to the TCEQ contested case hearing process required by HB 3735 and SB 1430 (85th Texas Legislature, 2017) may be subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 et seq., and therefore must be consistent with all applicable CMP goals and policies. In reviewing the removal of §80.4(c)(15) required by HB 1600 and SB 567 (83rd Texas Legislature, 2013), the commission found that the removal is neither identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4) nor will the removal affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the removal of §80.4(c)(15) is not subject to the CMP. The commission conducted a consistency determination for the adopted amendment to Chapter 80 implementing changes to the TCEQ contested case hearing process required by HB 3735 and SB 1430 (85th Texas Legislature, 2017) in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

Although the adopted rulemaking to implement HB 3735 and SB 1430 (85th Texas Legislature, 2017) is procedural, the rulemaking relates to prior rules that expedite permitting for diverting desalinated seawater. CMP goals applicable to the adopted rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the adopted rules include those contained in 31 TAC §501.33(a). The adopted rules implement HB 3735 and SB 1430, which encourage diversions of desalinated seawater by placing a time limit on preparation of a PFD from SOAH in contested cases for amendments to add diversion points to a surface water right when the applicant begins using desalinated seawater. In 2015, in HB 2031, the legislature found, concerning the desalination rules, "...that it is necessary and appropriate to grant authority and provide for expedited and streamlined authorization for marine seawater desalination facilities, consistent with appropriate environmental and water right protections,..." Since one of the purposes of the desalination rules is to protect coastal natural resources, these adopted rules which provide an incentive for applicants to begin using desalinated seawater in lieu of their existing surface water, are consistent with the CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because one of the purposes of the adopted rules is to protect coastal and natural resources.

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

Public Comment

The commission offered a public hearing on March 20, 2018. The comment period closed on March 26, 2018. The commission did not receive any comments for Chapter 80.

SUBCHAPTER A. GENERAL RULES

30 TAC §80.4

Statutory Authority

This amendment is adopted under the authority of Texas Water Code (TWC), §§5.102, concerning General Powers, §§5.103, concerning Rules, and §§5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §§5.013(a)(1), relating to the TCEQ’s authority over water and water rights; TWC, Chapter 18, concerning Marine Seawater Desalination Projects; TWC, §§11.1405, concerning Desalination of Seawater for the Use of Industrial Purposes; and TWC, §§11.122, relating to water rights amendments. This amendment is also adopted under Texas Government Code, §2003.047(e-3) and (e-6), relating to hearings for TCEQ.

The adopted amendment implements House Bill (HB) 1600 and Senate Bill (SB) 567 (83rd Texas Legislature, 2013), concerning
the transfer from the TCEQ to the Public Utility Commission of Texas the functions relating to the economic regulation of water and sewer utilities and HB 3735 and SB 1430 (85th Texas Legislature, 2017) and Texas Government Code, §2003.047(e-3) and (e-6), relating to referrals for contested case hearings to the State Office of Administrative Hearings.

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

Filed with the Office of the Secretary of State on July 27, 2018.

TRD-201803247
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: August 16, 2018
Proposal publication date: February 23, 2018
For further information, please call: (512) 239-6812

SUBCHAPTER F. POST HEARING PROCEDURES

30 TAC §80.252
Statutory Authority

This amendment is adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), relating to the commission’s authority over water and water rights; TWC, Chapter 18, concerning Marine Seawater Desalination Projects; TWC, §11.1405, concerning Desalination of Seawater for the Use of Industrial Purposes; and TWC, §11.122, relating to water rights amendments. This amendment is also adopted under Texas Government Code, §2003.047(e-3) and (e-6), relating to hearings for TCEQ.

The adopted amendment implements House Bill 3735 and Senate Bill 1430 (85th Texas Legislature, 2017) and Texas Government Code, §2003.047(e-3) and (e-6), relating to referrals for contested case hearings to the State Office of Administrative Hearings.

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

Filed with the Office of the Secretary of State on July 27, 2018.

TRD-201803248
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: August 16, 2018
Proposal publication date: February 23, 2018
For further information, please call: (512) 239-6812

CHAPTER 288. WATER CONSERVATION PLANS, DROUGHT CONTINGENCY PLANS, GUIDELINES AND REQUIREMENTS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §288.1 and §288.30.

The amendment to §288.1 is adopted with change to the proposed text as published in the February 23, 2018, issue of the Texas Register (43 TexReg 1013) and, therefore, will be republished. The amendment to §288.30 is adopted without change to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2017, the 85th Texas Legislature passed House Bill (HB) 1648. HB 1648 relates to the designation of a water conservation coordinator by a retail public utility to implement a water conservation plan. Under current law, retail public utilities that provide potable water service to 3,300 or more connections are required to submit a water conservation plan to the executive administrator of the Texas Water Development Board (Board). According to TCEQ's rules, a plan must be submitted to the Board starting May 1, 2009, and every five years thereafter, and the plan must comply with the minimum requirements established in the Board's rules. The Board is required to notify the TCEQ if the Board determines an entity has not complied with the plans or submission of plans and the commission will take appropriate enforcement action.

HB 1648 added provisions under Texas Water Code (TWC), §13.146, for the TCEQ to require retail public utilities that provide potable water to 3,300 or more connections to: 1) designate a person as the water conservation coordinator responsible for implementing the water conservation plan; and 2) identify, in writing, the water conservation coordinator to the executive administrator of the Board.

This adopted rulemaking amends §288.1 and §288.30 to include the requirements specified in HB 1648. This rulemaking under HB 1648 adds provisions requiring retail public utilities that provide potable water to 3,300 or more connections to: 1) designate a person as the water conservation coordinator responsible for implementing the water conservation plan; and 2) identify, in writing, the water conservation coordinator to the executive administrator of the Board.

In September 2017, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 1648, HB 3735, Senate Bill (SB) 864, and SB 1430 (85th Texas Legislature, 2017). The executive director based these rules on consideration of the legislation and consideration of comments received from the stakeholders.

In corresponding rulemakings published in this issue of the Texas Register, the commission also adopts new and amended sections in 30 TAC Chapter 80, Contested Case Hearings; 30 TAC Chapter 295, Water Rights, Procedural; and 30 TAC Chapter 297, Water Rights, Substantive to implement HB 3735, SB 864, and SB 1430.

Section by Section Discussion

§288.1, Definitions

Section 288.1 defines words and terms used within Chapter 288. The commission adopts nonsubstantive changes to reorganize
and renumber definitions in order to maintain alphabetical order. The commission also adopts §288.1(23) to add a definition for "Water conservation coordinator" and renumbers the subsequent paragraphs accordingly. In response to comments regarding §288.1(23), the definition for "Water conservation coordinator" was revised by substituting the term "retail public water supplier" for "retail public utility" to make this provision consistent with the entirety of Chapter 288. Chapter 288 refers to "retail public water supplier" when referring to a "retail public utility" that provides retail potable water service, as opposed to sewer service, and that is subject to the requirements of Chapter 288.

§288.30, Required Submittals

Section 288.30 outlines the requirements for water conservation plan and drought contingency plan submittals. The commission adopts §288.30(10)(B) to require that retail public water suppliers that provide potable water to 3,300 or more connections designate a person as the water conservation coordinator responsible for implementing the water conservation plan and identify, in writing, the water conservation coordinator, including contact information for that person, to the executive administrator of the Board. In addition, the commission adopts that notification of the initial designated water conservation coordinator be provided as specified by the Board and any changes to the water conservation coordinator be provided within 90 days of the effective date of the change. The commission re-letters the subsequent sub-paragraphs accordingly.

Final Regulatory Impact Analysis Determination

The commission reviewed this rulemaking under Texas Government Code, §2001.0225, "Regulatory Analysis of Major Environmental Rules," and determined that this rulemaking is not a "major environmental rule." HB 1648 was enacted to require that a retail public utility have a water conservation coordinator to implement its water conservation plan. This is a procedural requirement with the specific intent to aid the retail public utility in implementing its water conservation plan in order to have a more efficient plan. Therefore, the purpose of the rulemaking is not to protect the environment or reduce risks to human health from environmental exposure; in a way 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 specific intent of this rulemaking is not to protect the environment or reduce risks to human health from environmental exposures (see Texas Government Code, §2001.0225(g)(3)).

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a federal program, and is not adopted solely under the TCEQ's general rulemaking authority. This rulemaking is adopted to implement specific state statute enacted in HB 1648.

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

Takings Impact Assessment

The commission evaluated these adopted rules and performed analysis of whether these adopted rules constitute a takings un-der Texas Government Code, Chapter 2007 (see Texas Government Code, §2001.0225(g)(3)).

The specific purpose of these adopted rules is to implement HB 1648 which requires that a retail public utility providing potable water service to 3,300 or more connections designate a water conservation coordinator responsible for implementing the water conservation plan and identify that person to the executive administrator of the Board. The intent is to aid the retail public utility in implementing its water conservation plan in order to have a more efficient plan.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules because these rules do not impact private real property. The requirement is that a retail public utility designate a water conservation coordinator to implement the water conservation plan. This designation will not impact real property.

If it could be argued that this action constitutes a taking, the action would be exempt from the requirements of Texas Government Code, Chapter 2007, Subchapter C, because under Texas Government Code, §2007.003(13) this is an action that is taken in response to a real and substantial threat to public health and safety, is designed to significantly advance the health and safety purpose, and does not impose a greater burden than is necessary to achieve the health and safety purpose. Conservation of water is important in order to have adequate drinking water and water for other purposes.

Consistency with the Coastal Management Program

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

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is administrative in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

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

Public Comment

The commission offered a public hearing on March 20, 2018. The comment period closed on March 26, 2018. The commission received comments on Chapter 288 from Sledge Law Group PLLC on behalf of Benbrook Water Authority (BWA).

BWA suggested changes to the rules.

Response to Comments

General Comments

Comment

BWA commented that the proposed amendments to §288.1 and §288.30 do a good job of mirroring the language in TWC, §13.146, as amended by HB 1648.

Response
The commission appreciates this comment.

**Updates to TCEQ and Board Websites**

**Comment**

BWA recommended that the commission or the Board include on its website an updated list of each retail public water supplier's designated water conservation coordinator, to be available to the public for review.

**Response**

This comment is beyond the scope of this rulemaking because the legislation being implemented does not require this action. No changes were made in response to this comment.

§288.1, Definitions

**Comment**

BWA commented that in §288.1(23) and §288.30(10) there is inconsistency in the use of the term "retail public utility," as referenced in TWC, §13.146, amended by HB 1678, and in §288.1(23), and the use of the term "retail public water supplier," as referenced in §288.30(10).

**Response**

The commission agrees with this comment and has made non-substantive changes to §288.1(23) substituting the term "retail public water supplier" for "retail public utility" to make this provision consistent with the entirety of Chapter 288. Chapter 288 refers to "retail public water supplier" when referring to a "retail public utility" that provides retail potable water service, as opposed to sewer service.

**Proposed §288.30**

**Comment**

BWA supported the proposed amendment to §288.30(10) that requires the designation of a water conservation coordinator as a submission to the Board separate and apart from the submission of a water conservation plan to the Board. BWA believed that this process of designating a water conservation coordinator as a one-time submission to the Board, unless changed at a future date, separate and apart from being an element of a water conservation plan, which is submitted to the Board once every five years, is the easiest, least complex way to implement the statute.

**Response**

The commission acknowledges this comment.

**Comment**

BWA commented that the proposed language in §288.30(10)(B) should be revised to state that a retail public water supplier may also identify as its designated water conservation coordinator a position and the contact information for that position in lieu of a specific individual to avoid having to notify the Board each time there is employee turnover in the position designated as water conservation coordinator.

**Response**

The statute, as amended in HB 1648, specifically states that "a person," as opposed to a position, be designated as a water conservation coordinator. No changes were made in response to this comment.

SUBCHAPTER A. WATER CONSERVATION PLANS

**30 TAC §288.1**

**Statutory Authority**

This amendment is adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; and TWC, §5.013(a)(1), concerning the commission's authority over water and water rights. This amendment is also adopted under TWC, §13.146, concerning water conservation plans.

The amendment implements House Bill 1648 (85th Texas Legislature, 2017) and TWC, §13.146(1) - (3), which relates to the requirement for retail public utility to have a water conservation coordinator.

§288.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

1. Agricultural or Agriculture--Any of the following activities:

   A cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

   B the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;

   C raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;

   D raising or keeping equine animals;

   E wildlife management; and

   F planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure.

2. Agricultural use--Any use or activity involving agriculture, including irrigation.

3. Best management practices--Voluntary efficiency measures that save a quantifiable amount of water, either directly or indirectly, and that can be implemented within a specific time frame.

4. Conservation--Those practices, techniques, and technologies that reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

5. Commercial use--The use of water by a place of business, such as a hotel, restaurant, or office building. This does not include multi-family residences or agricultural, industrial, or institutional users.

6. Drought contingency plan--A strategy or combination of strategies for temporary supply and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies. A drought contingency plan may be a separate document identified as such or may be contained within another water management document(s).
(7) Industrial use--The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, and the development of power by means other than hydroelectric, but does not include agricultural use.

(8) Institutional use--The use of water by an establishment dedicated to public service, such as a school, university, church, hospital, nursing home, prison, or government facility. All facilities dedicated to public service are considered institutional regardless of ownership.

(9) Irrigation--The agricultural use of water for the irrigation of crops, trees, and pastureland, including, but not limited to, golf courses and parks which do not receive water from a public water supplier.

(10) Irrigation water use efficiency--The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include, but are not limited to, evapotranspiration needs for vegetative maintenance and growth, salinity management, and leaching requirements associated with irrigation.

(11) Mining use--The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(12) Municipal use--The use of potable water provided by a public water supplier as well as the use of sewage effluent for residential, commercial, industrial, agricultural, institutional, and wholesale uses.

(13) Nursery grower--A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to sale or lease, and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(14) Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to the public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

(15) Public water supplier--An individual or entity that supplies water to the public for human consumption.

(16) Regional water planning group--A group established by the Texas Water Development Board to prepare a regional water plan under Texas Water Code, §16.053.

(17) Residential gallons per capita per year--The total gallons sold for residential use by a public water supplier divided by the residential population served and then divided by the number of days in the year.

(18) Residential use--The use of water that is billed to single and multi-family residences, which applies to indoor and outdoor uses.

(19) Retail public water supplier--An individual or entity that for compensation supplies water to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants when that water is not resold to or used by others.

(20) Reuse--The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(21) Total use--The volume of raw or potable water provided by a public water supplier to billed customer sectors or nonrevenue uses and the volume lost during conveyance, treatment, or transmission of that water.

(22) Total gallons per capita per day (GPCD)--The total amount of water diverted and/or pumped for potable use divided by the total permanent population divided by the days of the year. Diversion volumes of reuse as defined in this chapter shall be credited against total diversion volumes for the purposes of calculating GPCD for targets and goals.

(23) Water conservation coordinator--The person designated by a retail public water supplier that is responsible for implementing a water conservation plan.

(24) Water conservation plan--A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate document identified as such or may be contained within another water management document(s).

(25) Wholesale public water supplier--An individual or entity that for compensation supplies water to another for resale to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants as an incident of that employee service or tenancy when that water is not resold to or used by others, or an individual or entity that conveys water to another individual or entity, but does not own the right to the water which is conveyed, whether or not for a delivery fee.

(26) Wholesale use--Water sold from one entity or public water supplier to other retail water purveyors for resale to individual customers.

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

Filed with the Office of the Secretary of State on July 27, 2018.

TRD-201803249
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: August 16, 2018
Proposal publication date: February 23, 2018
For further information, please call: (512) 239-6812

SUBCHAPTER C. REQUIRED SUBMITTALS
30 TAC §288.30

Statutory Authority
This amendment is adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, §5.103,
concerning Rules, and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; and TWC, §5.013(a)(1), concerning the commission’s authority over water and water rights.

The amendment implements House Bill 1648 (85th Texas Legislature, 2017) and TWC, §13.146(2) and (3), which relate to the requirement for retail public utility to have a water conservation coordinator.

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

Filed with the Office of the Secretary of State on July 27, 2018.
TRD-201803250
Robert Martinez
Director, Environmental Law Defense
Texas Commission on Environmental Quality
Effective date: August 16, 2018
Proposal publication date: February 23, 2018
For further information, please call: (512) 239-6812

CHAPTER 295. WATER RIGHTS,
PROCEDURAL

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§295.73, 295.121, and 295.122; the repeal of §§295.121 - 295.126; and amendments to §§295.151 - 295.153.

New §295.73 and the amendment to §295.153 are adopted with changes to the proposed text as published in the February 23, 2018, issue of the Texas Register (43 TexReg 1019) and, therefore, will be republished. New §295.121 and §295.122; the repeal of §§295.121 - 295.126; and amendments to §295.151 and §295.152 are adopted without changes to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2017, the 85th Texas Legislature passed House Bill (HB) 3735, Senate Bill (SB) 864, and SB 1430, which all became effective on September 1, 2017. SB 1430 amended the Texas Water Code (TWC) to require that the TCEQ provide an expedited procedure for acting on certain applications for an amendment to a water right by applicants that begin to use desalinated seawater. New TWC, §11.122(b-1), provides that an applicant has a right, under specified circumstances, to expedited consideration of an application to change the diversion point for their existing non-saline surface water right when the applicant begins using desalinated seawater. New TWC, §11.122(b-2), further requires the executive director or the commission to prioritize the technical review of such an application over the technical review of other applications that are not subject to TWC, §11.122(b-1).

HB 3735 includes the same provisions described in SB 1430, which were added to HB 3735 in a Senate Committee Substitute. HB 3735 additionally amended TWC, §11.125, to replace specific map requirements in TWC, §11.125(a) with a more general requirement to submit maps in the form prescribed by the commission and removed additional specific map requirements by repealing TWC, §11.125(b) and (c).

SB 864 amended the TWC as it relates to the procedure for obtaining a right to use state water if the applicant proposes an alternative source of water that is not state water. SB 864 amends notice requirements relating to alternate sources of water used in water rights applications. Amended TWC, §11.132(c) and §11.143(e), require that the notice of an application under those sections identify any proposed alternative sources of water. Amended TWC, §11.132(d) and §11.143(f), require that the commission provide mailed notice of an application to any groundwater conservation district (GCD) with jurisdiction over groundwater production in an area from which the applicant proposes to use groundwater as an alternative source. Amended TWC, §11.143(f), requires published notice of a hearing in a newspaper of general circulation in each county in which a GCD is located for applications to use an exempt reservoir to convey groundwater under the jurisdiction of a GCD.

The commission adopts amendments to Chapter 295 to implement the changes to the TCEQ water right amendment process required by HB 3735 and SB 1430, the TCEQ water rights mapping requirements required by HB 3735, and the TCEQ water right notices required by SB 864.

In September 2017, the commission held an informal stakeholder meeting to solicit comments regarding the implementation of HB 1648, HB 3735, SB 864, and SB 1430. While staff intends to strictly implement the legislation as the legislature intended, staff asked for input from stakeholders on the following issues: How to implement SB 1430 and HB 3735, which require the TCEQ to provide an expedited procedure for certain amendments to water rights and also requires the executive director to prioritize the technical review of those applications over applications that are not subject to the expedited process? What should the "expedited process" look like? Is the expedited process for desalination permits in Chapter 295, Subchapter G, an appropriate model? What does "prioritize" mean? How does it harmonize (or not) with the priority system? Does prioritize mean to skip the line of priority? If yes, how should the commission consider/model the impacts that would not occur to water rights applications, but for the expedited applications jumping to the front of the priority line?

The second topic of interest on which staff asked for input relates to the new mailed and published notice requirements to GCDs and their areas required in SB 864. A strict reading of SB 864 appears to only require mailed notice to a GCD and published notice in the GCD area for an application under TWC, §11.143, that uses groundwater under the jurisdiction of a GCD as an alternate source. New TWC, §11.132(d)(2)(B), also appears to require mailed notice to a GCD of a new appropriation which uses groundwater under the jurisdiction of the GCD as an alternate source to support the application. Since SB 864 became effective September 1, 2017, the executive director has put in place procedures to accomplish all of these notice requirements. During the stakeholder meeting, staff requested input on these new notice requirements in other instances. Specifically, did the legislature intend to expand the published notice requirement in TWC, §11.132(d)(3) to include publishing in a newspaper of general circulation in the area of the GCD (assuming they might be different than the project area in some instances)? Should the new mailed and/or published notice requirements apply to new bed and banks authorizations under TWC, §11.042(c), which use groundwater under the jurisdiction of a GCD? Current TCEQ...
rule, §295.161, requires downstream mailed notice, but does not require any published notice.

The executive director based these rules on consideration of the legislation and consideration of comments received from the stakeholders.

In corresponding rulemakings published in this issue of the Texas Register, the commission also adopts to implement HB 1648 in amended sections in 30 TAC Chapter 288, Water Conservation Plans, Drought Contingency Plans, Guidelines, and Requirements; HB 3735 in 30 TAC Chapter 297, Water Rights, Substantive; and SB 1430 and HB 3735 in 30 TAC Chapter 80, Contested Case Hearings.

Section by Section Discussion
§295.73, Texas Water Code, §11.122(b-1) Amendment Applications

The commission adopts new §295.73 to implement the requirement in TWC, §11.122(b-1) as added by HB 3735 and SB 1430, which requires that the TCEQ provide expedited technical review of an application to change the diversion point for a water right holder's existing non-saline surface water right when the applicant begins using desalinated seawater and further requires the executive director or the commission to prioritize the technical review of such an application over the technical review of all other applications that are not subject to the expedited process. Adopted new §295.73(a) requires that prior to being declared administratively complete, applicants requesting expedited technical review of an amendment under §295.73 must demonstrate the amount of desalinated seawater the water right holder has begun using or demonstrate with certainty any amount of desalinated seawater the water right holder will begin using in the future. This information is necessary for the commission to determine whether the application is eligible for the expedited consideration requested.

The expedited technical review and priority mandated by HB 3735 and SB 1430 are implemented by adopted new §295.73(b) which states “Technical review for applications under this section will be completed prior to all other administratively complete applications in the basin that do not meet the requirements of this section.” The expedited technical review, which prioritizes applications that meet the requirements of TWC, §11.122(b-1) over other administratively complete applications differs from the commission's current practice of processing applications in the order in which they became administratively complete. Adopted new §295.73(c) addresses the possibility that prioritizing applications under adopted new §295.73(b) over other applications that were declared administratively complete before the §295.73(b) application could result in adverse impacts to the availability of water to the applications that were not prioritized. Adopted new §295.73(c) states that "The commission may include special conditions in the permit, including, but not limited to a re-opener provision, to mitigate adverse impacts on the availability of water for applications that were administratively complete prior to an application that triggered the expedited technical review under subsection (b) of this section." The re-opener provision would be invoked if an application was processed after a §295.73(b) application, despite the fact that it was administratively complete prior to the §295.73(b) application, and technical review of the application revealed that there were adverse impacts on the availability of water that would not have occurred but for the §295.73(b) application being processed first.

Division 12, Maps, Plats, and Drawings Accompanying Application for Water Use Permit

The commission adopts the repeal of §§295.121 - 295.126 because HB 3735 provides for the removal of outdated mapping requirements and the replacement with more general requirements that maps must meet the requirements specified by the commission; therefore, these sections are obsolete.

§295.121, Content Requirements of Maps

The commission adopts new §295.121 to implement the more general requirements of HB 3735 that applications be accompanied by a map or plat in the form and containing the information prescribed by the commission. Adopted new §295.121 states that water right applications must include maps or plats in the form and containing the information specified in the relevant water right form and instructions for the particular authorization sought.

§295.122, Requirements for Dams and Reservoirs

The commission adopts new §295.122 which requires that maps, plats, or drawings submitted with application plans for dam and reservoir projects must include the information described in 30 TAC §299.3. This rule implements the more general requirements of HB 3735 that applications be accompanied by a map or plat in the form and containing the information prescribed by the commission.

§295.151, Notice of Application and Commission Action

The commission adopts §295.151(b)(9) that requires the notice to identify any proposed alternative source of water, other than state water, identified by the application. The subsequent paragraphs are renumbered accordingly.

§295.152, Notice By Publication

The commission adopts amended §295.152(a) to specify that this subsection applies to an application for a permit pursuant to TWC, §11.121, or for an amendment to a TWC, §11.121, permit, a certified filing, or a certificate of adjudication pursuant to TWC, §11.122, and §295.158(b). The commission also adopts §295.152(b) to require that an application for a permit pursuant to TWC, §11.143, or for an amendment pursuant to TWC, §11.122, to a TWC, §11.143, permit, or a certificate of adjudication which authorizes diversions from a reservoir which is exempted under TWC, §11.142, in which the applicant proposes to use groundwater from a well located within a GCD as an alternative source of water, the applicant shall cause the notice issued by the chief clerk to be published in a newspaper of general circulation within each county in which the GCD is located. The subsequent subsection is re-lettered.

§295.153, Notice By Mail

For an application for a permit pursuant to TWC, §11.121, or for an amendment to a TWC, §11.121 permit, a certified filing, or a certificate of adjudication pursuant to TWC, §11.122 and §295.158(b), the commission adopts §295.153(b)(3) to require notice be mailed to each GCD with jurisdiction over the proposed groundwater production, if the applicant proposes to use groundwater from a well located within a GCD as an alternative source of water. The subsequent paragraph is renumbered. At adoption, §295.153(b)(3) was revised to correct a grammatical error.

For an application for a permit pursuant to TWC, §11.143, or for an amendment pursuant to TWC, §11.122, to a TWC, §11.143 permit, or a certificate of adjudication which authorizes
diversions from a reservoir which is exempted under TWC, §11.142 and pursuant to §295.158(b), the commission adopts §295.153(c)(2) to require notice be mailed to each GCD with jurisdiction over the proposed groundwater production, if the applicant proposes to use groundwater from a well located within a GCD as an alternative source of water. The subsequent paragraph is renumbered.

The commission also adopts nonsubstantive amendments to §295.153(b) - (d) to comply with Texas Register formatting requirements.

Final Regulatory Impact Analysis Determination

The commission reviewed this rulemaking under Texas Government Code, §2001.0225, "Regulatory Analysis of Major Environmental Rules," and has determined that none of the rules in this rulemaking are a "Major environmental rule." The legislature in 2017 enacted HB 3735 and SB 1430, both of which amend TWC, §11.122 to add TWC, §11.122(b-1) and (b-2). HB 3735 and SB 1430 require the TCEQ to provide an expedited procedure for changing or adding diversion points in a water right when the water right holder begins to use desalinated seawater. HB 3735 also amends TWC, §11.125 to change the map requirements in an application. This rulemaking also implements SB 864 and TWC, §11.132(c) and (d) and §11.143(e) and (f) regarding use of alternative sources of water.

In 2015, the legislature enacted HB 2031, creating TWC, Chapter 18, which relates to marine seawater desalination, and HB 4097, creating TWC, §11.1405, relating to seawater desalination projects for industrial purposes. HB 2031 stated that the purpose of the law is to remain economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. The legislature also stated that in this state, marine seawater is a potential new source of water for drinking and other beneficial uses, and that this state has access to vast quantities of marine seawater from the Gulf of Mexico. The legislature stated the purpose of HB 2031 was to "...streamline the regulatory process for and reduce the time required for and cost of marine seawater." Therefore, the purpose of the rulemaking is not "to protect the environment or reduce risks to human health from environmental exposure," in a way 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 specific intent of this rulemaking is not to protect the environment or reduce risks to human health from environmental exposures (see Texas Government Code, §2001.0225(g)(3)). The specific intent of the rulemaking is to expedite the permitting process for amendments to change diversion points when the holder of the water right begins using desalinated seawater and to prioritize the technical review of such amendments over other applications. This is intended to encourage the use of desalinated water. As is stated in HB 2031, expediting the use of desalinated seawater supports development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits.

Concerning the amended map rules and notice rules relating to the use of an alternative source of water, these are also not "Major environmental rules." The purpose of these rules is to change requirements for maps in applications, and to add additional information in notices when an applicant wants to use an alternate source of water. The rules also add some additional notice re-

quirements. These rules are procedural in nature and are not to protect the environment or reduce risks to human health from environmental exposure.

Even if any of these rules in this rulemaking were a "Major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225, for the requirement to prepare a full Regulatory Impact Analysis. This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a federal program, and is not adopted solely under the TCEO's general rulemaking authority. This rulemaking is adopted under specific state statutes enacted in HB 3735, SB 864, and SB 1430.

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

Takings Impact Assessment

The commission evaluated these adopted rules and performed analysis of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007 (see Texas Government Code, §2001.0225(g)(3)).

The specific purpose of these adopted rules is to encourage the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water by expediting the process for amendments to change diversion points when the holder of the water right begins using desalinated seawater. In 2015, the legislature added requirements for expedited permitting for the diversion or transport of marine seawater under TWC, Chapter 18, and the diversion of seawater for industrial purposes under TWC, §11.1405. The adopted rules would substantially advance this stated purpose by allowing the expedited amendments to permits to change or add diversion points when the holder of the water right begins using desalinated seawater.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules because these rules do not impact private real property. These rules only allow an expedited amendment to a water right holder to change or add diversion points when the holder begins to use desalinated seawater. These diversions at new diversion points are limited by the amount of desalinated seawater used by the holder and the amount of water the holder was authorized to divert under the water right before the requested amendment. The water diverted from these diversion points cannot be transferred to another basin. Therefore, this expedited amendment process does not impact private real property rights.

Even if these rules were to impact real property rights, the commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules. These rules and the prior rules relating to the use of desalinated seawater are actions taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). Lack of water for drinking and other essential purposes would be a health and safety crisis. This rulemaking could help to provide more drinking water and water for other essential purposes. There will be no or very minimal burden on private real property rights because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico. For marine seawater, there are
no permanent water rights, real property rights, that have been granted for use of the water in the Gulf of Mexico. For seawater in a bay or arm of the Gulf of Mexico, very few water rights have been granted for this water. Diversions of seawater in a bay or arm of the Gulf are also limited to industrial water. Water for municipal and domestic needs will not be taken from this part of the Gulf of Mexico.

Concerning the amended map and notice rules, these rules do not impact private real property. The purpose of these procedural rules is to change requirements for maps in applications, and to add notice of an application for use of an alternate source of water. The intent is to bring mapping and plating requirements in TCEQ's rules up-to-date, and to provide notice to GCDs and other interested parties if an applicant is planning to use ground-water as an alternate source. These rules are procedural in nature and do not impact private real property.

Thus, Texas Government Code, Chapter 2007, does not apply to these adopted rules because these rules do not impact private real property. Furthermore, under the adopted rules, the commission may include special conditions in a permit issued under this rulemaking to mitigate adverse impacts on the availability of water for other water rights and water right applicants.

Consistency with the Coastal Management Program
The commission reviewed the adopted rulemaking and found that the adopted rules related to amended TWC, §11.122, may be subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 et seq., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

Although the adopted rules are procedural, the rules are related to prior rules that expedite permitting for diverting desalinated seawater. CMP goals applicable to the adopted rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the adopted rules include those contained in 31 TAC §501.33(a). The adopted rules implement HB 3735 and SB 1430, which encourage diversions of desalinated seawater by allowing expedited processing for amendments to add diversion points to an existing water right when the applicant begins use of desalinated seawater. In 2015, in HB 2031, the legislature found, concerning the existing rules, "...that it is necessary and appropriate to grant authority and provide for expedited and streamlined authorization for marine seawater desalination facilities, consistent with appropriate environmental and water right protections..." Since one of the purposes of the expedited amendment rules is to encourage applicants to begin using desalinated seawater in lieu of their existing surface water, the rules are consistent with the CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because one of the purposes of the adopted rules is to protect coastal and natural resources.

The commission reviewed the rules related to mapping and notice in the rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rules are administrative in nature and will have no substantive effect on commission actions subject to the CMP and are, therefore, consistent with the CMP goals and policies.

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

Public Comment
The commission held a public hearing on March 20, 2018. The comment period closed on March 28, 2018. The commission received comments on Chapter 285 from Poseidon Water LLC (Poseidon) and Prairielands Groundwater Conservation District (the District).

Poseidon and the District suggested changes to the rules.

Response to Comments

General

Comment

Poseidon commented that HB 3735 and SB 1430 reflect that the state wants desalinated water strategies to play an important role in meeting the water supply needs for protection of human health and economic prosperity. Poseidon commented that the Legislative Statement of Intent for SB 1430 explained that the 2017 State Water Plan indicates that Texas’ population is expected to reach 51 million people by 2070 and faces a potential water shortage of 8.9 million acre-feet of water per year under drought of record conditions and meeting future water needs will require new and innovative technologies such as seawater desalination. Poseidon further commented that SB 1430 seeks to encourage the development and use of desalinated seawater and the legislation does not change the priority date of an existing water right or the nature of the technical analysis that is conducted to establish a new diversion point.

Response

The commission acknowledges these comments. No changes were made in response to these comments.

Comment

The District commented that groundwater is a shared resource that is also privately owned, and any improper, wasteful, or illegal production or use of the resource may have far-reaching impacts on landowners’ private property rights associated with the groundwater underlying the GCD.

Response

Jurisdiction over whether groundwater use is improper, wasteful, or illegal resides in the GCD from which the groundwater originates. No changes were made in response to these comments.

Proposed §295.73(a)

Comment

Poseidon commented that the rule requirement that the applicant must demonstrate the amount of desalinated seawater the water right holder has begun using does not account for...
typical ramp up period for increased usage of desalinated water." Poseidon further commented that the ramp up should be accommodated by processing applications for the volume of water that "will be in use within a reasonable time of when the water right amendment is issued." Poseidon commented that a contract supporting the ramp up in usage that will occur within a reasonable time should support the processing of the application at the greater volume. Specifically, Poseidon requested that §295.73(a) be amended to include the following language: "(a) Prior to being declared administratively complete, applications submitted under this section must demonstrate the amount of desalinated seawater the water right holder has (i) begun using and (ii) for which it is applying and can demonstrate commitments for use within a reasonable time."

Response The commission agrees that TWC, §11.122(b-1), can be reasonably interpreted to allow permit amendments to include future use of a designated amount of desalinated seawater as well as an amount of use of desalinated seawater at the time the amendment application. An amendment granted under this section will be conditioned upon the actual use of the specified amount of desalinated seawater. The commission agrees that this interpretation of the statute is consistent with the statutory intent of encouraging use of desalinated seawater. Language was added to §295.73(a) in response to these comments stating that, "If the water right holder can demonstrate with certainty a specified amount of desalinated seawater the water right holder will begin using in the future, the commission may declare the application administratively complete, but condition any amendment granted under this section upon the actual use of the specified amount of desalination seawater."

Proposed §295.73(b) Comment Poseidon commented that while the expedited diversion point amendment applications authorized under SB 1430 are meant to be prioritized, the legislation is not intended to bring any and all draft permits in the basin to a halt regardless of their relationship to the expedited permit. Poseidon further commented that the legislature intended the commission to have the flexibility to determine which other applications may proceed to final draft permit and which need to be put on hold to take into account the expedited diversion point amendment. Poseidon provided several examples of instances in which Poseidon believed the commission may, based on its expertise, conclude that an application would have no impact on an expedited diversion point amendment. Poseidon commented that the executive director should have discretion to determine that particular applications should proceed to final draft permit without delay. Poseidon proposed the following language to replace proposed §295.73(b): "Technical review for applications under this section shall be completed prior to all other administratively complete applications in the basin that do not meet the requirements of this section, except to the extent that the Executive Director determines the completion of technical review of the application under this section is not reasonably likely to affect technical review of a particular administratively complete application."

Response TWC, §11.122(b-2), is the basis for the proposed requirement in §295.73(b) that technical review for expedited diversion point amendments will be completed prior to all other administratively complete applications in the basin. TWC, §11.122(b-2) states "The executive director or the commission shall prioritize the technical review of an application that is subject to Subsection (b-1) over the technical review of applications that are not subject to that subsection." The commission does not share Poseidon's interpretation of proposed §295.73(b) that the executive director must cease working on all other applications in a basin until the expedited diversion point amendment is completed. The executive director can continue to use staff resources to work on the technical review of other applications in the basin as long as staff is prioritizing the expedited diversion point amendment as required by TWC, §11.122(b-2), and the expedited diversion point amendment's technical review is completed prior to all other applications in the basin. No changes were made in response to these comments.

Proposed §295.73(c) Comment Poseidon commented that proposed §295.73(c) includes a provision that the commission may include special conditions in an expedited diversion point amendment permit, including, but not limited to a re-opener provision, to mitigate adverse impacts on the availability of water for applications that were administratively complete prior to an application that triggered the expedited review under this section. Poseidon commented that the rationale provided for the provision is that the commission's normal procedure is to process applications in the order received. Poseidon further commented that to incentivize seawater desalination projects, the legislature expressly overrode the commission's normal procedure to provide an expedited path to a final amendment that creates a predictable, reliable, and marketable water supply. Poseidon commented that the operative element of the legislation is time saved in technical review and time saved in contested case hearing and that minimizing the time it takes to get to a final amendment is the core incentive of the legislation. Poseidon requested that the commission not adopt §295.73(c).

Response A fundamental principal in Texas' prior appropriation water law is the doctrine of seniority whereby each water right is assigned a specific priority date. TWC, §11.027, states that "As between appropriators, the first in time is the first in right." The commission and its predecessor water rights agencies have considered the priority date of a permit or an amendment to be the date upon which an administratively complete application has been accepted for filing and filed with the chief clerk. This interpretation is codified in §297.44(c) of the commission's current rules. The commission does not agree with Poseidon's comment that the plain language in TWC, §11.122(b-1) and (b-2), "expressly overrode" the longstanding priority doctrine. Instead, the legislation requires the commission to expedite processing of certain applications and to prioritize their technical review. The commission proposes §295.73(c) as a means to harmonize TWC, §11.027, with the provisions in TWC, §11.122(b-1) and (b-2). The commission believes that the process outlined in proposed §295.73 will result in expedited final amendments being issued for the diversion point amendments that meet TWC, §11.122(b-1) and (b-2), requirements while also preserving the priority date for earlier filed applications and mitigating any impacts to the earlier filed applications caused by the expedited diversion point amendment being prioritized in technical review. No changes were made in response to these comments.

Proposed §295.152 Comment
The District recommended that the commission use its discretion to expand the proposed requirement in §295.152(b) beyond the current proposed requirement to publish notice in the area of a GCD for a permit pursuant to TWC, §11.143, or for an amendment under TWC, §11.122, to a TWC, §11.143, permit, or a certificate of adjudication which authorizes diversions from a reservoir which is exempted under TWC, §11.142, in which the applicant proposes to use groundwater from a well located within a GCD as an alternative source of water. Specifically, the District requested that the commission revise the proposed amendment to §295.152 to state that "for an application for a permit pursuant to TWC, §11.121, or for an amendment to a permit, a certified filing, or a certificate of adjudication pursuant to TWC, §11.122, and 30 TAC §295.158(b), in which the applicant proposes to use groundwater from a well located in a GCD as an alternative source of water, the applicant shall cause notice issued by the chief clerk to be published in a newspaper of general circulation within each county in which the GCD is located." The District commented that the intent of SB 864 was to apprise not just GCDs, but also landowners in the GCD of the proposed use of groundwater as an alternative source of water in an application before the commission. The District commented that SB 864 clearly requires mailed notice to a GCD, but SB 864 is less clear on the requirements for published notice. The District commented that it is illogical to think that the legislature intended to expand published notice to the area of a GCD for applications under TWC, §11.143, that use groundwater as an alternate source, but did not intend to expand notice for other applications under TWC, §11.121 and §11.122, that use much more groundwater as an alternate source. The District commented that the controlling default language in TWC, §11.132(a), requires the commission to give notice to "persons who in the judgement of the commission may be affected by an application . . ." The District further commented that landowners in an area where groundwater is proposed to be used as an alternative source of water may be affected by an application. Finally, the District commented that the requirement to publish notice in the area of the source of the surface water may not be sufficient to provide landowners who may be affected by an application when the area of the source of surface water does not coincide with the area where the groundwater is located.

Response

In SB 864, the legislature expressly expanded notice for applications under TWC, §11.143 (formerly exempt reservoirs), to include mailed notice to a GCD and published notice to include the area of a GCD. SB 864 also expressly expanded mailed notice for other new applications under TWC, §11.121 and §11.122, by amending TWC, §11.132(d)(2)(B), to include GCDs if an application proposes to use groundwater as an alternative source. SB 864 did not similarly expand published notice under TWC, §11.132(d)(1). No changes were made in response to these comments.

Existing §295.161 (Notice for Bed and Banks Authorizations)

Comment

The District commented that existing §295.161 should also be amended to include mailed notice to GCDs and published notice in the area of a GCD for a TWC, §11.042(c), application to convey groundwater under the jurisdiction of a GCD. The District commented that the legislative intent of SB 864 applies to these conveyances. The District commented that TWC, §11.042, is silent on notice requirements applicable to bed and banks permit applications and that notice for those permit applications is provided through TWC, §11.132(a), and §295.161 which requires mailed notice to certain water right holders downstream of the discharge point as well as Texas Parks and Wildlife Department and the Public Interest Counsel. The District commented that a GCD and the landowners in the GCD have a special interest in the use of groundwater in a bed and banks application that is similar to Texas Parks and Wildlife Department and the Public Interest Counsel. The District commented that a GCD is statutorily required to manage and conserve groundwater resources and does so primarily through issuance of permits. The District commented that notice of a bed and banks application gives the GCD or an affected landowner the opportunity to ensure the applicant's use of groundwater is permitted and in compliance with the GCDs rules by participating in a hearing prior to the issuance of the bed and banks permit when groundwater may not be available.

Response

For TWC, §11.042, bed and banks applications involving groundwater from wells in a GCD, commission practice has been to require the applicant to provide a groundwater permit or proof that no permit is required. Statute and commission rules do not require notice to GCDs for these applications. However, anyone, including a GCD, may request to be placed on an interested persons list and receive notices for applications within a county or basin. In SB 864, the legislature expressly expanded notice for applications under TWC, §11.143 (formerly exempt reservoirs), to include mailed notice to a GCD and published notice to include the area of a GCD. SB 864 also expressly expanded mailed notice for other new applications under TWC, §11.121 and §11.122, by amending TWC, §11.132(d)(2)(B), to include GCDs if an application proposes to use groundwater as an alternative source. SB 864 did not similarly expand notice for applications under TWC, §11.042. No changes were made in response to these comments.

SB 864

Comment

The District commented that SB 864 was created as a stakeholder consensus bill through the joint efforts of the Texas Water Conservation Association's Legislative Groundwater and Surface Water Committees and that the General Manager for the District participated in the drafting and discussions on the intent of the bill. The District commented that SB 864 was unchanged throughout the legislative process.

Response

The commission acknowledges these comments. No changes were made in response to these comments.

Comment

The District commented that commission staff requested input to specific questions relating to the implementation of SB 864.

Response

The commission clarifies that staff requested input on the questions during the informal stakeholder meeting in September 2017 and based these rules on the legislation and consideration of comments received from the stakeholders during the informal stakeholder process. No changes were made in response to these comments.
SUBCHAPTER A. REQUIREMENTS OF WATER RIGHTS APPLICATIONS GENERAL PROVISIONS

DIVISION 7. REQUIREMENTS FOR APPLICATIONS FOR AMENDMENTS TO WATER USE PERMITS AND EXTENSIONS OF TIME

30 TAC §295.73

Statutory Authority

The new rule is adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §§5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), concerning the TCEQ's authority over water and water rights; TWC, Chapter 18, concerning Marine Seawater Desalination Projects; TWC, §11.1405, concerning Desalination of Seawater for the Use of Industrial Purposes; and TWC, §11.122, relating to water rights amendments.

The new rule implements House Bill 3735 and Senate Bill 1430 (85th Texas Legislature, 2017) and TWC, §§11.122(b-1) and (b-2).

§295.73. Texas Water Code, §11.122(b-1) Amendment Applications.

(a) Prior to being declared administratively complete, applications submitted under this section must demonstrate the amount of desalinated seawater the water right holder has begun using. If the water right holder can demonstrate with certainty a specified amount of desalinated seawater the water right holder will begin using in the future, the commission may declare the application administratively complete, but condition any amendment granted under this section upon the actual use of the specified amount of desalination seawater.

(b) Technical review for applications under this section will be completed prior to all other administratively complete applications in the basin that do not meet the requirements of this section.

(c) The commission may include special conditions in the permit, including, but not limited to a re-opener provision, to mitigate adverse impacts on the availability of water for applications that were administratively complete prior to an application that triggered the expedited technical review under subsection (b) of this section.

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

Filed with the Office of the Secretary of State on July 27, 2018.

TRD-201803251
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: August 16, 2018
Proposal publication date: February 23, 2018
For further information, please call: (512) 239-6812

DIVISION 12. MAPS, PLATS, AND DRAWINGS ACCOMPANYING APPLICATION FOR WATER USE PERMIT

30 TAC §§295.121 - 295.126

Statutory Authority

The repeal of the rules is adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), concerning the commission's authority over water and water rights; and TWC, §11.125, relating to maps and plats.

The repeal of the rules implements House Bill 3735 (85th Texas Legislature, 2017) and TWC, §11.125(a).

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

Filed with the Office of the Secretary of State on July 27, 2018.

TRD-201803252
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: August 16, 2018
Proposal publication date: February 23, 2018
For further information, please call: (512) 239-6812

TRD-201803253
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: August 16, 2018
Proposal publication date: February 23, 2018
For further information, please call: (512) 239-6812
SUBCHAPTER C. NOTICE REQUIREMENTS FOR WATER RIGHT APPLICATIONS

30 TAC §§295.151 - 295.153

Statutory Authority

The amendments are adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), concerning the commission’s authority over water and water rights; TWC, §11.132(c) and (d); TWC, §11.143, relating to notice; and TWC, §11.143(c), relating to use of water from an exempt reservoir for nonexempt purposes.

The amendments implement House Bill 864 (85th Texas Legislature, 2017); TWC, §11.132(c) and (d); and TWC, §11.143(e) and (f).


(a) If notice by mail is required, the commission shall mail the notice by first-class mail, postage prepaid, to persons listed in this section for each type of application. The commission shall mail required notice not less than 30 days before the date set for commission consideration of the application.

(b) For an application for a permit pursuant to Texas Water Code (TWC), §11.121, or for an amendment to a TWC, §11.121, permit, a certified filing, or a certificate of adjudication pursuant to TWC, §11.122, and §295.158(b) of this title (relating to Notice of Amendments to Water Rights), notice shall be mailed to the following:

(1) each claimant or appropriator of water from the source of water supply, the record of whose claim or appropriation has been filed with the commission or its predecessor agencies;

(2) all navigation districts within the river basin concerned;

(3) each groundwater conservation district with jurisdiction over the proposed groundwater production, if the applicant proposes to use groundwater from a well located within a groundwater conservation district as an alternative source of water; and

(4) other persons who, in the judgment of the commission, might be affected.

(c) For an application for a permit pursuant to TWC, §11.143, or for an amendment pursuant to TWC, §11.122, to a TWC, §11.143, permit, or a certificate of adjudication which authorizes diversions from a reservoir which is exempted under TWC, §11.142, and pursuant to §295.158(b) of this title, notice shall be mailed to the following:

(1) each person whose claim or appropriation has been filed with the commission or its predecessor agencies and whose diversion point is downstream from the location of the dam or reservoir as described in the application;

(2) each groundwater conservation district with jurisdiction over the proposed groundwater production, if the applicant proposes to use groundwater from a well located within a groundwater conservation district as an alternative source of water; and

(3) other persons who, in the judgment of the commission, might be affected.

(d) For an application to amend a certified filing authorizing diversions from a reservoir which is exempted under TWC, §11.142, which, if granted, will cause a change in the reservoir so that it would no longer be exempt under TWC, §11.142, notice shall be mailed to the persons listed in subsection (b) of this section.

(e) For an application to authorize the use of state water for domestic and livestock use from a reservoir constructed by the federal government for which no local sponsor has been designated nor permit issued, the commission shall issue such notice as it deems appropriate.

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

Filed with the Office of the Secretary of State on July 27, 2018.

TRD-201803254
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: August 16, 2018
Proposal publication date: February 23, 2018
For further information, please call: (512) 239-6812

CHAPTER 297. WATER RIGHTS, SUBSTANTIVE

SUBCHAPTER E. ISSUANCE AND CONDITIONS OF WATER RIGHTS

30 TAC §297.46

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts an amendment to §297.46 without change to the proposed text as published in the February 23, 2018, issue of the Texas Register (43 TexReg 1026) and, therefore, the section will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

In 2017, the 85th Texas Legislature passed House Bill (HB) 3735, which became effective on September 1, 2017. Existing Texas Water Code (TWC), §11.134(b)(3)(C), states that the commission may only grant a water right application if it is not detrimental to the public welfare. HB 3735 amended TWC, §11.134, by adding TWC, §11.134(b-1) which states that the commission may consider only the factors that are within the jurisdiction and expertise of the commission as established by TWC, Chapter 11, in determining whether an appropriation is detrimental to the public welfare. The change the commission adopts to Chapter 297 implements the further defining of the TCEQ’s consideration of public welfare required by HB 3735. Specifically, the commission amends §297.46 to implement the changes required by HB 3735.

In September 2017, the commission held an informal stakeholder meeting to solicit comments regarding the implementation of HB 3735. The executive director based this rule on consideration of the legislation and consideration of comments received from the stakeholders.

In corresponding rulemakings published in this issue of the Texas Register, the commission also adopts new and amended sections to implement HB 3537 and SB 1430 in 30 TAC Chapter 80, Contested Case Hearings; HB 1648 in 30 TAC Chapter 288, Water Conservation Plans, Drought Contingency Plans,
Guidelines and Requirements; and HB 3735 and SB 1430 in 30 TAC Chapter 295, Water Rights, Procedural.

Section Discussion

§297.46, Consideration of Public Welfare

Section 297.46 provides that the commission may grant an application for a new or amended water right only if it finds that it would not be detrimental to the public welfare. The commission adopts amended §297.46 to add "For purposes of public welfare findings made under this section, the commission may consider only factors that are within the commission's jurisdiction and expertise as established in Texas Water Code, Chapter 11." The commission adopts this amendment to implement TWC, §11.134(b-1), as amended by HB 3735.

Final Regulatory Impact Analysis Determination

The commission reviewed this rulemaking under Texas Government Code, §2001.0225, "Regulatory Analysis of Major Environmental Rules," and has determined that this rulemaking is not a "Major environmental rule." HB 3735 amended TWC, §11.134, to add that the TCEQ may consider only the factors that are within the jurisdiction and expertise of the TCEQ as established by TWC, Chapter 11, in determining whether an appropriation is detrimental to the public welfare. This rulemaking implements that statute.

The purpose of the rulemaking is not "to protect the environment or reduce risks to human health from environmental exposure," in a way 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 specific intent of this rule is not to protect the environment or reduce risks to human health from environmental exposures (see Texas Government Code, §2001.0225(g)(3)). The specific intent of the rule is to enumerate what the TCEQ may consider when it is determining whether an application for a water right is detrimental to the public welfare under TWC, §11.134(b)(3)(C). This rule is consistent with existing case law and the TCEQ's current interpretation of TWC, §11.134.

Even if this rulemaking was a "Major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225, for the requirement to prepare a full Regulatory Impact Analysis. This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a federal program, and is adopted solely under the TCEQ's general rulemaking authority. This rulemaking is adopted under a specific state statute enacted in HB 3735.

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

Takings Impact Assessment

The commission evaluated this rule and performed analysis of whether this adopted rule constitutes a takings under Texas Government Code, Chapter 2007 (see Texas Government Code, §2001.0225(g)(3)). The specific purpose of the adopted rule is to incorporate the requirements of HB 3735 into the TCEQ's rules by stating that for the purpose of determining whether an application for a water right is detrimental to the public welfare under TWC, §11.134(b)(3)(C), the TCEQ may only consider factors that are within the commission's jurisdiction and expertise as established by TWC, Chapter 11. The adopted rule advances this stated purpose by incorporating this statutory directive into the rule requiring the public welfare determination. The rule does not burden private real property in any way.

Consistency with the Coastal Management Program

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

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

Public Comment

The commission offered a public hearing on March 20, 2018. The comment period closed on March 26, 2018. The commission did not receive any comments for Chapter 297.

Statutory Authority

The amendment is adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1) concerning the TCEQ's authority over water and water rights; and TWC, §11.134(b-1), which relates to the factors that the commission may consider when determining whether a water right application is detrimental to public welfare.

The amendment implements House Bill 3735, Section 5 (85th Texas Legislature, 2017) and TWC, §11.134(b-1), which relate to the factors that the commission may consider when determining whether a water right application is detrimental to the public welfare.

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

Filed with the Office of the Secretary of State on July 27, 2018.
TRD-201803255
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: August 16, 2018
Proposal publication date: February 23, 2018
For further information, please call: (512) 239-6812

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 49. CONTRACTING FOR COMMUNITY SERVICES
As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §§531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the executive commissioner of HHSC adopts amendments to §§49.101, 49.102, 49.202 - 49.204, 49.206 - 49.211, 49.301, 49.304, 49.305, 49.308, 49.309, 49.311, 49.411, 49.413, 49.414, 49.511, 49.521 - 49.523, 49.531 - 49.534, 49.541, 49.551, 49.601, 49.701, and 49.702, and the repeal of §49.412, concerning Contracting for Community Services. The amendments and repeal are adopted without changes to the proposed text as published in the March 30, 2018, issue of the Texas Register (43 TexReg 1963), and will not be re-published.

HHSC adopts amendments to §§49.205, 49.302, and 49.307, with changes to the proposed text as published in the March 30, 2018, issue of the Texas Register (43 TexReg 1963).

BACKGROUND AND JUSTIFICATION

Chapter 49, Contracting for Community Services, governs contracting with HHSC to provide the community-based services for which the Department of Aging and Disability Services (DADS) previously contracted. The amendments delete references to the Medically Dependent Children’s Program (MDCP), as those services are now provided through STAR Kids, and delete references to relocation services, as those services are now provided through STAR+PLUS. The amendments change “DADS” to “HHSC,” as appropriate, because DADS was abolished effective September 1, 2017. The amendments change “DFPS” to “HHSC,” as appropriate, to reflect the transfer of certain regulatory functions of DFPS to HHSC in accordance with Texas Government Code, §531.02013. The amendments also reflect that certain functions of HHSC Consumer Rights and Services, related to the handling of complaints, have transferred to the HHSC Office of the Ombudsman. Other amendments and the repeal make contracting requirements more specific and consistent with contract provisions; consolidate monitoring provisions; clarify the requirement for a contractor to have documentation supporting a claim before submitting the claim for payment; and change the requirements for contract termination when a contractor undergoes a change of ownership or change of legal entity.

The purpose of the amendments and repeal is to help ensure HHSC contracts with qualified and competent contractors and to strengthen compliance monitoring and enforcement, thereby promoting the provision of higher quality services.

COMMENTS

The 30-day comment period ended April 29, 2018.

During this period, HHSC received comments regarding the proposed rules from four commenters, including the Texas Association for Home Care and Hospice. A summary of comments relating to the rules and HHSC’s responses follows.

Comment: Regarding proposed §49.205(a)(4), one commenter stated that centers for independent living are now under the auspices of the Administration for Community Living of the United States Department of Health and Human Services, rather than the Rehabilitation Services Administration of the United States Department of Education.

Response: HHSC agrees and has revised the rule as suggested.

Comment: Regarding proposed §49.302(q)(3), two commenters suggested changing the requirement that notice be sent to the HHSC contract staff identified on the form “Contract Approval Letter” and instead that the notice be sent to the HHSC "Contracting department" due to the number of staff changes at HHSC.

Response: HHSC agrees that requiring notice to be sent to a particular staff person may not be the most effective way to ensure delivery to the correct area within HHSC. However, because there are multiple contracting areas at HHSC, HHSC revised the rule to require contractors to send notice to the mailing address or email address identified on the form "Contract Approval Letter."

Comment: Regarding proposed §49.304(f), two commenters requested that HHSC add a timeframe to the rule for the retention of the List of Excluded Individuals and Entities (LEIE) monthly searches.

Response: HHSC declines to make the suggested change. Evidence of compliance with the monthly LEIE searches is considered a "record," as described in §49.305; therefore, contractors must maintain this evidence in accordance with record retention requirements described in §49.307(a).

Comment: Regarding proposed §49.304(f), two commenters suggested that HHSC allow contractors to shred the LEIE searches after contract monitoring has been completed.

Response: HHSC declines to make the suggested change because evidence of compliance with LEIE searches must be retained in accordance with §49.307(a).

Comment: Regarding proposed §49.305(i)(2), two commenters noted that, with faxing and emailing of documents, an original record many times does not exist. These commenters asked HHSC to consider the ongoing modernization and digitization of contractor's records and either delete the term "original" or allow for the retention of "original" records that have been "digitized."

Response: HHSC declines to make the suggested change at this time because this provision was not proposed for amendment and should have the benefit of public comment before being amended. HHSC will consider proposing an amendment to this provision in the future.

Comment: Regarding proposed §49.307(a)(1), three commenters noted that the proposed requirement for a contractor to retain records seven years after a contract expires or is terminated is burdensome, expensive, and an unreasonable expectation. Two commenters suggested changing this requirement to seven years from the end of the federal fiscal period in which services were terminated.

Response: HHSC acknowledges that the proposed rule may have resulted in contractors retaining voluminous records because a community services contract may be in effect for many years. Therefore, HHSC added §49.307(a)(2) to require a contractor to retain only its contract and any contract solicitation documents for seven years after the contract expires or is termi-
nated. HHSC also modified §49.307(a)(1) to limit the retention period for a record developed and maintained in accordance with §49.305 to seven years after the contractor submits a claim for the service about which the record relates, rather than seven years after the contract expires or is terminated. These changes are consistent with Texas Government Code §441.1855 and the Texas Procurement and Contract Management Guide and will shorten the retention period for most records. HHSC plans to amend the Form 3254, Community Services Contract - Provider Agreement, to be consistent with the adopted rule.

Comment: Regarding proposed §49.411(a), two commenters suggested that the option for HHSC to conduct a desk review be removed from the rule because conducting a desk review would hinder the efficacy of contract monitoring.

Response: HHSC declines to revise the rule because it considers desk reviews to be an effective method to monitor a contractor that allows for the efficient use of state resources, including staff time and travel expenses.

The agency changed the date in §49.307(d) from July 29, 2018, to September 1, 2018. July 29 was the anticipated effective date of the amendment, but it will not be effective until September 1, 2018, so the date was changed.

SUBCHAPTER A. APPLICATION AND DEFINITIONS

40 TAC §49.101, §49.102

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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

Filed with the Office of the Secretary of State on July 25, 2018.
TRD-201803190
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: September 1, 2018
Proposal publication date: March 30, 2018
For further information, please call: (512) 438-5609

SUBCHAPTER B. CONTRACTOR ENROLLMENT

40 TAC §§49.202 - 49.211

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

§49.205. License, Certification, Accreditation, and Other Requirements.

(a) To be a contractor, an applicant must have a license, certification, accreditation, or other document as follows:

(1) CLASS-CFS and CLASS-SFS require:

(A) a permit to operate a child-placing agency issued by HHSC in accordance with Chapter 745 of this title (relating to Licensing); or

(B) a HCSSA license issued by HHSC in accordance with Chapter 97 of this title (relating to Licensing Standards for Home and Community Support Services Agencies) with:

(i) the licensed home health services (LHHS) category; or

(ii) the licensed and certified home health services (L&CHHS) category;

(2) CLASS-DSA requires a HCSSA license issued by HHSC in accordance with Chapter 97 of this title with:

(A) the LHHS category; or

(B) the L&CHHS category;

(3) DBMD requires:

(A) a HCSSA license issued by HHSC in accordance with Chapter 97 of this title with:

(i) the LHHS category; or

(ii) the L&CHHS category; and

(B) for a contractor that provides residential services to four to six individuals, an assisted living facility license Type A or Type B issued by HHSC in accordance with Chapter 92 of this title (relating to Licensing Standards for Assisted Living Facilities);

(4) TAS requires:

(A) written documentation from HHSC or the Administration for Community Living of the United States Department of Health and Human Services that the applicant is a center for independent living, as defined by 29 United States Code §796a;

(B) a contract other than the TAS contract; or

(C) written designation by HHSC as an area agency on aging;

(5) Medicaid hospice requires:

(A) a HCSSA license for hospice issued by HHSC in accordance with Chapter 97 of this title; and

(B) a written notification from the Centers for Medicare & Medicaid Services that the applicant is certified to participate as a hospice agency in the Medicare Program;

(6) PHC, CAS, and FC require a HCSSA license issued by HHSC in accordance with Chapter 97 of this title with:

(A) the LHHS category;
(B) the L&CHHS category; or  
(C) the PAS category;  
(7) DAHS requires a DAHS facility license issued by HHSC in accordance with Chapter 98 of this title (relating to Day Activity and Health Services Requirements);  
(8) Title XX AFC requires for an AFC home serving four to eight individuals, an assisted living facility license Type A or Type B issued by HHSC in accordance with Chapter 92 of this title; and  
(9) Title XX RC requires an assisted living facility license Type A or Type B issued by HHSC in accordance with Chapter 92 of this title.

(b) The license, certification, accreditation, or other document required by subsection (a) of this section must be valid in the service or catchment area:  
(1) in which the applicant is seeking to provide services; or  
(2) covered under the contractor's contract.

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

Filed with the Office of the Secretary of State on July 25, 2018.  
TRD-201803191  
Karen Ray  
Chief Counsel  
Department of Aging and Disability Services  
Effective date: September 1, 2018  
Proposal publication date: March 30, 2018  
For further information, please call: (512) 438-5609

**SUBCHAPTER C. REQUIREMENTS OF A CONTRACTOR**

40 TAC §§49.301, 49.302, 49.304, 49.305, 49.307 - 49.309, 49.311

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

§49.302. General Requirements.

(a) A contractor must have and maintain a license, certification, accreditation, or other documentation required of an applicant in §49.205 of this chapter (relating to License, Certification, Accreditation, and Other Requirements), except:

(1) a contractor that has had a contract for the DBMD Program continuously since September 1, 1999, and that does not provide home health or personal assistance services is not required to have a HCSSA license issued in accordance with Chapter 97 of this title (relating to Licensing Standards for Home and Community Support Services Agencies) for a contract in effect on September 1, 2014; and

(2) a contractor that has had a contract for AFC services in a four-bed home continuously since January 15, 2009, and that has an assisted living facility Type C license issued in accordance with Chapter 92 of this title (relating to Licensing Standards for Assisted Living Facilities) is not required to have an assisted living facility Type A or Type B license issued in accordance with Chapter 92 of this title.

(b) A contractor must complete any training required by HHSC as stated on the HHSC website before HHSC places a contract of the contractor on a choice list.

(c) A contractor must ensure that an employee, subcontractor, or volunteer can effectively communicate with an individual or LAR concerning service planning and the provision of services, which may require the contractor to provide an interpreter for the individual.

(d) Except as provided in HHSC rules governing services provided under the contract, a contractor must not allow an individual to perform services under the contract or perform other work that benefits the contractor.

(e) A contractor must comply with the terms of its contract, which requires compliance with applicable federal and state laws, rules, and regulations, including this chapter, rules governing services provided under the contract, and applicable reimbursement rules in 1 TAC Chapter 535 (relating to Reimbursement Rates).

(f) A contractor:

(1) must accept the reimbursement rate for a service in effect at the time the service is provided as payment in full for performance under the contract; and

(2) must not make an additional charge to the individual, any member of the individual's family, or any other source for supplementation for performance under the contract, unless specifically allowed by federal or state law, rule, or regulation.

(g) A contractor must:

(1) subscribe to receive HHSC e-mail updates, using the link provided at the HHSC website and, for its contract, select the following categories:

(A) information letters; and

(B) provider alerts; and

(2) be informed of the content of the e-mail updates.

(h) A contractor must notify HHSC of a change of ownership or change in legal entity in accordance with §49.210(a)(1) of this chapter (relating to Contractor Change of Ownership or Legal Entity).

(i) If there is a change to a contractor's physical, mailing, or e-mail address, as stated on the contractor's contract application packet or on a prior written notice of change to the information, the contractor must notify HHSC of the change and provide the new physical, mailing, or e-mail address:

(1) at least 30 days before the address changes; or

(2) if a natural or unforeseen disaster prevents compliance with paragraph (1) of this subsection, within three days after the change.

(j) If there is a change to the name of the signature authority, the contractor must notify HHSC of the change within 30 days after the change by submitting a new, fully executed HHSC "Governing Authority Resolution" form.

(k) If there is a change to the information regarding the applicant or a controlling person of the applicant being confirmed by DFPS
or HHSC as having committed abuse, neglect, or exploitation, as stated on the contractor's contract application packet or on a prior written notice of change to the information, the contractor must notify HHSC of the change within three business days after the contractor or controlling person becomes aware of the change.

(i) If a controlling person of a contractor is convicted of any crime listed in §49.206 of this chapter (relating to Ineligibility Due to Criminal History), the contractor must notify HHSC within three business days after the contractor or controlling person becomes aware of the conviction.

(m) If a contractor files for bankruptcy, the contractor must notify HHSC within 14 days after filing.

(n) If a contractor or controlling person of a contractor is excluded in accordance with §§1128, 1128A, 1136, 1156, or 1842(j)(2) of the Social Security Act, the contractor must notify HHSC of the exclusion change within three business days after the contractor or controlling person becomes aware of the exclusion.

(o) If a contractor or a controlling person of a contractor becomes aware the contractor or controlling person is listed on any of the following, the contractor must notify HHSC within three business days after the contractor becomes aware of the listing:

(1) the HHSC employee misconduct registry as unemployable;
(2) the HHSC nurse aide registry as revoked or suspended;
(3) the United States System for Award Management maintained by the General Services Administration;
(4) the LEIE maintained by the United States Department of Health and Human Services, Office of Inspector General;
(5) the LEIE maintained by the HHSC Office of Inspector General; or
(6) the Debarred Vendor List maintained by the Texas Comptroller of Public Accounts.

(p) If there is a change to any of the information on the contractor's contract application packet or on a prior written notice of change to the information, other than the information referenced in subsections (i) - (o) of this section, a contractor must notify HHSC of the change and provide the new information within 14 days after the information changes.

(q) For a notice that a contractor is required to send to HHSC in accordance with this chapter, the contractor must ensure that the notice is:

(1) in writing;
(2) signed by the signature authority; and
(3) sent to the HHSC mailing address or email address identified on the form "Contract Approval Letter" issued to the contractor when the contract was awarded.

(r) A contractor must allow HHSC and any authorized federal or state agency access to:

(1) individuals;
(2) employees, subcontractors, or volunteers of the contractor; and
(3) any premises controlled by the contractor.

(s) A contractor must not pay for any item or service furnished, ordered, or prescribed by an individual listed on either LEIE described in §49.304(f)(1) of this subchapter (relating to Background Checks). §49.307. Record Retention and Disposition.

(a) Except as provided in subsections (c) and (d), a contractor must retain a record in the form in which it was created as follows:

(1) a record developed and maintained in accordance with §49.305 of this subchapter (relating to Records) until the latest of the following:

(A) seven years after the contractor submits a claim for the service about which the record relates;
(B) seven years after all issues that arise from any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the record are resolved; or
(C) the individual about whom the record relates becomes 21 years of age.

(2) its contract and any contract solicitation documents until the later of the following:

(A) seven years after the contract expires or is terminated; or
(B) seven years after all issues that arise from any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the contract are resolved.

(b) If a contractor destroys records containing confidential information, the records must be destroyed in a manner that makes the confidential information unusable, as follows:

(1) for paper, film, and other hard copy records, shredding, pulping, or burning; and
(2) for electronic records, disintegration, degaussing, digital shredding, or using specialized software to copy over the data.

(c) If applicable law, the contract, or rules governing services provided under the contract require a contractor to retain records for a longer period than described in subsection (a) of this section, the contractor must retain the records for the longer period.

(d) A contractor is not required to comply with subsection (a) of this section for a record not required by applicable law, rule, or the contract to be in the contractor's possession on September 1, 2018.

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

Filed with the Office of the Secretary of State on July 25, 2018.
TRD-201803192
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: September 1, 2018
Proposal publication date: March 30, 2018
For further information, please call: (512) 438-5609

SUBCHAPTER D. MONITORING AND INVESTIGATION OF A CONTRACTOR

43 TexReg 5234 August 10, 2018 Texas Register
DIVISION 2. MONITORING AND INVESTIGATION

40 TAC §§49.411, 49.413, 49.414

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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

Filed with the Office of the Secretary of State on July 25, 2018.
TRD-201803193
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: September 1, 2018
Proposal publication date: March 30, 2018
For further information, please call: (512) 438-5609

40 TAC §49.412

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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

Filed with the Office of the Secretary of State on July 25, 2018.
TRD-201803194
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: September 1, 2018
Proposal publication date: March 30, 2018
For further information, please call: (512) 438-5609

SUBCHAPTER E. ENFORCEMENT BY HHSC AND TERMINATION BY CONTRACTOR

DIVISION 2. IMMEDIATE PROTECTION

40 TAC §49.511

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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

Filed with the Office of the Secretary of State on July 25, 2018.
TRD-201803195
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: September 1, 2018
Proposal publication date: March 30, 2018
For further information, please call: (512) 438-5609

DIVISION 3. ACTIONS

40 TAC §§49.521 - 49.523

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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

Filed with the Office of the Secretary of State on July 25, 2018.
TRD-201803196
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: September 1, 2018
Proposal publication date: March 30, 2018
For further information, please call: (512) 438-5609

DIVISION 4. SANCTIONS

40 TAC §§49.531 - 49.534

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency.
that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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

Filed with the Office of the Secretary of State on July 25, 2018.
TRD-201803197
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: September 1, 2018
Proposal publication date: March 30, 2018
For further information, please call: (512) 438-5609

DIVISION 5. APPEALS

40 TAC §49.541

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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

Filed with the Office of the Secretary of State on July 25, 2018.
TRD-201803198
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: September 1, 2018
Proposal publication date: March 30, 2018
For further information, please call: (512) 438-5609

DIVISION 6. TERMINATION BY CONTRACTOR

40 TAC §49.551

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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

Filed with the Office of the Secretary of State on July 25, 2018.
TRD-201803200
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: September 1, 2018
Proposal publication date: March 30, 2018
For further information, please call: (512) 438-5609

SUBCHAPTER F. REVIEW BY HHSC OF EXPIRING OR TERMINATED CONTRACT

40 TAC §49.601

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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

Filed with the Office of the Secretary of State on July 25, 2018.
TRD-201803199
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: September 1, 2018
Proposal publication date: March 30, 2018
For further information, please call: (512) 438-5609

SUBCHAPTER G. APPLICATION DENIAL PERIOD

40 TAC §49.701, §49.702

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.
Filed with the Office of the Secretary of State on July 25, 2018.
TRD-201803201
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: September 1, 2018
Proposal publication date: March 30, 2018
For further information, please call: (512) 438-5609

**TITLE 43. TRANSPORTATION**

**PART 1. TEXAS DEPARTMENT OF TRANSPORTATION**

**CHAPTER 1. MANAGEMENT**

**SUBCHAPTER F. ADVISORY COMMITTEES**

43 TAC §1.84
The Texas Department of Transportation (department) adopts amendments to §1.84, concerning Statutory Advisory Committees. The amendments to §1.84 are adopted without changes to the proposed text as published in the May 11, 2018, issue of the Texas Register (43 TexReg 2963) and will not be republished.

**EXPLANATION OF ADOPTED AMENDMENTS**

Senate Bill 1522, 85th Legislature, Regular Session, amended Transportation Code, §21.003, relating to the aviation advisory committee. Previously, the statute provided that the committee consisted of six members, all of whom must have five years of successful experience as an aircraft pilot, an aircraft facilities manager, or a fixed-base operator. The amended section now requires the Texas Transportation Commission (commission), by rule, to determine the number of members of the committee, and provides that a majority of the members must have the requisite experience.

Amendments to §1.84, Statutory Advisory Committees, conform the rule to Transportation Code, §21.003, as described above. The amendments to §1.84(a)(2) specify that the commission will appoint nine members to the aviation advisory committee to staggered terms of three years. The department has determined that nine members will provide greater representation across the state, without being too cumbersome to coordinate meetings and ensure the presence of a quorum. The amendments also update the requisite level of experience for committee membership. In addition, members may only serve three consecutive terms, to ensure that the committee continues to represent a wide variety of interests across the state. This provision will apply only to service occurring after the effective date of the amendments.

**COMMENTS**

No comments on the proposed amendments were received.

**STATUTORY AUTHORITY**

The amendments are adopted under Transportation Code, '201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §21.003, which requires the commission, by rule, to determine the number of members of the aviation advisory committee.

**CROSS REFERENCE TO STATUTE**

Transportation Code, §21.003.
The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 26, 2018.
TRD-201803210
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: August 15, 2018
Proposal publication date: May 11, 2018
For further information, please call: (512) 463-8630

**CHAPTER 2. ENVIRONMENTAL REVIEW OF TRANSPORTATION PROJECTS**

**SUBCHAPTER H. MEMORANDUM OF UNDERSTANDING WITH THE TEXAS HISTORICAL COMMISSION**

The Texas Department of Transportation (department) adopts the repeal of Chapter 2, Subchapter H, Memorandum of Understanding with the Texas Historical Commission, §§2.251 - 2.278. The department adopts the simultaneous replacement with new §§2.251 - 2.279. The repeal and new sections are adopted without changes to the proposed text as published in the May 11, 2018, issue of the Texas Register (43 TexReg 2965) and will not be republished.

**EXPLANATION OF ADOPTED REPEAL AND NEW SECTIONS**

Transportation Code, §201.607 requires the department to adopt a memorandum of understanding (MOU) with each state agency that has responsibilities for the protection of the natural environment or for the preservation of historic or archeological resources. Transportation Code, §201.607 also requires the department to adopt the MOU and all revisions to it by rule, and to periodically evaluate and revise the MOU. In order to meet the legislative intent and to ensure that historic and archeological resources are given full consideration in accomplishing the department's activities, the department has evaluated its MOU with the Texas Historical Commission (THC) adopted in 2013, and finds it necessary to repeal existing 43 TAC Chapter 2, Subchapter H and simultaneously replace it with a new Subchapter H, §§2.251 - 2.279.

The provisions of Chapter 2, new Subchapter H have been agreed on by the Texas Historical Commission (THC) and the department in order to update the current Memorandum of Understanding (MOU). This replacement is proposed to better explain both agencies' responsibilities. The changes include several administrative adjustments, including reorganization of the agreement. The proposed replacement also offers clarification of project activities relating to non-archeological historic properties, the addition of new definitions relating to archeological and non-archeological properties, and the addition of text relating to programmatic public outreach activities.

**COMMENTS**

ADOPTED RULES  August 10, 2018  43 TexReg 5237
The Texas Department of Transportation (department) adopts the repeal of Subchapter E, §§7.80 - 7.88, and the simultaneous adoption of new Subchapter E, §§7.80 - 7.95 concerning the department's safety oversight of rail fixed guideway systems. The repeal of Subchapter E, §§7.80 - 7.88, and the simultaneous adoption of new Subchapter E, §§7.80 - 7.95 are adopted without changes to the proposed text as published in February 9, 2018, issue of the Texas Register (43 TexReg 734) and will not be republished.

Federal regulation 49 C.F.R. §674.11, State Safety Oversight Program, requires each state that has a rail fixed guideway public transportation system to have a State Safety Oversight program approved by the Federal Transit Administrator before April 15, 2019. This rulemaking adopts the state program and therefore, is subject to federal approval before it takes effect. The Texas Transportation Commission (commission) directs the department to file these adopted rules with the Office of the Texas Secretary of State so that they take effect after receipt of notice of federal approval of the program.

EXPLANATION OF ADOPTED REPEALS AND NEW SECTIONS

Senate Bill 1523, 85th Legislature, Regular Session, 2017, (SB 1523) requires the department to create a state safety oversight program for rail fixed guideway public transportation systems. The legislation also aligns Texas law with federal state safety oversight requirements of 49 U.S.C. Section 5329(e), as amended by the Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 C.F.R. Part 674.

New Subchapter E implements SB 1523 and 49 C.F.R. Part 674, and makes general changes and updates to the existing State Safety Oversight Program. The department has been responsible for the State Safety Oversight program since 1996. SB 1523 expands the department's authority by providing more enforcement responsibilities to comply with the changes in the federal regulations. The federal requirements must be implemented by March 2019 and these rules are necessary to meet that obligation. Failure to comply with 49 C.F.R. §674 could result in the loss of federal transit funding, including funds disbursed directly to the local transit agencies.

New §7.80, Purpose, states that the purpose of these rules is establishing the standards for the state oversight of the safety practices of rail fixed guideway systems as required by 49 C.F.R. §5330. This is a reinstatement of the current §7.80 with minor non-substantive changes.

New §7.81, Definitions, is a restatement of many of the definitions used in the existing §7.81 without substantive changes. However, definitions of "hazard," "incident," "investigation," "pre-revenue operations," "rail fixed guideway public transportation system," "rail transit agency," and "revenue service" have been added or modified to be consistent with the definitions in 49 C.F.R. §674 and federal guidance on State Safety Oversight.

New §7.82, System Safety Program Plan, is the language of existing §7.82, Program Standard, with only non-substantive changes. The language continues to track the federal requirements for a system safety program plan.

New §7.83, Hazard Management Process, is the language of existing §7.83 System Safety Program Plan regarding the hazard management process with the addition of a new hazard reporting requirement as required by the new federal regulations.
New §7.84, New State Rail Transit Agency Responsibilities, provides that a new rail transit system may not begin pre-revenue operations until the state approves the agency's system safety program plan (SSPP) in accordance with the federal requirements. This section also provides specific timelines for the submission and approval of the SSPP.

New §7.85, Modifications to a System Safety Program Plan, provides guidance for modifying an existing transit agency SSPP. The section requires a new plan to be approved prior to implementation unless the transit agency believes the modification is necessary to address an imminent safety hazard. These provisions are needed for compliance with the federal requirements.

New §7.86, Rail Transit Agency's Annual Review, primarily reinstates the requirements of existing §7.85. The section provides that the state may participate in or observe the agency's internal review. It also establishes December 1st as the date for an annual internal safety review submission to the state, a change from the current February 1 deadline. This is necessary due to the federal requirement for the state to submit an accurate report to the Federal Transit Administration (FTA) by March 15 each year. The department has found that the current timeline does not provide sufficient time for the department to prepare the required federal report.

New §7.87, Department System Safety Program Plan Audit, provides guidance on the department's audit procedures. The new section includes details on the required elements of the SSPP audit, the department's checklist procedures and timelines to coordinate with the agency and conduct the audit, details on the draft and final report process, and necessary corrective actions. The new guidance provides the transit agencies with the information needed to prepare for the department's audit and provide for a smoother process.

New §7.88, Accident Notification, revises the elements of the accident notification requirements based on new federal requirements and a pending update to the department's web-based notification and tracking system. The new section provides for the various reporting deadlines as required under 49 C.F.R. §674. The federal regulations require a 2-hour or 30-day notification for most accidents, depending on the level of severity or the type of incident. The new section details which accidents must be reported within 2 hours and those that must be reported within 30 days and mirrors the federal requirements. The section requires a transit agency to track other accidents and events that do not require reporting and to make that information available on request. The section also requires the agencies to notify the department in a format specified by the department to accommodate the transition from a manual, paper-based notification system to an online, web-based electronic system that is currently in the procurement process. This will allow the department the ability to change to the more efficient system without requiring a change to the rules.

New §7.89, Accident Investigations, describes the department's requirements for accident investigations in accordance with FTA and National Transportation Safety Board regulations. It also provides department discretion in authorizing an agency to conduct its own investigation provided that personnel meet federal qualifications. This section specifies the timeline for submitting investigation reports and provides that the department may conduct an accident investigation in specified circumstances.

New §7.90, Corrective Action Plan, includes language that is in existing §7.86, Accident Notification and Corrective Action Plans. Language is added to commit the department to reviewing a Corrective Action Plan (CAP) submitted by an agency within 30 days of receipt and requires an agency to submit CAPs every 30 days until compliance is achieved. New language also provides that failure to complete a CAP is a violation of this chapter. The new language is needed to strengthen the department's enforcement responsibilities as required under the new federal regulations.

New §7.91, Administrative Actions by the Department, ensures that the department has investigative and enforcement authority. The new federal regulations require the department to enforce the federal requirements. The administrative process outlined in this section lays out the process the department has selected to enforce compliance with the program requirements. The section provides that the department will notify the transit agency of any violations and the needed compliance action and that the transit agency has 45 days to comply with the notification or to request administrative review.

New §7.92, Administrative Review, provides the process for an agency to challenge the department's decision on a CAP under §7.90 or an administrative actions under §7.91. The section provides for a review by the department's executive director or designee if the request is submitted in writing within 45 days of receipt of the violation notification. The department will make the final determination within 60 days of the review request and that failing to comply with the final determination could result in the rescission of the SSPP. The department's determination is final and enforceable by rescinding the agency's approved SSPP which may lead to petitioning a court to halt the operation of the agency's rail service. This new language is needed to establish an enforcement process as required by the federal regulations.

New §7.93, Escalation of Enforcement Action, describes the process that the department will use if an agency fails to comply with an administrative action notification. The section allows the department to escalate the issue to the transit agency's governing body to resolve safety issues before petitioning a court to halt the operation of an agency's rail service. This language is necessary to address problems with a transit agency that is not responding to the department's enforcement actions.

New §7.94, Emergency Order to Address Imminent Public Safety Concerns, describes the conditions under which the department may address imminent safety concerns that a rail transit agency is unable to eliminate. The department's executive director will rescind approval of the agency's SSPP and order the agency to cease all operations until the threat is eliminated. If the agency fails to halt operations, the department may seek a temporary injunction. This new language is needed to make it clear that the department can take immediate action if continued operations create an imminent safety threat to the public.

New §7.95, Admissibility; Use of Information, is a restatement of existing §7.88 with no substantive changes.

COMMENTS

On February 27, 2018, the department conducted a public hearing to receive comments on the proposed repeal of existing rules and adoption of new rules. No comments were received at the hearing or otherwise submitted to the department.

43 TAC §§7.80 - 7.88

STATUTORY AUTHORITY
The repeals are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically Transportation Code, §455.060, which authorizes the commission to adopt rules for the oversight of rail fixed guideway systems.

CROSS REFERENCE TO STATUTE
Transportation Code, Chapter 455, Subchapter B.

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

Filed with the Office of the Secretary of State on July 26, 2018.
TRD-201803208
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: September 1, 2018
Proposal publication date: February 9, 2018
For further information, please call: (512) 463-8630

43 TAC §§7.80 - 7.95

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically Transportation Code, §455.060, which authorizes the commission to adopt rules for the oversight of rail fixed guideway systems.

CROSS REFERENCE TO STATUTE
Transportation Code, Chapter 455, Subchapter B.

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

Filed with the Office of the Secretary of State on July 26, 2018.
TRD-201803209
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: September 1, 2018
Proposal publication date: February 9, 2018
For further information, please call: (512) 463-8630

CHAPTER 16. PLANNING AND DEVELOPMENT OF TRANSPORTATION PROJECTS


EXPLANATION OF ADOPTED AMENDMENTS, REPEAL, AND NEW SECTION

Senate Bill (SB) 312, 85th Legislature, Regular Session, 2017, requires changes to be made to several of the planning and programming processes that the Texas Transportation Commission (commission) and the department use to plan, prioritize and finance transportation projects.

In response to SB 312, and as part of the implementation effort, the department created a planning partners group in May of 2017. This group is comprised of representatives from the commission, department administration, five department districts, and seven metropolitan planning organizations (MPOs). The purpose of convening this group was to obtain input and feedback on the development of strategies, goals and targets, and other performance measures as required by SB 312 and to obtain input and feedback on potential changes to the department’s administrative rules.

As part of this rulemaking, a subcommittee of the planning partners group reviewed and provided feedback on the amendments described below.

The amendments are necessary to implement the requirements of SB 312 as well as to align the rules with updates to federal planning regulations, located at Title 23, Code of Federal Regulations, Part 450, resulting from the passage of the Fixing America’s Surface Transportation Act (FAST Act).

The amendments will take effect on September 1, 2018.

Amendments to §16.2, Definitions and Acronyms, eliminate the rural transportation plan (RTP) acronym in subsection (b). The RTP will no longer be a stand-alone document. It will be integrated into the statewide long-range transportation plan (SLRTP). The subsequent items have been renumbered accordingly.

Amendments to §16.4, Introduction, clarify the required content of certain planning documents. The amendments to subsection (b)(1) specify that the metropolitan transportation plan (MTP) will include a mid-range component covering a period of ten years. This change is necessary to align the rule with Transportation Code §201.9911. The amendments also remove the reference to a stand-alone RTP, as previously described.

Amendments to §16.4(c)(1) revise the description of the SLRTP to provide that the document will have a minimum forecast period of 24 years. This change is necessary to align the rule with the timeframes prescribed by federal planning regulations. The amendments clarify that the priority-based project listing is contained in the MTPs and the unified transportation program (UTP) and is incorporated by reference into the SLRTP. These documents are updated as needed on various schedules and including them by reference ensures the list is always up-to-date. The amendments incorporate minor changes to the language regarding the state’s transportation system strategies, goals, targets and other related performance measures. This change is necessary to align the rule with Transportation Code §201.601, as revised by SB 312. The amendments specify that the SLRTP will include a rural component, as previously described. Finally, the amendments correct the title of the statewide transportation improvement program (STIP) and clarify that the document will be included in the SLRTP by reference.
Amendments to §16.4(c)(2) specify that the MTP will include a mid-range component of projects covering a period of ten years, as previously described.

Subsection 16.4(c)(3) is deleted to remove the reference to a stand-alone RTP, as previously described.

Subsections 16.4(f) and (g) are deleted because the existing graphic no longer accurately reflects the planning and programming process and is unnecessary.

Amendments to §16.51, Responsibilities of Metropolitan Planning Organizations (MPO), clarify the MPO's responsibilities with respect to certain activities. Amendments to subsection (a) specify that the MTP will contain a mid-range component of projects, as previously described.

Amendments to §16.51(d)(2) provide that agreements between the transit operators and the MPOs must include provisions for developing and sharing transportation performance data, the selection and reporting of performance targets, the reporting and tracking of progress toward attainment of critical outcomes for the region, and the collection of certain data. This change is necessary to align the rule with updated federal planning regulations.

New §16.51(g) provides that the MPOs and the department shall work collaboratively to evaluate the availability, consistency and quality of the data used for performance-based planning and project selection. This change is necessary to align the rule with Transportation Code §201.9992, as added by SB 312.

Amendments to §16.53, Metropolitan Transportation Plan (MTP), clarify the requirements of the MTP. Amendments to subsection (a) specify that the MTP will include a mid-range component of projects covering a period of ten years, as previously described. The amendments clarify that reasonably expected locally funding options and contingent state, federal, and local funding sources must also be used for the development of the MTP. This change is necessary to align the rule with updated federal planning regulations. The amendments remove the requirement that development and update of the MTP be tied to the development and update of the SLRTP, which conflicted with federal planning regulations. The amendments also specify that the funding assumptions used to develop the ten-year component of the MTP may be subject to review by the department.

Amendments to §16.54, Statewide Long-Range Transportation Plan (SLRTP), clarify the requirements of the SLRTP. Amendments to subsection (a) revise the description of the SLRTP to provide that the document will have a minimum forecast period of 24 years, as previously described.

Amendments to §16.54(b)(1) correct the title of the statewide transportation improvement program (STIP) and clarify that the document will be included in the SLRTP by reference.

Amendments to §16.54(b)(2) clarify that the UTP will be included in the SLRTP by reference.

Amendments to §16.54(b)(3) and (4) incorporate minor changes to the language regarding the state's transportation system strategies, goals, targets and other related performance measures. These changes are necessary to align the rule with Transportation Code §201.601, as revised by SB 312.

Amendments to §16.54(b)(6) and (8) incorporate the requirements of the RTP as a component of the SLRTP, as previously described. Other subparagraphs are renumbered accordingly.

Amendments to §16.54(c)(1) provide that the fiscally constrained component of the SLRTP will be based on funding assumptions and forecasts set in §16.151 and §16.152, as well as any local contributions that may be identified by an individual MPO. This change is necessary to clarify the basis of the fiscal constraint for the SLRTP.

Section 16.55, Long Range Transportation Planning Recommendations for Non-Metropolitan Areas, is repealed to remove the requirement of a stand-alone RTP, as previously described.

New §16.57, Responsibilities of the Department, is added, which provides that the department will review the 10-year component of each MPO's MTP prior to adoption, provide each MPO access to the department's information systems and annually provide each MPO a listing of project evaluation data. These new provisions are required to align the rules with Transportation Code §201.9992, as added by SB 312.

Amendments to §16.101, Transportation Improvement Program (TIP), clarify the requirements of the TIP. Amendments to subsection (a) specify that the TIPs shall be designed such that once implemented, it makes progress toward achieving federal performance requirements. In addition, the TIP shall include a description of the anticipated effect of the TIP toward achieving federal performance targets and demonstrate a link between investment priorities and the performance targets. These changes are necessary to align the rule with federal planning regulations.

Amendments to §16.101(f) remove the requirement for MPOs to submit a paper copy of the TIP to the department, as a cost-saving measure.

Amendments to §16.101(g) provide that the TIP must demonstrate and maintain fiscal constraint by year. This change is necessary to align the rule with federal planning regulations.

Amendments to §16.101(k)(1)(C)(ii) clarify that the change in the cost estimate described in the rule is the federal cost. This change is necessary to align the rule with the terms of the local agreement between the department and the Federal Highway Administration.

Amendments to §16.101(n)(1) provide that the MPO shall coordinate project selection criteria relating to the statewide transportation goals with the department for the purposes of attaining consistent, common goals. This change is necessary to align the rule with Transportation Code §201.9992, as added by SB 312. Section 201.9992 uses the term "project recommendation criteria." However, for purposes of this rule, "project recommendation criteria" has the same meaning as "project selection criteria."

Amendments to §16.102, Rural Transportation Improvement Program (RTIP), clarify the requirements of the RTIP. The amendments to subsection (i)(2) clarify that public involvement is required for revisions involving added mobility projects and individually-listed federally funded projects. This change is necessary to align the rural TIPs prepared by the department with the TIPs prepared by the MPOs.

Amendments to §16.103, Statewide Transportation Improvement Program (STIP), clarify the requirements of the STIP. Amendments to subsection (b) provide that the STIP shall include a description of the effect of the STIP toward achieving federal performance targets and a demonstration of the link between investment priorities and the performance targets. This change is necessary to align the rule with federal planning regulations.
Amendments to §16.105, Unified Transportation Program (UTP) clarify the requirements of the UTP. Amendments to subsection (d)(1)(B) incorporate minor changes to the language regarding the state’s transportation system strategies, goals, targets and other related performance measures. These changes are necessary to align the rule with Transportation Code §201.6015, as amended by SB 312.

Amendments to §16.105(d)(2) provide that the commission may conduct a secondary evaluation of projects based on factors such as funding availability and project readiness once the commission has evaluated projects based on strategic need and potential contribution toward meeting the transportation goals. This change is necessary to align the rule with Transportation Code §201.9992, as amended by SB 312. Other subparagraphs are renumbered accordingly.

Amendments to §16.105(e) remove references to the presentation of information to the commission and the required public hearing. These items are included in the amendments to §16.105(g), as described below.

Amendments to §16.105(g) consolidate existing public involvement requirements into one subsection, which provides clarity and transparency to the public involvement process related to the UTP. This change is necessary to align the rule with the requirements of Transportation Code §201.991, as amended by SB 312. In addition, the amendments incorporate minor changes to the timing of certain presentations to be made to the commission and the method by which the department will engage stakeholders for public meetings.

Amendments to §16.105(h) and (i) result from the consolidation of public involvement requirements as previously described. Subsection (i) is deleted and the text is relocated to subsection (h).

Amendments to §16.151, Long-Term Planning Assumptions, remove references to a stand-alone RTP and repealed §16.55, as previously described.

Amendments to §16.160, Funding Allocation Adjustments, correct the citation to the public involvement requirements, as previously described.

Amendments to §16.202, Reporting System for Delivery of Individual Projects, replace all references to "work program" with the term "portfolio." This change is necessary to align the rule with Transportation Code §201.998, as amended by SB 312.

Amendments to subsection (a)(1) specify that each district will seek to engage key stakeholders in portfolio review meetings. This change is necessary to align the rule with Transportation Code §201.998, as amended by SB 312.

Amendments to §16.202(a)(4) provide that the department will develop performance measures to report whether the department is developing the appropriate volume and mix of projects and is on track to meet letting targets. The amendments provide that the department will use this review for the preparation of the budget for each district and the department. In conducting the review the department will, when appropriate, seek input from key stakeholders. The amendments also specify that these performance evaluations will be reported regularly to the commission. These changes are necessary to align the rule with Transportation Code §201.998, as amended by SB 312.

Amendments to §16.202(a)(6) provide that the department will conduct a comprehensive review of the project and performance reporting system at least every four years to determine if improvements are necessary. This review will include feedback from internal and external users of the system. If improvements are necessary, the department will develop an implementation plan for those improvements. These changes are necessary to align the rule with Transportation Code §201.998, as amended by SB 312.

COMMENTS

No comments on the proposed amendments, repeal and new section were received.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §16.2, §16.4

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code §201.807, which requires the commission to adopt rules specifying how the department shall conduct a review of the project information reporting system. Transportation Code §201.991, which requires the commission to adopt rules explaining the department’s approach to public involvement and transparency, Transportation Code §201.998, which requires the commission to adopt rules regarding a review of district project portfolios, and Transportation Code §201.9992, which requires the commission to adopt rules governing the roles and responsibilities of the department and metropolitan planning organizations.

CROSS REFERENCE TO STATUTE


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

Filed with the Office of the Secretary of State on July 26, 2018.

Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: September 1, 2018
Proposal publication date: May 11, 2018
For further information, please call: (512) 463-8630

SUBCHAPTER B. TRANSPORTATION PLANNING

43 TAC §§16.51, 16.53, 16.54, 16.57

STATUTORY AUTHORITY
The amendments and new section are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code §201.807, which requires the commission to adopt rules specifying how the department shall conduct a review of the project information reporting system, Transportation Code §201.991, which requires the commission to adopt rules explaining the department's approach to public involvement and transparency, Transportation Code §201.998, which requires the commission to adopt rules regarding a review of district project portfolios, and Transportation Code §201.9992, which requires the commission to adopt rules governing the roles and responsibilities of the department and metropolitan planning organizations.

CROSS REFERENCE TO STATUTE

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

Filed with the Office of the Secretary of State on July 26, 2018.
TRD-201803214
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: September 1, 2018
Proposal publication date: May 11, 2018
For further information, please call: (512) 463-8630

43 TAC §16.55
STATUTORY AUTHORITY

The repeal is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code §201.807, which requires the commission to adopt rules specifying how the department shall conduct a review of the project information reporting system, Transportation Code §201.991, which requires the commission to adopt rules explaining the department's approach to public involvement and transparency, Transportation Code §201.998, which requires the commission to adopt rules regarding a review of district project portfolios, and Transportation Code §201.9992, which requires the commission to adopt rules governing the roles and responsibilities of the department and metropolitan planning organizations.

CROSS REFERENCE TO STATUTE

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

Filed with the Office of the Secretary of State on July 26, 2018.
TRD-201803216
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: September 1, 2018
Proposal publication date: May 11, 2018
For further information, please call: (512) 463-8630

SUBCHAPTER C. TRANSPORTATION PROGRAMS
43 TAC §§16.101 - 16.103, 16.105
STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code §201.807, which requires the commission to adopt rules specifying how the department shall conduct a review of the project information reporting system, Transportation Code §201.991, which requires the commission to adopt rules explaining the department's approach to public involvement and transparency, Transportation Code §201.998, which requires the commission to adopt rules regarding a review of district project portfolios, and Transportation Code §201.9992, which requires the commission to adopt rules governing the roles and responsibilities of the department and metropolitan planning organizations.

CROSS REFERENCE TO STATUTE

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

Filed with the Office of the Secretary of State on July 26, 2018.
TRD-201803215

SUBCHAPTER D. TRANSPORTATION FUNDING
43 TAC §16.151, §16.160
STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code §201.807, which requires the commission to adopt rules specifying how the department shall conduct a review of the project information reporting system, Transportation Code §201.991, which requires the commission to adopt rules
explaining the department's approach to public involvement and transparency, Transportation Code §201.998, which requires the commission to adopt rules regarding a review of district project portfolios, and Transportation Code §201.9992, which requires the commission to adopt rules governing the roles and responsibilities of the department and metropolitan planning organizations.

CROSS REFERENCE TO STATUTE

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

Filed with the Office of the Secretary of State on July 26, 2018.
TRD-201803217
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: September 1, 2018
Proposal publication date: May 11, 2018
For further information, please call: (512) 463-8630

SUBCHAPTER E. PROJECT, PERFORMANCE, AND FUNDING REPORTING

43 TAC §16.202

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code §201.807, which requires the commission to adopt rules specifying how the department shall conduct a review of the project information reporting system, Transportation Code §201.991, which requires the commission to adopt rules explaining the department's approach to public involvement and transparency, Transportation Code §201.998, which requires the commission to adopt rules regarding a review of district project portfolios, and Transportation Code §201.9992, which requires the commission to adopt rules governing the roles and responsibilities of the department and metropolitan planning organizations.

CROSS REFERENCE TO STATUTE

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

Filed with the Office of the Secretary of State on July 26, 2018.
TRD-201803218
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Effective date: September 1, 2018
Proposal publication date: May 11, 2018
For further information, please call: (512) 463-8630