ADOPTED RULES

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

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.21

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 10 TAC Chapter 1, Administration, Subchapter A, General Policies and Procedures, §1.21, Action by Department if Outstanding Balances Exist, without changes to the proposed text as published in the July 31, 2020, issue of the Texas Register (45 TexReg 5283). The rule will not be republished. The purpose of the repeal is to clarify the applicability of this rule.

Tex. Gov't Code §2001.0045(b) does not apply to the rule because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.


Mr. Bobby Wilkinson has determined that, for the first five years the repeal would be in effect:

1. The repeal does not create or eliminate a government program but relates to changes to an existing activity: previous participation reviews.

2. The repeal does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The repeal does not require additional future legislative appropriations.

4. The repeal will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The repeal will not expand, limit, or repeal an existing regulation.

7. The repeal will not increase or decrease the number of individuals subject to the rule’s applicability.

8. The repeal will not negatively or positively affect the state’s economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV’T CODE §2006.002.

The Department has evaluated the repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV’T CODE §2007.043. The repeal does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV’T CODE §2001.024(a)(6).

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV’T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the changed sections would be an updated and more germane rule. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV’T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

SUMMARY OF PUBLIC COMMENT. The public comment period was held from July 31, 2020, to August 31, 2020. No comment was received. The Department is adopting this rule with no changes to the proposed version published in the July 31, 2020 Texas Register.

STATUTORY AUTHORITY. The repeal is made pursuant to Tex. Gov’t Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the repealed sections affect no other code, article, or 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 October 9, 2020.

TRD-202004208
10 TAC §1.21

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 1, Administration, Subchapter A, General Policies and Procedures, §1.21, Action by Department if Outstanding Balances Exist, without changes to the proposed text as published in the July 31, 2020, issue of the Texas Register (45 TexReg 5283). The rule will not be republished. The purpose of the new section is to make minor clarifications to the handling of requests to the Department when outstanding balances are due. The new rule clarifies that this rule is applicable to cases of applications for awards, and makes other minor modifications.

Tex. Gov’t Code §2001.0045(b) does not apply to the rule because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV’T CODE §2001.0221.

Mr. Bobby Wilkinson has determined that, for the first five years the new section would be in effect:

1. The new section does not create or eliminate a government program but relates to changes to an existing activity, previous participation reviews.
2. The new section does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.
3. The new section does not require additional future legislative appropriations.
4. The new section will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.
5. The new section is not creating a new regulation, except that they are replaced sections being repealed simultaneously to provide for revisions.
6. The new section will not expand, limit, or repeal an existing regulation.
7. The new section will not increase or decrease the number of individuals subject to the rule’s applicability.
8. The new section will not negatively or positively affect the state’s economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV’T CODE §2006.002.

The Department has evaluated the new section and determined that it will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV’T CODE §2007.043. The new section does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV’T CODE §2001.024(a)(6).

The Department has evaluated the new section as to their possible effects on local economies and has determined that for the first five years the new section would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV’T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section would be an updated rule. There will not be economic costs to individuals required to comply with the new sections.

f. FISCAL NOTE REQUIRED BY TEX. GOV’T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the rule does not have any foreseeable implications related to costs or revenues of the state or local governments.

SUMMARY OF PUBLIC COMMENT. The public comment period was held from July 31, 2020, to August 31, 2020. No comment was received. The Department is adopting this rule with no changes to the proposed version published in the July 31, 2020 Texas Register.

STATUTORY AUTHORITY. The new section is made pursuant to Tex. Gov’t Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the adopted new section affects no other code, article, or 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 October 9, 2020.

TRD-202004209

Brooke Boston
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Texas Department of Housing and Community Affairs
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Proposal publication date: July 31, 2020
For further information, please call: (512) 475-1762

TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 65. BOILERS

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 65, Subchapter A, §65.2, and Subchapter I, §65.64, regarding the Boilers Program. The amendments are adopted without changes to the proposed text.
as published in the June 5, 2020, issue of the Texas Register (45 TexReg 3719). The rules will not be republished.

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

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

The adopted rules simplify and clarify the process to apply for extensions of the internal inspection interval for boilers (extensions) and add specific conditions under which boiler operators may obtain extensions in §65.64; and add new four related definitions to §65.2. The adopted rules are necessary to provide clarity and certainty to boiler operators to plan the frequency of internal inspections. Health and Safety Code, §755.026 provides for the availability of extensions and the adopted rules supply additional specific conditions under which the Department may approve the extensions.

A task group was first convened on May 22, 2018, to examine and deliberate the criteria under which the Department may approve extension requests. The task group created amendments to the extensions rule and the related definitions. The Board of Boiler Rules (Board) discussed the rules and voted to propose them at its meeting on July 13, 2018. After the public comment period and discussion by the Board at its meeting on December 5, 2018, the Board voted to return the extension rules to the task group for further review and modification. Following communication among staff, task group members, and stakeholders, the Board met on August 19, 2019, and voted to again propose the extension rules. After the public comment period and the receipt of oral and written comments, at its meeting on November 7, 2019, the Board deliberated and voted to return the proposed extension rules to the task group for additional review. Subsequently, the Department communicated with task group members and stakeholders, reviewed the relevant information, and held an informative Boiler Summit public meeting to explain the statutory and rule requirements for extensions and the proposed rule modifications, as well as to collect input and answer questions about applying the rules in the field.

The task group met to discuss the information exchanged in the Summit meeting and recommended one change to the wording of the proposed rules. The Department added the correction of a citation in the rules and presented the changes to the Board at its meeting on February 26, 2020. The Board discussed the input from the Summit and the task group and voted to recommend that the proposed rules without further changes be published in the Texas Register for public comment. The Department then submitted the rules to the governor’s office for review and they were approved on May 18, 2020.

SECTION-BY-SECTION SUMMARY

The adopted amendments to §65.2 add definitions for "continuous water treatment," "operation," "out of service," and "standby" and relate to the amendments to §65.64. The section is also renumbered accordingly.

The adopted amendments to §65.64 clarify the requirements for extension of the interval between internal inspections, and simplify the language used in the section.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the June 5, 2020, issue of the Texas Register (45 TexReg 3719). The deadline for public comments was July 6, 2020. The Department received comments from two interested parties on the proposed rules during the 30-day public comment period. Similar amendments to the rules relating to extensions of the internal inspection interval were formerly proposed and were published for public comment in the October 5, 2018, issue of the Texas Register (43 TexReg 6516) and, with modifications, were again proposed and published in the September 13, 2019 issue of the Texas Register (44 TexReg 4925).

Because these earlier amendments related to extension of the internal inspection interval were not adopted, the Department did not have the opportunity to address the substance of the public comments that were received in relation to extensions during each comment period. Therefore, the Department takes this opportunity to address both the earlier public comments and those received during the public comment period for the current amendments to the rules. The Department's responses identify certain modifications to the proposed rules that were made over time and not necessarily in response to a particular comment.

The public comments received are summarized below. For brevity, in the Department's responses the term "owner" includes the owner’s agents, operators, and Authorized Inspection Agency (AIA).

Comments received during the public comment period October 5 - November 5, 2018.

The Department received four comments relating to extensions of the internal inspection interval from two individuals with Xcel Energy; from Luminant Generation Company, LLC (LGC); and from the Texas Chemical Council (TCC) and Texas Oil and Gas Association (TXOGA), commenting jointly.

Comment: TCC/TXOGA commented that the reference to the "normal operating level" of water in a boiler in the definitions of "out of service" and "standby" is ambiguous as to what is considered a normal operating level and should be modified to reflect that the normal operating level of water falls within a range and may vary between operators.

Department Response: The Department agrees that the level of water in a boiler that is out of service, on standby, or in operation falls within a range. The definitions have been modified to use criteria other than water level to characterize the out of service or standby status of a boiler.

Comment: LGC and one individual from Xcel Energy commented that §65.64 should not be amended as proposed, and one individual from Xcel Energy commented that the notification requirement for periods of time that a boiler will be out of service exceeding 10 consecutive days should not be imposed. They comment that the notification will be burdensome, requires extra tracking of operation time and water levels, adds complexity to the extension process, reduces flexibility for owners, will prohibit optimizing the timing and duration of outages required for internal inspections, imposes costs, and will not provide benefits or add to the safe operation of utility boilers. The commenters stated that the market is increasingly unpredictable and dictates, on short notice, when units must be taken out of service and returned to service, and that the length of periods out of service vary widely.

Department Response: The Department disagrees with the comments asserting that the new rule places significant burdens on owners and that the notification option should not be added. The Department has proposed that owners contact the Department when time out of service exceeds 15 consecutive
days to confirm continuing eligibility for an extension. Section 65.64(b)(4) imposes no requirement to notify the Department of periods of time out of service and imposes no limit on their frequency or duration. Instead, the simple procedure for notifying the Department is an option for owners that is designed to provide certainty for them as to whether their ability to obtain extension of the internal inspection interval may be preserved despite periods out of service. If notification is not made the likelihood of approval of an extension may be greatly reduced. If notification is made by the 15th consecutive day out of service but the Department informs the owner that the extension will not be approved, then the owner may make a business decision as to when to arrange an internal inspection before the certificate of operation expires. Owners may disregard the notification process but will not be assured of obtaining extension of the inspection interval if periods out of service exceed 15 consecutive days. Such periods reduce confidence that a boiler is being safely operated. The boiler law requires owners to maintain safety procedures including a program of continuous water treatment even during time out of service in order to obtain extensions. Owners may opt to place the boiler on standby or to reduce the time out of service to help maintain eligibility for extension and to support safe operation. The proposed changes in §65.64 impose no new operating burdens and provide additional options for maintaining eligibility for extensions.

The Department is charged with creating rules to ensure the safe operation of boilers in Texas. It is obligated by law to ensure that certain safety minimums are observed, such as continuous water treatment and daily sampling during operation. The purpose of notification for longer periods out of service during the inspection interval while possibly retaining eligibility for an extension is for safety concerns that arise when a boiler is taken out of service for more than a short time. The proposed rule specifically provides for periods of standby and repair while maintaining eligibility for extension of the internal inspection interval. However, the internal inspection is an annual requirement and periods out of service during which an internal inspection can be performed are opportunities to perform the inspection. The Department believes that the minor burden of notification to support certain extension requests can be justified if it is fulfilling its statutory obligations as well as providing certainty and efficiency to owners. There is no cost for the notification and the Department will accept an email message. The rule has been updated to recommend notification after 15 consecutive days to provide owners additional time.

Comment: LGC commented with the following five recommendations for the following changes to §65.64 if the proposed amendments to the section are not withdrawn.

LGC recommendation 1: Add the italicized language to §65.64(a)(5): Violations noted during the external inspection and not resolved to the satisfaction of the Authorized Inspector may be cause for denial of the extension request.

Department Response: The Department agrees that violations noted during the external inspection that have been properly resolved may not result in denial of an extension request; however, approval of extension requests is always dependent upon the facts and conditions at the time. The Authorized Inspector may not approve or deny extension requests because the decision may only be made upon the agreement of the Executive Director of the Department and the AIA. The Act in §755.026(a) provides the Executive Director and the AIA with discretion to approve extension requests, and violations identified during an external inspection that have been satisfactorily resolved is one of the factors already considered when making decisions to approve extension requests. The Department has removed this provision from the rules because it is unnecessary to restate it.

LGC recommendation 2: Do not remove the requirement in §65.64(a) to submit requests for extensions not less than 30 days before the expiration date of the certificate of operation, so that the Department will have time to review and timely respond to the operator before the expiration of the current certificate.

Department Response: The Department can review and process most extension requests in significantly less time than 30 days; therefore, the Department disagrees that there is value in continuing to impose the 30-day deadline on all owners. Those owners who need additional time to schedule boiler-related activities after receiving the Department's response to an extension request are not prohibited from submitting such requests well in advance of the expiration of the certificate of operation. The Department has modified the rule to require the owner to request the extension no less than three business days before the expiration of the certificate of operation.

LGC recommendation 3: Retain the language in italics that is proposed to be removed from §65.64(a)(6): If the department denies an extension request, the boiler shall be internally inspected before the expiration of the certificate of operation, unless authorized in writing to continue operation until an internal inspection can be conducted.

Department Response: The Department disagrees because the operation of a boiler is prohibited unless the boiler has qualified for a current certificate of operation. The language being removed introduces ambiguity because it is unlawful for a boiler to operate beyond the expiration of its certificate of operation. No change has been made to the proposed rules in response to this comment.

LGC recommendation 4: Add the following to §65.64(b) to provide additional conditions under which the internal inspection interval may be extended: (the commenter lists the content of Health and Safety Code §755.026(b)(2) and (b)(3)(A) - (C), Boilers, Extensions).

Department Response: The Department disagrees with the addition because these statutory conditions in the Health and Safety Code, Chapter 755 (the boiler law) for obtaining extension of the interval between internal inspections are fully applicable to all boiler owners requesting extensions and therefore need not be repeated in the boiler rules. Because the approval of extension requests is a decision made by the Executive Director and the AIA having jurisdiction, the proposed rules were crafted to supply owners with criteria under which the approval of an extension request is likely, thus increasing certainty for boiler owners. Decisions about extension requests are invariably based on a demonstrated record of compliance with safe operational standards and compliance with the statute and rules. The Department has made no changes to the rules in response to this comment.

LGC recommendation 5: The requirement in §65.64(b) to notify the Authorized Inspector of outages expected to exceed 10 days, and to obtain confirmation from the Department that eligibility for extensions will be maintained, could compromise the confidentiality of sensitive market information. Information about plant outages is protected under ERCOT rules, must be reported to ERCOT confidentially, and ERCOT may not release the information for 60 days. Therefore, the boiler rules should provide
that this information be considered critical electric infrastructure information and require that it should not be disclosed publicly for at least 60 days.

Department Response: The Department disagrees that the boiler rules should require information about outages to be withheld from public disclosure because the Department is not authorized to create such a rule. The notice provided to the Department of time out of service for a boiler if expected to exceed 15 consecutive days would not fall under the protections provided to the reporting of expected outages required under ERCOT (Electric Reliability Council of Texas) Protocols that are reported to ERCOT. However, because time out of service for a boiler may sometimes coincide with an expected outage that must be reported to ERCOT, and because the information may be afforded other protections under the Public Information Act, the Department would be obligated to seek to protect the outage information from release should it receive a request for that information. The Department is not authorized to independently classify information as confidential and withhold it; instead, the procedure to protect information includes seeking a ruling from the Texas Attorney General's office as to the confidentiality of the information under Government Code Ch. 552, the Public Information Act, or other law. In that process the owner would also be provided the opportunity to make arguments against release of the information. Owners are encouraged to mark and identify as confidential any information that they consider to be sensitive, proprietary, or otherwise warranting confidential treatment when submitting or reporting that information to the Department or any entity. Authorized Inspection Agencies are required to protect the confidential information of their clients in accordance with their National Board accreditation. No change to the rule has been made in response to this comment.

Comments received during the public comment period September 13 - October 14, 2019.

The Department received three comments relating to extensions of the internal inspection interval from Praxair Inc.; Xcel Energy; and the Texas Chemical Council (TCC) and Texas Oil and Gas Association (TXOGA), commenting jointly.

Comment: Xcel Energy commented that the new definitions for "standby," "operation," and "out of service" are adequate and accurate but proposes that the requirement in §65.64 to report outages greater than 10 days be rejected by the board. The commenter states that the requirement will be burdensome and will bring no value to the owner, AIAs, and the Department. Praxair Inc. commented that the notification to the state and to the authorized inspection agency when a boiler is shut down for a period exceeding 10 days is too restrictive for plants that have regular shutdowns for general process maintenance not associated with the boiler. The commenter requests that the notification to the Department be required only after 30 days of shutdown.

Department Response: The Department disagrees with the comments asserting that the new rule places significant burdens on owners and that the notification time should be increased from 10 days to 30. However, the Department has modified the rule to expand the time out of service from 10 to 15 consecutive days to provide owners some additional time before notification should be made, as appropriate. Section 65.64(c) imposes no requirement to notify the Department of periods of time out of service and imposes no limit on their frequency or duration. Instead, the simple procedure for notifying the Department is an option for owners that is designed to provide certainty for them as to whether their ability to obtain extension of the internal inspection interval may be preserved despite periods out of service. If notification is not made the likelihood of approval of an extension may be greatly reduced. If notification is made by the 15th consecutive day out of service but the Department informs the owner that the extension will not be approved, then the owner will have time to arrange an internal inspection before the certificate of operation expires. Owners may disregard the notification process but will not be assured of obtaining extension of the inspection interval if periods out of service exceed 15 consecutive days. Such periods reduce confidence that a boiler is being safely operated. The Act requires owners to maintain safety procedures including continuous water treatment during time out of service in order to obtain extensions. The proposed changes in §65.64 impose no new operating burdens and provide additional options for maintaining eligibility for extensions.

The Department is charged with creating rules to ensure the safe operation of boilers in Texas. It is obligated by law to ensure that certain safety minimums are observed, such as continuous water treatment and daily sampling during operation. The purpose of notification for longer periods out of service during the inspection interval while possibly retaining eligibility for an extension is for safety concerns that arise when a boiler is taken out of service for more than a short time. The proposed rule specifically addresses periods of standby and repair while maintaining eligibility for extension of the internal inspection interval. However, the internal inspection is an annual requirement and periods out of service during which an internal inspection can be safely and competently performed are opportunities to perform the inspection. Extensions of the interval normally are not appropriate under those conditions. Owners ordinarily may preserve the ability to obtain an extension if they place a boiler in standby. The information provided by the notification aids the Executive Director and the AIA to evaluate whether an extension will be granted or if the owner can take steps to better ensure that possibility. The Department believes that the minor burden of notification to support certain extension requests is an appropriate condition to ensure that it is fulfilling its statutory obligations as well as providing certainty and efficiency to owners. There is no cost for the notification and the Department will accept an email message.

Comment: TCC/TXOGA commented in support of clarifying the eligibility for an extended interval between internal inspections but requested changes to the proposed text in consideration of the impact to refining and petrochemical industry operations:

Remove the italicized text from the definition of "out of service": "A boiler is out of service when it is not in operation and it is not designated as in standby." Also modify the definition of "standby" to allow the boiler to be out of service when there is an unplanned shutdown and no repairs are being performed, to read "A boiler is in standby when the owner or operator has designated it as in standby and it is in operation at low fire or it is designated as in standby and out of service with no repairs" (the Department's proposed language is "A boiler is in standby when the owner or operator has designated it as in standby and it is in operation at low fire or it is designated as in standby and can be placed into operation within a maximum of 48 hours’ notice").

Department Response: The Department disagrees with the recommended changes. The purpose of the extension of the interval between internal inspections is to allow a boiler that is operating continuously and safely, or that has periods of standby or brief repair periods when it is out of service, as described, to continue to operate without having to take the boiler out of ser-
vice for an internal inspection that is otherwise required. A boiler that is in standby can be quickly returned to service. A boiler that is out of service for more than a brief period of time may be internally inspected as required before it is returned to service or may require inspection before the Department issues a new certificate of operation. Extended periods out of service indicate that a boiler may not be safe to continue operating without passing an internal inspection. No change has been made to the proposed rules in response to this comment.

Comment: Increase the amount of time from a maximum of 10 consecutive days to a maximum of 30 consecutive days that a boiler can be out of service before notification is required to maintain eligibility for an extension, including times when one or more opportunistic repairs are being made. Amend the rule to not require continuous water treatment when a boiler is out of service with no repairs. Clarify at what point the time period for notification begins if a boiler is in standby before an opportunistic repair begins. Clarify which types of repairs may be made for which eligibility for an extension will be preserved if the time out of service will exceed 10 days.

Department Response: The Department disagrees with the recommended changes. However, the Department has modified the rule to expand the time out of service from 10 to 15 consecutive days to provide owners some additional time before notification should be made, as appropriate. The Act provides the Executive Director and the AIA with discretion to consider the factual circumstances to make decisions regarding the conditions under which the eligibility for an extension of the internal inspection interval may be approved. The rules provide for periods out of service of up to 15 consecutive days without the need to notify but require notification for longer periods of time if the owner desires to obtain a determination that eligibility for an extension has been preserved. Any such request will be confirmed or denied at the discretion of the Executive Director and the AIA based on the conditions existing during the time since the last internal inspection. Notification is not necessary for periods when a boiler is in standby as defined in §65.2 or for periods of time out of service for repair for no longer than 15 consecutive days. The length of periods of time out of service and the nature of repairs are only two of the factors the Executive Director must consider when responding to notifications and when approving or denying extension requests. Owners are welcome to contact the Department to discuss options for operating that may improve the likelihood of obtaining extensions.

Health and Safety code §755.026 requires continuous water treatment, and the rule defines this term as "a verifiable program that controls and limits corrosion and deposits in a boiler." This continuous water treatment calls for uninterrupted attention to controlling and limiting corrosion and deposits in boilers regardless of their day-to-day operating status. The Executive Director must know the conditions under which a boiler is taken out of service to determine whether the time out of service will jeopardize safety. In addition, the required internal inspection may be completed during a lengthy period out of service and an extension of the inspection interval would not be appropriate or in keeping with safe operation. See also, the Department’s other responses discussing the request to lengthen from 10 to 30 days the amount of time before notification must be made to preserve eligibility for extension of the internal inspection interval.

Comments received during the public comment period June 5 - July 6, 2020.

The Department received comments from the Texas Oil and Gas Association (TXOGA) and from Dow Chemical Company.

Comment: Dow Chemical Company commented in support of the proposed rule. Dow predicts that the changes should reduce the number of internal inspections, which will improve overall worker safety by reducing confined space entries, scaffold building, equipment openings, etc. Dow also notes that the proposed rules provide certainty for business operations by removing ambiguity that exists in the current regulations and encourages the Department to adopt the proposed changes.

Department Response: The Department appreciates the expression of support and agrees that the proposed amendments clarify the requirements and will operate to improve safety and provide other benefits. No change has been made to the rules in response to this comment.

Comment: TXOGA commented that it disagrees with the Department's analysis and states that the amendments will have significant economic impact to the refining and petrochemical industry. TXOGA disagrees that the amendments will result in the public benefit of increased safety of boiler operation in Texas. Instead, TXOGA states that the amendments will discourage owners from performing opportunistic boiler work and increase health, safety, and environmental risk due to having to inspect boilers more frequently.

Department Response: The Department disagrees that the amendments place significant burdens on owners or result in no benefit or increased risk. The Department is charged by statute with creating rules to ensure the safe operation of boilers in Texas. It is obligated by law to ensure that operators observe certain safety minimums such as continuous water treatment, daily sampling during operation, and annual internal inspections. The purpose of providing notification to the Executive Director and the AIA for longer periods out of service while possibly retaining eligibility for an extension is for safety concerns that arise when a boiler is taken out of service for more than a short time. The proposed rules specifically provide for periods of standby and repair while maintaining eligibility for extension of the internal inspection interval. The rules do not require an internal inspection during most brief opportunistic repairs, but even for longer periods out of service the inspection, if required under the conditions, may be delayed until a more convenient time. Periods out of service when the boiler is in a condition where an inspection can be safely and competently performed are opportunities to perform the required annual inspection. Extensions of the interval normally are not appropriate under those conditions, but the amendments do provide for much greater flexibility than currently exists in the law. For example, owners may now preserve the ability to obtain an extension if they place a boiler in standby, an option that has not been available in the past. In addition, operators may choose to schedule the internal inspection at any time before the expiration of the certificate of operation, even if the boiler experiences extended periods out of service but performing the inspection during those times is not cost-efficient for the operator. No change has been made to the rules in response to these comments.

Comment: TXOGA comments that a facility may be unprepared to conduct an internal inspection during an unplanned shutdown and that requiring it to be performed will cause the outage to take longer and increase risk and cost without increasing the safety of boiler operation. TXOGA suggests edits to the definitions of "operation," "standby," and "out of service" so that a boiler may be out of service when no repairs are being performed for periods
up to 30 consecutive days instead of 15. TXOGA comments that certain repairs can be done without opening the steam drum for internal inspection. Further, the commenter considers a boiler at low fire to be in operation so the definition of standby should not include operation at low fire but should be defined as the condition of an energy source being applied to the boiler to produce steam. The commenter suggests that continuous water treatment should not be required when in standby under its proposed edits.

TXOGA also recommends edits to the text of §65.64(b) and (c) to provide for the availability of extensions if a boiler is out of service for repairs not exceeding 30 consecutive days to allow opportunistic repairs without having to conduct an internal inspection. TXOGA states that this would not discourage owners from performing preventative maintenance because it would remove the risk of being obligated to perform the costly internal inspection that also does not improve boiler safety. TXOGA further recommends loosening the requirements to contact the Department and the AIA when a boiler is out of service for more than 30 consecutive days; reducing the information that must be provided to the Department and the AIA; and removing the obligation to update the information if significant changes in conditions occur.

Department Response: The Department does not agree with the commenter's interpretation of the rule requirements. First, a facility is not required to perform an internal inspection during an unplanned shutdown. The facility may make a business decision to conduct it at that time, but the annual inspection can be conducted at any time before the certificate of operation expires. If the circumstances of the unplanned shutdown are such that the Executive Director agrees that an extension may still be approved, then no inspection will be necessary. For example, if repairs can be conducted without opening the steam drum then the boiler cannot be safely and competently inspected, and an internal inspection would not be required. The rules impose no limit on the frequency or duration of periods of time out of service. Instead, the simple procedure for notifying the Executive Director is an option for owners that is designed to provide certainty for them as to whether their ability to obtain extension of the internal inspection interval may be preserved despite periods out of service. However, periods out of service exceeding 15 consecutive days may not necessarily cause the extension to be denied.

Second, the Act requires owners to maintain safety procedures including continuous water treatment even during time out of service in order to obtain extensions. The definition of "operation" focuses on the energy source being applied to the boiler because the important variable is steam pressure, not temperature or other conditions. The definition provides a narrow but universal factor essential to considering any boiler to be in operation. Third, a boiler that is out of service is not in operation so no energy source is being applied, but a boiler can be in operation in standby at low fire. The law requires continuous water treatment during operation; therefore, the rules require water sampling and treatment during this type of standby only. If a boiler could be out of service for periods of time up to 30 consecutive days but could be considered in standby, this would eviscerate the meaning of standby and open the possibility of unsafe operation. The Department has defined "continuous water treatment" as a program to control and limit corrosion and deposits as an acknowledgment that boilers need to be protected against corrosion and deposits at all times regardless of the quantity of water in them, or lack of it, at any given time, and regardless of their status as in or out of service.

Finally, the proposed changes in §65.64 impose no new operating burdens and provide additional options for maintaining eligibility for extensions. The Department believes that the optional minor burden of notification to support certain extension requests is an appropriate condition to ensure that it is fulfilling its statutory obligations as well as providing certainty and efficiency to owners. There is no cost for the notification and the Department will accept an email message for notification. No changes have been made to the rules in response to this comment.

Comment: TXOGA presents several factual scenarios and asks the Department to clarify when a boiler is designated as out of service and when extensions will be provided under those scenarios.

Department Response: The Executive Director and the AIA’s position as to whether an extension will be granted, barring additional changes in conditions following that determination, depends on several factors. One of the most important is the quality of recordkeeping by the operator. A determination can only be made based on the facts presented, so if records are incomplete, inadequate, or absent, this undermines support for the availability of an extension. Therefore, two outwardly similar events could have different outcomes regarding extensions. The purpose of the extension of the interval between internal inspections is to allow a boiler that is operating continuously and safely, or that has periods of standby or brief repair periods when it is out of service, to continue to operate without having to take the boiler out of service for an internal inspection that is otherwise required. A boiler that is in standby can be quickly returned to service. A boiler that is out of service for more than a brief period of time and will not qualify for an extension may be internally inspected as required before it is returned to service, or, at the operator’s discretion, may be inspected at any time before the certificate of operation expires.

Operators should compare the rules and definitions to their operating practices and consider expanding or modifying the information they record to support the condition of the boiler when in standby, operation, or out of service; what components of the system are functioning normally or are disabled; what type of repair or maintenance work is being conducted, how long boiler operation is affected and in what way, and so on. The Act requires operators to maintain accurate and complete records. Operators may contact the Department at any time during an event to obtain guidance on how they might best proceed and retain the ability to qualify for extension of the inspection interval. The Department sought and received extensive input from stakeholders to arrive at the rule amendments presented and believes that the rules are workable, efficient, and fulfill the purpose of ensuring safety while offering increased flexibility for operators. Therefore, no changes have been made in response to this comment.

ADVISORY BOARD RECOMMENDATIONS AND COMMISSION ACTION

The Board of Boiler Rules (Advisory Board) met on August 6, 2020, to discuss the proposed rules and the public comments received. The Advisory Board recommended that the Commission adopt the proposed rules as published in the Texas Register. Subsequent minor editorial changes were made and at its meeting on September 29, 2020, the Commission adopted the proposed rules.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §65.2
STATUTORY AUTHORITY

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

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

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

Filed with the Office of the Secretary of State on October 9, 2020.
TRD-202004190
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Effective date: October 29, 2020
Proposal publication date: June 5, 2020
For further information, please call: (512) 475-4879

SUBCHAPTER AA. COMMISSIONER’S RULES ON SCHOOL FINANCE

19 TAC §61.1006

The Texas Education Agency (TEA) adopts §61.1006, concerning Foundation School Program funding for reimbursement of disaster remediation costs. The new section is adopted with changes to the proposed text as published in the July 10, 2020 issue of the Texas Register (45 TexReg 4612) and will be reprinted. The adopted new section reflects changes made by House Bill (HB) 3, 86th Texas Legislature, 2019, by establishing the criteria, funding sources, and procedures that a school district or an open-enrollment charter school, all or part of which is located in an area declared a disaster area by the governor under Texas Government Code, Chapter 418, must meet in order to receive disaster remediation expense reimbursement.

REASONED JUSTIFICATION: HB 3, 86th Texas Legislature, 2019, added Texas Education Code (TEC), §48.261, Reimbursement for Disaster Remediation Costs. The new statute establishes the criteria, a timeline for application, and funding sources for school districts affected by and within an area declared a disaster area by the governor under Texas Government Code, Chapter 418.

New §61.1006 implements TEC, §48.261, by establishing guidelines and requirements that school districts and open-enrollment charter schools must meet in order to qualify for disaster cost reimbursement from appropriated funds and/or the Foundation School Program.

The adopted new section applies to disasters that occur on or after September 1, 2019. For disasters that occurred prior to September 1, 2019, school districts and open-enrollment charter schools may apply for reimbursement of disaster remediation costs under 19 TAC §61.1013, Foundation School Program Funding for Reimbursement of Disaster Remediation Costs, or 19 TAC §61.1014, Credit Against Recapture for Reimbursement of Disaster Remediation Costs. Because 19 TAC §61.1013 and §61.1014 were adopted in relation to the methods of school finance in place prior to the passage of HB 3, 86th Texas Legislature, 2019, the rules treat school districts that are subject to recapture and those that are not differently. Adopted new §61.1006 is necessary to provide one common rule under the new method of school finance implemented by HB 3.

In response to public comment, subsection (l)(1)(A) has been modified at adoption. New clause (iii) was added to clarify that, except where specifically identified, 19 TAC Chapter 61, Subchapter CC, does not apply to open-enrollment charter schools.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began July 10, 2020, and ended August 24, 2020. Following is a summary of the public comments received and corresponding responses.

Comment: The Texas Public Charter Schools Association (TPCSA) expressed opposition to open-enrollment charter schools being required to follow 19 TAC Chapter 61 designating the use of disaster remediation funds for construction projects. TPCSA stated that charter schools have never been subject to 19 TAC §61.1033 and §61.1036, which regulate the construction of buildings for independent school districts, and that open-enrollment charters have been exempt from specific square footage requirements in order to lease and/or renovate nontraditional spaces. TPCSA stated that subjecting charter schools to highly specific square footage requirements would...
cause additional burden when leasing and/or purchasing non-traditional spaces for renovation. TPCSA further commented that new requirements would deny charters the flexibility to design buildings to best meet student needs and that, since public charter schools do not receive full facilities funding, subjecting them to new standards would take away classroom funding.

Response: The agency agrees that open-enrollment charter schools are not subject to the requirements in 19 TAC §61.1033 and §61.1036. Language was added in §61.1006(l)(1)(A)(iii) at adoption to clarify that, except where specifically identified, 19 TAC Chapter 61, Subchapter CC, does not apply to open-enrollment charter schools. The agency anticipates revising rules in 19 TAC Chapter 61, Subchapter CC, to add security and safety provisions that would apply to open-enrollment charter schools in accordance with Senate Bill (SB) 11, 86th Texas Legislature, 2019.

Comment: The law firm of Schulman, Lopez, Hoffer & Adelstein commented in opposition to open-enrollment charter schools being required to follow 19 TAC Chapter 61. The commenter noted that neither TEC, §46.008, which requires the commissioner to establish standards for the adequacy of school facilities, nor TEC, §46.002, applies to charter schools and that these are the statutes authorizing 19 TAC §61.1033 and §61.1036.

Response: The agency agrees that open-enrollment charter schools are not subject to the requirements in TEC, §46.002 or §46.008. Language was added in §61.1006(l)(1)(A)(iii) at adoption to clarify that, except where specifically identified, 19 TAC Chapter 61, Subchapter CC, does not apply to open-enrollment charter schools. The agency anticipates revising rules in 19 TAC Chapter 61, Subchapter CC, to add security and safety provisions that would apply to open-enrollment charter schools in accordance with SB 11, 86th Texas Legislature, 2019.

STATUTORY AUTHORITY. The new section is adopted under Texas Education Code (TEC), §48.261, as transferred, redesignated, and amended by House Bill 3, 86th Texas Legislature, 2019, which establishes reimbursement for disaster remediation cost guidelines and applies only to a school district or an open-enrollment charter school located in an area declared a disaster area by the governor under Texas Government Code, Chapter 418, that incurs disaster remediation expenses as a result of the disaster. TEC, §48.261(e), requires that the commissioner of education adopt rules necessary to implement the provisions of the statute.

CROSS REFERENCE TO STATUTE. The new section implements Texas Education Code, §48.261.

§61.1006. Foundation School Program Funding for Reimbursement of Disaster Remediation Costs.

(a) General provisions. This section implements Texas Education Code (TEC), §48.261 (Reimbursement for Disaster Remediation Costs). The commissioner of education may provide disaster remediation cost reimbursement under this section only if funds are available for that purpose from:

(1) amounts appropriated for that purpose, including amounts appropriated for school districts or open-enrollment charter schools for that purpose to the disaster contingency fund established under Texas Government Code, §418.073; or

(2) Foundation School Program (FSP) funds available for that purpose based on a determination by the commissioner that the amount appropriated for the FSP, including the facilities component as provided by TEC, Chapter 46, exceeds the amount to which school districts and open-enrollment charter schools are entitled under this subchapter and TEC, Chapter 46.

(b) Eligibility. A school district or an open-enrollment charter school that meets the following criteria is eligible to apply:

(1) all or part of the school district or open-enrollment charter school must be located in an area declared a disaster area by the governor under Texas Government Code, Chapter 418;

(2) the school district or open-enrollment charter school must have incurred and paid disaster remediation costs during the two-year period following the date of the governor's initial proclamation or executive order declaring a state of disaster that the school district or open-enrollment charter school does not anticipate recovering through insurance proceeds, federal disaster relief payments, or another similar source for reimbursement; and

(3) in accordance with TEC, §48.261, the school district or open-enrollment charter school must apply for reimbursement during the two-year period following the date of the governor's initial proclamation or executive order declaring a state of disaster. The school district or open-enrollment charter school must submit a completed application by the application deadline. A school district or an open-enrollment charter school that submits an incomplete application or submits an application after the application deadline may be deemed ineligible for funds.

(c) Definitions. The following terms have the following meanings when used in this section.

(1) Disaster remediation costs--Costs incurred by a school district or an open-enrollment charter school for replacing school facilities; equipment, including, but not limited to, the cost to repair or replace vehicles or computers damaged in the disaster; and supplies needed to provide instruction at a location where students eligible for FSP funding regularly attend classes.

(2) Paid disaster remediation costs--Disaster remediation costs that are paid or remitted resulting in an outflow of cash in exchange for goods or services evidenced by an invoice, receipt, voucher, or other such document, and in accordance with standards found in the Financial Accountability System Resource Guide adopted by reference in §109.41 of this title (relating to Financial Accountability System Resource Guide) and TEC, §48.261, that the school district or open-enrollment charter school does not anticipate recovering through insurance proceeds, federal disaster relief payment, or another similar source of reimbursement in accordance with TEC, §48.261, and that were paid during the two-year period following the governor's initial proclamation or executive order declaring a state of disaster.

(d) Application process. A school district or an open-enrollment charter school seeking disaster reimbursement must submit a new application each time Texas Education Agency (TEA) opens a disaster reimbursement application process on a form prescribed by TEA. The application shall contain, at a minimum, the following:

(1) identification of the governor's initial proclamation or executive order declaring a state of disaster and evidence that all or part of the school district or open-enrollment charter school is in the area subject to the disaster declaration;

(2) the total dollar amount of paid disaster remediation costs during the two-year period following the governor's proclamation or executive order declaring a state of disaster;

(3) the total dollar amount of paid disaster remediation costs paid during the two-year period following the governor's proclamation or executive order declaring a state of disaster that the school
45 TexReg 7586  October 23, 2020  Texas Register

district or open-enrollment charter school anticipates to be reimbursed from insurance proceeds, federal disaster relief payments, or another similar source of reimbursement;

(4) the total difference between the amounts of paid disaster remediation costs specified in paragraphs (2) and (3) of this subsection and, of the total difference, the specific paid disaster remediation costs for which the school district or open-enrollment charter school is seeking reimbursement under TEC, §48.261;

(5) an explanation as to why the school district or open-enrollment charter school does not anticipate being reimbursed from insurance proceeds, federal disaster relief payments, or another similar source of reimbursement for each paid disaster remediation cost identified in paragraph (4) of this subsection;

(6) a certification from the school district or open-enrollment charter school board and superintendent or chief executive officer that all paid disaster remediation costs for which the school district or open-enrollment charter school is seeking reimbursement under paragraph (4) of this subsection qualify as paid disaster remediation costs and that the school district or open-enrollment charter school board and superintendent or chief executive officer do not anticipate recovering these payments through insurance proceeds, federal disaster relief payments, or another similar source of reimbursement; and

(7) a certification from the school district or open-enrollment charter school board and superintendent or chief executive officer that the school district or open-enrollment charter school, for any paid disaster remediation costs for which the school district or open-enrollment charter school is seeking reimbursement under paragraph (4) of this subsection, has made and will continue to make efforts to seek reimbursement from insurance proceeds, federal disaster relief payments, or another similar source of reimbursement as allowable or appropriate.

(e) Updates for new payments. If a school district or open-enrollment charter school makes more paid disaster remediation cost payments after submission of its initial application to the TEA and prior to the deadline announced for disaster reimbursement application submission, the TEA will prescribe a form allowing the school district or open-enrollment charter school to submit additional paid disaster remediation cost payments and information consistent with the application process in subsection (d) of this section and will increase the amount of reimbursement as available and appropriate.

(f) Reporting requirement. Annually after the date of the award under this disaster reimbursement program, the awarded school district or open-enrollment charter school board and superintendent or chief executive officer shall provide a certified report on a form prescribed by TEA until all insurance proceeds, federal disaster relief, or other similar sources of reimbursements related to the disaster are finalized. On the report, the school district or open-enrollment charter school shall identify any insurance proceeds, federal disaster relief payments, or other similar sources of reimbursement that the school district or open-enrollment charter school received for which the school district or open-enrollment charter school previously received reimbursement payment from TEA. TEA will adjust funding for any overpayments made to the school district or open-enrollment charter school based on the final report made under this subsection of the school district or open-enrollment charter school out of the school district's or open-enrollment charter school's future FSP payments or will require a refund from the school district or open-enrollment charter school.

(g) Finality of award. Awards of assistance under this section will be made based only on paid disaster remediation costs. Prior to making an award, TEA may request additional documentation, including, but not limited to, evidence described in subsection (c)(2) of this section and evidence supporting the certifications required by subsection (d)(6) and (7) of this section. A school district or an open-enrollment charter school is not entitled to any requested reimbursement, and a decision by the commissioner is final and may not be appealed.

(h) Deadlines. The commissioner will announce a deadline for disaster reimbursement applications in conjunction with making a determination of the amount of funds available for the disaster reimbursement program cycle. All applications received by the announced deadline will be reviewed. Applications will be funded if sufficient funds are available to fully fund each application. If sufficient funds are not available to fully fund each application, funding will be prorated proportionately so that every funded application receives the same percentage of requested funding.

(i) Distribution of funds. Funds will be allocated through the FSP and will appear on the school district or open-enrollment charter school payment ledger and be delivered as soon as is practicable after award amounts have been determined.

(j) Finalization of award. When the school district or open-enrollment charter school determines that all insurance proceeds, federal disaster relief payments, or other similar sources of reimbursement that the school district or open-enrollment charter school anticipates receiving are finalized and there are no pending claims, the school district or open-enrollment charter school board and superintendent or chief executive officer shall certify to TEA in writing that the annual report required by subsection (f) of this section is no longer necessary and disaster reporting is finalized.

(k) Record retention and audit. The school district or open-enrollment charter school shall maintain all documents necessary to substantiate payment and certifications made in subsections (c)(2), (d), (g), and (h) of this section, and the school district or open-enrollment charter school is subject to audit by TEA until two years after the school district or open-enrollment charter school certifies to TEA in writing that the disaster is finalized and closed in accordance with subsection (j) of this section.

(l) Replacement of school facilities damaged in the disaster. In accordance with TEC, §48.261, a school district or an open-enrollment charter school is permitted to elect to replace a facility damaged in a disaster instead of repairing that facility, provided that the state funds provided under this section do not exceed the lesser of the amount that would be provided to the district or charter school if the facility were repaired or the amount necessary to replace the facility.

(1) Construction plans and budgeted costs to rebuild the facility must be reasonable and appropriate, as follows.

(A) Construction plans should follow current TEA facility guidelines and physical plant requirements as prescribed in applicable provisions of Chapter 61, Subchapter CC, of this title (relating to Commissioner's Rules Concerning School Facilities) without significant add-ons or upgrades, noting that:

(i) pre-disaster square footage in temporary buildings may be replaced with square footage in permanent buildings;
(ii) pre-disaster square footage amounts may be adjusted to account for additional square footage specifically required by TEA guidelines, if applicable; and
(iii) except where specifically identified, the provisions of Chapter 61, Subchapter CC, of this title do not apply to open-enrollment charter schools.
(B) Budgeted cost per square foot may not be significantly higher than recent comparable construction costs within the region where the facility will be constructed.

(C) Enrollment capacity of the facility may not vary significantly from current common practice for new facilities of a like purpose.

(D) The facility's square footage per unit of enrollment capacity may not significantly exceed current best practice guidelines for new facilities of like purpose.

(E) The requesting school district or open-enrollment charter school is responsible for demonstrating that construction plans and budgeted costs conform to the requirements in this paragraph.

(2) The cost to replace a facility shall be based on the average of the following two methodologies:

(A) replacement cost based on square footage, which is an amount equal to the product of the reasonable and appropriate budgeted costs and the quotient of the square footage of the pre-disaster facility and the square footage of the planned facility, where the replacement cost may not exceed the budgeted cost; and

(B) replacement cost based on enrollment capacity, which is an amount equal to the product of the reasonable and appropriate budgeted costs and the quotient of the pre-disaster facility enrollment capacity and the planned facility enrollment capacity, where the replacement cost may not exceed the budgeted cost.

(3) The commissioner may grant a waiver of one or more of the requirements in paragraph (1) of this subsection if the school district or open-enrollment charter school provides sufficient justification why the requirement should not apply in a particular instance.

(4) The school district or open-enrollment charter school may request an initial reimbursement based on anticipated insurance proceeds, federal disaster relief payments, or other similar sources of reimbursements. When this occurs, TEA will determine at a later date the appropriate reimbursement when actual insurance proceeds, federal disaster relief payments, or other similar sources of reimbursements are known.

(m) Applicability. This section applies to disasters that occur on or after September 1, 2019. Reimbursement requests for disaster remediation costs for disasters that occurred prior to September 1, 2019, are governed by §61.1013 of this title (relating to Foundation School Program Funding for Reimbursement of Disaster Remediation Costs) and §61.1014 of this title (relating to Credit Against Recapture for Reimbursement of Disaster Remediation Costs).

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

Filed with the Office of the Secretary of State on October 7, 2020.

TRD-202004165
Cristina De La Fuente-Valdez
Director, Rulemaking
Texas Education Agency
Effective date: October 27, 2020
Proposal publication date: July 10, 2020
For further information, please call: (512) 475-1497

PART 14. TEXAS OPTOMETRY BOARD
CHAPTER 273. GENERAL RULES

22 TAC §273.10
The Texas Optometry Board adopts amendments to §273.10 of Chapter 273, Title 22, without changes to the proposed text as published in the June 26, 2020, issue of the Texas Register (45 TexReg 4292). The rule will not be republished.

The amendments prohibit disciplinary action by a licensing agency because of a default on a student loan or a breach of a student loan repayment contract or scholarship contract.

No comments were received.

The amendment is adopted under the Texas Optometry Act, Texas Occupations Code, §351.151 and Senate Bill 37, 86th Legislature, Regular Session.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession. The agency interprets Senate Bill 37 (Texas Occupations Code §56.003) to prohibit disciplinary action against a licensee because of a default on a student loan or a breach of a student loan repayment contract or scholarship 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 October 12, 2020.

TRD-202004221
Kelly Parker
Executive Director
Texas Optometry Board
Effective date: November 1, 2020
Proposal publication date: June 26, 2020
For further information, please call: (512) 305-8502

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 329. LICENSING PROCEDURE

22 TAC §329.5
The Texas Board of Physical Therapy Examiners adopts the amendments to 22 Texas Administrative Code (TAC) §329.5. Licensing Procedures for Foreign-Trained Applicants. The amendments are adopted without changes to the proposed text as published in the August 21, 2020, issue of the Texas Register (45 TexReg 5824). The rule will not be republished.

The amendment is adopted to update the Test of English as a Foreign Language (TOEFL) minimum standards accepted by the board as proof of English language proficiency for a foreign-trained licensure applicant. The amendment eliminates outdated scores and adds the most recent TOEFL scores adopted by the Federation of State Boards of Physical Therapy (FSBPT).

No public comment was received.
PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 567. CERTIFICATE OF PUBLIC ADVANTAGE

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts new §§567.1 - 567.6, 567.21 - 567.26, 567.31 - 567.33, 567.41, and 567.51 - 567.54 in Texas Administrative Code (TAC) Title 26, Part 1, Chapter 567. The new rules are adopted without changes to the proposed text as published in the July 10, 2020, issue of the Texas Register (45 TexReg 4704). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The new sections are necessary to implement House Bill (H.B.) 3301, 86th Legislature, Regular Session, 2019, which added Chapter 314A to Texas Health and Safety Code (HSC). This chapter requires HHSC, as the agency designated by the governor under HSC §314A.004, to adopt rules for the administration and implementation of Chapter 314A. This chapter permits qualifying hospitals in certain counties to apply for a Certificate of Public Advantage (COPA). A COPA grants merging hospitals immunity from federal and state antitrust laws.

The new sections require hospitals eligible to apply for a COPA to pay a fee if applying for a COPA and, if granted a COPA, pay an annual supervision fee, report changes that could affect the COPA, submit an annual report, request approval from HHSC to change rates, and submit a corrective action plan if found to be out of compliance with 26 TAC Chapter 567.

COMMENTS

The 31-day comment period ended August 10, 2020. During this period, HHSC received comments regarding the proposed rules from one commenter. A summary of comments relating to the rules and HHSC’s responses follows.

Comment: The commenter made three statements and suggestions surrounding public comment and notification that were not attached to a specific rule. The commenter requested that the rules require public notice that an application has been filed, posting the public version of applications on the HHSC website, or a process for public hearing or comments on the application.

Response: HHSC declines to revise the rule in response to the comment. HSC Chapter 314A does not require HHSC to provide public notice of a COPA application, post the public version of a COPA application on its website, or conduct a public hearing or solicit public comments. HHSC will post the public version of COPA applications under review on its website. HHSC notes that it accepts informal comments on any matter before it.

Comment: The commenter made two statements about the COPA applications that appear to relate to §567.22. The commenter noted that the rules do not have provisions for HHSC or the Office of the Attorney General (OAG) to require a COPA applicant to provide additional information before an application is deemed complete and there is no way for HHSC or the public to challenge whether redactions to the public version of a COPA application were proper. The commenter requested that the rules require a merger agreement, and all financial and market data that may become public in required government reports about the merger, be made available to the public.
Response: HHSC declines to revise the rule in response to this comment and notes that §567.22 provides detailed information about which information is necessary to deem an application complete. Under §567.22(e), "HHSC may request additional information necessary to make the application complete and to meet the requirements of" HSC Chapter 314A and 26 TAC Chapter 567. This permits HHSC to request any additional information needed to deem an application complete. HHSC also notes that it does not have any regulatory authority over the OAG.

HHSC notes §567.22(c) is based directly on HSC §314A.052(b)(2), which requires applicants to "submit duplicate applications, one application that has complete information for the designated agency's use and one redacted application that will be made available for public release." HHSC is required under the statute to accept a redacted application and does not have the legal authority to mandate what information the applicant designates as proprietary. Any request for information an applicant has designated as proprietary must be made under the Texas Public Information Act.

Comment: The commenter made two statements about the rules not allowing for public notice and comment on the terms of a COPA. The commenter noted the rules do not require HHSC to publish a draft COPA or provide a process for holding public hearings or soliciting public comments on a draft COPA.

Response: HHSC declines to revise the rule in response to this comment. HSC Chapter 314A does not require HHSC to solicit public comments regarding the terms of a COPA. HHSC notes that it accepts informal comments on any matter before it.

Comment: The commenter stated that the rules do not allow for the OAG to review or comment on the draft COPA.

Response: HHSC declines to revise the rule in response to this comment and notes that 26 TAC §567.24, based on HSC §314A.026, requires HHSC to consult with the OAG regarding each COPA application.

Comment: The commenter stated that the rules do not allow for public participation regarding the terms of the COPA.

Response: HHSC declines to revise the rule in response to this comment. HHSC notes that it accepts informal comments on any matter before it.

Comment: The commenter made a statement about the scope of the review by the OAG, which appears to relate to §567.24. The commenter requested that the rules explain the scope of the OAG's role in HHSC's review of a COPA application and require the OAG to provide HHSC with an opinion on potential antitrust violations that could result from a merger in the absence of immunity under a COPA.

Response: HHSC declines to revise the rule in response to this comment. Defining the scope of the OAG review is outside HHSC's authority. Section 567.24 is based on HSC §314A.056(a), which mandates only that HHSC, as the designated agency, makes a final decision about issuing a COPA after "reviewing the application and consulting with the attorney general in accordance with Section 314A.055."

Comment: The commenter made three comments that appear to be related to §§567.32 and 567.51. The commenter stated the proposed rules make no provision for public input as part of the ongoing state supervision of the monopoly. The commenter noted that the rules do not have a provision related to HHSC or the OAG requiring a COPA holder to provide additional information, and HHSC is not required to publish annual COPA reports on its website or obtain public input on the accuracy or adequacy of the annual report or the conduct of the COPA holder.

Response: HHSC declines to revise the rule in response to this comment. HSC Chapter 314A does not require HHSC to post the annual report on its website or solicit input regarding conduct of a COPA holder. HHSC will post information regarding the ongoing supervision of hospitals operating under a COPA on its website. HHSC notes that it accepts informal comments on any matter before it. HHSC also notes that §567.32 specifies the information required in the annual report, including §567.32(5), which states "any other information required by HHSC to ensure compliance with Texas Health and Safety Code Chapter 314A and this chapter, including information relating to compliance with any terms or conditions for issuance of the COPA."

Comment: The commenter made a statement regarding rate adjustments, which appears to relate to §567.41. The commenter noted that the rules do not address a COPA holder's ability to allow a contract with a health plan to expire and adopt an out-of-network business model or what patients and health plans must pay under an out-of-network business model.

Response: HHSC declines to revise the rule in response to this comment. The rules closely follow the direction of the Legislature in H.B. 3301, which does not require hospitals operating under a COPA to follow a specific business model.

Comment: The commenter suggested requiring a separation plan for voluntary terminations, which appears to relate to §567.33. The commenter requested that the rules require an enforceable separation plan if a COPA is voluntarily terminated and that HHSC notify the OAG when a COPA is terminated. The commenter noted that Tennessee COPA rules require a separation plan when a COPA is terminated, and the proposed HHSC rules do not.

Response: HHSC declines to revise the rule in response to this comment. The rules closely follow the direction of the Legislature in H.B. 3301, which does not require a voluntary separation plan. The rules are specific to Texas and the needs of its healthcare community, particularly in rural and underserved areas, and they are not intended to mirror similar rules developed by other states.

SUBCHAPTER A. GENERAL PROVISIONS

26 TAC §§567.1 - 567.6

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and HSC §314A.005, which requires HHSC, as the agency designated by the governor under HSC §314A.004, to adopt rules for the administration and implementation of Chapter 314A.

The new sections implement Texas Government Code §531.0055 and HSC Chapter 314A.

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 October 5, 2020. TRD-202004138
SUBCHAPTER B.  APPLICATION AND ISSUANCE

26 TAC §§567.21 - 567.26

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and HSC §314A.005, which requires HHSC, as the agency designated by the governor under HSC §314A.004, to adopt rules for the administration and implementation of Chapter 314A.

The new sections implement Texas Government Code §531.0055 and HSC Chapter 314A.

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

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Karen Ray
Chief Counsel
Health and Human Services Commission
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Proposal publication date: July 10, 2020
For further information, please call: (512) 834-4591

SUBCHAPTER C.  OPERATIONAL REQUIREMENTS

26 TAC §§567.31 - 567.33

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and HSC §314A.005, which requires HHSC, as the agency designated by the governor under HSC §314A.004, to adopt rules for the administration and implementation of Chapter 314A.

The new sections implement Texas Government Code §531.0055 and HSC Chapter 314A.

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 October 5, 2020.
According to §281.18, it is the intent of the TCEQ to establish a general policy for the processing of applications in order to achieve the greatest efficiency and effectiveness possible. However, §281.18 requires notices of application deficiencies to be sent to the applicant via certified, return receipt mail and allows the applicant 30 days to provide a response. The adopted rulemaking amends §281.18 to allow the use of electronic mail (email) for communicating application deficiencies and receiving responses from applicants. The adopted changes modernize communications between the TCEQ and applicants, reduce TCEQ postage costs, and improve the efficiency of application processing.

Section Discussion

§281.18, ApplicationsReturned

The commission adopts the amendment to §281.18(a) to include email as a method of communicating application deficiency notices to applicants and allow the commission to establish a timeframe of less than 30 days for applicants to provide the requested information. The purpose of this change is to reduce the timeframes for obtaining necessary information and to reduce postage costs to the TCEQ. Additionally, the commission amends §281.18(a) by parsing a portion of the requirements into adopted paragraphs (1) and (2) to improve readability. Adopted §281.18(a)(1) provides the timeframe for the executive director to review the applicant’s response to the notice of administrative deficiencies. Adopted §281.18(a)(2) provides the executive director’s course of action if the applicant fails to submit the requested information within the established timeframe. At least one deficiency notice must be sent via certified mail, return receipt requested providing the applicant 30 days to respond before an application may be returned.

Final Regulatory Impact Determination

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a “Major environmental rule” as defined in that statute. A major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the rulemaking is not to protect the environment or reduce risks to human health from environmental exposure, and the adopted rule is not anticipated to have an adverse effect in a material way on 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 intent of the adopted amendment is to reduce the timeframe for obtaining necessary information from applicants and reduce postage costs to the TCEQ.

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

Takings Impact Assessment

The commission evaluated this rulemaking and performed an analysis of whether the adopted rulemaking will constitute a taking. Texas Government Code, §2007.002(5), defines a taking as either: 1) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or section 17 or 19, article I, Texas Constitution; or 2) a governmental action that affects an owner’s private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner’s right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. The commission determined that this adopted rulemaking will not constitute a taking as that term is defined under Texas Government Code, §2007.002(5). Specifically, the adopted rulemaking will not affect any landowners’ rights in private real property, and there are no burdens that will be imposed on private real property by the adopted rulemaking; it is solely procedural and does not impact real property.

Consistency with the Coastal Management Program

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

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

Public Comment
The commission invited public comment on the adopted rulemaking. The comment period closed on June 16, 2020. The commission received comments from Texas Molecular Holdings LLC (TM). The commenter was generally in support of the rulemaking but requested clarifications to the rule language.

Response to Comments

Comment

TM is concerned about possible inconsistencies while determining the appropriate amount of time allotted for a response to application deficiencies. To allow the respondent adequate time to arrange a response or request an extension, 10 working days at a minimum should be afforded.

Response

The commission disagrees that a minimum timeframe should be established for emailed deficiency notices. The timeframe for emailed deficiency notices should be determined based on the type and quantity of information requested. If the applicant fails to provide the requested information within the timeframe specified in the emailed notice, the commission will consider the request made in a second notice via certified mail that provides the applicant an additional 30 days to provide the requested information, as specified in §281.18(a)(2). No changes were made in response to this comment.

Comment

TM recommended revised language in §281.18(a)(1) to clarify the information that the TCEQ is evaluating.

Response

The commission agrees with this comment and revised the rule language as recommended by the commenter.

Comment

TM recommends changing the language in §281.18(a)(2) to clarify that the application will only be returned if the applicant has failed to respond to both the electronically-delivered deficiency notice and the subsequent notice sent via certified mail return receipt, within the specified timeframe required by each notice.

Response

The commission’s intent is to require at least one deficiency notice to be sent via certified mail, return receipt requested that allows the applicant 30 days to respond prior to returning an application. The certified letter may be sent as the initial deficiency notice, in which case the application will be returned if the requested information is not received within 30 days. Alternatively, the certified letter may be sent as a second deficiency notice if the requested information is not received within the timeframe specified in the emailed initial deficiency notice. If the certified letter is sent as a second deficiency notice, the application will be returned if the requested information is not received within 30 days from the date of the certified letter. No changes were made in response to this comment.

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission’s authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §§5.013; TWC, §5.128, which authorizes the commission to utilize electronic means of transmission of information, including notices, orders, and decisions issued or sent by the commission; Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §§361.011, 361.017, and 361.024, which establish the commission’s jurisdiction over the regulation, management, and control of municipal solid waste, industrial solid waste, and municipal hazardous waste, and authorize the commission to adopt rules consistent with the general purposes of the Solid Waste Disposal Act; and THSC. Solid Waste Disposal Act, §361.018 and THSC, Texas Radiation Control Act, §§401.011, 401.051, and 401.412, which establish the commission’s jurisdiction and authorize the commission to adopt rules necessary to carry out its responsibilities to regulate the disposal of radioactive substances and the recovery and processing of source material.

The adopted amendment implements THSC, Chapter 361.

§281.18. Applications Returned.

(a) If an application or petition is received which is not administratively complete, the executive director shall notify the applicant of the deficiencies by electronic mail or certified mail return receipt requested prior to expiration of the applicable review period established by §281.3(a), (b), and (d) of this title (relating to Initial Review).

(1) The executive director will evaluate the applicant’s response to the notice of administrative deficiencies within eight working days of receipt and, where applicable, shall prepare a statement of receipt of the application and declaration of administrative completeness in accordance with §281.17 of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness). For applications for radioactive material licenses, the executive director shall evaluate the applicant’s response to the notice of administrative deficiencies within 30 days of receipt.

(2) If the required information is not received from the applicant within the timeframe specified in the deficiency notice, the executive director shall return the incomplete application to the applicant. The executive director shall send at least one deficiency notice via certified mail return receipt requested, providing the applicant 30 days to respond, before an application may be returned.

(b) For applications involving industrial, hazardous, or municipal waste, or for new, renewal, or major amendment applications for radioactive material licenses, the executive director may grant an extension of an additional 60 days beyond the original 30 days allowed under the rule for a total response time of 90 days upon sufficient proof from the applicant that an adequate response cannot be submitted within 30 days. Unless there are extenuating circumstances, if an applicant does not submit an administratively complete application as required by this chapter, the application shall be considered withdrawn. However, if applicable, the applicant is responsible for the cost of any notice provided under §281.17 of this title and the costs of such notice shall be deducted from any filing fees submitted by the applicant prior to return of the incomplete application.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.
CHAPTER 293. WATER DISTRICTS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§293.3, 293.11, 293.14, 293.15, 293.44, 293.81, 293.94, 293.201, and 293.202; new §293.90 and §§293.132 - 293.137; and the repeal of §§293.132 - 293.136.

The amendments to §§293.3, 293.11, 293.14, 293.81, 293.94, and 293.202; new §293.90 and §§293.132 - 293.137; and the repeal of §§293.132 - 293.136 are adopted without change to the proposal as published in the May 15, 2020, issue of the Texas Register (45 TexReg 3218) and, therefore, will not be republished. The amendments to §§293.15, 293.44, and 293.201 are adopted with change to the proposal as published in the May 15, 2020, issue of the Texas Register and, therefore, will be republished.

Background and Summary of the Factual Basis for the Adapted Rules

This rulemaking adoption implements Senate Bill (SB) 1234 from the 82nd Texas Legislature, 2011; SB 1987 and SB 2014 from the 85th Texas Legislature, 2017; and House Bill (HB) 304, HB 2590, HB 2914, SB 239, and SB 911 from the 86th Texas Legislature, 2019.

SB 1234 repealed Texas Government Code, §375.021, which allowed creation of a municipal management district (MMD) outside of a municipality.

SB 1987 amended Texas Local Government Code, §375.022(b), the petition requirements for creations of MMDs. SB 2014 amended Texas Water Code (TWC), §49.181, to revise language relating to creation and organization expenses and change orders; and to add language regarding the issuance of bonds to finance the cost of spreading and compacting fill to remove property from the 100-year floodplain or provide drainage made by a levee improvement district (LID) or a municipal utility district (MUD), respectively, if certain requirements are met.

HB 304 amended Texas Local Government Code, §375.022(b), to include language to place further qualifications on the petitioner of a creation application. HB 2590 amended TWC, §54.030 and §54.032(a) relating to notice and proof of hearing. HB 2910 also amended TWC, §54.030 to remove the requirement for a commission hearing for the conversion of certain districts to districts operating under the powers of a MUD. Furthermore, HB 2590 amended TWC, §54.234(a) to update language regarding cost analyses for road projects. HB 2914 added TWC, §49.3225 and amended TWC, §54.030(b) to allow the commission to convert a water district to a MUD and to dissolve a district without having a public hearing. SB 239 amended TWC, §49.062 relating to the process for designation of an alternative meeting place. Senate Bill 911 amended TWC, §12.081(a) to add language regarding issuance of a permit under Texas Health and Safety Code (THSC), Chapter 361. SB 911 also amended TWC, §49.102(e) and (f) to add language regarding a temporal component and submittal updates and amended TWC, §49.196(a) to add language regarding on-site audit function.

Section by Section Discussion

The commission adopts non-substantive changes, such as grammatical corrections or to clarify language. These changes are considered non-substantive and are not specifically addressed in the Section by Section Discussion of this preamble.

§293.3. Continuing Right of Supervision of Districts and Authorities Created under Article III, Section 52 and Article XVI, Section 59 of the Texas Constitution

The commission adopts amended §293.3(a)(1) to reflect the changes made to TWC, §12.081 by SB 911. The commission also adopts §293.3(a)(6) to incorporate the change to TWC, §12.081, which confirmed that the commission may issue a permit under THSC, Chapter 361, regardless of a district's rule or objection. The subsequent paragraph is renumbered accordingly. These amendments implement SB 911.

§293.11, Information Required to Accompany Applications for Creation of Districts

The commission adopts amended §293.11(d)(1) to remove the option for petition by 50 persons if more than 50 people own property in the proposed district to reflect that this option was removed from TWC, Chapter 54 by SB 1987 and SB 2014. The commission also adopts amended §293.11(d)(9) to update the requirements for temporary directors in accordance with TWC, §54.022. The commission adopts amended §293.11(j)(1) to clarify that the petitioners for creation of an MMD must be owners of property that would be subject to assessment by the district. The commission also adopts amended §293.11(j)(1) to remove the option for petition by 50 persons if more than 50 people own property in the proposed district. The commission adopts amended §293.11(j)(1)(F) to remove the language that implies that the commission can create MMDs outside of a municipality to reflect changes made to Texas Local Government Code, Chapter 375 which removed the authority of the commission to create an MMD outside of a city. These amendments implement SB 1234 (82nd Texas Legislature); SB 1987 and SB 2014 (85th Texas Legislature); and HB 304 (86th Texas Legislature).

§293.14, District Reporting Actions Following Creation

The commission adopts amended §293.14(a) to add a requirement that a district must submit a certified copy of an order canvassing results of a confirmation election no later than the 30th day after the date of the election in accordance with TWC, §49.102(e) and (f). This amendment implements SB 911.

§293.15, Addition of Wastewater and/or Drainage Powers and Conversion of Districts into Municipal Utility Districts

The commission adopts amended §293.15 to incorporate the revised process for a district conversion in TWC, §§54.030, 54.032, and 54.033. This amendment implements HB 2590 and HB 2914.

§293.44, Special Considerations

The commission amends §293.44(a)(4) to allow districts to finance the cost of spreading and compacting fill to remove property from the 100-year flood plain or to provide drainage if the costs are less than constructing or improving drainage.
facilities. The commission also adopts §293.44(a)(16)(B) and amends existing §293.44(a)(16)(B) and (D) to differentiate types of expenses incurred by districts. The subparagraphs are re-lettered accordingly to account for adopted §293.44(a)(16)(B). The commission also adopts §293.44(b)(8) to add language regarding the issuance of bonds to use a certain return flow of wastewater. This amendment implements SB 2014 (85th Texas Legislature).

§293.81, Change Orders
The commission adopts §293.81 to reflect the changes made to TWC, §49.273(i) by SB 2014. The commission adopts amended §293.81(1) to better reflect existing statute and to clarify change orders must benefit the district. The commission also adopts §293.81(1)(C) to remove competitive bidding requirements to change orders. These amendments implement SB 2014.

§293.90, Change in Designated Meeting Location
The commission adopts new §293.90 to outline procedures for changing a designated meeting place of a district. This adoption implements SB 239.

§293.94, Annual Financial Reporting Requirements
The commission adopts amended §293.94(j)(1) and (3) to allow the executive director to review, investigate, conduct on-site audits, and request additional information, and requires a district to submit additional information within 60 days after a request by the executive director. This amendment implements SB 911.

§293.132, Notice of Hearing
The commission adopts the repeal of §293.132 and moves the language to new §293.133.

§293.133, Investigation by the Staff of the Commission
The commission adopts the repeal of §293.133 and moves the language to new §293.134.

§293.134, Order of Dissolution
The commission adopts the repeal of §293.134 and moves the language to new §293.135.

§293.135, Certified Copy of Order to be Filed in the Deed Records
The commission adopts the repeal of §293.135 and moves the language to new §293.136.

§293.136, Filing Fee
The commission adopts the repeal of §293.136 and moves the language to new §293.137.

§293.132, Applications for Order without Hearing
The commission adopts new §293.132 to allow the commission to adopt an order without conducting a hearing if it meets the requirements of TWC, §49.324, and to allow dissolution of districts without a hearing if they meet certain requirements outlined in new §293.132. This adoption implements HB 2914.

§293.133, Notice of Hearing
The commission adopts new §293.133. The language in existing §293.132 is moved to this new section with a change to exclude dissolutions that meet the provisions of §293.132. This change implements HB 2914.

§293.134, Investigation by the Staff of the Commission
The commission adopts new §293.134. The language in existing §293.133 is moved to this new section.

§293.135, Order of Dissolution
The commission adopts new §293.135. The language in existing §293.134 is moved to this new section with a change to include the executive director's authority over an order of dissolution. This amendment implements HB 2914.

§293.136, Certified Copy of Order to be Filed in the Deed Records
The commission adopts new §293.136. The language in existing §293.135 is moved to this new section.

§293.137, Filing Fee
The commission adopts new §293.137. The language in existing §293.136 is moved to this new section.

§293.201, Acquisition of Road Powers by a Municipal Utility District
The commission adopts amended §293.201 to align the commission's rules with TWC, §54.234, as amended by HB 2590. These changes apply to prior orders for the addition of road powers under TWC, §54.234, unless specifically stated otherwise.

§293.202, Application Requirements for Commission Approval
The commission adopts amended §293.202(a)(8) to clarify the language regarding cost analysis for adopted road facilities. This amendment implements HB 2590.

Final Regulatory Impact Determination
The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in the Texas Administrative Procedure Act. A "Major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "Major environmental rule" because it is not the specific intent of the rule to protect the environment or reduce risks to human health from environmental exposure. The primary purpose of the adopted rulemaking is to implement legislative changes enacted by: SB 1234 (82nd Texas Legislature); SB 1987 and SB 2014 (85th Texas Legislature); and HB 304, HB 2590, HB 2914, SB 239, and SB 911 (86th Texas Legislature).

These bills require the following changes:
SB 1234 - amends requirements for resolutions of a municipality in support of MMD creations;
SB 1987 - amends the petition requirements for creations of MMDs;
SB 2014 - makes revisions relating to creation and organization expenses and change orders for water districts, as well as adds language regarding LID and MUD bond issuances for spreading and compacting fill to provide drainage;
HB 304 - implements further qualifications on the petitioner of an MMD creation application;

HB 2590 - amends notice and proof of hearing language for water districts; and repeals the requirement for a hearing for the conversion of certain districts to districts that operate under the powers of a MUD;

HB 2914 - allows the commission to convert a water district to a MUD without having a public hearing, and allows the commission to dissolve a district without having a public hearing;

SB 239 - adds a new section relating to the process for designating an alternative meeting place for district board meetings; and

SB 911 - adds new language regarding issuance of a permit under THSC, Chapter 361, adds a temporal component and submittal updates in accordance with TWC, Chapter 49, and adds new language regarding on-site audits of districts.

The adopted rulemaking will substantially advance this purpose by amending Chapter 293 rules to incorporate the new statutory requirements.

In addition, the rulemaking does not meet the statutory definition of a "Major environmental rule" because the adopted rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The cost of complying with the adopted rules is not expected to be significant with respect to the economy.

Furthermore, the adopted rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). There are no federal standards governing the areas of contracts, projects, and authority with respect to water districts. Second, the adopted rulemaking does not exceed an express requirement of state law. Third, the adopted rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, the adopted rulemaking is pursuant to the commission's specific authority in the TWC, §12.081, which allows the commission to issue rules necessary to supervise districts and authorities. Therefore, the rules are not adopted solely under the commission's general powers.

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

Takings Impact Assessment

The commission evaluated the adopted rules and performed an analysis of whether the adopted rules constitute a taking under Texas Government Code, Chapter 2007. The primary purpose of the adopted rulemaking is to implement legislative changes enacted by SB 1234 (82nd Texas Legislature); SB 1987 and SB 2014 (85th Texas Legislature); and HB 304, HB 2590, HB 2914, SB 239, and SB 911 (86th Texas Legislature).

These bills require the following changes:

SB 1234 repealed Local Government Code, §375.021; thus, MMD creation language that reflected such districts can be created outside of a municipality was removed from §293.11(j)(1)(F).

SB 1987 removed the requirement in TWC, §54.014 that petitions for creations of MMDs have to be signed by 50 landowners in the proposed district.

SB 2014 added TWC, §49.181(i) to differentiate types of expenses incurred by districts. SB 2014 added TWC, §49.181(k) to allow districts to finance the cost of spreading and compacting fill to provide drainage in certain situations. SB 2014 also amended TWC, §49.273(i) to clarify that change orders must benefit the district, and removed competitive bidding requirements to change orders.

SB 304 amended Local Government Code, §375.022(b) to require additional information in petitions for creations of MMDs.

HB 2590 amended TWC, Chapter 54 by replacing the requirement that the district request, and the commission holds a hearing for a conversion with the requirement that the district request, and the commission issues an order for conversions.

HB 2914 added TWC, §49.3225 which allows dissolution of districts without a hearing if certain requirements are met. HB 2914 also amended TWC, §54.030(b) by allowing the commission to convert water districts to a MUD without a hearing.

SB 239 amended TWC, §49.062(b) and (c) and added §49.062(c-1) and (e) - (g) to reflect the process for designation of an alternative meeting place.

SB 911 amended TWC, §49.102(e) and (f) to require a district to submit a certified copy of an order canvassing results of a confirmation election no later than the 30th day after the date of the election. SB 911 amended TWC, §49.195(a) to allow the executive director to request additional information from the district after reviewing the audit report, and amended TWC, §49.196(a) to allow the executive director to conduct on-site audits of districts. SB 911 also amended TWC, §12.081(a) by adding language regarding issuance of a permit under THSC, Chapter 361.

The adopted rulemaking will substantially advance this purpose by amending Chapter 293 rules to incorporate the new statutory requirements.

Promulgation and enforcement of these adopted rules will be neither a statutory nor a constitutional taking of private real property. The adopted rules do not affect a landowner's rights in private real property because this rulemaking does not relate to or have any impact on an owner's rights to property. This rulemaking adoption will primarily affect districts, especially in the areas of creations/conversions, projects, and authority; this will not be an effect on private real property. Therefore, the rulemaking adoption will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

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

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

Public Comment
The comment period closed on Tuesday, June 16, 2020. The commission received comments from Allen Boone Humphries Robinson LLP (ABHR), the Association of Water Board Directors (AWBD), Masterson Advisors LLC (MALLC), Schwartz, Paige & Harding L.L.P., the Texas Association of Builders (TAB), and Utility District Advisory Corporation (UDAC). Most comments received were neither in support of nor against the rulemaking, rather, suggested changes to the proposed rule language.

Response to Comments

Comment

The AWBD commented that the changes made to §293.15(c)(3) are beyond the requirements enacted by HB 2590 or HB 2914, and that there is no statutory support for the TCEQ to impose these changes. Additional comments were made regarding clarity in §293.15(c)(1)(A) and (B) and (2)(B).

Response

The commission responds that §293.15(c)(3) was previously included in the commission's rules as §293.15(c)(2). This provision has been renumbered but has not been changed through this rulemaking. No changes have been made in response to this comment. Regarding the additional comment concerning the clarity of the rule, the commission has revised language to provide further clarity to the rule language.

Comment

The AWBD commented that to avoid conflict with the rules to §293.44(a)(25) and (26), additional language for the spreading and compacting of fill needs to be added to §293.44(a)(4).

Response

The commission responds that providing the recommended changes allows the rule to flow more concisely, and therefore the suggested changes were made and subsequently §293.44(a)(25) and (26) were removed from the rule language.

Comment

The AWBD commented that making additional changes to §293.44(a)(16) would provide clarity on creation and organizational expenses.

Response

The commission responds that adding this additional language does add clarity to the rule, and thus the recommended changes were made regarding this comment.

Comment

The AWBD commented that suggested changes made to §293.44(a)(25) would provide further clarity on the spreading and compacting of fill.

Response

The commission responds that because of a previous change to the rules responding to a comment on §293.44(a)(4), §293.44(a)(25) was removed, and so no change is needed.

Comment

The ABHR and AWBD commented that the changes made to §293.44(b)(8) and (9) regarding general obligation bonds should be removed from the rule language as it is out of the scope of the TCEQ and not specific to water districts.

Response

The commission responds that removing these sections from the rule more closely aligns with the purview of the TCEQ, therefore, the commission agrees to remove §293.44(b)(8) and (9). The subsequent paragraph is renumbered.

Comment

The ABHR and AWBD commented that in §293.90 regarding meeting place and location, restating the statute verbatim would result in unnecessary changes to the rule when there is a change in the statute.

Response

The commission responds that the legislature was specific on how this process should be implemented in the rule language, and so no change is needed.

Comment

The AWBD commented that amending §293.201 would better conform the rule to TWC, §54.234 and remove any potential confusion.

Response

The commission responds that we agree with the comment and have made the recommended amendments to the rule language.

Comment

The ABHR and AWBD commented that adding §293.201(c) would resolve ambiguity in interpreting the amendment to TWC, §54.234.

Response

The commission responds that we understand the request for clarification on the amendments to §293.201 concerning prior orders. Therefore, we have provided additional language to the Section by Section Discussion of this preamble to address this concern; however, no changes to the rule language were made based on this comment.

Comment

The ABHR and AWBD commented that the amendment to TWC, §49.181(f) needs to be addressed in the rules by amending §293.48 and §293.62 to include an exemption clause.

Response

The commission responds that we have reviewed the requested revisions and have determined that revisions to this section are not necessary, so no changes to the rule were made.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §293.3

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; and TWC, §5.105, which establishes the commission's authority to set policy by rule. In addition, TWC, §5.013, gives the commission continuing supervision over districts; and TWC, §12.081, gives the commission the authority to issue rules necessary to supervise districts. Therefore, the TWC authorizes rulemaking that amends §293.3, which relates to the commission's continuing right of supervision of districts.
The adopted amendment implements the language set forth in Senate Bill 911 from the 86th Texas Legislature, 2019, which updated the scope of an inquiry into the officers and directors of any district or authority and added new language regarding issuance of a permit under Texas Health and Safety Code, Chapter 361.

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

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

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For further information, please call: (512) 239-2678

SUBCHAPTER B. CREATION OF WATER DISTRICTS

30 TAC §§293.11, 293.14, 293.15

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; and TWC, §5.105, which establishes the commission's authority to set policy by rule. In addition, TWC, §5.013, gives the commission continuing supervision over districts; and TWC, §12.081, gives the commission the authority to issue rules necessary to supervise districts. Therefore, the TWC authorizes rulemaking that amends §§293.11, 293.14, and 293.15, which relates to district creation applications, required actions after district creations, and conversions of districts.

The adopted amendments implement the language set forth in Senate Bill (SB) 1234 from the 82nd Texas Legislature, 2011; SB 1987 and SB 2014 from the 85th Texas Legislature, 2017; and House Bill (HB) 304, HB 2590, HB 2914, and SB 911 from the 86th Texas Legislature, 2019. These bills require, in part, additional information in municipal management district creation petitions; a timeline for submission of district creation election results; and changes in requirements for the conversion of certain districts to municipal utility districts.

§293.15. Addition of Wastewater and/or Drainage Powers and Conversion of Districts into Municipal Utility Districts.

(a) Any water improvement district, water control and improvement district, fresh water supply district, levee improvement district, irrigation district or any other conservation and reclamation district or any special utility district created under the Texas Constitution, Article XVI, §59, may be converted into a municipal utility district operating under the Texas Water Code (TWC), Chapter 54.

(b) The application for the conversion of a district shall be accompanied by the following:

1. a certified copy of the resolution adopted by the board of directors in accordance with TWC, §54.030(b) as amended by House Bill (HB) 2914, 86th Texas Legislature, 2019 and §54.030(d). The resolution required by this paragraph may be submitted after the hearing required by TWC, §54.030(b) as amended by HB 2590, 86th Texas Legislature, 2019;

2. a $700 application fee;

3. unless waived by the executive director, a preliminary plan (22 - 24 inches by 36 inches or digital data in electronic format) showing the location of existing facilities including highways, roads, and other improvements together with the location of proposed utility mains and sizing, general drainage patterns, principal drainage ditches and structures, utility plant sites, recreational areas, commercial and school sites, areas within the 100-year flood plain, and any other information pertinent to the project;

4. unless waived by the executive director, a preliminary engineering report including:

A. a description of existing area, conditions, topography, and proposed improvements;

B. land use plan;

C. 100-year flood computations or source of information;

D. existing and projected populations;

E. tentative itemized cost estimates of the proposed capital improvements, if any and itemized cost summary for anticipated bond issue requirements;

F. projected tax rate and water and wastewater rates; and

G. total tax assessments on all land within the district; and

5. other data and information as the executive director may require.

(c) Prior to commission action on the application for conversion the following requirements shall be met with evidence of such compliance filed with the chief clerk:

1. Notice of the conversion application filed with the commission shall be given by publishing notice in a newspaper with general circulation in the county or counties in which the district is located. The notice shall be published once a week for two consecutive weeks. The notice shall:

A. set out the resolution provided in subsection (b)(1) of this section in full; and

B. notify all interested persons how they may offer comments to the commission for or against the proposal contained in the resolution.

2. Notice of the hearing to be conducted by the district's board as required by TWC, §54.030(b) as amended by HB 2590, shall be given by publishing notice of the hearing in a newspaper with general circulation in the district. The notice shall be published once a week for two consecutive weeks. The notice shall:

A. set out the resolution adopted by the district in full; and

B. notify all interested persons how they may offer comments to the district's board for or against the proposal contained in the resolution.

3. The district shall file its resolution requesting conversion with the city secretary or clerk of each city, in whose corporate limits or extraterritorial jurisdiction any part of the district is located.
concurrently with submitting its application for conversion to the commission.

(d) After the hearing required by TWC, §54.030(b) as amended by HB 2590, the resolution required by TWC, §54.030(d) shall be filed with the commission and mailed to each state senator and representative who represents the area in which the district is located.

(e) A special utility district formed pursuant to the TWC, Chapter 65, which applies for conversion to a district having taxing authority that provides water, wastewater, or other public utility services, must comply with the requirements of Texas Local Government Code, §42.042.

(f) Any water improvement district, water control and improvement district, fresh water supply district, levee improvement district, irrigation district, or any other conservation and reclamation district or any special utility district created under the Texas Constitution, Article XVI, §59, may obtain additional wastewater and/or drainage powers.

(g) The application for the addition of wastewater and/or drainage powers shall be accompanied by the following:

(1) a certified copy of the resolution adopted by the board of directors requesting the commission to hold a hearing on the question of the addition of wastewater and/or drainage powers for the district;

(2) a $700 application fee;

(3) unless waived by the executive director, a preliminary plan (22 - 24 inches by 36 inches or digital data in electronic format) showing the location of existing facilities including highways, roads, and other improvements together with the location of proposed utility mains and sizing, general drainage patterns, principal drainage ditches and structures, utility plant sites, recreational areas, commercial and school sites, areas within the 100-year flood plain, and any other information pertinent to the project;

(4) unless waived by the executive director, a preliminary engineering report including:

(A) a description of existing area, conditions, topography, and proposed improvements;

(B) land use plan;

(C) 100-year flood computations or source of information;

(D) existing and projected populations;

(E) tentative itemized cost estimates of the proposed capital improvements, if any and itemized cost summary for anticipated bond issue requirements;

(F) projected tax rate and water and wastewater rates;

and

(G) total tax assessments on all land within the district;

and

(5) other data and information as the executive director may require.

(h) Prior to the hearing for the addition of wastewater and/or drainage powers, the following requirements shall be met with evidence of such compliance filed with the chief clerk at or prior to the hearing:

(1) Notice of the hearing in a form issued by the chief clerk shall be given by publishing notice in a newspaper with general circulation in the county or counties in which the district is located. The notice shall be published once a week for two consecutive weeks with the first publication to be made not less than 14 days before the time set for the hearing. The notice shall:

(A) state the time and place of the hearing;

(B) set out the resolution adopted by the district in full; and

(C) notify all interested persons to appear and offer testimony for or against the proposed contained in the resolution.

(2) The district shall file its resolution requesting additional powers with the city secretary or clerk of each city, in whose corporate limits or extraterritorial jurisdiction any part of the district is located, concurrently with submitting its application to the commission.

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

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SUBCHAPTER E. ISSUANCE OF BONDS

30 TAC §293.44

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; and TWC, §5.105, which establishes the commission's authority to set policy by rule. In addition, TWC, §5.013, gives the commission continuing supervision over districts; and TWC, §12.081, gives the commission the authority to issue rules necessary to supervise districts. Therefore, the TWC authorizes rulemaking that amends §293.44, which relates to several special considerations, including the factors for financing spreading and compacting fill, and the use of bond funds to finance certain district costs and expenses.

The adopted amendment implements the language set forth in Senate Bill 2014 from the 85th Texas Legislature, 2017, which adds language regarding levee improvement district and municipal utility district bond issuances for spreading and compacting fill to provide drainage, and revises creation and organization expenses and change orders for districts.

§293.44. Special Considerations.

(a) Developer projects. The following provisions shall apply unless the commission, in its discretion, determines that application to a particular situation renders an inequitable result.

(1) A developer project is a district project that provides water, wastewater, drainage, or recreational facility service for property owned by a developer of property in the district, as defined by Texas Water Code (TWC), §49.052(d).
(2) Except as permitted under paragraph (8) of this subsection, the costs of joint facilities that benefit the district and others should be shared on the basis of benefits received. Generally, the benefits are the design capacities in the joint facilities for each participant. Proposed cost sharing for conveyance facilities should account for both flow and inflow locations.

(3) The cost of clearing and grubbing of district facilities' easements that will also be used for other facilities that are not eligible for district expenditures, such as roads, gas lines, telephone lines, etc., should be shared equally by the district and the developer, except where unusually wide road or street rights-of-way or other unusual circumstances are present, as determined by the commission. The district's share of such costs is further subject to any required developer contribution under §293.47 of this title (relating to Thirty Percent of District Construction Costs to Be Paid by Developer). The applicability of the competitive bidding statutes and/or regulations for clearing and grubbing contracts let and awarded in the developer's name shall not apply when the amount of the estimated district share, including any required developer contribution does not exceed 50% of the total construction contract costs.

(4) A district may finance the cost of spreading and compacting of fill as follows:

(A) A district may finance the cost of spreading and compacting of fill in areas that require the fill for development purposes, such as in abandoned ditches or floodplain areas, only to the extent necessary to dispose of the spoil material (fill) generated by other projects of the district.

(B) A levee improvement district or a district with the powers of a levee improvement district may finance the cost of spreading and compacting fill to remove property from the 100-year floodplain.

(C) A municipal utility district or a district with the powers of a municipal utility district may finance the costs of spreading and compacting fill to provide drainage if the costs are less than the cost of constructing or improving drainage facilities which would have been required to achieve a similar purpose as the fill project, as determined by the district's engineer.

(5) The cost of any clearing and grubbing in areas where fill is to be placed should not be paid by the district, unless the district can demonstrate a net savings in the costs of disposal of excavated materials when compared to the estimated costs of disposal off site.

(6) When a developer changes the plan of development requiring the abandonment or relocation of existing facilities, the district may pay the cost of either the abandoned facilities or the cost of replacement facilities, but not both.

(7) When a developer changes the plan of development requiring the redesign of facilities that have been designed, but not constructed, the district may pay the cost of the original design or the cost of the redesign, but not both.

(8) A district shall not finance the pro rata share of oversized water, wastewater, or drainage facilities to serve areas outside the district unless:

(A) such oversizing:

(i) is required by or represents the minimum approvable design sizes prescribed by local governments or other regulatory agencies for such applications;

(ii) does not benefit out-of-district land owned by the developer;

(iii) does not benefit out-of-district land currently being developed by others; and

(iv) the district agrees to use its best efforts to recover such costs if a future user outside the district desires to use such capacity; or

(B) the district has entered into an agreement with the party being served by such oversized capacity that provides adequate payment to the district to pay the cost of financing, operating, and maintaining such oversized capacity; or

(C) the district has entered into an agreement with the party to be served or benefited in the future by such oversized capacity, which provides for contemporaneous payment by such future user of the incremental increase in construction and engineering costs attributable to such oversizing and which, until the costs of financing, construction, operation, and maintenance of such oversized facilities are prorated according to paragraph (2) of this subsection, provides that:

(i) the capacity or usage rights of such future user shall be restricted to the design flow or capacity of such oversized facilities multiplied by the fractional engineering and construction costs contemporaneously paid by such future user; and

(ii) such future user shall pay directly allocable operation and maintenance costs proportionate to such restricted capacity or usage rights; or

(D) the district or a developer in the district has entered into an agreement with a municipality or regional water or wastewater provider regarding the oversized facilities and such oversizing is more cost-effective than alternative facilities to serve the district only. For the purposes of this subparagraph, regional water or wastewater provider means a provider that serves land in more than one county. An applicant requesting approval under this subparagraph must provide:

(i) bid documents or an engineer's sealed estimate of probable costs of alternatives that meet minimum acceptable standards based on costs prevailing at the time the facilities were constructed; or

(ii) an engineering feasibility analysis outlining the service alternatives considered at the time the decision to participate in the oversizing was made; or

(iii) any other information requested by the executive director.

(9) Railroad, pipeline, or underground utility relocations that are needed because of road crossings should not be financed by the district; however, if such relocations result from a simultaneous district project and road crossing project, then such relocation costs should be shared equally. The district's share of such costs is further subject to any required developer contribution under §293.47 of this title.

(10) Engineering studies, such as topographic surveys, soil studies, fault studies, boundary surveys, etc., that contain information that will be used both for district purposes and for other purposes, such as roadway design, foundation design, land purchases, etc., should be shared equally by the district and the developer, unless unusual circumstances are present as determined by the commission. The district's share of such costs is further subject to any required developer contribution under §293.47 of this title.

(11) Land planning, zoning, and development planning costs should not be paid by the district, except for conceptual land-use plans required to be filed with a city as a condition for city consent to creation of the district.
(12) The cost of constructing lakes or other facilities that are part of the developer's amenities package should not typically be paid by the district; however, the costs for the portion of an amenity lake considered a recreational facility under paragraph (24) of this subsection may be funded by the district. The cost of combined lake and detention facilities should be shared with the developer on the basis of the volume attributable to each use, and land costs should be shared on the same basis, unless the district can demonstrate a net savings in the cost of securing fill and construction materials from such lake or detention facilities, when compared to the costs of securing such fill or construction materials off site for another eligible project. Pursuant to the provisions of TWC, §49.4641, as amended, a district is not required to prorate the costs of a combined lake and detention site between the primary drainage purpose and any secondary recreational facilities purpose if a licensed professional engineer certifies that the site is reasonably sized for the primary drainage purpose.

(13) Bridge and culvert crossings shall be financed in accordance with the following provisions.

(A) The costs of bridge and culvert crossings needed to accommodate the development's road system shall not be financed by a district, unless such crossing consists of one or more culverts with a combined cross-sectional area of not more than nine square feet. The district's share shall be subject to the developer's 30% contribution as may be required by §293.47 of this title.

(B) Districts may fund the costs of bridge and culvert crossings needed to accommodate the development's road system that are larger than those specified in subparagraph (A) of this paragraph, which cross channels other than natural waterways with defined bed and banks and are necessary as a result of required channel improvements subject to the following limitations:

(i) the drainage channel construction or renovation must benefit property within the district's boundaries;

(ii) the costs shall not exceed a pro rata share based on the percent of total drainage area of the channel crossed, measured at the point of crossing, calculated by taking the total cost of such bridge or culvert crossing multiplied by a fraction, the numerator of which is the total drainage area located within the district upstream of the crossing, and the denominator of which is the total drainage area upstream of the crossing; and

(iii) the district shall be responsible for not more than 50% of the pro rata share as calculated under this subsection, subject to the developer's 30% contribution as may be required by §293.47 of this title.

(C) The cost of replacement of existing bridges and culverts not constructed or installed by the developer, or the cost of new bridges and culverts across existing roads not financed or constructed by the developer, may be financed by the district, except that any costs of increasing the traffic-carrying capacity of bridges or culverts shall not be financed by the district.

(14) In evaluating district construction projects, including those described in paragraphs (1) - (12) of this subsection, primary consideration shall be given to engineering feasibility and whether the project has been designed in accordance with good engineering practices, regardless of other acceptable or less costly engineering alternatives that may exist.

(15) Bond issue proceeds will not be used to pay or reimburse consultant fees for the following:

(A) special or investigative reports for projects which, for any reason, have not been constructed and, in all probability, will not be constructed;

(B) fees for bond issue reports for bond issues consisting primarily of developer reimbursables and approved by the commission but which are no longer proposed to be issued;

(C) fees for completed projects which are not and will not be of benefit to the district; or

(D) provided, however, that the limitations shall not apply to regional projects or special or investigative reports necessary to properly evaluate the feasibility of alternative district projects.

(16) Bond funds may be used to finance costs and expenses necessarily incurred in the creation and organization of the district and the operation of the district as follows.

(A) Creation and organization expenses were incurred or projected to incur during the creation and organization period. Operational expenses were incurred or projected to incur during construction periods which include periods during which the district is constructing its facilities or there is construction by third parties of above ground improvements within the district.

(B) Creation and organization expenses are expenses incurred through the date of the canvassing of the confirmation election.

(C) Construction periods do not need to be continuous; however, once reimbursement for a specific time period has occurred, operational expenses for a prior time period are no longer eligible. Payment of operational expenses during construction periods is limited to five years in any single bond issue.

(D) Any reimbursement to a developer of operational expenses with bond funds is restricted to actual operational expenses paid by the district during the same five-year period for which application is made in accordance with this subsection.

(E) The district may pay interest on the expenses under this paragraph. Section 293.50 of this title (relating to Developer Interest Reimbursement) applies to interest payments for a developer and such payments are subject to a developer reimbursement audit.

(17) In instances where creation costs to be paid from bond proceeds are determined to be excessive, the executive director may request that the developer submit invoices and cancelled checks to determine whether such creation costs were reasonable, customary, and necessary for district creation purposes. Such creation costs shall not include planning, platting, zoning, other costs prohibited by paragraphs (10) and (14) of this subsection, and other matters not directly related to the district's water, wastewater, and drainage system, even if required for city consent.

(18) The district shall not purchase, pay for, or reimburse the cost of facilities, either completed or incomplete, from which it has not and will not receive benefit, even though such facilities may have been at one time required by a city or other entity having jurisdiction.

(19) The district shall not enter into any binding contracts with a developer that compel the district to become liable for costs above those approved by the commission.

(20) A district shall not purchase more water supply or wastewater treatment capacity than is needed to meet the foreseeable capacity demands of the district, except in circumstances where:
(A) lease payments or capital contributions are required
to be made to entities owning or constructing regional water supply or
wastewater treatment facilities to serve the district and others;

(B) such purchases or leases are necessary to meet min-
imum regulatory standards; or

(C) such purchases or leases are justified by considera-
tions of economic or engineering feasibility.

(21) The district may finance those costs, including miti-
gation, associated with flood plain regulation and wetlands regulation,
attributable to the development of water plants, wastewater treatment
plants, pump and lift stations, detention/retention facilities, drainage
channels, and levees. The district's share shall not be subject to the de-
veloper's 30% contribution as may be required by §293.47 of this title.

(22) The district may finance those costs associated with
endangered species permits. Such costs shall be shared between the
district and the developer with the district's share not to exceed 70%
of the total costs, unless unusual circumstances are present as deter-
mimed by the commission. The district's share shall not be subject to
the developer's 30% contribution under §293.47 of this title. For pur-
poses of this paragraph, "endangered species permit" means a permit or
other authorization issued under §7 or §10(a) of the federal Endangered

(23) The district may finance 100% of those costs associ-
ated with federal storm water permits. The district's share shall be sub-
ject to the developer's 30% contribution as may be required by §293.47
of this title. For purposes of this paragraph, "federal storm water per-
mits" means a permit for storm water discharges issued under the federal
Clean Water Act, including National Pollutant Discharge Elimination
System permits issued by the United States Environmental Protection
Agency and Texas Pollutant Discharge Elimination System permits is-
sued by the commission.

(24) The district may finance the portion of an amenity lake
project that is considered a recreational facility.

(A) The portion considered a recreational facility must
be accessible to all persons within the district and is determined as:

(i) the percentage of shoreline with a shoreline and private property;
or

(ii) the percentage of the perimeter of a high bank of
a combination detention facility and lake with at least thirty feet wide buffer between the high bank and private property.

(B) The district's share of costs for the portion of an
amenity lake project that is considered a recreational facility is not sub-
ject to the developer's 30% contribution under §293.47 of this title.

(C) The authority for districts to fund recreational
amenity lake costs in accordance with this paragraph does not apply retroactively to projects included in bond issues submitted to the com-
mission prior to the effective date of this paragraph.

(b) All projects.

(1) The purchase price for existing facilities not covered by
a preconstruction agreement or otherwise not constructed by a de-
veloper in contemplation of resale to the district, or if constructed by a
developer in contemplation of resale to the district and the cost of the
facilities is not available after demonstrating a good faith effort to lo-
cate the cost records should be established by an independent apprais-
als by a licensed professional engineer hired by the district. The appraised
value should reflect the cost of replacement of the facility, less repairs
and depreciation, taking into account the age and useful life of the fa-
cility and economic and functional obsolescence as evidenced by an
on-site inspection.

(2) Contract revenue bonds proposed to be issued by dis-
tricts for facilities providing water, wastewater, or drainage, under con-
tracts authorized under Texas Local Government Code, §552.014, or
other similar statutory authorization, will be approved by the commis-
ion only when the city's pro rata share of debt service on such bonds is
sufficient to pay for the cost of the water, wastewater, or drainage
facilities proposed to serve areas located outside the boundaries of the
service area of the issuing district.

(3) When a district proposes to obtain capacity in or ac-
cquire facilities for water, wastewater, drainage, or other service from
a municipality, district, or other political subdivision, or other utility
provider, and proposes to use bond proceeds to compensate the pro-
viding entity for the water, wastewater, drainage, or other services on
the basis of a capitalized unit cost, e.g., per connection, per lot, or per
acre, the commission will approve the use of bond proceeds for such
compensation under the following conditions:

(A) the unit cost is reasonable;

(B) the unit cost approximates the cost to the entity pro-
viding the necessary facilities, or the providing entity has adopted a
uniform service plan for such water, wastewater, drainage, and other
services based on engineering studies of the facilities required; and

(C) the district and the providing entity have entered
into a contract that will:

(i) specifically convey either an ownership interest
in or a specified contractual capacity or volume of flow into or from
the system of the providing entity;

(ii) provide a method to quantify the interest or con-
tractual capacity rights;

(iii) provide that the term for such interest or con-
tractual capacity right is not less than the duration of the maturity sched-
ule of the bonds; and

(iv) contain no provisions that could have the effect
of subordinating the conveyed interest or contractual capacity right to
a preferential use or right of any other entity.

(4) A district may finance those costs associated with recre-
ational facilities, as defined in §293.1(c) of this title (relating to Objec-
tive and Scope of Rules; Meaning of Certain Words) and as detailed in
§293.41(e)(2) of this title (relating to Approval of Projects and Issu-
ce of Bonds) for all affected districts that benefit and are available to
to all persons within the district. A district's financing, whether from
tax-supported or revenue debt, of costs associated with recreational fa-
cilities is subject to §293.41(e)(1) - (6) of this title and is not subject to
the developer's 30% contribution as may be required by §293.47 of
this title. The automatic exemption from the developer's 30% require-
ment provided in this paragraph supersedes any conflicting provision in
§293.47(d) of this title. In planning for and funding recreational facili-
ties, consideration is to be given to existing and proposed municipal and/or county facilities as required by TWC, §49.465, and to the re-
quirement that bonds supported by ad valorem taxes may not be used to
finance recreational facilities, as provided by TWC, §49.464(a), ex-
cept as allowed in TWC, §49.4645.

(5) The bidding requirements established in TWC, Chapter
49, Subchapter I are not applicable to contracts or services related to
a district's use of temporary erosion-control devices or cleaning of silt
and debris from streets and storm sewers.
(6) A district's contract for construction work may include economic incentives for early completion of the work or economic disincentives for late completion of the work. The incentive or disincentive must be part of the proposal prepared by each bidder before the bid opening.

(7) A district may utilize proceeds from the sale and issuance of bonds, notes, or other obligations to acquire an interest in a certificate of public convenience and necessity, contractual rights to use capacity in facilities and to acquire facilities, with costs determined in accordance with applicable law such as paragraph (3) of this subsection.

(8) If a district is approved for the issuance of bonds by the commission to use a certain return flow of wastewater, the approval applies to subsequent bond authorizations unless the district seeks approval to use a different return flow of wastewater.

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

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SUBCHAPTER G. OTHER ACTIONS REQUIRING COMMISSION CONSIDERATION FOR APPROVAL
30 TAC §293.81, §293.90

Statutory Authority
The amendment and new section are adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; and TWC, §5.105, which establishes the commission's authority to set policy by rule. In addition, TWC, §5.013, gives the commission continuing supervision over districts; and TWC, §12.081, gives the commission the authority to issue rules necessary to supervise districts. Therefore, the TWC authorizes rulemaking that amends §293.90, which relates to financial reporting requirements for districts.

The adopted amendment implements the language set forth in Senate Bill 911, 86th Texas Legislature, 2019, which in part, allows the executive director to request additional information from the district after reviewing the audit report, and allows the executive director to conduct on-site audits of districts.

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

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SUBCHAPTER L. DISSOLUTION OF DISTRICTS
30 TAC §§293.132 - 293.136

Statutory Authority
The repeal of the sections is adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; and TWC, §5.105, which establishes the commission's authority to set policy by rule. In addition, TWC, §5.013, gives the commission continuing supervision over districts; and TWC, §12.081, gives the commission the authority to issue rules necessary to supervise districts.
The adopted repeal of the sections implements TWC, §§5.102, 5.103, 5.105, 5.013, and 12.081.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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30 TAC §§293.132 - 293.137
Statutory Authority

The new sections are adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §§5.103, which establishes the commission's general authority to adopt rules; and TWC, §§5.105, which establishes the commission's authority to set policy by rule. In addition, TWC, §5.013, gives the commission continuing supervision over districts; and TWC, §12.081, gives the commission the authority to issue rules necessary to supervise districts. Therefore, the TWC authorizes rulemaking that amends §293.201 and §293.202 which relates to the cost analysis for road projects.

The adopted amendments implement the language set forth in House Bill 2590, 86th Texas Legislature, 2019, which add, in part, additional powers related to road projects which can be included in the petition for road powers.

§293.201. Acquisition of Road Powers by a Municipal Utility District.

(a) Texas Water Code (TWC), §54.234, authorizes a municipal utility district, or any petitioner seeking the creation of a municipal utility district, to petition the commission to acquire road powers.

(b) This section and §293.202 of this title (relating to Application Requirements for Commission Approval) provide the requirements for petitioning the commission for road powers.

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

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CHAPTER 305. CONSOLIDATED PERMITS
SUBCHAPTER C. APPLICATION FOR PERMIT OR POST-CLOSURE ORDER

30 TAC §305.53
The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §305.53.

The amendment to §305.53 is adopted without change to the proposed text as published in the May 15, 2020, issue of the Texas Register (45 TexReg 3239), and therefore, will not be re-published.

Background and Summary of the Factual Basis for the Adopted Rule

House Bill (HB) 1331, passed by the 86th Texas Legislature, 2019, creates new Texas Health and Safety Code (THSC), §361.0675, to require the commission to increase the application fee for a permit for a municipal solid waste facility from $100 to $2,000. The commission determined that the $2,000 application fee will only apply to applications for a permit, or major permit amendment as provided in §305.62(j)(1), for a municipal solid waste landfill. All other application fees will remain unchanged. Under §305.53(b), the application fee must also include an additional fee of $50 to be applied toward the cost of providing required notice. This will result in a total application fee of $2,050.

In corresponding rulemaking published in this issue of the Texas Register, the commission also adopts the revision to 30 TAC Chapter 330, Municipal Solid Waste.
The commission adopts various stylistic, non-substantive changes, such as grammatical corrections and updating cross-references. These changes are generally not specifically discussed in this preamble.

§305.53, Application Fee

The commission adopts the amendment to §305.53(a)(7) to increase the application fee for a permit, or major permit amendment as provided in §305.62(j)(1), for a municipal solid waste landfill to $2,000. The subsequent paragraph was renumbered.

Final Regulatory Impact Determination

The commission reviewed the adopted rule to determine whether a regulatory analysis is required by Texas Government Code, §2001.0225, and determined that the adopted rule is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute. "Major environmental rule" is defined under Texas Government Code, §2001.0225(g)(3) as "a rule the specific intent of which is to protect the environment or reduce risks to human health from the environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state."

The adopted rule does not meet the two prongs of the major environmental rule standard. First, the rule only changes the required fee for a solid waste permit but does not change any technical or substantive regulatory requirements. Therefore, it does not satisfy the first prong related to intent.

Second, changing the amount of the fee already required by current rules will not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, or jobs nor adversely affect in a material way the environment or the public health and safety of the state or a sector of the state. Therefore, the rule also fails the second prong of the major environmental rule standard.

Additionally, the adopted rule does not meet any of the applicability criteria in Texas Government Code, §2001.0225(a)(1-4). The adopted rule will not exceed a standard set by federal or state law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor adopt a rule solely under the general powers of the agency. The adopted rule implements and is adopted under the authority of new state laws and will not exceed any requirements of our delegated authority.

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

Takeings Impact Assessment

The commission evaluated the adopted rule and performed an analysis of whether the adopted rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of this adopted rule is to implement HB 1331, requiring the commission to increase the application fee for a municipal solid waste landfill permit or major permit amendment to $2,000. The adopted rule will substantially advance this stated purpose by amending §305.53(a)(7) to increase the application fee for a permit, or major permit amendment as provided in §305.62(j)(1), for a municipal solid waste landfill to $2,000.

Promulgation and enforcement of this adopted rule will be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted regulation increasing application fees does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, the adopted rule will not affect real property in a manner that is different than real property would have been affected without the adopted rule.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found that it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) and (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule 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. The commission received no comments regarding consistency with the CMP.

Public Comment

The comment period closed on June 16, 2020. The commission received no comments on Chapter 305.

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also adopted under Texas Health and Safety Code (THSC), Texas Solid Waste Disposal Act (TSWDA), §361.017 and §361.024, which provide the commission with the authority to adopt rules necessary to carry out its power and duties under the TSWDA; THSC, §361.011, which establishes the commission’s jurisdiction over all aspects of the management of municipal solid waste; THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; and THSC, §361.0675, which requires the commission to increase the application fee for a permit or major permit amendment for a municipal solid waste landfill to $2,000.

The adopted amendment implements THSC, §361.0675.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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CHAPTER 330. MUNICIPAL SOLID WASTE


Background and Summary of the Factual Basis for the Adopted Rules

House Bill (HB) 1331, passed by the 86th Texas Legislature, 2019, creates new Texas Health and Safety Code (THSC), §361.0675, to require the commission to increase the application fee for a permit for a municipal solid waste (MSW) facility from $100 to $2,000. The commission determined that the $2,000 application fee will only apply to applications for a permit, or major permit amendment as provided in 30 Tex Administrative Code (TAC) §305.62(j)(1), for an MSW landfill. All other application fees will remain unchanged. Under §305.53(b), the application fee must also include an additional fee of $50 to be applied toward the cost of providing required notice. This will result in a total application fee of $2,050.

HB 1435, passed by the 86th Texas Legislature, 2019, amends THSC, §361.088, to require the commission to confirm information included in an application for a permit for an MSW facility by performing a site assessment before the agency issues the authorization. HB 1435 also requires the commission to specify the information that will be confirmed during the site assessment. The commission determined that the site assessments will only apply to applications for a permit, or major permit amendment as provided in §305.62(j)(1), for an MSW landfill. In addition, the information that will be confirmed during site assessments will be signed by the executive director and will be made available to the public.

HB 1953, passed by the 86th Texas Legislature, 2019, creates new THSC, §361.041, and amends THSC, §§361.003, 361.119, and 361.421, to require the commission to exempt facilities that reuse or convert recyclable materials, including post-use polymers and recoverable feedstocks, in a pyrolysis or gasification process, from regulation as an MSW facility.

On October 9, 2019, as a result of the Quadrennial Rules Review, the commission determined that the rules in Chapter 330, Subchapter F, are obsolete because the requirements of Subchapter F expired on January 1, 2019 (2019-066-330-WS).

In corresponding rulemaking published in this issue of the Texas Register, the commission also adopts the revision to 30 TAC Chapter 305, Consolidated Permits.

Section by Section Discussion

The commission adopts various stylistic, non-substantive changes, such as, grammatical corrections and updating cross-references. These changes are generally not specifically discussed in this preamble.

SUBCHAPTER A: GENERAL INFORMATION

§330.3, Definitions

The commission adopts the amendment and addition of definitions to exempt pyrolysis and gasification of post-use polymers from regulation under Chapter 330.

The commission adopts the amendment to §330.3(58) to add the definition of "Gasification" to reflect its exclusion from the definition of "processing" by HB 1953.

The commission adopts the amendment to §330.3(59) to add the definition of "Gasification facility" to reflect its exclusion from the definition of "solid waste facility" by HB 1953. The subsequent paragraphs are renumbered.

The commission adopts the amendment to §330.3(117) to add the definition of "Post-use polymers" to reflect its exclusion from the definition of "solid waste" by HB 1953. The subsequent paragraphs are renumbered.

The commission adopts the amendment to §330.3(120) to specify that pyrolysis facilities and gasification facilities are excluded from the definition of "Processing."

The commission adopts the amendment to §330.3(123) to add the definition of "Pyrolysis" to reflect its exclusion from the definition of "processing" by HB 1953.

The commission adopts the amendment to §330.3(124) to add the definition of "Pyrolysis facility" to reflect its exclusion from the definition of "solid waste facility" by HB 1953. The subsequent paragraphs are renumbered.

The commission adopts the amendment to §330.3(127) to add the definition of "Recoverable feedstock" to reflect its exclusion from the definition of "solid waste" by HB 1953. The subsequent paragraphs are renumbered.

The commission adopts the amendment to §330.3(128) to include post-use polymers and recoverable feedstocks that are converted through pyrolysis or gasification into valuable raw, intermediate, and final products as a "Recoverable material."

The commission adopts the amendment to §330.3(151)(D) to exclude pyrolysis facilities and gasification facilities.

§330.13, Waste Management Activities Exempt from Permitting, Registration, or Notification

The commission adopts the amendment to §330.13(g) to add an exempt activity for beneficial conversion of plastics and recoverable materials using pyrolysis and gasification processes.

SUBCHAPTER B: PERMIT AND REGISTRATION APPLICATION PROCEDURES

§330.59, Contents of Part I of the Application

The commission adopts the amendment to §330.59(h)(1) to increase the application fee for a permit, or major permit amendment as provided in §305.62(j)(1), for an MSW landfill to $2,050. The subsequent paragraphs are renumbered.

The commission adopts the amendment to §330.59(h)(2) to indicate that the application fee for a permit,
registration, amendment, modification, or temporary authorization not subject to §330.59(h)(1) will be $150.

§330.73, Additional Standard Permit and Registration Conditions for Municipal Solid Waste Facilities

The commission adopts the amendment to §330.73(c), to require that before an application for a permit, or major permit amendment as provided in §305.62(j)(1) for an MSW landfill, will be issued, the executive director shall perform a site assessment of the facility, as prescribed by the executive director, to confirm information included in the application. The subsequent subsections are re-lettered.

SUBCHAPTER F: ANALYTICAL QUALITY ASSURANCE AND QUALITY CONTROL


Final Regulatory Impact Determination

The commission reviewed the adopted rules to determine whether a regulatory analysis is required by Texas Government Code, §2001.0225, and determined that the adopted rules are not subject to Texas Government Code, §2001.0225, because they do not meet the definition of a "Major environmental rule" as defined in that statute. "Major environmental rule" is defined under Texas Government Code, §2001.0225(g)(3) as "a rule the specific intent of which is to protect the environment or reduce risks to human health from the environmental exposure and that may adversely affect in a material way 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 the adopted rules satisfies the first prong of the definition. The rules implement the agency's requirement to confirm application information by performing a site assessment and exempt the beneficial conversion of plastics and recoverable materials using pyrolysis and gasification processes, both of which further the intent to protect the environment or reduce risks to human health from environmental exposure.

However, the adopted rules do not meet the second prong of the definition of "Major environmental rule" by adversely affecting, in a material way, the economy, a sector of the economy, productivity, competition, or jobs because the adopted rules do not require more from an applicant than is required by current rules. Additionally, the adopted rules are not anticipated to adversely affect in a material way the environment or the public health and safety of the state or a sector of the state because the adopted rules specify new administrative requirements and an exemption from the regulatory process for a recycling activity.

In addition, the adopted rules do not meet any of the applicability criteria in Texas Government Code, §2001.0225(a)(1-4). The adopted rules do not exceed a standard set by federal or state law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor adopt a rule solely under the general powers of the agency. The adopted rules implement and are adopted under the authority of new state laws and do not exceed any requirements of our delegated authority.

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

Takings Impact Assessment

The commission evaluated these adopted rules and performed analysis of whether these adopted rules would constitute a taking under Texas Government Code, Chapter 2001. The specific purpose of these adopted rules is to implement HB 1331, which creates new THSC, §361.0675 to require the commission to increase the application fee for a permit or major permit amendment for an MSW landfill to $2,000; HB 1435 amends THSC, §361.088 to require the commission to confirm information included in an application for a permit or major permit amendment for an MSW landfill by performing a site assessment of the facility before the agency issues the authorization; and HB 1953 creates new THSC, §361.041, and amends THSC, §§361.003, 361.119, and 361.421 to exempt from regulations the beneficial conversion of plastics and recoverable materials using pyrolysis and gasification processes. The adopted rules will also repeal Chapter 330, Subchapter F which expired on January 1, 2009, and is, therefore, obsolete and no longer needed. The adopted rules will substantially advance this stated purpose by increasing the application fee for a permit or major permit amendment for an MSW landfill to $2,000; requiring the executive director to confirm information included in an MSW facility application by requiring a site assessment of the proposed facility before a permit or major amendment may be issued; exempting the beneficial conversion of plastics and recoverable materials using pyrolysis and gasification processes from regulation under Chapter 330; and repealing Chapter 330, Subchapter F.

Promulgation and enforcement of these adopted rules will be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted regulations will not affect a landowner’s rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner’s right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, the adopted rules will not affect real property in a manner that is different than real property would have been affected without the adopted rules.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that it is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 et seq., and therefore must be consistent with all applicable CMP goals and policies. 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.

The CMP goals applicable to the adopted rules include to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; and to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone.
CMP policies applicable to the adopted rules include the construction and operation of solid waste treatment, storage, and disposal facilities. These rules ensure that new and existing solid waste facilities continue to be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and ensure compliance with federal Solid Waste Disposal Act standards, 42 United States Code, §§6901, et seq.

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, do not create or have a direct or significant adverse effect on any CNRAs, and will update and enhance the commission's rules concerning MSW facilities.

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

Public Comment
The comment period closed on June 16, 2020. The commission received comments from Dow Inc. (DOW) and the Texas Chemical Council (TCC). The comments received were in support of the rules and did not include any suggested changes.

Response to Comments
Comment
DOW and TCC commented that they support TCEQ's rulemaking to implement HB 1953.

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

SUBCHAPTER A. GENERAL INFORMATION

30 TAC §330.3, §330.13

Statutory Authority
The amendments are adopted under Texas Water Code (TWC), §5.102 which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission.

The amendments are also adopted under Texas Health and Safety Code (THSC), Texas Solid Waste Disposal Act (TSWDA), §361.017 and §361.024, which provide the commission with the authority to adopt rules necessary to carry out its power and duties under the TSWDA; THSC, §361.011, which establishes the commission's jurisdiction over all aspects of the management of MSW; THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; and THSC, §361.041, which allows the commission to exempt from regulations the beneficial conversion of plastics and recoverable materials using pyrolysis and gasification processes.

The adopted amendments implement THSC, §§361.003, 361.041, 361.119, and 361.421.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER B. PERMIT AND REGISTRATION APPLICATION PROCEDURES

30 TAC §330.59, §330.73

Statutory Authority
The amendments are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105 (concerning General Policy), which authorizes the commission by rule to establish and approve all general policy of the commission.

The amendments are also adopted under Texas Health and Safety Code (THSC), Texas Solid Waste Disposal Act (TSWDA), §361.017 and §361.024, which provide the commission with the authority to adopt rules necessary to carry out its power and duties under the TSWDA; THSC, §361.011, which establishes the commission's jurisdiction over all aspects of the management of MSW; THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; THSC, §361.0675, which requires the commission to increase the application fee for a permit or major permit amendment for an MSW landfill to $2,000; and THSC, §361.088, which requires the commission to confirm information included in an application for a permit or major permit amendment for an MSW landfill by performing a site assessment of the facility before the agency issues the authorization.

The adopted amendments implement THSC, §361.0675 and §361.088.

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

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Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER F. ANALYTICAL QUALITY ASSURANCE AND QUALITY CONTROL
The repeals are adopted under Texas Water Code (TWC), §§5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §§5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §§5.105 which authorize the commission by rule to establish and approve all general policy of the commission. The amendments are also adopted under Texas Health and Safety Code (THSC), Texas Solid Waste Disposal Act (TSWDA) §§361.017 and §§361.024, which provide the commission with the authority to adopt rules necessary to carry out its power and duties under the TSWDA; THSC, §361.011, which establishes the commission’s jurisdiction over all aspects of the management of MSW; and THSC, §§361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste.

The adopted repeals implement THSC, §§361.002, 361.011, and 361.024.

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

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Robert Martinez
Director, Environmental Law Division
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TITLE 34. PUBLIC FINANCE
PART 1. COMPTROLLER OF PUBLIC ACCOUNTS
CHAPTER 9. PROPERTY TAX ADMINISTRATION
SUBCHAPTER I. VALUATION PROCEDURES
34 TAC §9.4011

The Comptroller of Public Accounts adopts amendments to §9.4011, concerning appraisal of timberlands, without changes to the proposed text as published in the September 4, 2020, issue of the Texas Register (45 TexReg 6218). The rule will not be republished. These amendments are to reflect updates and revisions to the manual for the appraisal of timberland. The amended manual may be viewed at https://comptroller.texas.gov/taxes/property-tax/rules/index.php.

The comptroller amends the Manual for the Appraisal of Timberland, adopted by reference, to update and revise the manual for the appraisal of timberland that has been in effect since May 2004. The manual sets forth the methods to apply and the procedures to use in qualifying and appraising land used for timber production under Tax Code, Chapter 23, Subchapters E and H. The updates and revisions to the manual generally reflect statutory changes; changes dictated by case law; changes to examples to reference more current prices, expenses and values; changes to organization names and information available from different sources; and the addition of footnotes for citations to Tax Code sections and case law referenced. The amendments also provide that appraisal districts are required by law to use this manual in qualifying and appraising timberland. Pursuant to Tax Code, §23.73(b), these rules have been approved by the Comptroller with the review and counsel of the Texas A&M Forest Service.

The comptroller did not receive any comments regarding adoption of the amendment.

The comptroller adopts these amendments under Tax Code, §§5.05 (Appraisal Manuals and Other Materials), 23.73 (Appraisal of Timber Land), and 23.9803 (Appraisal of Restricted-use Timber Land), which provide the comptroller with the authority to prepare and issue publications relating to the appraisal of property and to promulgate rules specifying methods to apply and the procedures to use in appraising qualified timberland and restricted-use timberland for ad valorem tax purposes.

These amendments implement Tax Code §23.73 (Appraisal of Timber Land) and §23.9803 (Appraisal of Restricted-use Timber Land).

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

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TRD-202004163
Victoria North
General Counsel for Fiscal and Agency Affairs
Comptroller of Public Accounts
Effective date: October 27, 2020
Proposal publication date: September 4, 2020
For further information, please call: (512) 475-2220

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
PART 20. TEXAS WORKFORCE COMMISSION
CHAPTER 800. GENERAL ADMINISTRATION

The Texas Workforce Commission (TWC) adopts the following new section in Chapter 800, relating to General Administration, without changes to the text as published in the July 24, 2020, issue of the Texas Register (45 TexReg 5139):

Subchapter A. General Provisions, §800.10

TWC adopts amendments to the following section of Chapter 800, relating to General Administration, without changes to the text as published in the July 24, 2020, issue of the Texas Register (45 TexReg 5139):

Subchapter A. General Provisions, §800.3
TWC adopts the following new subchapters to Chapter 800, relating to General Administration, without changes to the text as published in the July 24, 2020, issue of the Texas Register (45 TexReg 5139):

Subchapter H. Vendor Protests, §§800.300 and §800.301
Subchapter I. Enhanced Contract Monitoring, §§800.350 - 800.352

The rules will not be republihed.

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted Chapter 800 rule amendments is to align TWC rules with the following sections of the Texas Government Code requiring state agencies to adopt rules regarding contracting and purchasing:

--Section 2252.202 requires agencies to adopt rules to promote compliance with the requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

--Section 2155.076 requires agencies to establish, by rule, procedures for resolving vendor protests relating to purchasing issues; and

--Section 2261.253 requires agencies to establish, by rule, a procedure to identify each contract that requires enhanced contract performance monitoring.

Additionally, minor nonsubstantive revisions are required to correct the Texas Comptroller of Public Accounts (Comptroller) rule citation and to remove the obsolete Comptroller division reference related to the Historically Underutilized Business (HUB) program.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. GENERAL PROVISIONS

TWC adopts the following amendments to Subchapter A:

§800.3. Historically Underutilized Businesses

Section 800.3 is amended to correct the Comptroller rule citation related to the HUB program and to remove the obsolete Comptroller division reference.

§800.10. Purchase of Certain Products

New §800.10 is added to comply with Texas Government Code, Chapter 2252, Subchapter G, §2252.202, requiring that governmental entities adopt rules to promote compliance with the uniform general conditions for a project in which iron or steel products will be used must require that the bid documents provided to all bidders and the contract include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States.

The rule language states that TWC complies with the statutory requirements of Texas Government Code, Chapter 2252, Subchapter G.

SUBCHAPTER H. VENDOR PROTESTS

TWC adopts new Subchapter H:

According to Texas Government Code, §2155.076, each state agency, by rule, "shall develop and adopt protest procedures for resolving vendor protests relating to purchasing issues. An agency's rules must be consistent with the [Comptroller's] rules." TWC has procedures in place, and staff has ensured that its procedures are consistent with the Comptroller's rules in 34 Texas Administrative Code §1.72. However, pursuant to Texas Government Code, §2155.076, these procedures must be in rule.

New Subchapter H language reflects TWC's current procedures regarding bid protest procedures.

New §800.300 provides the following definitions related to vendor protests:

--Interested Parties--Respondents in connection with the solicitation, evaluation, or award that is being protested.

--Protestant--A respondent vendor that submits a protest under TWC vendor protest procedures.

--Respondent--A vendor that submits an offer or proposal in response to a TWC solicitation.

--Solicitation--A document, such as an Invitation for Bids, Request for Offers, Request for Proposals, or Request for Qualifications that contains a request for responses from vendors to provide specified goods and services. The term also refers to the process of obtaining responses from vendors to provide specified goods and services.

--Vendor--A potential provider of goods or services to TWC.

New §800.301 describes the vendor protest procedures. The procedures state that any bid respondent who is allegedly aggrieved in connection with the solicitation, evaluation, or award of a contract by TWC may formally protest, in writing, to the TWC's director of business operations.

The protest must be received by the TWC's director of business operations within 10 working days after the protestant knows, or should have known, of the occurrence of the action that is protested.

The rules state that a protest that is not filed timely shall not be considered unless the director of business operations determines that a protest raises issues that are significant to the TWC's procurement practices or procedures.

The protest must be signed by an authorized representative for the protestant, and the signature notarized and contain the following details:

--the identifying name and number of the solicitation being protested

--identification of the specific statute or regulation that the protestant alleges has been violated

--a specific description of each act or omission alleged to have violated the statutory or regulatory provision identified in §800.301(c)(2)

--a precise statement of the relevant facts, including:

--sufficient documentation to establish that the protest has been timely filed; and

--a description of the resulting adverse impact to the protestant

--a statement of the argument and authorities that the protestant offers in support of the protest.
--an explanation of the action the protestant is requesting from TWC
--a statement confirming that copies of the protest have been mailed or delivered to any other interested party known to the protestant.

The protestant may appeal determination of a protest to TWC’s deputy executive director. The appeal must be in writing, addressed to TWC’s deputy executive director, and the protest must be received by the deputy executive director no later than 10 business days after the date of receipt of the written determination issued by the director of business operations.

Finally, in order to protect the best interests of TWC or the state, the rules provide that TWC may move forward with a solicitation or contract award without delay, in spite of a timely filed protest.

SUBCHAPTER I. ENHANCED CONTRACT MONITORING

TWC adopts new Subchapter I:

Texas Government Code, §2261.253(c) requires state agencies to establish, by rule, a procedure to identify contracts, prior to award, that require enhanced contract or performance monitoring and submit the information to the agency's governing body. In its Procurement and Contract Management Guide, the Comptroller has indicated that this requirement applies to “high-dollar and high-risk contracts.” TWC has a procedure implementing the requirement; however, pursuant to Texas Government Code, §2261.253(c), these procedures must be in rule. New Subchapter I language reflects the current TWC procedures regarding enhanced contract monitoring.

New §800.350 describes the purpose and scope of the subchapter. The purpose of Subchapter I is to implement the requirements of Texas Government Code, §2261.253(c) requiring state agencies to establish, by rule, a procedure to identify each contract that requires enhanced contract or performance monitoring. Pursuant to Texas Government Code, §2261.253(d), Subchapter I does not apply to:

--memoranda of understanding;
--interagency contracts;
--interlocal agreements; or
--contracts for which there is not a cost.

New §800.351 describes the enhanced contract monitoring policy and procedures. The rules state that:

TWC shall identify contracts requiring enhanced monitoring by evaluating the risk factors, which include:
--the complexity of the goods and services to be provided;
--the contract amount;
--the length and scope of the project supported by the contract;
--whether the services are new or have changed significantly since the last procurement of the same services;
--whether TWC has experience with the contractor;
--whether the project affects external stakeholders or is of particular interest to third parties;
--whether TWC data is accessed by the contractor; and

--any other factors TWC determines in a particular circumstance will create a level of risk to the state or TWC such that enhanced monitoring is required.

The rule states that for contracts requiring enhanced monitoring, the contractor shall report to the assigned TWC contract manager on progress toward goals or performance measure achievements, and the status of deliverables, if any, and on issues of which the contractor is aware that may create an impediment to meeting the project timeline or goals.

Enhanced monitoring may also include site visits, additional meetings with contractor staff, and inspection of documentation required by TWC to assess progress toward achieving performance requirements.

Projects deemed medium or high risk shall be monitored by the assigned contract manager and may involve additional team members such as an assigned project manager and staff from the Office of General Counsel or the Finance, Information Technology, or Regulatory Integrity Divisions, if warranted.

Texas Government Code, §2261.253 requires TWC to submit information on each contract identified for enhanced contract monitoring to TWC’s three-member Commission (Commission). New §800.352 describes the reporting requirements for enhanced contract monitoring as follows:

--The director of Procurement and Contract Services (PCS Director) shall immediately notify the Commission of any serious issue or risk that is identified with respect to a contract identified for enhanced contract monitoring.
--The contract manager shall report on the status of all contracts subject to enhanced monitoring to the PCS director quarterly.
--If any serious issues or risks are identified about a contract subject to enhanced monitoring, the PCS director will immediately notify the director of business operations and the executive director.

No comments were received.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §800.3, §800.10

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

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

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SUBCHAPTER H. VENDOR PROTESTS

40 TAC §800.300, §800.301

The new rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

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SUBCHAPTER I. ENHANCED CONTRACT MONITORING

40 TAC §§800.350 - 800.352

The new rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

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CHAPTER 813. SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM EMPLOYMENT AND TRAINING

The Texas Workforce Commission (TWC) adopts amendments to the following sections of Chapter 813, relating to Supplemental Nutrition Assistance Program Employment and Training (SNAP E&T), without changes to the text as published in the July 24, 2020, issue of the Texas Register (45 TexReg 5144):

Subchapter B. Access to Employment and Training Activities and Support Services, §813.11 and §813.14
Subchapter D. Allowable Activities, §813.33, §813.34

TWC adopts amendments to the following section of Chapter 813, relating to Supplemental Nutrition Assistance Program Employment and Training (SNAP E&T), with changes to the text as published in the July 24, 2020, issue of the Texas Register (45 TexReg 5144):

Subchapter B. Access to Employment and Training Activities and Support Services, §813.13
Subchapter D. Allowable Activities, §813.31, §813.32

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the Chapter 813 rule change is to comply with the Agriculture Improvement Act of 2018 and other federal requirements.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER B. ACCESS TO EMPLOYMENT AND TRAINING ACTIVITIES AND SUPPORT SERVICES

TWC adopts the following amendments to Subchapter B:

§813.11. Board Responsibilities Regarding Access to SNAP E&T Activities and Support Services
Section 813.11 is amended to add clarification regarding Local Workforce Development Board (Board) responsibilities in monitoring SNAP E&T participation.

§813.13. Good Cause for Mandatory Work Registrants Who Participate in SNAP E&T Services
Section 813.13 is amended to add clarification regarding actions that Boards must take when a mandatory work registrant fails to respond to an outreach notification or fails to participate in SNAP E&T activities.

At adoption, §813.13(a) is amended to remove the proposed sentence, "A Board shall notify HHSC of a SNAP E&T participant's noncompliance within seven days of the noncompliance."
The sentence is removed from §813.13(a) and the reference to the timeline for reporting noncompliance to HHSC is added to the associated guidance document.

Section 813.14 is amended to revise the 120-hour monthly participation limitation to comply with 7 USC §2015(d)(4)(F)(ii).

SUBCHAPTER D. ALLOWABLE ACTIVITIES

TWC adopted the following amendments to Subchapter D:

§813.31. Activities for Mandatory Work Registrants and Exempt Recipients Who Voluntarily Participate in SNAP E&T Services
Section 813.31 is amended to update the activities that may be provided for SNAP E&T mandatory work registrants and exempt recipients who voluntarily participate in SNAP E&T services to comply with the requirements of the Agriculture Improvement Act of 2018.

§813.32. SNAP E&T Activities for ABAWDs

ADOPTED RULES  October 23, 2020  45 TexReg 7611
Section 813.32 is amended to add, as an allowable SNAP E&T activity, employment and training programs for veterans operated by the US Department of Labor or the US Department of Veterans Affairs.

§813.33. Job Retention Activities

Section 813.33 is amended to update Board requirements regarding the provision of job retention activities to comply with the requirements of the Agriculture Improvement Act of 2018 and offers flexibility to Boards regarding the job retention period.

§813.34. Job Retention Support Services

Section 813.34 is amended to update Board requirements regarding the provision of job retention support services to comply with the requirements of the Agriculture Improvement Act of 2018 and offers flexibility to Boards regarding the job retention period.

No comments were received.

SUBCHAPTER B. ACCESS TO EMPLOYMENT ACTIVITIES AND SUPPORT SERVICES

40 TAC §§813.11, 813.13, 813.14

The rule is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rule affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.


(a) Good cause applies only to mandatory work registrants who are required to participate in SNAP E&T services. A Board shall ensure that all good cause claims are forwarded to HHSC for determination before SNAP benefits are denied when mandatory work registrants state that they have a reason for failing to:

(1) respond to the outreach notification; and

(2) participate in SNAP E&T activities.

(b) For purposes of this chapter, the following are reasons a Board may consider when making a good cause recommendation to HHSC after a SNAP E&T participant fails to respond to outreach notifications or fails to participate in SNAP E&T activities:

(1) temporary illness or incapacitation;

(2) court appearance;

(3) caring for a physically or mentally disabled household member who requires the recipient's presence in the home;

(4) no available transportation and the distance prohibits walking; or no available job within reasonable commuting distance, as defined by the Board;

(5) distance from the mandatory work registrant who participates in SNAP E&T services, to the Workforce Solutions Office, or employment service provider requires commuting time of more than two hours a day (not including taking a child to and from a child care facility), the distance prohibits walking, and there is no available transportation;

(6) farmworkers who are away from their permanent residence or home base, who travel to work in an agriculture or related industry during part of the year, and are under contract or similar agreement with an employer to begin work within 30 days of the date that the individual notified the Board of his or her seasonal farmwork assignment;

(7) an inability to obtain needed child care, as defined by the Board and based on any of the following reasons:

(A) informal child care by a relative or child care provided under other arrangements is unavailable or unsuitable, and based on, where applicable, Board policy regarding child care. Informal child care may also be determined unsuitable by the parent;

(B) eligible formal child care providers, as defined in Chapter 809 of this title (relating to Child Care Services), are unavailable;

(C) affordable formal child care arrangements within maximum rates established by the Board are unavailable; or

(D) formal or informal child care within a reasonable distance from home or the work site is unavailable;

(8) an absence of other support services necessary for participation;

(9) receiving a job referral that results in an offer below the federal minimum wage, except when a lower wage is permissible under federal minimum wage law;

(10) an individual or family crisis or a family circumstance that may preclude participation, including substance abuse and mental health and disability-related issues, provided that the mandatory work registrant who participates in SNAP E&T services engages in problem resolution through appropriate referrals for counseling and support services; or

(11) a individual is a victim of family violence.

(c) A Board shall ensure that good cause is monitored at least on a monthly basis and results are shared with HHSC if there is a change in the circumstances surrounding the good cause exception.

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

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SUBCHAPTER D. ALLOWABLE ACTIVITIES

40 TAC §§813.31 - 813.34

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.
§813.31. Activities for Mandatory Work Registrants and Exempt Recipients Who Voluntarily Participate in SNAP E&T Services.

The following activities may be provided for SNAP E&T mandatory work registrants and exempt recipients who voluntarily participate in SNAP E&T services, subject to the limitations specified in §813.32 of this subchapter:

(1) Supervised job search services that shall:

(A) incorporate job readiness, job search training, directed job search, and group job search, and may include the following:

(i) Employability assessment;
(ii) Counseling;
(iii) Information on available jobs;
(iv) Occupational exploration, including information on local emerging and demand occupations;
(v) Interviewing skills and practice interviews;
(vi) Assistance with applications and résumés;
(vii) Job fairs;
(viii) Life skills; and
(ix) Guidance and motivation for development of positive work behaviors necessary for the labor market; and

(B) limit the number of weeks a mandatory work registrant or exempt recipient who voluntarily participates in SNAP E&T services can spend as follows:

(i) ABAWDs shall not be enrolled for more than four weeks, and the job search activity shall be provided in conjunction with the workfare activity, as described in §813.32(a)(4)(D) of this subchapter.

(ii) General Population mandatory work registrants and exempt recipients who voluntarily participate in SNAP E&T services shall not be enrolled:

(I) for more than four weeks of consecutive activity under this paragraph; or

(II) for more than six weeks of total activity in a federal fiscal year.

(iii) Job search, when offered as part of other SNAP E&T activities, is allowed for more time than the limitations set forth in clauses (i) and (ii) of this subparagraph if the job search activities comprise less than half of the required time spent in other activities.

(2) Vocational training that shall:

(A) relate to the types of jobs available in the labor market;

(B) be consistent with employment goals identified in the employment plan, when possible; and

(C) be provided only if there is an expectation that employment will be secured upon completion of the training.

(3) Nonvocational education that shall increase employability, such as:

(A) enrollment and satisfactory attendance in:

(i) a secondary school; or

(ii) a course of study leading to a high school diploma or a certificate of general equivalence;

(B) basic skills and literacy;

(C) English proficiency; or

(D) postsecondary education, leading to a degree or certificate awarded by a training facility, career school or college, or other educational institution that prepares individuals for employment in current and emerging occupations that do not require baccalaureate or advanced degrees;

(4) Work experience, as authorized by 7 USC §2015(d)(4)(B)(iv) and by 20 CFR §663.200(b), for mandatory work registrants who need assistance in becoming accustomed to basic work skills that shall:

(A) occur in the workplace for a limited period of time;

(B) be made in either the private for-profit, the nonprofit, or the public sectors; and

(C) be paid or unpaid;

(5) Unsubsidized employment

(6) Other activities approved in the current SNAP E&T state plan of operations

§813.32. SNAP E&T Activities for ABAWDs.

(a) Boards shall ensure that SNAP E&T activities for ABAWDs are limited to participating in the following:

(1) Services or activities under the Trade Act of 1974, as amended by the Trade Act of 2002

(2) Other activities under Workforce Innovation and Opportunity Act (29 USC §3111 et seq.)

(3) Education and training, which may include:

(A) vocational training as described in §813.31(2) of this subchapter; or

(B) nonvocational education as described in §813.31(3) of this subchapter; and

(4) Workfare activities that shall:

(A) be designed to improve the employability of ABAWDs through actual employment experience or training, or both;

(B) be unpaid job assignments based in the public or private nonprofit sectors;

(C) have hourly requirements based on the ABAWD's monthly household SNAP allotment divided by the number of ABAWDs in the SNAP household, as provided by HHSC and then divided by the federal minimum wage; and

(D) include a four-week job search period before placement in a workfare activity.

(b) Boards shall ensure that ABAWDs who are referred to a Workforce Solutions Office and subsequently become engaged in unsubsidized employment for at least 20 hours per week are not required to continue participation in SNAP E&T services because they have fulfilled their work requirement, as described in 7 USC §2015(o)(2)(A). Additionally, Boards shall ensure that HHSC is notified when ABAWDs obtain employment.

(c) An employment and training program for veterans operated by the US Department of Labor or the US Department of Veterans Affairs, as tracked by HHSC, is an allowable SNAP E&T activity for ABAWDs.
The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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