

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to

submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

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

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

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

The Public Utility Commission of Texas (commission) proposes amendments to §§24.3 (relating to Definitions of Terms), 24.8 (relating to Administrative Completeness), 24.14 (relating to Emergency Orders), 24.21 (relating to Form and Filing of Tariffs), 24.23 (relating to Time Between Filings), 24.31 (relating to Cost of Service), 24.32 (relating to Rate Design), 24.34 (relating to Alternative Rate Methods), 24.41 (relating to Appeal of Rate-making Pursuant to the Texas Water Code, §13.043), 24.44 (relating to Seeking Review of Rates for Sales of Water Under the Texas Water Code, §11.041 and §12.013), 24.72 (relating to Financial Records and Reports--Uniform System of Accounts), 24.73 (relating to Water and Sewer Utilities Annual Reports), 24.102 (relating to Criteria for Considering and Granting Certificates or Amendments), 24.109 (relating to Report of Sale, Merger, Etc.; Investigation; Disallowance of Transaction), 24.111 (relating to Purchase of Voting Stock in Another Utility), 24.114 (relating to Requirement to Provide Continuous and Adequate Service), 24.131 (relating to Commission's Review of Petition or Appeal), and 24.150 (relating to Jurisdiction of Municipality: Surrender of Jurisdiction).

The commission proposes the repeal of §§24.11 (relating to Informal Proceedings), 24.22 (relating to Notice of Intent to Change Rates), 24.25 (relating to Rate Change Applications, Testimony and Exhibits), 24.26 (relating to Suspension of Rates), 24.27 (relating to Request for a Review of a Rate Change by Ratepayers Pursuant to the Texas Water Code §13.187(b)), and 24.28 (relating to Action on Notice of Rate Change Pursuant to Texas Water Code, §13.187(b)).

The commission proposes new §§24.11 (relating to Financial Assurance), 24.22 (relating to Notice of Intent and Application to Change Rates Pursuant to Texas Water Code §13.187 or §13.1871), 24.26 (relating to Suspension of the Effective Date of Rates), 24.28 (relating to Processing and Hearing Requirements for an Application Filed Pursuant to Texas Water Code §13.187 and §13.1871), 24.33 (relating to Rate-case Expenses Pursuant to Texas Water Code §13.187 and §13.1871), and 24.36 (relating to Application for a Rate Adjustment by a Class C Utility Pursuant to Texas Water Code §13.1872).

The proposed amendments, repeals, and new sections will implement and conform the commission's substantive rules to

House Bill 1600 (HB 1600) of the 83rd Legislature, Regular Session, enacted in 2013, which amended the ratemaking and reporting requirements for certain water utilities. In addition to conforming the commission's substantive rules to House Bill 1600, the proposed amendments and new sections will revise the procedures by which a utility can demonstrate financial assurance to the commission. Additional amendments, repeals, and new sections have resulted in the reorganization and/or restructuring of several rule sections to promote clarity. Finally, additional amendments and new sections revise other limited aspects of ratemaking at the commission including the removal of authorization for standby fees; instructions related to identifying a tariff change; clarification of the applicability of a rule section related to time between filings; modification to the allowable recovery on cost of service established via trending studies; clarification of the applicability of a negative acquisition adjustment; description of availability of intangible asset in rate base; removal of single issue rate change as an alternative rate method; clarification of commission authority in the appeal of ratemaking decisions; extension of the deadline by which a utility is required to file an annual report; and modification of the manner in which the commission provides notice of cities that have surrendered jurisdiction to the commission.

Project Number 43871 is assigned to this proceeding.

Debi Loockerman, Regulatory Accountant, Rate Regulation Division, has determined that for each year of the first five-year period the proposed sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mrs. Loockerman has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing the sections will be compliance with HB 1600 and the adoption of streamlined requirements for the provision of financial assurance.

Mrs. Loockerman has determined there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing these sections. All or nearly all utilities affected by the proposed amendments and new sections are small or micro-businesses. The largest group of utilities affected by the proposed amendments and new sections--Class C utilities--will benefit from the proposed new streamlined ratemaking mechanisms. In addition, although the proposed amendments and new sections, as well as any forms that the commission may adopt in accordance with the proposed amendments and new sections, may increase the complexity of filing certain applications to change rates, this increase of complexity comports with amendments to the Texas Water Code pursuant to HB 1600. It is not expected that these filings will be more costly to prepare for a utility that maintains records according to generally accepted accounting principles and guidelines published by the National

Association of Regulatory Utility Commissioners. Further, the effect of the proposed amendments and new sections will be revenue-neutral, as recovery of reasonable costs of preparing applications to change rates may be requested as part of a utility's total recoverable costs. Therefore, there is no anticipated adverse economic effect to utilities that are required to comply with the sections as proposed, and no regulatory flexibility analysis is required.

Mrs. Loockerman has also determined that for each year of the first five years the proposed sections are in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rule-making, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on May 5, 2015. The request for a public hearing must be received within 21 days after publication.

Comments on the proposed amendments, repeals, and new sections may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 21 days after publication. Sixteen copies of comments to the proposed amendments, repeals, and new sections are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 35 days after publication. Comments should be organized in a manner consistent with the organization of the proposed sections. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendments, repeals, and new sections. The commission will consider the costs and benefits in considering the adoption or repeal of the identified sections. All comments should refer to Project Number 43871.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §§24.3, 24.8, 24.11, 24.14

The amendments and new section are proposed under Texas Water Code Annotated §13.041(b) (West 2008 and Supp. 2014) (TWC), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, TWC §§13.246(c), 13.253, and 13.302(c), which permit the commission to require the provision of financial assurance; TWC §13.136(b), which requires the commission to require by rule the filing of an annual service, financial, and normalized earnings report; and HB 1600 §2.96(k), which requires the commission to adopt rules to implement changes in law made by HB 1600 to TWC Chapter 13 not later than September 1, 2015.

Cross Reference to Statutes: TWC §§13.041, 13.136, 13.253, and 13.302 and HB 1600.

§24.3. Definitions of Terms.

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

(1) - (5) (No change.)

(6) Allocations--For all retail public utilities, the division of plant, revenues, expenses, taxes, and reserves between municipalities, or between municipalities and unincorporated areas, where such items are used for providing water or sewer utility service in a munic-

ipality or for a municipality and unincorporated areas. A non-municipal allocation is the division of plant, revenues, expenses, taxes and reserves between affiliates, jurisdictions, rate regions, business units, functions, or customer classes defined within a retail public utility's operations for all retail public utilities and affiliates.

(7) Base rate--The portion of a consumer's utility bill which is paid for the opportunity of receiving utility service[~~excluding stand-by fees~~], which does not vary due to changes in utility service consumption patterns.

(8) - (9) (No change.)

(10) Certificate of Convenience and Necessity (CCN)--A permit issued by the commission which authorizes and obligates a retail public utility to furnish, make available, render, or extend continuous and adequate retail water or sewer utility service to a specified geographic area.

(11) (No change.)

(12) Class A Utility--A public utility that provides retail water or sewer utility service to 10,000 or more taps or active connections. If a public utility provides both water and sewer utility service, the number of active water connections determines how the utility is classified.

(13) Class B Utility--A public utility that provides retail water or sewer utility service to 500 or more taps or active connections but fewer than 10,000 taps or active connections. If a public utility provides both water and sewer utility service, the number of active water connections determines how the utility is classified.

(14) Class C Utility--A public utility that provides retail water or sewer utility service to fewer than 500 taps or active connections. A Class C utility filing an application pursuant to TWC §13.1871 shall be subject to all requirements applicable to Class B utilities filing an application pursuant to TWC §13.1871. If a public utility provides both water and sewer utility service, the number of active water connections determines how the utility is classified.

~~(12) Class of service or customer class--A description of utility service provided to a customer which denotes such characteristics as nature of use or type of rate.]~~

(15) ~~[(13)] Code--The Texas Water Code (TWC). [Any reference to TWC §13.187 is to be construed to reference the substantive requirements of TWC §13.187 as the TWC existed on August 31, 2013, until such time as the commission adopts rules to implement the changes in law made by this Act to TWC Chapter 13 and §12.013, not later than September 1, 2015.]~~

(16) ~~[(14)] Commission--The Public Utility Commission of Texas or a presiding officer, as applicable.~~

(17) ~~[(15)] Corporation--Any corporation, joint-stock company, or association, domestic or foreign, and its lessees, assignees, trustees, receivers, or other successors in interest, having any of the powers and privileges of corporations not possessed by individuals or partnerships, but shall not include municipal corporations unless expressly provided otherwise in the TWC.~~

(18) ~~[(16)] Customer--Any person, firm, partnership, corporation, municipality, cooperative, organization, or governmental agency provided with services by any retail public utility.~~

(19) Customer class--A description of utility service provided to a customer which denotes such characteristics as nature of use or type of rate. For rate-setting purposes, a group of customers with similar cost-of-service characteristics that take basic utility service under a single set of rates.

(20) [(17)] Customer service line or pipe--The pipe connecting the water meter to the customer's point of consumption or the pipe which conveys sewage from the customer's premises to the service provider's service line.

(21) [(18)] Facilities--All the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility.

(22) Financial assurance--The owner's or operator's demonstration that sufficient or adequate financial resources exist to operate and manage the utility and to provide continuous and adequate service to the current and proposed utility service area.

(23) [(19)] Incident of tenancy--Water or sewer service, provided to tenants of rental property, for which no separate or additional service fee is charged other than the rental payment.

(24) [(20)] Landowner--An owner or owners of a tract of land including multiple owners of a single deeded tract of land as shown on the appraisal roll of the appraisal district established for each county in which the property is located.

(25) [(21)] License--The whole or part of any commission permit, certificate, registration, or similar form of permission required by law.

(26) [(22)] Licensing--The commission process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license, certificates of convenience and necessity, or any other authorization granted by the commission in accordance with its authority under the TWC.

(27) [(23)] Main--A pipe operated by a utility service provider that is used for transmission or distribution of water or to collect or transport sewage.

(28) [(24)] Mandatory water use reduction--The temporary reduction in the use of water imposed by court order, government agency, or other authority with appropriate jurisdiction. This does not include water conservation measures that seek to reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling or reuse of water so that a water supply is made available for future or alternative uses.

(29) [(25)] Member--A person who holds a membership in a water supply or sewer service corporation and who is a record owner of a fee simple title to property in an area served by a water supply or sewer service corporation, or a person who is granted a membership and who either currently receives or will be eligible to receive water or sewer utility service from the corporation. In determining member control of a water supply or sewer service corporation, a person is entitled to only one vote regardless of the number of memberships the person owns.

(30) [(26)] Membership fee--A fee assessed each water supply or sewer service corporation service applicant that entitles the applicant to one connection to the water or sewer main of the corporation. The amount of the fee is generally defined in the corporation's bylaws and payment of the fee provides for issuance of one membership certificate in the name of the applicant, for which certain rights, privileges, and obligations are allowed under said bylaws. For purposes of TWC[,] §13.043(g), a membership fee is a fee not exceeding approximately 12 times the monthly base rate for water or sewer service or an amount that does not include any materials, labor, or services required for or provided by the installation of a metering

device for the delivery of service, capital recovery, extension fees, buy-in fees, impact fees, or contributions in aid of construction.

(31) [(27)] Municipality--A city, existing, created, or organized under the general, home rule, or special laws of this state.

(32) [(28)] Municipally owned utility--Any retail public utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.

(33) [(29)] Nonfunctioning system or utility--A system that is operating as a retail public utility that is required to have a CCN and is operating without a CCN or a retail public utility under the supervision of a receiver, temporary manager, or that has been referred for the appointment of a temporary manager or receiver, pursuant to §24.142 of this title (relating to Operation of Utility That Discontinues Operation or Is Referred for Appointment of a Receiver) and §24.143 of this title (relating to Operation of a Utility by a Temporary Manager).

(34) [(30)] Person--Any natural person, partnership, cooperative corporation, association, or public or private organization of any character other than an agency or municipality.

[(31) Physician--Any public health official, including, but not limited to, medical doctors, doctors of osteopathy, nurse practitioners, registered nurses, and any other similar public health official.]

(35) [(32)] Point of use or point of ultimate use--The primary location where water is used or sewage is generated; for example, a residence or commercial or industrial facility.

(36) [(33)] Potable water--Water that is used for or intended to be used for human consumption or household use.

(37) [(34)] Premises--A tract of land or real estate including buildings and other appurtenances thereon.

(38) [(35)] Public utility--The definition of public utility is that definition given to water and sewer utility in this subchapter.

(39) [(36)] Purchased sewage treatment--Sewage treatment purchased from a source outside the retail public utility's system to meet system requirements.

(40) [(37)] Purchased water--Raw or treated water purchased from a source outside the retail public utility's system to meet system demand requirements.

(41) [(38)] Rate--Includes every compensation, tariff, charge, fare, toll, rental, and classification or any of them demanded, observed, charged, or collected, whether directly or indirectly, by any retail public utility, or water or sewer service supplier, for any service, product, or commodity described in TWC[,] §13.002(23), and any rules, regulations, practices, or contracts affecting any such compensation, tariff, charge, fare, toll, rental, or classification.

(42) [(39)] Ratepayer--Each person receiving a separate bill shall be considered as a ratepayer, but no person shall be considered as being more than one ratepayer notwithstanding the number of bills received. A complaint or a petition for review of a rate change shall be considered properly signed if signed by any person, or spouse of any such person, in whose name utility service is carried.

(43) [(40)] Reconnect fee--A fee charged for restoration of service where service has previously been provided. It may be charged to restore service after disconnection for reasons listed in §24.88 of this title (relating to Discontinuance of Service) or to restore service after disconnection at the customer's request.

(44) [(41)] Retail public utility--Any person, corporation, public utility, water supply or sewer service corporation, municipality,

political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.

(45) [(42)] Retail water or sewer utility service--Potable water service or sewer service, or both, provided by a retail public utility to the ultimate consumer for compensation.

(46) [(43)] Safe drinking water revolving fund--The fund established by the Texas Water Development Board to provide financial assistance in accordance with the federal program established under the provisions of the Safe Drinking Water Act and as defined in TWC[5] §15.602.

(47) [(44)] Service--Any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under the TWC to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.

(48) [(45)] Service line or pipe--A pipe connecting the utility service provider's main and the water meter or for sewage, connecting the main and the point at which the customer's service line is connected, generally at the customer's property line.

(49) [(46)] Sewage--Ground garbage, human and animal, and all other waterborne type waste normally disposed of through the sanitary drainage system.

[(47) Standby fee--A charge imposed on unimproved property for the availability of water or sewer service when service is not being provided.]

(50) [(48)] Tap fee--A tap fee is the charge to new customers for initiation of service where no service previously existed. A tap fee for water service may include the cost of physically tapping the water main and installing meters, meter boxes, fittings, and other materials and labor. A tap fee for sewer service may include the cost of physically tapping the main and installing the utility's service line to the customer's property line, fittings, and other material and labor. Water or sewer taps may include setting up the new customer's account, and allowances for equipment and tools used. Extraordinary expenses such as road bores and street crossings and grinder pumps may be added if noted on the utility's approved tariff. Other charges, such as extension fees, buy-in fees, impact fees, or contributions in aid of construction (CIAC) are not to be included in a tap fee.

(51) [(49)] Tariff--The schedule of a retail public utility containing all rates, tolls, and charges stated separately by type or kind of service and the customer class, and the rules and regulations of the retail public utility stated separately by type or kind of service and the customer class.

(52) [(50)] TCEQ--Texas Commission on Environmental Quality.

(53) [(51)] Temporary water rate provision for mandatory water use reduction--A provision in a utility's tariff that allows a utility to adjust its rates in response to mandatory water use reduction.

(54) Temporary rate for services provided for a nonfunctioning system--A temporary rate for a retail public utility that takes over the provision of services for a nonfunctioning retail public water or sewer utility service provider.

(55) [(52)] Test year--The most recent 12-month period, beginning on the first day of a calendar or fiscal year quarter, for which [representative] operating data for a retail public utility are available.

[A utility rate filing must be based on a test year that ended less than 12 months before the date on which the utility made the rate filing.]

(56) [(53)] Utility--The definition of utility is that definition given to water and sewer utility in this subchapter.

(57) [(54)] Water and sewer utility--Any person, corporation, cooperative corporation, affected county, or any combination of those persons or entities, other than a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for the production, transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public, other than equipment or facilities owned and operated for either purpose by a municipality or other political subdivision of this state or a water supply or sewer service corporation, but does not include any person or corporation not otherwise a public utility that furnishes the services or commodity only to itself or its employees or tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by others.

(58) [(55)] Water use restrictions--Restrictions implemented to reduce the amount of water that may be consumed by customers of the system due to emergency conditions or drought.

(59) [(56)] Water supply or sewer service corporation--Any nonprofit corporation organized and operating under TWC[5] Chapter 67, that provides potable water or sewer service for compensation and that has adopted and is operating in accordance with bylaws or articles of incorporation which ensure that it is member-owned and member-controlled. The term does not include a corporation that provides retail water or sewer service to a person who is not a member, except that the corporation may provide retail water or sewer service to a person who is not a member if the person only builds on or develops property to sell to another and the service is provided on an interim basis before the property is sold. For purposes of this chapter, to qualify as member-owned, member-controlled a water supply or sewer service corporation must also meet the following conditions.

(A) All members of the corporation meet the definition of "member" under this section, and all members are eligible to vote in those matters specified in the articles and bylaws of the corporation. Payment of a membership fee in addition to other conditions of service may be required provided that all members have paid or are required to pay the membership fee effective at the time service is requested.

(B) Each member is entitled to only one vote regardless of the number of memberships owned by that member.

(C) A majority of the directors and officers of the corporation must be members of the corporation.

(D) The corporation's bylaws include language indicating that the factors specified in subparagraphs (A) - (C) of this paragraph are in effect.

(60) [(57)] Wholesale water or sewer service--Potable water or sewer service, or both, provided to a person, political subdivision, or municipality who is not the ultimate consumer of the service.

§24.8. Administrative Completeness.

(a) An application to change rates, including a minor rate change, applications for [Notice of rate/tariff change; report of] sale, acquisition, lease, rental, merger, or consolidation, assignment of facilities or certificates; requests for purchase of voting stock or change in controlling interest of a utility; applications for cessation of

operations by a retail public utility[; and sale, assignment of, or lease of a certificate;] and applications for certificates of convenience and necessity shall be reviewed for administrative completeness within 30 calendar days of receipt of the application. If notice is required, upon determination that the notice or application is administratively complete, the applicant shall be notified of that determination. [A notice or an application for rate/tariff change; report of sale, acquisition, lease, rental, merger, or consolidation; and applications for certificates of convenience and necessity are not considered filed until received by the commission, accompanied by the filing fee, if any, required by statute or commission rules, and a determination of administrative completeness is made. Upon determination that the notice or application is administratively complete, the applicant shall be notified by mail of that determination. If the commission determines that material deficiencies exist in any pleadings, statement of intent, applications, or other requests for commission action addressed by this chapter, the notice or application may be rejected and the effective date suspended until the deficiencies are corrected.]

(b) If the commission determines that deficiencies exist in any pleadings, statement of intent, applications, or other requests for commission action addressed by this chapter, the application or filing may be rejected and the effective date suspended, as applicable, until the deficiencies are corrected.

{(b) In cases involving proposed rate changes, the effective date of the proposed change must be at least 60 days after:}

{(1) the date that an application and notice are received by the commission, provided the application and notice are determined to be administratively complete as filed;}

{(2) the date that the application and notice are determined to be administratively complete for previously rejected applications and notices; or}

{(3) the date that the notice is delivered to each ratepayer, whichever is later.}

(c) (No change.)

(d) A report of sale, acquisition, lease, rental, merger, or consolidation; requests for purchase of voting stock or change in controlling interest of a utility; applications for cessation of operations by a retail public utility; and applications for certificates of convenience and necessity are not considered filed until the commission makes a determination of administrative completeness.

§24.11. Financial Assurance.

(a) Purpose. This section establishes criteria to demonstrate that an owner or operator of a public utility has the financial resources to operate and manage the utility and to provide continuous and adequate service to the current or proposed utility service area.

(b) Application. The section applies to a new or existing owner or operator of a retail public utility that is required to provide financial assurance pursuant to this chapter.

(c) Financial Assurance shall be achieved by compliance with either subsection (d) or (e) of this section.

(d) Irrevocable stand-by letter of credit. Irrevocable stand-by letters of credit must be issued by a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation. The retail public utility must use the standard form irrevocable stand-by letter of credit approved by the commission. The irrevocable stand-by letter of credit must be irrevocable for a period not less than five years, payable to the commission, and permit a

draw to be made in part or in full. The irrevocable stand-by letter of credit must permit the commission's executive director or the designee to draw by the commission's executive director or the commission's designee on the irrevocable stand-by letter of credit if the retail public utility has failed to provide continuous and adequate service or the retail public utility cannot demonstrate its ability to provide continuous and adequate service without sufficient financial assurance for the current and/or proposed retail public utility's service area.

(c) Financial test.

(1) An owner or operator may satisfy the requirements of financial assurance by satisfying a financial test including the leverage and operations test which conforms to the requirements of this section.

(2) Leverage test. To satisfy this test, the owner or operator must meet the criteria of one of the following:

(A) The owner or operator must have a debt to equity ratio of less than one, using long term debt and equity or net assets;

(B) The owner or operator must have a debt service coverage ratio of more than 1.25 using annual net operating income before depreciation and non-cash expenses divided by annual combined long term debt payments;

(C) The owner or operator must have sufficient unrestricted cash available as a cushion for two years of debt service. Restricted cash includes monetary resources that are committed as a debt service reserve which will not be used for operations, maintenance or other payables;

(D) The owner or operator must have an investment-grade credit rating from Standard & Poor's Financial Services LLC, Moody's Investors Service, or Fitch Ratings Inc.; or

(E) The owner or operator must demonstrate that an affiliated interest is capable, available, and willing to cover temporary cash shortages. The affiliated interest must be found to satisfy the requirements of subparagraphs (A), (B), (C), or (D) of this paragraph.

(3) Operations test. The owner or operator must demonstrate sufficient cash is available to cover any projected operations and maintenance shortages in the first five years of operations. An affiliated interest may provide a written guarantee of coverage of temporary cash shortages. The affiliated interest of the owner or operator must satisfy the leverage test.

(4) To demonstrate that the requirements of the test are being met, the owner or operator shall submit the following items to the commission:

(A) An affidavit signed by the owner or operator attesting to the accuracy of the information provided. The owner or operator may use the affidavit included with an application filed pursuant to §24.105 of this title (relating to Contents of Certificate of Convenience and Necessity Applications) pursuant to the commission's form for the purpose of meeting the requirements of this subparagraph; and

(B) A copy of one of the following:

(i) the owner or operator's independently audited year-end financial statements for the most recent fiscal year including the "unqualified opinion" of the auditor; or

(ii) compilation of year-end financial statements for the most recent fiscal year as prepared by a certified public accountant (CPA); or

(iii) internally produced financial statements meeting the following requirements:

(I) for an existing utility, three years of projections and two years of historical data including a balance sheet, income statement and an expense statement or evidence that the utility is moving toward proper accountability and transparency; or

(II) for a proposed or new utility, start up information and five years of pro forma projections including a balance sheet, income statement and expense statement or evidence that the utility will be moving toward proper accountability and transparency during the first five years of operations. All assumptions must be clearly defined and the utility shall provide all documents supporting projected lot sales or customer growth.

(C) In lieu of meeting the leverage test and operations tests, if the applicant utility is a city or district, the city or district may substantiate financial capability with a letter from the city's or district's financial advisor indicating that the city or district is able to issue debt (bonds) in an amount sufficient to cover capital requirements to provide continuous and adequate service and providing the document in subparagraph (B)(i) of this paragraph.

(5) If the applicant is proposing service to a new CCN area or a substantial addition to its current CCN area requiring capital improvements in excess of \$100,000, the applicant must provide the following:

(A) The owner must submit loan approval documents indicating funds are available for the purchase of an existing system plus any improvements necessary to provide continuous and adequate service to the existing customers if the application is a sale, transfer, or merger; or

(B) The owner must submit loan approval documents or firm capital commitments affirming funds are available to install plant and equipment necessary to serve projected customers in the first two years of projections or a new water system or substantial addition to a currently operating water system if the application includes added CCN area with the intention of serving a new area or subdivision.

(6) If the applicant is a nonfunctioning utility, as defined in §24.3(33) of this title (relating to Definitions of Terms), the commission may consider other information to determine if the proposed certificate holder has the capability of meeting the leverage test.

§24.14. *Emergency Orders.*

(a) (No change.)

(b) The commission may also issue orders under Chapter 22, Subchapter P of this title (relating to Emergency Orders for Water and Sewer Utilities):

(1) to appoint a temporary manager under TWC[;] §5.507 and §13.4132; and/or

(2) to approve an emergency rate increase under TWC[;] §5.508 and §13.4133 in certain circumstances:[-]

(A) for which a temporary manager has been appointed under TWC §13.4132; or

(B) for which a receiver has been appointed under TWC §13.412; and

(C) if the increase is necessary to ensure the provision of continuous and adequate services to the utility's customers.

(c) (No change.)

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

Filed with the Office of the Secretary of State on March 6, 2015.

TRD-201500769

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Earliest possible date of adoption: April 19, 2015

For further information, please call: (512) 936-7223



16 TAC §24.11

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Public Utility Commission of Texas or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed under Texas Water Code Annotated §13.041(b) (West 2008 and Supp. 2014) (TWC), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, TWC §§13.246(c), 13.253, and 13.302(c), which permit the commission to require the provision of financial assurance; TWC §13.136(b), which requires the commission to require by rule the filing of an annual service, financial, and normalized earnings report; and HB 1600 §2.96(k), which requires the commission to adopt rules to implement changes in law made by HB 1600 to TWC Chapter 13 not later than September 1, 2015.

Cross Reference to Statutes: TWC §§13.041, 13.136, 13.253, and 13.302 and HB 1600.

§24.11. *Informal Proceedings.*

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

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SUBCHAPTER B. RATES, RATE-MAKING, AND RATES/TARIFF CHANGES

16 TAC §§24.21 - 24.23, 24.26, 24.28, 24.31 - 24.34, 24.36

These amendments and new rules are proposed under Texas Water Code Annotated §13.041(b) (West 2008 and Supp. 2014) (TWC), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, TWC §§13.246(c), 13.253, and 13.302(c), which permit the commission to require the provision of financial assurance; TWC §13.136(b), which requires the commission to require by rule the filing of an annual service, financial, and normalized earnings report; and HB 1600 §2.96(k), which requires the commission to adopt rules to implement changes in law made by HB 1600 to TWC Chapter 13 not later than September 1, 2015.

Cross Reference to Statutes: TWC §§13.041, 13.136, 13.253, and 13.302 and HB 1600.

§24.21. *Form and Filing of Tariffs.*

(a) Approved tariff. A utility may not directly or indirectly demand, charge, or collect any rate or charge, or impose any classifications, practices, rules, or regulations different from those prescribed in its approved tariff filed with the commission or with the municipality exercising original jurisdiction over the utility, except as noted in this subsection. A utility may charge the rates proposed under TWC §13.187 or §13.1871[; §13.187(a) (relating to Statement of Intent to Change Rates)] after the proposed effective date, unless the proposed effective date of the rates is [are] suspended or the commission [or a judge] sets interim rates. The regulatory assessment required in TWC[;] §5.235(n) does not have to be listed on the utility's approved tariff to be charged and collected but must be included in the tariff at the earliest opportunity. A person who possesses facilities used to provide water utility service or a utility that holds a certificate of public convenience and necessity to provide water service that enters into an agreement in accordance with TWC[;] §13.250(b)(2), may collect charges for wastewater services on behalf of another retail public utility on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement. A utility may enter into a contract with a county to collect solid waste disposal fees and include those fees on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement.

(b) Requirements as to size, form, identification, minor changes, and filing of tariffs.

(1) Tariffs filed with applications for certificates of convenience and necessity.

(A) (No change.)

(B) Every water supply or sewer service corporation shall file with the commission a complete [the number of copies of its] tariff containing schedules of all its rates, tolls, charges, rules, and regulations pertaining to all of its utility service when it applies for a certificate of convenience and necessity to operate as a retail public utility.

(2) Minor tariff changes. Except for an affected county, a public utility's approved tariff may not be changed or amended without commission approval. An affected county may change rates for water or wastewater service without commission approval but shall file a copy of the revised tariff with the commission within 30 days after the effective date of the rate change.

(A) The commission may approve the following minor changes to tariffs:

(i) - (v) (No change.)

(vi) addition of a provision allowing a utility to collect wastewater charges in accordance with TWC[;] §13.250(b)(2) or §13.147(d);

(vii) - (ix) (No change.)

(B) (No change.)

(3) Tariff revisions and tariffs filed with rate changes.

(A) The utility shall file its revision with the commission. Each revision must be accompanied by a cover page that contains a list of pages being revised, a statement describing each change, its effect if it is a change in an existing rate, and a statement as to impact on rates of the change by customer class, if any. If a proposed tariff re-

vision constitutes an increase in existing rates of a particular customer class or classes, then the commission may require that notice be given.

(B) Symbols for changes. Each proposed tariff sheet accompanying an application filed pursuant to TWC §13.187 or §13.1871 shall contain notations in the right-hand margin indicating each change made on the sheets. Notations to be used are: (C) to denote a change in regulations; (D) to denote discontinued rates or regulations; (E) to denote the correction of an error made during a revision (the revision which resulted in the error must be one connected to some material contained in the tariff prior to the revision); (I) to denote a rate increase; (N) to denote a new rate or regulation; (R) to denote a rate reduction; and (T) to denote a change in text, but no change in rate or regulation. In addition to symbols for changes, each changed provision in the tariff shall contain a vertical line in the right-hand margin of the page, which clearly shows the exact number of lines being changed.

(4) - (5) (No change.)

(c) - (h) (No change.)

(i) Effective date. The effective date of a tariff change is the date of approval by the commission [unless otherwise stated in the letter transmitting the approval or the date of approval by the commission], unless otherwise specified in a commission order or rule. The effective date of a proposed rate increase under TWC[;] §13.187 or §13.1871 is the proposed date on the notice to customers and the commission, unless suspended by the commission [and must comply with the requirements of §24.8(b) of this title (relating to Administrative Completeness)].

(j) Tariffs filed by water supply or sewer service corporations. Every water supply or sewer service corporation shall file, for informational purposes only, three complete copies [one copy] of its tariff showing all rates that are subject to the appellate jurisdiction of the commission and that are in force for any utility service, product, or commodity offered. The tariff must include all rules and regulations relating to or affecting the rates, utility service or extension of service or product, or commodity furnished and shall specify the certificate of convenience and necessity number and in which counties or cities it is effective.

(k) (No change.)

(l) Temporary water rate provision for mandatory water use reduction.

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

(3) A utility may request a temporary water rate provision using the formula in this paragraph to recover 50% or less of the revenues that would otherwise have been lost due to mandatory water use reductions through a limited rate proceeding. The formula for a temporary water rate provision under this paragraph is:
Figure: 16 TAC §24.21(l)(3) (No change.)

(A) The utility shall file a temporary water rate application [prescribed by the commission] and provide customer notice as required by the commission [in the application], but is not required to provide complete financial data to support its existing rates. Notice must include a statement of when the temporary water rate provision would be implemented, the customer class(es) [classes of customers] affected, the rates affected, information on how to protest the rate change, [the required number of protests to ensure a hearing;] the address of the commission, the time frame for protests, and any other information that is required by the commission in the temporary water rate application. The utility's existing rates are not subject to review in the proceeding and the utility is only required to support the need

for the temporary rate. A request for a temporary water rate provision under this paragraph is not considered a statement of intent to increase rates subject to the 12-month limitation in §24.23 of this title (relating to Time Between [~~between~~] Filings).

(B) (No change.)

(4) A utility may request a temporary water rate provision using the formula in paragraph (3) of this subsection or any other method acceptable to the commission to recover up to 100% of the revenues that would otherwise have been lost due to mandatory water use reductions.

(A) If the utility requests authorization to recover more than 50% of lost revenues, it shall submit financial data to support its existing rates as well as the temporary water rate provision even if no other rates are proposed to be changed. [~~The utility shall complete a rate application and provide notice in accordance with the requirements of §24.22 of this title (relating to Notice of Intent to Change Rates).~~] The utility's existing rates are subject to review in addition to the temporary water rate provision.

(B) (No change.)

(5) (No change.)

(6) The utility may readjust its rates using the temporary water rate provision as necessary to respond to modifications or changes to the original order requiring mandatory water use reductions by reissuing notice as required by paragraph (7) of this subsection. [~~The commission's review of the proposed implementation of an approved temporary water rate provision is an informal proceeding.~~] Only the commission or the utility may request a hearing on the proposed implementation.

(7) A utility that wishes to place a temporary water rate into effect shall take the following actions prior to the beginning of the billing period in which the temporary water rate takes effect:

(A) (No change.)

(B) e-mail, if the customer has agreed to receive communications electronically, or mail notice to the utility's customers. Notice may be in the form of a billing insert and must contain the effective date of the implementation and the new rate the customers will pay after the temporary water rate is implemented. The notice must include the following language: "This rate change is being implemented in accordance with the temporary water rate provision approved by the Public Utility Commission of Texas to recognize the loss of revenues due to mandatory water use reduction ordered by (name of entity issuing order). The new rates will be effective on (date) and will remain in effect until the mandatory water use reductions are lifted or expired. The purpose of the rate is to ensure the financial integrity of the utility. The utility will recover through the rate (the percentage authorized by the temporary rate) % of the revenues the utility would otherwise have lost due to mandatory water use reduction by increasing the volume charge from (\$ per 1,000 gallons to \$ per 1,000 gallons)."

(8) - (9) (No change.)

(m) (No change.)

(n) Regional rates. The commission, where practicable, shall consolidate the rates by region for applications submitted under TWC §13.187 or §13.1871 with a consolidated tariff and rate design for more than one system.

(o) (No change.)

(p) Energy cost adjustment clause.

(1) A utility that purchases energy (electricity or natural gas) that is necessary for the provision of water or sewer service may request the inclusion of an energy cost adjustment clause in its tariff to allow the utility to adjust its rates to reflect increases and decreases in documented energy costs.

(2) A utility that requests the inclusion of an energy cost adjustment clause in its tariff shall file an application with the commission. The utility shall also give notice of the proposed energy cost adjustment clause by mail, either separately or accompanying customer billings, e-mail or by hand delivery to all affected utility customers at least 60 days prior to the proposed effective date. Proof of notice in the form of an affidavit stating that proper notice was delivered [~~mailed~~] to affected customers and stating the dates of such delivery [~~mailing~~] shall be filed with the commission by the applicant utility as part of the application. Notice must be provided on the notice form included in the commission's application package and must contain the following information:

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

(3) - (4) (No change.)

(5) Before a utility implements a change in its energy cost adjustment clause as required by paragraph (4) of this subsection, the utility shall take the following actions prior to the beginning of the billing period in which the implementation takes effect:

(A) (No change.)

(B) e-mail, if the customer has agreed to receive communications electronically, mail either separately or accompanying customer billings, or hand deliver notice to the utility's affected customers. Notice must contain the effective date of change and the increase or decrease in charges to the utility for documented energy costs. The notice must include the following language: "This tariff change is being implemented in accordance with the utility's approved energy cost adjustment clause to recognize (increases) (decreases) in the documented energy costs. The cost of these charges to customers will not exceed the (increase) (decrease) in documented energy costs."

(6) - (7) (No change.)

(8) A proceeding under this subsection is not a rate case pursuant to TWC §13.187, §13.1871, or §13.1872 [~~; and TWC, does not apply~~].

§24.22. Notice of Intent and Application to Change Rates Pursuant to Texas Water Code §13.187 or §13.1871.

(a) Purpose. This section describes the requirements for the contents of an application to change rates and the requirements for the provision of notice pursuant to TWC §13.187 or §13.1871.

(b) Contents of the application. An application to change rates pursuant to TWC §13.187 or §13.1871 is initiated by the filing of a rate filing package, a statement of intent to change rates, and the proposed form and method of notice to customers and other affected entities pursuant to subsection (c) of this section.

(1) The application shall include the commission's rate filing package form and include all required schedules.

(2) The application shall be based on a test year as defined in §24.3(55) of this title (Definitions of Terms).

(3) For an application filed pursuant to TWC §13.187, the rate filing package, including each schedule, shall be supported by pre-filed direct testimony. The pre-filed direct testimony shall be filed at the same time as the application to change rates.

(4) For an application filed pursuant to TWC §13.1871, the rate filing package, including each schedule, shall be supported by affidavit. The affidavit shall be filed at the same time as the application to change rates. The utility may file pre-filed direct testimony at the same time as the application to change rates. If the application is set for a hearing, the presiding officer may require the filing of pre-filed direct testimony at a later date.

(5) Proof of notice. Proof of notice in the form of an affidavit stating that proper notice was mailed, e-mailed, or delivered to customers and affected municipalities and stating the date(s) of such delivery, shall be filed with the commission by the applicant utility as part of the rate change application.

(c) Notice requirements specific to applications filed pursuant to TWC §13.187.

(1) Notice of the application. In order to change rates pursuant to TWC §13.187, a utility must comply with the following requirements at least 35 days before the effective date of the proposed change.

(A) The utility must file a statement of intent (notice) with the commission and provide a copy of the notice to all customers of the utility affected by the proposed rate change, to the appropriate offices of each affected municipality affected by the proposed rate change, and to the Office of Public Utility Counsel.

(B) Notice shall be provided using the commission-approved form included in the rate application and shall include a description of the process by which a ratepayer may intervene in the proceeding.

(C) This notice shall state the docket number assigned to the rate application. Prior to the provision of notice, the utility shall file a request for the assignment of a docket number for the rate application.

(D) Notices to affected ratepayers may be mailed separately, e-mailed if the customer has agreed to receive communications electronically, or may accompany customer billings.

(2) Notice of the hearing. After the rate application is set for a hearing, the commission shall give reasonable notice of the hearing, including notice to the governing body of each affected municipality and county. The commission may require the utility to complete this notice requirement.

(d) Notice requirements specific to applications filed pursuant to TWC §13.1871.

(1) Notice of the application. In order to change rates pursuant to TWC §13.1871, a utility must comply with the following requirements at least 35 days before the effective date of the proposed change.

(A) The utility must file a notice with the commission and provide a copy of the notice to all customers of the utility affected by the proposed rate change and to the appropriate offices of each affected municipality affected by the proposed rate change.

(B) Notice shall be provided using the commission-approved form included in the rate application and shall include a description of the process by which a ratepayer may file a complaint pursuant to TWC §13.1871(i).

(C) For utilities serving more than 1,000 active taps or connections, this notice shall state the docket number assigned to the rate application. Prior to providing notice, the utility shall file a request for the assignment of a docket number for the rate application.

(D) Notices to affected ratepayers may be mailed separately, e-mailed if the customer has agreed to receive communications electronically, or may accompany customer billings.

(2) Notice of the hearing. After the rate application is set for a hearing, the following notice requirements shall apply.

(A) The commission shall give reasonable notice of the hearing, including notice to the governing body of each affected municipality and county. The commission may require the utility to complete this notice requirement.

(B) The utility shall mail notice of the hearing to each affected ratepayer at least 20 days before the hearing. The notice must include a description of the process by which a ratepayer may intervene in the proceeding.

(e) Line extension and construction charges. A request to approve or amend a utility's line extension and construction charges shall be filed in a rate change application under TWC §13.187 or §13.1871. The application filed under TWC §13.187 or §13.1871 must include the proposed tariff and other information requested by the commission. The request may be made with a request to change one or more of the utility's other rates.

(f) Capital improvements surcharge. In a rate proceeding pursuant to TWC §13.187 or TWC §13.1871, the commission may authorize collection of additional revenues from the customers pursuant to a surcharge to provide funds for capital improvements necessary to provide facilities capable of providing continuous and adequate utility service, and for the preparation of design and planning documents.

(g) Debt repayments surcharge. In a rate proceeding pursuant to TWC §13.187 or TWC §13.1871, the commission may authorize collection of additional revenues from customers pursuant to a surcharge to provide funds for debt repayments and associated costs, including funds necessary to establish contingency funds and reserve funds. Surcharge funds may be collected to meet all of the requirements of the Texas Water Development Board in regard to financial assistance from the Safe Drinking Water Revolving Fund.

§24.23. *Time Between [between] Filings.*

(a) Application. The following provisions are applicable to utilities, including those with system-wide or consolidated tariffs, under common control or ownership with any utility that has filed a statement of intent to increase rates pursuant to TWC §13.187 or §13.1871.

(b) Unless the commission requires ~~[it to deliver]~~ a corrected statement of intent, a utility or two or more utilities under common control or ownership may not file a ~~statement [notice]~~ of intent to increase rates pursuant to TWC §13.187 or §13.1871 more than once in a 12-month period except:

- (1) to implement an approved purchase water pass through provision;
- (2) to adjust the rates of a newly acquired utility system;
- (3) to comply with a commission order;
- (4) to adjust rates authorized by §24.21(b)(2) of this title (relating to Form and Filing of Tariffs); or
- (5) unless the regulatory authority determines that a financial hardship exists. A utility may be considered to be experiencing a financial hardship if revenues are insufficient to:
 - (A) cover reasonable and necessary operating expenses;
 - (B) cover cash flow needs which may include regulatory sampling requirements, unusual repair and maintenance expenses,

revenues to finance required capital improvements or, in certain instances, existing debt service requirements specific to utility operations; or[-]

(C) support a determination that the utility is able to provide continuous and adequate service to its existing service area.

(c) A Class C utility under common control or ownership with a utility that has filed an application to change rates pursuant to TWC §13.187 or §13.1871 within the preceding 12 months may not file an application to change rates pursuant to TWC §13.187 or §13.1871 unless it is filed pursuant to an exception listed in subsection (b) of this section.

§24.26. Suspension of the Effective Date of Rates.

(a) Regardless of, and in addition to any period of suspension ordered pursuant to subsection (b) of this section, after written notice to the utility, the commission may suspend the effective date of a rate change for not more than:

(1) 150 days from the date the proposed rates would otherwise be effective for an application filed pursuant to TWC §13.187; or

(2) 205 days from the date the proposed rates would otherwise be effective for an application filed pursuant to TWC §13.1871.

(b) Regardless of, and in addition to any period of suspension ordered pursuant to subsection (a) of this section, the commission may suspend the effective date of a change in rates requested pursuant to TWC §13.187 or §13.1871 if:

(1) the utility has failed to properly complete the rate application as required by §24.22 of this title (relating to Notice of Intent and Application to Change Rates Pursuant to Texas Water Code §13.187 or §13.1871), has included in the cost of service for the noticed rates rate-case expenses other than those necessary to complete and file the application, has failed to comply with the notice requirements and proof of notice requirements, or has for any other reason failed to file a request to change rates that is not deemed administratively complete until a properly completed request to change rates is accepted by the commission;

(2) the utility does not have a certificate of convenience and necessity or a completed application pending with the commission to obtain or to transfer a certificate of convenience and necessity until a completed application to obtain or transfer a certificate of convenience and necessity is accepted by the commission; or

(3) the utility is delinquent in paying the regulatory assessment fee and any applicable penalties or interest required by TWC §5.701(n) until the delinquency is remedied.

(c) If the commission suspends the effective date of a requested change in rates pursuant to subsection (b) of this section, the utility may not notify its customers of a new proposed effective date until the utility receives written notification from the commission that all deficiencies have been corrected.

(d) A suspension ordered pursuant to subsection (a) of this section shall be extended two days for each day a hearing on the merits exceeds 15 days.

(e) If the commission does not make a final determination on the proposed rate before the expiration of the suspension period described by subsections (a) and (d) of this section, the proposed rate shall be considered approved. This approval is subject to the authority of the commission thereafter to continue a hearing in progress.

(f) A suspension of rates may be ordered at any time during the pendency of a proceeding, including after the date on which the

proposed rates are otherwise effective, for rate change applications that are not filed pursuant to TWC §13.187 or TWC §13.1871.

(g) For good cause shown, the commission may at any time during the proceeding require the utility to refund money collected, including interest, under a proposed rate before the rate was suspended to the extent the proposed rate exceeds the existing rate.

§24.28. Processing and Hearing Requirements for an Application Filed Pursuant to Texas Water Code §13.187 or §13.1871.

(a) Purpose. This section describes requirements for the processing of applications to change rates filed pursuant to TWC §13.187 or §13.1871.

(b) Proceedings pursuant to TWC §13.187. The following criteria apply to applications to change rates filed by Class A utilities pursuant to TWC §13.187.

(1) Not later than the 30th day after the effective date of the change, the commission shall begin a hearing to determine the propriety of the change.

(2) The matter may be referred to the State Office of Administrative Hearings and the referral shall be deemed to be the beginning of the hearing required by paragraph (1) of this subsection.

(c) Proceedings pursuant to TWC §13.1871. The following criteria apply to applications to change rates filed by a Class B utility or a Class C utility pursuant to TWC §13.1871.

(1) The commission may set the matter for hearing on its own motion at any time within 120 days after the effective date of the rate change.

(2) The commission shall set the matter for a hearing if it receives a complaint from any affected municipality or from the lesser of 1,000 or 10 percent of the affected ratepayers of the utility over whose rates the commission has original jurisdiction, during the first 90 days after the effective date of the proposed rate change.

(A) Ratepayers may file individual complaints or joint complaints. Each complaint must contain the following information:

(i) a clear and concise statement that the complaint is to protest a specific rate action of the water or sewer service utility in question; and

(ii) the name and service address or other identifying information of each signatory ratepayer. The complaint shall list the address of the location where service is received if it differs from the residential address of the signatory ratepayer.

(B) For the purposes of this subsection, each person receiving a separate bill is considered a ratepayer, but one person may not be considered more than one ratepayer regardless of the number of bills the person receives. The complaint is properly signed if signed by a person, or the spouse of a person, in whose name utility service is carried.

(3) Referral to SOAH at any time during the pendency of the proceeding is deemed to be setting the matter for hearing as required by paragraphs (1) and (2) of this subsection.

(d) If, after hearing, the regulatory authority finds the rates currently being charged or those proposed to be charged are unreasonable or in violation of the law, the regulatory authority shall determine the rates to be charged by the utility and shall fix the rates by order served on the utility

(e) The utility may begin charging the proposed rates on the proposed effective date, unless the proposed rate change is suspended by the commission pursuant to §24.26 of this title (relating to Suspen-

sion of the Effective Date of Rates) or interim rates are set by the presiding officer pursuant to §24.29 of this title (relating to Interim Rates). Rates charged under a proposed rate during the pendency of a proceeding are subject to refund, including interest, to the extent the commission ultimately approves rates that are lower than the proposed rates.

§24.31. *Cost of Service.*

(a) (No change.)

(b) Allowable expenses. Only those expenses that are reasonable and necessary to provide service to the ratepayers may be included in allowable expenses. In computing a utility's allowable expenses, only the utility's ~~historical~~ test year expenses as adjusted for known and measurable changes may be considered. A change in rates must be based on a test year as defined in §24.3(55) of this title (Definitions of Terms).

(1) Components of allowable expenses. Allowable expenses, to the extent they are reasonable and necessary, and subject to this section, may include, but are not limited to, the following general categories:

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

~~{(E) reasonable expenditures for ordinary advertising, contributions, and donations; and}~~

~~(E) [(F)] funds expended in support of membership in professional or trade associations, provided such associations contribute toward the professionalism of their membership; and[-]~~

(F) advertising, contributions and donations. The actual expenditures for ordinary advertising, contributions, and donations may be allowed as a cost of service provided that the total sum of all such items allowed in the cost of service shall not exceed three-tenths of 1.0% (0.3%) of the gross receipts of the water or wastewater utility for services rendered to the public. The following expenses shall be included in the calculation of the three-tenths of 1.0% (0.3%) maximum:

(i) funds expended advertising methods of conserving energy;

(ii) funds expended advertising methods by which the consumer can effect a savings in total water or wastewater utility bills; and

(iii) funds expended advertising water quality protection.

(2) (No change.)

(c) Return on invested capital. The return on invested capital is the rate of return times invested capital.

(1) (No change.)

(2) Invested capital, also referred to as rate base. The rate of return is applied to the rate base. Components to be included in determining the rate base are as follows:

(A) (No change.)

(B) original cost, less net salvage and accumulated depreciation at the date of retirement, of depreciable utility plant, property and equipment retired by the utility; and

(i) For original cost under subparagraph (A) of this paragraph or this subparagraph, cost of plant and equipment allowed in the cost of service that has been estimated by trending studies or other means which has no historical records for verification purposes shall receive a rate of return on equity on the estimated portion of rate base that is lower by 3 percentage points than the utility's actual or presumptive rate of return on equity. If, however, the cost of plant and equipment

is estimated using a trending study for a nonfunctioning utility where there are no historical records, the commission may consider other factors when establishing a reasonable rate of return.

(ii) [(i)] original cost under subparagraph (A) of this paragraph or this subparagraph is the actual money cost, or the actual money value of any consideration paid other than money, of the property at the time it was dedicated to public use, whether by the utility that is the present owner or by a predecessor. Assets may be booked in itemized or group accounting, but all accounting for assets and their retirements must be supported by an approved accounting system. On all assets retired from service after June 19, 2009, the original cost of an asset must be the book cost less net salvage value. If a utility calculates annual depreciation expense for an asset with allowance for salvage value, then it must account for the actual salvage amounts when the asset is actually retired. The utility must include the actual salvage calculation(s) in its net plant calculation(s) in the first full rate change application (excluding alternative rate method applications as described in §24.34 of this title (relating to Alternative Rate Methods)) it files after the date on which the asset was removed from service, even if it was not retired during the test year. Recovery of investment on assets retired from service before the estimated useful life or remaining life of the asset shall be combined with over accrual of depreciation expense for those assets retired after the estimated useful life or remaining life and the net amount shall be amortized over a reasonable period of time taking into account prudent regulatory principles. The following list shall govern the manner by which depreciation will be accounted for.

(I) Accelerated depreciation is not allowed.

(II) For those utilities that elect a group accounting approach, all mortality characteristics, both life and net salvage, must be supported by an engineering or economic based depreciation study for which the test year for the depreciation is no more than five years old in comparison to the rate case test year. The engineering or economic based depreciation study must include:

(-a) investment by homogenous category;
(-b) expected level of gross salvage by category;

category;

(-c) expected cost of removal by category;
(-d) the accumulated provision for depreciation as appropriately reflected on the company's books by category;

tion as appropriately reflected on the company's books by category;

(-e) the average service life by category;

(-f) the remaining life by category;

(-g) the Iowa Dispersion Pattern by category;

category; and

(-h) a detailed narrative identifying the specific factors, data, criteria and assumptions that were employed to arrive at the specific mortality proposal for each homogenous group of property.

(iii) [(ii)] reserve for depreciation under subparagraph (A) of this paragraph or this subparagraph is the accumulation of recognized allocations of original cost, representing recovery of initial investment, over the estimated useful life or remaining life of the asset. If individual accounting is used, a utility must continue booking depreciation expense until the asset is actually retired, and the reserve for depreciation shall include any additional depreciation expense accrued past the estimated useful or remaining life of the asset. If salvage value is zero, depreciation must be computed on a straight line basis over the expected useful life or remaining life of the item or facility. If salvage value is not zero, depreciation must also be computed on a straight line basis over the expected useful life or the remaining life. For an asset removed from service after June 19, 2009, accumulated depreciation will be calculated on book cost less net salvage of the asset. The retirement of a plant asset from

service is accounted for by crediting the book cost to the utility plant account in which it is included. Accumulated depreciation must also be debited with the original cost and the cost of removal and credited with the salvage value and any other amounts recovered. Return is allowed for assets removed from service after June 19, 2009, that result in an increased rate base through recognition in the reserve for depreciation if the utility proves that the decision to retire the asset was financially prudent, unavoidable, necessary because of technological obsolescence, or otherwise reasonable. The utility must also provide evidence establishing the original cost of the asset, the cost of removal, salvage value, any other amounts recovered, the useful life of the asset (or remaining life as may be appropriate), the date the asset was taken out of service, and the accumulated depreciation up to the date it was taken out of service. Additionally, the utility must show that it used due diligence in recovering maximum salvage value of a retired asset. The requirements relating to the accounting for the reasonableness of retirement decisions for individual assets and the net salvage value calculations for individual assets only apply to those utilities using itemized accounting. For those utilities practicing group accounting, the depreciation study will provide similar information by category. TWC[5] §13.185(e) relating to dealings with affiliated interests, will apply to business dealings with any entity involved in the retirement, removal, or recovery of assets. Assets retired subsequent to June 19, 2009, will be included in a utility's application for a rate change if the application is the first application for a rate change filed by the utility after the date the asset was retired and specifically identified if the utility uses itemized accounting. Retired assets will be reported for the asset group in depreciation studies for those utilities practicing group accounting, while retired assets will be specifically identified for those utilities practicing itemized accounting;

(iv) ~~[(iii)]~~ the original cost of plant, property, and equipment acquired from an affiliated interest may not be included in invested capital except as provided in TWC[5] §13.185(e);

(v) ~~[(iv)]~~ utility property funded by explicit customer agreements or customer contributions in aid of construction such as surcharges may not be included in original cost or invested capital; and

(C) working capital allowance to be composed of, but not limited to the following:

(i) reasonable inventories of materials and supplies, held specifically for purposes of permitting efficient operation of the utility in providing normal utility service. This amount excludes inventories found by the commission to be unreasonable, excessive, or not in the public interest;

(ii) reasonable prepayments for operating expenses. Prepayments to affiliated interests ~~[(prepayments to affiliated interests)]~~ are subject to the standards set forth in TWC[5] §13.185(e); and

(iii) a reasonable allowance for cash working capital. The following shall apply in determining the amount to be included in invested capital for cash working capital:

(I) Cash working capital for water and wastewater utilities shall in no event be greater than one-eighth of total annual operations and maintenance expense, excluding amounts charged to operations and maintenance expense for materials, supplies, fuel, and prepayments.

(II) For Class C utilities, one-eighth of operations and maintenance expense excluding amounts charged to operations and maintenance expense for materials, supplies, expenses recovered through a pass through provision or through charges other

than base rate and gallonage charges, prepayments will be considered a reasonable allowance for cash working capital.

(III) For Class B utilities, one-twelfth of operations and maintenance expense excluding amounts charged to operations and maintenance expense for materials, supplies, expenses recovered through a pass through provision or charges other than base rate and gallonage charges, and prepayments will be considered a reasonable allowance for cash working capital.

(IV) Operations and maintenance expense does not include depreciation, other taxes, or federal income taxes, for purposes of subclauses (I), (II), (III) and (V) of this clause.

(V) For Class A utilities, a reasonable allowance for cash working capital, including a request of zero, will be determined by the use of a lead-lag study. A lead-lag study will be performed in accordance with the following criteria:

(-a-) The lead-lag study will use the cash method; all non-cash items, including but not limited to depreciation, amortization, deferred taxes, prepaid items, and return (including interest on long-term debt and dividends on preferred stock), will not be considered.

(-b-) Any reasonable sampling method that is shown to be unbiased may be used in performing the lead-lag study.

(-c-) The check clear date, or the invoice due date, whichever is later, will be used in calculating the lead-lag days used in the study. In those cases where multiple due dates and payment terms are offered by vendors, the invoice due date is the date corresponding to the terms accepted by the water or wastewater utility.

(-d-) All funds received by the water or wastewater utility except electronic transfers shall be considered available for use no later than the business day following the receipt of the funds in any repository of the water or wastewater utility (e.g., lockbox, post office box, branch office). All funds received by electronic transfer will be considered available the day of receipt.

(-e-) For water and wastewater utilities the balance of cash and working funds included in the working cash allowance calculation shall consist of the average daily bank balance of all noninterest bearing demand deposits and working cash funds.

(-f-) The lead on federal income tax expense shall be calculated by measurement of the interval between the midpoint of the annual service period and the actual payment date of the water or wastewater utility.

(-g-) If the cash working capital calculation results in a negative amount, the negative amount shall be included in rate base.

(VI) If cash working capital is required to be determined by the use of a lead-lag study under subclause (IV) of this clause and either the water or wastewater utility does not file a lead lag study or the utility's lead-lag study is determined to be unreliable, in the absence of persuasive evidence that suggests a different amount of cash working capital, zero will be presumed to be the reasonable level of cash working capital.

(VII) A lead lag study completed within five years of the application for rate/tariff change shall be deemed adequate for determining cash working capital unless sufficient persuasive evidence suggests that the study is no longer valid.

~~[(iii)]~~ a reasonable allowance up to one-eighth of total annual operations and maintenance expense excluding amounts charged to operations and maintenance expense for materials, supplies, and prepayments (operations and maintenance expense does not include depreciation, other taxes, or federal income taxes).]

(3) Deduction of certain items from rate base, which include, but are not limited to, the following. [Terms not included in rate base.] Unless otherwise determined by the commission, for good cause shown, the following items will be deducted from [not be included in determining] the overall rate base in the consideration of applications filed pursuant to TWC §13.187 or §13.1871.

{(A) Miscellaneous items. Certain items that include, but are not limited to, the following:}

(A) [(+)] accumulated reserve for deferred federal income taxes;

(B) [(+)] unamortized investment tax credit to the extent allowed by the Internal Revenue Code;

(C) [(+)] contingency and/or property insurance reserves;

(D) [(+)] contributions in aid of construction; and

(E) [(+)] other sources of cost-free capital, as determined by the commission.

(F) Subparagraphs (A) - (E) of this paragraph shall not be deducted from a Class C utility's rate base if the utility has no other utility affiliates such that the combined number of customers served by all affiliates would meet the number of connection requirements for a Class B or Class A utility.

(4) [(B)] Construction work in progress (CWIP). The inclusion of construction work in progress is an exceptional form of relief. Under ordinary circumstances, the rate base consists only of those items that are used and useful in providing service to the public. Under exceptional circumstances, the commission may include construction work in progress in rate base to the extent that the utility has proven that:

(A) [(+)] the inclusion is necessary to the financial integrity of the utility; and

(B) [(+)] major projects under construction have been efficiently and prudently planned and managed. However, construction work in progress may not be allowed for any portion of a major project that the utility has failed to prove was efficiently and prudently planned and managed.

(5) Requirements for post-test year adjustments.

(A) A post-test year adjustment to test year data for known and measurable rate base additions may be considered only if:

(i) the addition represents plant which would appropriately be recorded for investor-owned water or wastewater utilities in NARUC account 101 or 102;

(ii) the addition comprises at least 10% of the water or wastewater utility's requested rate base, exclusive of post-test year adjustments and CWIP;

(iii) the addition is in service before the rate year begins; and

(iv) the attendant impacts on all aspects of a utility's operations (including but not limited to, revenue, expenses and invested capital) can with reasonable certainty be identified, quantified and matched. Attendant impacts are those that reasonably result as a consequence of the post-test year adjustment being proposed.

(B) Each post-test year plant adjustment described by subparagraph (A) of this paragraph will be included in rate base at the reasonable test year-end CWIP balance, if the addition is constructed by the utility or the reasonable price, if the addition represents a

purchase, subject to original cost requirements, as specified in TWC §13.185.

(C) Post-test year adjustments to historical test year data for known and measurable rate base decreases will be allowed only if:

(i) the decrease represents:

(I) plant which was appropriately recorded in the accounts set forth in subparagraph (A) of this paragraph;

(II) plant held for future use;

(III) CWIP (mirror CWIP is not considered CWIP); or

(IV) an attendant impact of another post-test year adjustment.

(ii) the decrease represents plant that has been removed from service, sold, or removed from the water or wastewater utility's books prior to the rate year; and

(iii) the attendant impacts on all aspects of a utility's operations (including but not limited to, revenue, expenses and invested capital) can with reasonable certainty be identified, quantified and matched. Attendant impacts are those that reasonably result as a consequence of the post-test year adjustment being proposed.

(d) (No change.)

(e) Negative acquisition adjustment. Except for the instance of an acquisition of a non-functioning utility by another utility through a sale, transfer, or merger application, receivership assignment, or temporary manager assignment, a utility's plant, property, or equipment acquired from another retail public utility in accordance with an application filed on or after September 1, 1997 pursuant to §24.109 of this chapter (relating to Report of Sale, Merger, Etc.; Investigation; Disallowance of Transaction), shall be adjusted for a negative acquisition adjustment to the extent that:

(1) the original cost less depreciation exceeds the actual purchase price; or

(2) other good cause is shown.

(f) Intangible assets shall not be allowed in rate base unless:

(1) The amount requested has been verified by documentation as to amount and exact nature;

(2) Testimony has been submitted as to reasonableness and necessity and benefit of the expense to the customers;

(3) The testimony must further show how the amount is properly considered as part of an actual asset purchased or installed, or a source of supply, such as water rights; or

(4) If the requirements in paragraphs (1) and (2) of this subsection are met, but the requirement in paragraph (3) of this subsection is not met, the amount shall be amortized over a reasonable period and the amortization shall be allowed in the cost of service. The amount shall be considered a non-recurring expense. Unamortized amounts shall not be included in rate base for purposes of calculating return on equity.

§24.32. Rate Design.

(a) (No change.)

(b) Conservation.

(1) (No change.)

(2) After receiving final authorization from the regulatory authority through a rate change proceeding, a utility may implement a water conservation surcharge using an inclining block rate or other conservation rate structure. A utility may not implement such a rate structure to avoid providing facilities necessary to meet the TCEQ's [Texas Commission on Environmental Quality's (TCEQ's)] minimum standards for public drinking water systems. A water conservation rate structure may generate revenues over and above the utility's usual cost of service:

(A) - (B) (No change.)

(3) All additional revenues over and above the utility's usual cost of service collected under paragraph (2) of this subsection:

(A) must be accounted for separately and reported to the commission, as requested; and

(B) are considered customer contributed capital unless otherwise specified in a commission order.[: and]

[(C) may only be used in a manner approved by the commission for applications not subject to hearing under TWC, §13.187(b).]

(c) (No change.)

[(d) Surecharges.]

[(1) Capital improvements. In a rate proceeding, the commission may authorize collection of additional revenues from the customers to provide funds for capital improvements necessary to provide facilities capable of providing adequate and continuous utility service, and for the preparation of design and planning documents.]

[(2) Debt repayments. In a rate proceeding, the commission may authorize collection of additional revenues from customers to provide funds for debt repayments and associated costs, including funds necessary to establish contingency funds and reserve funds. Surcharge funds may be collected to meet all of the requirements of the Texas Water Development Board in regard to financial assistance from the Safe Drinking Water Revolving Fund.]

§24.33. Rate-case Expenses Pursuant to Texas Water Code §13.187 and §13.1871.

(a) A utility may recover rate case expenses, including attorney fees, incurred as a result of filing a rate change application pursuant to TWC §13.187 or TWC §13.1871, only if the expenses are just, reasonable, necessary, and in the public interest.

(b) A utility may not recover any rate case expenses if the increase in revenue generated by the just and reasonable rate determined by the commission after a contested case hearing is less than 51% of the increase in revenue that would have been generated by a utility's proposed rate.

(c) A utility may not recover any rate case expenses incurred after the date of a written settlement offer by all ratepayer parties if the revenue generated by the just and reasonable rate determined by the commission after a contested case hearing is less than or equal to the revenue that would have been generated by the rate contained in the written settlement offer.

(d) Unamortized rate case expense may not be a component of invested capital for calculation of rate of return purposes.

§24.34. Alternative Rate Methods.

(a) (No change.)

[(b) Single issue rate change. Unless a utility is using the cash needs method, it may request approval to increase rates to reflect a

change in any one specific cost component. The following conditions apply to this type of request.]

[(1) The proposed effective date of the single issue rate change request must be within 24 months of the effective date of the last rate change request in which a complete rate change application was filed.]

[(2) The change in rates is limited to those amounts necessary to recover the increase in the specific cost component and the increase will be allocated to the rate structure in the same manner as in the previous rate change.]

[(3) The scope of a single issue rate proceeding is limited to the single issue prompting a change in rates. For capital items this includes depreciation and return determined using the rate of return established in the prior rate change proceeding.]

[(4) The utility shall provide notice as described in §24.22(a) - (e) of this title (relating to Notice of Intent to Change Rates); and the notice must describe the cost component and reason for the increased cost.]

[(5) A utility exercising this option shall submit a complete rate change application within three years following the effective date of the single issue rate change request.]

(b) [(e)] Phased and multi-step rate changes. In a rate proceeding under TWC §13.187 or §13.1871, the commission may authorize a phased, stepped, or multi-year approach to setting and implementing rates to eliminate the requirement that a utility file another rate application.

(1) A utility may request to use the phased or multi-step rate method:

(A) to include the capital cost of installation of utility plant items that are necessary to improve service or achieve compliance with TCEQ or commission regulations in the utility's rate base and operating expenses in the revenue requirement when facilities are placed in service;

(B) to provide additional construction funds after major milestones are met;

(C) to provide assurance to a lender that rates will be immediately increased when facilities are placed in service;

(D) to allow a utility to move to metered rates from unmetered rates as soon as meters can be installed at all service connections;

(E) to phase in increased rates when a utility has been acquired by another utility with higher rates;

(F) to phase in rates when a utility with multiple rate schedules is making the transition to a system-wide rate structure; or

(G) when requested by the utility.

(2) Construction schedules and cost estimates for new facilities that are the basis for the phased or multi-step rate increase must be prepared by a licensed professional engineer.

(3) Unless otherwise specified in the commission order, the next phase or step cannot be implemented without verification of completion of each step by a licensed professional engineer, agency inspector, or agency subcontractor.

(4) At the time each rate step is implemented, the utility shall review actual costs of construction versus the estimates upon which the phase-in rates were based. If the revenues received from

the phased or multi-step rates are higher than what the actual costs indicate, the excess amount must be reported to the commission prior to implementing the next phase or step. Unless otherwise specified in a commission order, the utility may:

(A) refund or credit the overage to the customers in a lump sum; or

(B) retain the excess to cover shortages on later phases of the project. Any revenues retained but not needed for later phases must be proportioned and refunded to the customers at the end of the project with interest paid at the rate on deposits.

(5) The original notice to customers must include the proposed phased or multi-step rate change and informational notice must be provided to customers and the commission 30 days prior to the implementation of each step.

(6) A utility that requests and receives a phased or multi-step rate increase cannot apply for another rate increase during the period of the phase-in rate intervals unless:

(A) the utility can prove financial hardship; or

(B) the utility is willing to void the next steps of the phase-in rate structure and undergo a full cost of service analysis.

(c) [~~(d)~~] Cash needs method. The cash needs method of establishing rates allows a utility to recover reasonable and prudently incurred debt service, a reasonable cash reserve account, and other expenses not allowed under standard methods of establishing rates.

(1) A utility may request to use the cash needs method of setting rates if:

(A) the utility is a nonprofit corporation controlled by individuals who are customers and who represent a majority of the customers; or

(B) the utility can demonstrate that use of the cash needs basis:

(i) is necessary to preserve the financial integrity of the utility;

(ii) will enable it to develop the necessary financial, managerial, and technical capacity of the utility; and

(iii) will result in higher quality and more reliable utility service for customers.

(2) Under the cash needs method, the allowable components of cost of service are: allowable operating and maintenance expenses; depreciation expense; reasonable and prudently incurred debt service costs; recurring capital improvements, replacements, and extensions that are not debt-financed; and a reasonable cash reserve account.

(A) Allowable operating and maintenance expenses. Only those expenses that are reasonable and necessary to provide service to the ratepayers may be included in allowable operations and maintenance expenses and they must be based on the utility's [~~historical~~] test year expenses as adjusted for known and measurable changes and reasonably anticipated, prudent projected expenses.

(B) Depreciation expense. Depreciation expense may be included on any used and useful depreciable plant, property, or equipment that was paid for by the utility and that has a positive net book value on the effective date of the rate change in the same manner as described in §24.31(b)(1)(B) of this title (relating to Cost of Service).

(C) Debt service costs. Debt service costs are cash outlays to an unaffiliated interest necessary to repay principal and interest on reasonably and prudently incurred loans. If required by the lender, debt service costs may also include amounts placed in a debt service reserve account in escrow or as required by the commission, Texas Water Development Board, or other state or federal agency or other financial institution. Hypothetical debt service costs may be used for:

(i) self-financed major capital asset purchases where the useful life of the asset is ten years or more. Hypothetical debt service costs may include the debt repayments using an amortization schedule with the same term as the estimated service life of the asset using the prime interest rate at the time the application is filed; and

(ii) prospective loans to be executed after the new rates are effective. Any pre-commitments, amortization schedules, or other documentation from the financial institution pertaining to the prospective loan must be presented for consideration.

(D) Recurring capital improvements, replacements, and extensions that are not debt-financed. Capital assets, repairs, or extensions that are a part of the normal business of the utility may be included as allowable expenses. This does not include routine capital expenses that are specifically debt-financed.

(E) Cash reserve account. A reasonable cash reserve account, up to 10% of annual operation and maintenance expenses, must be maintained and revenues to fund it may be included as an allowable expense. Funds from this account may be used to pay expenses incurred before revenues from rates are received and for extraordinary repair and maintenance expenses and other capital needs or unanticipated expenses if approved in writing by the commission. The utility shall account for these funds separately and report to the commission. Unless the utility requests an exception in writing and the exception is explicitly allowed by the commission in writing, any funds in excess of 10%, shall be refunded to the customers each year with the January billing either as a credit on the bill or refund accompanied by a written explanation that explains the method used to calculate the amounts to be refunded. Each customer must receive the same refund amount. These reserves are not for the personal use of the management or ownership of the utility and may not be used to compensate an owner, manager, or individual employee above the amount approved for that position in the most recent rate change request unless authorized in writing by the commission.

(3) If the revenues collected exceed the actual cost of service, defined in paragraph (2) of this subsection, during any calendar year, these excess cash revenues must be placed in the cash reserve account described in paragraph (2)(E)[~~(D)~~] of this subsection and are subject to the same restrictions.

(4) If the utility demonstrates to the commission that it has reduced expenses through its efforts, and has improved its financial, managerial, and technical capability, the commission may allow the utility to retain 50% of the savings that result for the personal use of the management or ownership of the utility rather than pass on the full amount of the savings through lower rates or refund all of the amounts saved to the customers.

(5) If a utility elects to use the cash needs method, it may not elect to use the utility method for any rate change application initiated within five years after beginning to use the cash needs method. If after the five-year period, the utility does elect to use the utility method, it may not include in rate base, or recover the depreciation expense, for the portion of any capital assets paid for by customers as a result of including debt service costs in rates. It may, however, include in rate base, and recover through rates, the depreciation expense for capital assets that were not paid for by customers as a result of including debt

service costs in rates. The net book value of these assets may be recovered over the remaining useful life of the asset.

§24.36. Application for a Rate Adjustment by a Class C Utility Pursuant to Texas Water Code §13.1872.

(a) Purpose. This section establishes procedures for a Class C utility to apply for an adjustment to its water or wastewater rates pursuant to TWC §13.1872.

(b) Definitions. The following words and terms when used in this section shall have the following meaning unless the context clearly indicates otherwise:

(1) Application--An application for a rate adjustment filed pursuant to the this section and TWC §13.1872.

(2) Price index--a price index established annually by the commission for the purposes of this section.

(c) Requirements for filing of the application. Subject to the limitations set out in subsection (f) of this section, a Class C utility may file an application with the commission.

(1) The utility may request to increase its tariffed monthly fixed customer or meter charges and monthly gallonage charges by the lesser of:

(A) five percent; or

(B) the percentage increase in the price index between the year preceding the year in which the utility requests the adjustment and the year in which the utility requests the adjustment.

(2) The application shall be on the commission's form and shall include:

(A) a proposal for the provision of notice that is consistent with subsection (e) of this section; and

(B) a copy of the relevant pages of the utility's currently approved tariff showing its current monthly fixed customer or meter charges and monthly gallonage charges.

(3) The application shall contain a proposed notice of approved rates as described by subsection (e) of this section.

(d) Processing of the application. The following criteria apply to the processing of an application.

(1) Determining whether the application is administratively complete.

(A) If commission staff requires additional information in order to process the application, commission staff shall file a notification to the utility within 10 days of the filing of the application requesting any necessary information.

(B) An application may not be deemed administratively complete pursuant to §24.8 of this title (relating to Administrative Completeness) until after the utility has responded to commission staff's request under subparagraph (A) of this paragraph.

(2) Within 30 days of the filing of the application, Staff shall file a recommendation stating whether the application should be deemed administratively complete pursuant to §24.8 of this title. If Staff recommends that the application should be deemed to be administratively complete, Staff shall also file a recommendation on final disposition, including, if necessary, proposed tariff sheets reflecting the requested rate change.

(e) Notice of Approved Rates. After the utility receives a written order by the commission approving or modifying the utility's application, including the proposed notice of approved rates, and at least

30 days before the effective date of the proposed change established in the commission's order, the utility shall send by mail, or by e-mail if the ratepayer has agreed to receive communications electronically, the approved or modified notice to each ratepayer describing the proposed rate adjustment. The notice must include:

(1) a statement that the utility requested a rate adjustment based on the commission's approved price index and must state the percentage change in the price index during the previous year;

(2) the existing rate;

(3) the approved rate; and

(4) a statement that the rate adjustment was requested pursuant to TWC §13.1872 and that a hearing will not be held for the request.

(f) Time between filings. The following criteria apply to the timing of the filing of an application.

(1) A Class C utility may adjust its rates pursuant to this section not more than once each calendar year and not more than four times between rate proceedings described by TWC §13.1781.

(2) The filing of applications pursuant to this section is limited to a specific month based on the last two digits of a utility's certificate of convenience and necessity (CCN) number as outlined below unless good cause is shown for filing in a different month. For a utility holding multiple CCNs, the utility may file an application in any month for which any of its CCN numbers is eligible.

(A) January: CCNs ending in 00 through 09;

(B) February: CCNs ending in 10 through 18;

(C) March: CCNs ending in 19 through 27;

(D) April: CCNs ending in 28 through 36;

(E) May: CCNs ending in 37 through 45.

(F) June: CCNs ending in 46 through 54;

(G) July: CCNs ending in 55 through 63;

(H) August: CCNs ending in 64 through 72;

(I) September: CCNs ending in 73 through 81;

(J) October: CCNs ending in 82 through 90; and

(K) November: CCNs ending in 91 through 99.

(g) Establishing the price index. The commission shall, on or before December 1 of each year, establish a price index as required by TWC §13.1872(b) based on the following criteria. The price index will be established in an informal project to be initiated by commission staff.

(1) The price index shall be equal to Gross Domestic Product Implicit Price Deflator index published by the Bureau of Economic Analysis of the United States Department of Commerce for the prior 12 months ending on September 30 unless the commission finds that good cause exists to establish a different price index for that year.

(2) Until the commission adopts its first order establishing an index pursuant to this subsection, applications filed pursuant to this subsection shall be processed using the initial indices established in this subsection. The percentage difference between the initial indices is equal to 1.57%. The initial indices are equal to:

(A) 106.923 for 2013; and

(B) 108.603 for 2014.

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

Filed with the Office of the Secretary of State on March 6, 2015.

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Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

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For further information, please call: (512) 936-7223



16 TAC §§24.22, 24.25 - 24.28

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Public Utility Commission of Texas or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

These repeals are proposed under Texas Water Code Annotated §13.041(b) (West 2008 and Supp. 2014) (TWC), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, TWC §§13.246(c), 13.253, and 13.302(c), which permit the commission to require the provision of financial assurance; TWC §13.136(b), which requires the commission to require by rule the filing of an annual service, financial, and normalized earnings report; and HB 1600 §2.96(k), which requires the commission to adopt rules to implement changes in law made by HB 1600 to TWC Chapter 13 not later than September 1, 2015.

Cross Reference to Statutes: TWC §§13.041, 13.136, 13.253, and 13.302 and HB 1600.

§24.22. *Notice of Intent to Change Rates.*

§24.25. *Rate Change Applications, Testimony, and Exhibits.*

§24.26. *Suspension of Rates.*

§24.27. *Request for a Review of a Rate Change by Ratepayers Pursuant to the Texas Water Code, §13.187(b).*

§24.28. *Action on Notice of Rate Change Pursuant to Texas Water Code, §13.187(b).*

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

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SUBCHAPTER C. RATE-MAKING APPEALS

16 TAC §24.41, §24.44

These amendments are proposed under Texas Water Code Annotated §13.041(b) (West 2008 and Supp. 2014) (TWC), which provides the commission with the authority to make and

enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, TWC §§13.246(c), 13.253, and 13.302(c), which permit the commission to require the provision of financial assurance; TWC §13.136(b), which requires the commission to require by rule the filing of an annual service, financial, and normalized earnings report; and HB 1600 §2.96(k), which requires the commission to adopt rules to implement changes in law made by HB 1600 to TWC Chapter 13 not later than September 1, 2015.

Cross Reference to Statutes: TWC §§13.041, 13.136, 13.253, and 13.302 and HB 1600.

§24.41. *Appeal of Rate-making Decision, Pursuant to the Texas Water Code[.] §13.043.*

(a) Any party to a rate proceeding before the governing body of a municipality may appeal the decision of the governing body to the commission. This subsection does not apply to a municipally owned utility, but does include privately owned utilities operating within the corporate limits of a municipality. An appeal under this subsection may be initiated by filing with the commission a petition signed by a responsible official of the party to the rate proceeding or its authorized representative[.] and by serving a copy of the petition on all parties to the original proceeding. The appeal must be initiated within 90 days after the date of notice of the final decision of the governing body, or within 30 days if the appeal relates to the rates of a Class A utility, by filing a petition for review with the commission and by serving copies on all parties to the original rate proceeding.

(b) - (j) (No change.)

§24.44. *Seeking Review of Rates for Sales of Water Under the Texas Water Code[; §11.041 and] §12.013.*

(a) Ratepayers seeking commission [participation under the TWC, §11.041 or] action under TWC[.] §12.013 should include in a written petition to the commission, the following information:

(1) - (6) (No change.)

(b) Water suppliers seeking commission [participation under the TWC, §11.041, or] action under TWC[.] §12.013 should include in a written petition for relief to the commission, the following information:

(1) - (5) (No change.)

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

Filed with the Office of the Secretary of State on March 6, 2015.

TRD-201500771

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Earliest possible date of adoption: April 19, 2015

For further information, please call: (512) 936-7223



SUBCHAPTER D. RECORDS AND REPORTS

16 TAC §24.72, §24.73

These amendments are proposed under Texas Water Code Annotated §13.041(b) (West 2008 and Supp. 2014) (TWC), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, TWC §§13.246(c), 13.253, and

13.302(c), which permit the commission to require the provision of financial assurance; TWC §13.136(b), which requires the commission to require by rule the filing of an annual service, financial, and normalized earnings report; and HB 1600 §2.96(k), which requires the commission to adopt rules to implement changes in law made by HB 1600 to TWC Chapter 13 not later than September 1, 2015.

Cross Reference to Statutes: TWC §§13.041, 13.136, 13.253, and 13.302 and HB 1600.

§24.72. *Financial Records and Reports--Uniform System of Accounts.*

Every public utility, except a utility operated by an affected county, shall keep uniform accounts as prescribed by the commission of all business transacted. The classification of utilities, index of accounts, definitions, and general instructions pertaining to each uniform system of accounts, as amended from time to time, shall be adhered to at all times, unless provided otherwise by these sections or by rules of a federal regulatory body having jurisdiction over the utility, or unless specifically permitted by the commission.

~~[(1) Classification. For the purposes of accounting and reporting to the commission, each public water and/or sewer utility shall be classified with respect to its annual operating revenues as follows:]~~

~~[(A) Class A--annual operating revenues exceeding \$750,000;]~~

~~[(B) Class B--annual operating revenues exceeding \$150,000 but not more than \$750,000;]~~

~~[(C) Class C--annual operating revenues not exceeding \$150,000;]~~

~~(1) [(2)] System of accounts. For the purpose of accounting and reporting to the commission, each public water and/or sewer utility shall maintain its books and records in accordance with the following prescribed uniform system of accounts:~~

~~(A) Class A Utility, as defined by §24.3(12) of this title (relating to Definitions of Terms); the uniform system of accounts as adopted and amended by the (NARUC) for a utility classified as a NARUC Class A utility.~~

~~(B) Class B Utility, as defined by §24.3(13) of this title; the uniform system of accounts as adopted and amended by NARUC for a utility classified as a NARUC Class B utility.~~

~~(C) Class C Utility, as defined by §24.3(14) of this title; the uniform system of accounts as adopted and amended by for a utility classified as a NARUC Class C utility.~~

~~[(A) Class A--system of accounts approved by the commission which will be adequately informative for all regulatory purposes or uniform system of accounts as adopted and amended by the National Association of Regulatory Utility Commissioners for A utilities;]~~

~~[(B) Class B--system of accounts approved by the commission which will be adequately informative for all regulatory purposes or uniform system of accounts as adopted and amended by the National Association of Regulatory Utility Commissioners for Class B utilities;]~~

~~[(C) Class C--system of accounts approved by the commission which will be adequately informative for all regulatory purposes or uniform system of accounts as adopted and amended by the National Association of Regulatory Utility Commissioners for Class C utilities;]~~

~~(2) [(3)] Accounting period. Each utility shall keep its books on a monthly basis so that for each month all transactions applicable thereto shall be entered in the books of the utility.~~

§24.73. *Water and Sewer Utilities Annual Reports.*

(a) Each utility, except a utility operated by an affected county, shall file a service, ~~[and] financial, and normalized earnings~~ report by May 15 [April 4] of each year unless otherwise specified in a form prescribed by the commission.

(b) Contents of report. The annual report shall disclose the information required on the forms approved by the commission and may include any additional information required by the commission.~~[-]~~

~~[(1) the rates that are subject to the original or appellate jurisdiction of the commission for any service, product, or commodity offered by the utility;]~~

~~[(2) rules and regulations relating to or affecting the rates, utility service, product or commodity furnished by the utility;]~~

~~[(3) all ownership and management relationships among the utility and other entities, including individuals, with which the utility has had financial transactions during the reporting period;]~~

~~[(4) all transactions with affiliates, including, but not limited to, payments for costs of any services, interest expense, or for any property, right, or thing;]~~

~~[(5) information on receipts and disbursements of revenues;]~~

~~[(6) all payments of compensation (other than salary or wages subject to the withholding of federal income tax) for legislative matters in Texas or for representation before the Texas Legislature or any governmental agency or body; and]~~

~~[(7) a verified or certified copy of the appropriate permit, issued by the conservation, reclamation, or subsidence district, for each utility which withdraws groundwater from conservation, reclamation, or subsidence districts;]~~

(c) A Class C utility's normalized earnings shall be equal to its actual earnings during the reporting period for the purposes of compliance with TWC §13.136.

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

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Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

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For further information, please call: (512) 936-7223

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SUBCHAPTER G. CERTIFICATES OF CONVENIENCE AND NECESSITY

16 TAC §§24.102, 24.109, 24.111, 24.114

These amendments are proposed under Texas Water Code Annotated §13.041(b) (West 2008 and Supp. 2014) (TWC), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, TWC §§13.246(c), 13.253, and

13.302(c), which permit the commission to require the provision of financial assurance; TWC §13.136(b), which requires the commission to require by rule the filing of an annual service, financial, and normalized earnings report; and HB 1600 §2.96(k), which requires the commission to adopt rules to implement changes in law made by HB 1600 to TWC Chapter 13 not later than September 1, 2015.

Cross Reference to Statutes: TWC §§13.041, 13.136, 13.253, and 13.302 and HB 1600.

§24.102. *Criteria for Considering and Granting Certificates or Amendments.*

(a) - (d) (No change.)

(e) The commission may require an applicant for a certificate or for an amendment to provide a bond or other financial assurance to ensure that continuous and adequate utility service is provided. The commission shall set the amount of financial assurance. The form of the financial assurance will be as specified in §24.11 of this title (relating to Financial Assurance) [30 TAC Chapter 37, Subchapter 0 (relating to Financial Assurance for Public Drinking Water Systems and Utilities)]. The obligation to obtain financial assurance under this chapter does not relieve an applicant from any requirements to obtain financial assurance in satisfaction of another state agency's rules.

(f) - (i) (No change.)

§24.109. *Report of Sale, Merger, Etc.; Investigation; Disallowance of Transaction.*

(a) - (b) (No change.)

(c) If the person purchasing or acquiring the water or sewer system cannot demonstrate adequate financial capability, the commission may require that the person provide financial assurance to ensure continuous and adequate utility service is provided. The commission shall set the amount of financial assurance. The form of the financial assurance must be as specified in §24.11 of this title (relating to Financial Assurance) [30 TAC Chapter 37, Subchapter 0 (relating to Financial Assurance for Public Drinking Water Systems and Utilities)]. The obligation to obtain financial assurance under this chapter does not relieve an applicant from any requirements to obtain financial assurance in satisfaction of another state agency's rules.

(d) - (l) (No change.)

§24.111. *Purchase of Voting Stock in Another Utility.*

(a) - (b) (No change.)

(c) If the person acquiring a controlling interest cannot demonstrate adequate financial capability, the commission may require that the person provide financial assurance to ensure continuous and adequate utility service is provided. The commission shall set the amount of financial assurance. The form of the financial assurance must be as specified in §24.11 of this title (relating to Financial Assurance) [30 TAC Chapter 37, Subchapter 0 (relating to Financial Assurance for Public Drinking Water Systems and Utilities)]. The obligation to obtain financial assurance under this chapter does not relieve an applicant from any requirements to obtain financial assurance in satisfaction of another state agency's rules.

(d) - (g) (No change.)

§24.114. *Requirement to Provide Continuous and Adequate Service.*

(a) (No change.)

(b) After notice and hearing, the commission may:

(1) order any retail public utility that is required by law to possess a certificate of public convenience and necessity or any re-

tail public utility that possesses a certificate of public convenience and necessity and is located in an affected county as defined in TWC[§] §16.341, to:

(A) (No change.)

(B) develop, implement, and follow financial, managerial, and technical practices that are acceptable to the commission to ensure that continuous and adequate service is provided to any areas currently certificated to the retail public utility if the retail public utility has not provided continuous and adequate service to any of those areas and, for a utility, to provide financial assurance of the retail public utility's ability to operate the system in accordance with applicable laws and rules as specified in §24.11 of this title (relating to Financial Assurance) [30 TAC Chapter 37, Subchapter 0 (relating to Financial Assurance for Public Drinking Water Systems and Utilities)], or as specified by the commission. The obligation to obtain financial assurance under this chapter does not relieve an applicant from any requirements to obtain financial assurance in satisfaction of another state agency's rules;

(2) - (4) (No change.)

(c) (No change.)

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

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TRD-201500773

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

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For further information, please call: (512) 936-7223

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SUBCHAPTER I. WHOLESALE WATER OR SEWER SERVICE

16 TAC §24.131

This amendment is proposed under Texas Water Code Annotated §13.041(b) (West 2008 and Supp. 2014) (TWC), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, TWC §§13.246(c), 13.253, and 13.302(c), which permit the commission to require the provision of financial assurance; TWC §13.136(b), which requires the commission to require by rule the filing of an annual service, financial, and normalized earnings report; and HB 1600 §2.96(k), which requires the commission to adopt rules to implement changes in law made by HB 1600 to TWC Chapter 13 not later than September 1, 2015.

Cross Reference to Statutes: TWC §§13.041, 13.136, 13.253, and 13.302 and HB 1600.

§24.131. *Commission's Review of Petition or Appeal Concerning Wholesale Rate.*

(a) When a petition or appeal is filed, the commission shall determine within 30 [ten] days of the filing of the petition or appeal whether the petition contains all of the information required by this subchapter. For purposes of this section only, the initial review of probable grounds shall be limited to a determination whether the petitioner has met the requirements §24.130 of this title (relating to Petition or Appeal). If the commission determines that the petition or appeal does not

meet the requirements of §24.130 of this title, the commission shall inform the petitioner of the deficiencies within the petition or appeal and allow the petitioner the opportunity to correct these deficiencies. If the commission determines that the petition or appeal does meet the requirements of §24.130 of this title, the commission shall forward the petition or appeal to the State Office of Administrative Hearings for an evidentiary hearing.

(b) - (d) (No change.)

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

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Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

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For further information, please call: (512) 936-7223



SUBCHAPTER K. PROVISIONS REGARDING MUNICIPALITIES

16 TAC §24.150

This amendment is proposed under Texas Water Code Annotated §13.041(b) (West 2008 and Supp. 2014) (TWC), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, TWC §§13.246(c), 13.253, and 13.302(c), which permit the commission to require the provision of financial assurance; TWC §13.136(b), which requires the commission to require by rule the filing of an annual service, financial, and normalized earnings report; and HB 1600 §2.96(k), which requires the commission to adopt rules to implement changes in law made by HB 1600 to TWC Chapter 13 not later than September 1, 2015.

Cross Reference to Statutes: TWC §§13.041, 13.136, 13.253, and 13.302 and HB 1600.

§24.150. *Jurisdiction of Municipality: Surrender of Jurisdiction.*

(a) (No change.)

(b) The commission shall post on its website a list of municipalities that surrendered original jurisdiction to the commission.

~~[(b) The City of Coffee City, a municipality, surrendered its jurisdiction to the commission effective December 4, 1993.]~~

~~[(c) The City of Nolanville, a municipality, surrendered its jurisdiction to the commission effective April 18, 1996.]~~

~~[(d) The City of Aurora, a municipality, surrendered its jurisdiction to the commission effective April 14, 1997.]~~

~~[(e) The City of Arcola, a municipality, surrendered its jurisdiction to the commission effective May 5, 1998.]~~

~~[(f) The City of San Antonio, a municipality, surrendered its jurisdiction over investor owned utilities within its corporate limits, to the commission, effective January 30, 2014.]~~

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

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Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

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For further information, please call: (512) 936-7223



TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 108. PROFESSIONAL CONDUCT SUBCHAPTER F. CONTRACTUAL AGREEMENTS

22 TAC §108.74

The State Board of Dental Examiners (Board) proposes new §108.74, concerning ownership, maintenance, and operation of a dental practice. The new rule restates the statutes in the Dental Practice Act that relate to the ownership of a dental practice and defines dental services.

Julie Hildebrand, Executive Director, has determined that for the first five-year period the proposed rule is in effect, there will not be any fiscal implications for state or local government as a result of enforcing or administering the new rule.

Ms. Hildebrand has also determined that for the first five-year period the proposed rule is in effect, enforcing or administering the rule will ensure the protection of public health and safety. Ms. Hildebrand has determined that for the first five-year period the proposed rule is in effect, enforcing the rule will not have foreseeable economic costs to persons or small businesses who are required to comply with the rule. There is no foreseeable impact on employment in any regional area where the rule is enforced or administered.

Comments on the proposed rule may be submitted to Simone Salloum, Assistant General Counsel, 333 Guadalupe, Suite 3-800, Austin, Texas 78732, Fax (512) 463-7452, rulecomments@tsbde.texas.gov no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

The new rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

The proposed new rule affects Texas Occupations Code §251.003 and §259.004.

§108.74. Ownership, Maintenance, and Operation of a Dental Practice.

(a) Pursuant to §251.003(a)(4) of the Dental Practice Act, a person practices dentistry if the person owns, maintains, or operates an office or place of business in which the person employs or engages under any type of contract another person to practice dentistry. The dentist owner shall be legally responsible and liable for compliance with the Dental Practice Act and Board Rules.

(b) Pursuant to §259.004(b) of the Dental Practice Act, a person who practices dentistry and has another dentist practicing under the person is responsible for all professional acts performed under the name of the person, regardless of whether the dentist has an ownership interest or an employment or contractual relationship. This does not affect an individual license holder's responsibilities and rights under this subtitle, and the Board may take disciplinary action against both the dentist under whose name others are practicing dentistry and the persons practicing dentistry under the dentist's name, for violations of the Dental Practice Act and Board Rules committed by the persons practicing dentistry.

(c) Pursuant to §259.004(c) of the Dental Practice Act, a licensed dentist may maintain more than one office in this state so long as the dentist assumes full legal responsibility and liability for the dental services provided in each office and complies with the requirements prescribed by Board Rules. Dental services include acts or services that are regulated under the Dental Practice Act and Board Rules.

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

Filed with the Office of the Secretary of State on March 3, 2015.

TRD-201500737

Julie Hildebrand

Executive Director

State Board of Dental Examiners

Earliest possible date of adoption: April 19, 2015

For further information, please call: (512) 475-0977



CHAPTER 115. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL HYGIENE

22 TAC §115.2

The State Board of Dental Examiners (Board) proposes amendments to §115.2, concerning permitted duties of a dental hygienist. The amended rule includes the permitted duties of a dental hygienist found in statute and explains when a hygienist may use a laser and the training required.

Julie Hildebrand, Executive Director, has determined that for the first five-year period the proposed amendments are in effect, there will not be any fiscal implications for state or local government as a result of enforcing or administering the amendments to the rule.

Ms. Hildebrand has also determined that for the first five-year period the proposed amendments are in effect, enforcing or administering the rule will ensure the protection of public health and safety. Ms. Hildebrand has determined that for the first five-year period the proposed amendments are in effect, enforcing the rule will not have foreseeable economic costs to persons or small businesses who are required to comply with the rule. There is no foreseeable impact on employment in any regional area where the rule is enforced or administered.

Comments on the proposed amendments may be submitted to Simone Salloum, Assistant General Counsel, 333 Guadalupe, Suite 3-800, Austin, Texas 78732, Fax (512) 463-7452, rulecomments@tsbde.texas.gov no later than 30 days from the date that the proposed amendments are published in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

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

§115.2. Permitted Duties.

(a) In addition to the duties that a dentist may delegate pursuant to the Dental Practice Act and Board Rules, a Texas-licensed dental hygienist (hygienist) may perform the following services and procedures in the dental office of his/her supervising Texas-licensed dentist (dentist) or dentists who are legally engaged in the practice of dentistry in this state or under the supervision of a supervising dentist in an alternate setting: [In addition to those duties identified in the Texas Occupations Code, Section 262.152, a dental hygienist may perform the following services and procedures in the dental office of his/her supervising dentist or dentists who are legally engaged in the practice of dentistry in this state or under the supervision of a supervising dentist in an alternate setting.]

(1) remove accumulated matter, tartar, deposits, accretions, or stains, other than mottled enamel stains, from the natural and restored surface of exposed human teeth and restorations in the human mouth;

(2) smooth roughened root surfaces;

(3) polish exposed human teeth, restorations in the human mouth, or roughened root surfaces;

(4) topically apply drugs to the surface tissues of the human mouth or the exposed surface of human teeth;

(5) make dental x-rays; and

(6) [(+) apply pit and fissure sealants;

(A) dental hygienists who graduated from a dental or dental hygiene school accredited by the Commission on Dental Accreditation of the American Dental Association after December 31, 1980 may do so without obtaining a certificate from the SBDE;

(B) dental hygienists who graduated from a dental or dental hygiene school accredited by the Commission on Dental Accreditation of the American Dental Association before December 31, 1980, must obtain certification from the SBDE to apply sealants. Certification to apply pit and fissure sealants in Texas may be obtained by submitting a written request to the SBDE accompanied by proof of course completion.

(7) [(2)] monitor patients receiving nitrous oxide/oxygen inhalation conscious sedation only after obtaining certification issued by the State Board of Dental Examiners and only under the direct supervision of a Texas licensed dentist. Certification may be obtained by successful completion of a board-approved course, that includes examination, on the monitoring of the administration of nitrous oxide.

(b) Dental hygienists may use lasers in the practice of dental hygiene under the direct supervision of a dentist, so long as they do not perform any procedure that is irreversible or involves the intentional cutting of soft or hard tissue.

(1) Prior to using a laser for non-diagnostic purposes, dental hygienists must complete no less than twelve hours of in-person continuing education in laser utilization specific to the procedures to be performed by the dental hygienist using the laser. Three of the twelve required hours must include clinical simulation laser training similar to the procedures to be performed by the dental hygienist. The continuing education must be provided by an educational course provider

recognized by the Board. Dental hygienists must maintain documentation of the satisfactory completion of the required continuing education courses.

(2) Use of lasers by dental hygienists must be in accordance with the minimum standard of care and limited to the dental hygienist's scope of practice.

(3) A dentist who supervises a dental hygienist in the use of lasers must have laser education and training sufficient to adequately supervise the dental hygienist, including but not limited to meeting the continuing education requirements required of dental hygienists in subsection (b)(1) of this section. Pursuant to §258.003 of the Dental Practice Act, the delegating dentist is responsible for all dental acts delegated to the dental hygienist, including the use of lasers.

(4) The dental hygienist must comply with the Dental Practice Act and Board Rules in the use of lasers. The dental hygienist may be subject to disciplinary action for any act that violates the Dental Practice Act or Board Rules.

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

Filed with the Office of the Secretary of State on March 3, 2015.

TRD-201500739

Julie Hildebrand

Executive Director

State Board of Dental Examiners

Earliest possible date of adoption: April 19, 2015

For further information, please call: (512) 475-0977



PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 280. THERAPEUTIC OPTOMETRY

22 TAC §280.6

The Texas Optometry Board proposes new §280.6 to clarify the administering and dispensing authority of therapeutic optometrists. Section 351.358 of the Texas Optometry Act authorizes procedures including the procedure to administer an amniotic membrane, in order to treat visual defects, abnormal conditions, or diseases of the human vision system, including the eye and adnexa. Therapeutic optometrists are authorized to dispense and charge for therapeutic contact lenses by §551.004 of the Texas Pharmacy Act.

Chris Kloeris, executive director of the Texas Optometry Board, has determined that for the first five-year period the new section is in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering the section.

Chris Kloeris also has determined that for each of the first five years the new section is in effect, the public benefit anticipated is that the identified licensees will be able to provide the health care services, devices and medication permitted by statute.

It is anticipated that there will be no economic costs for applicants for license, the persons required to comply with the rule, as statutory authority allows the procedure and gives the identified licensees authority to dispense and collect a fee.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

The agency licenses approximately 4,000 optometrists and therapeutic optometrists. A significant majority of licensees own or work in one or more of the 1,000 to 3,000 optometric practices which meet the definition of a small business. Some of these practices meet the definition of a micro business. The agency does not license these practices. There are no anticipated costs because of the new section for those persons required to comply with the rule.

ENVIRONMENT AND TAKINGS IMPACT ASSESSMENT

The agency has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register*.

The new section is proposed under the Texas Optometry Act, Texas Occupations Code, §351.151 and §351.358; and Texas Pharmacy Act, Texas Occupations Code, §551.004. No other sections are affected by the new section.

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 §351.358 as defining the procedures, treatment and dispensing permitted by therapeutic optometrists, and §551.004 of the Texas Pharmacy Act as permitting the dispensing and sales of therapeutic contact by therapeutic optometrists.

§280.6. Procedures Authorized for Therapeutic Optometrists.

(a) Under the authority of §351.358 of the Act, a therapeutic optometrist may administer, perform, or prescribe ophthalmic devices, procedures, and appropriate medications administered by topical means, to diagnose or treat visual defects, abnormal conditions, or diseases of the human vision system, including the eye and adnexa.

(b) Pursuant to the limitations in subsection (a) of this section, a therapeutic optometrist may:

(1) administer an amniotic membrane in a procedure that does not involve suturing; and

(2) dispense and charge for therapeutic contact lenses in accordance with §551.004 of the Texas Pharmacy Act.

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

Filed with the Office of the Secretary of State on March 4, 2015.

TRD-201500753

Chris Kloeris

Executive Director

Texas Optometry Board

Earliest possible date of adoption: April 19, 2015

For further information, please call: (512) 305-8500



PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 461. GENERAL RULINGS

22 TAC §461.20

The Texas State Board of Examiners of Psychologists proposes new §461.20, Agency Staff Training and Education. The proposed new rule will ensure compliance with the State Employee Training Act, Chapter 656, Subchapter C, Texas Government Code.

Darrel D. Spinks, Executive Director, has determined that for the first five-year period the proposed new rule will be in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no economic costs to persons required to comply with this rule. There will be no effect on small businesses or local economies.

Comments on the proposed new rule may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701 within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701 or via email to brenda@tsbep.texas.gov.

The new rule is proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§461.20. Agency Staff Training and Education.

(a) In accordance with the State Employee Training Act, Board staff may be permitted or required to attend training or education programs if those programs are related to the employee's duties or prospective duties, and the training materially aids effective administration of the Psychologists' Licensing Act or Board rules and serves an important public purpose.

(b) The Board's Executive Director shall be eligible to attend training and education programs, and shall determine which other employees will be permitted or required to attend training.

(c) Employees who receive training must utilize the training opportunity to prepare for technological and legal developments facing the Board, or to increase their work capabilities or competence.

(d) An employee, prior to receiving training for three or more months, during which the employee does not perform his or her regular duties, must enter into a written agreement with the Board to comply with the requirements of Tex. Gov't Code Ann. §656.103(a)(1). Employees who fail or refuse to enter into such an agreement shall not be permitted to attend training lasting three or more months.

(e) The Board shall pay the costs and expenses related to approved training in accordance with the State Employee Training Act, the Comptroller's rules and regulations, and the Board's own policies relating to employee reimbursement.

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

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TRD-201500779

Darrel D. Spinks
Executive Director

Texas State Board of Examiners of Psychologists

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For further information, please call: (512) 305-7700



22 TAC §461.21

The Texas State Board of Examiners of Psychologists proposes new §461.21, Sick Leave Pool. The proposed new rule will ensure compliance with Texas Government Code Annotated §661.002(c), which requires the Board to adopt rules relating to the operation of the agency's sick leave pool.

Darrel D. Spinks, Executive Director, has determined that for the first five-year period the proposed new rule will be in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no economic costs to persons required to comply with this rule. There will be no effect on small businesses or local economies.

Comments on the proposed new rule may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701 within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701 or via email to brenda@tsbep.texas.gov.

The new rule is proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§461.21. Sick Leave Pool.

(a) The Board hereby establishes a sick leave pool to assist employees and their immediate families in dealing with catastrophic illness or injury that forces them to exhaust all accrued sick leave.

(b) The Board's sick leave pool shall be administered by the Executive Director in accordance with Chapter 661 of the Texas Government Code, the rules and regulations of the Employees Retirement System of Texas, and the Texas Human Resources Statutes Inventory manual published by the Texas State Auditor's Office.

(c) The Executive Director shall develop and prescribe procedures for the operation of the sick leave pool, and include such procedures in the Board's personnel manual.

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

Filed with the Office of the Secretary of State on March 6, 2015.

TRD-201500780

Darrel D. Spinks
Executive Director

Texas State Board of Examiners of Psychologists

Earliest possible date of adoption: April 19, 2015

For further information, please call: (512) 305-7700

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CHAPTER 463. APPLICATIONS AND EXAMINATIONS

22 TAC §463.27

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas State Board of Examiners of Psychologists or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas State Board of Examiners of Psychologists proposes the repeal of §463.27, Temporary License for Persons Licensed in Other States. The proposed repeal would delete this rule in its entirety. Simultaneously with this proposal, a proposed new section is being offered that would clarify the rule.

Darrel D. Spinks, Executive Director, has determined that for the first five-year period the proposed repeal will be in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no economic costs to persons required to comply with this rule. There will be no effect on small businesses or local economies.

Comments on the proposed repeal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701 within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701 or via email to brenda@tsbep.texas.gov.

The repeal is proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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

§463.27. Temporary License for Persons Licensed in Other States.

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

Filed with the Office of the Secretary of State on March 6, 2015.

TRD-201500781

Darrel D. Spinks
Executive Director

Texas State Board of Examiners of Psychologists

Earliest possible date of adoption: April 19, 2015

For further information, please call: (512) 305-7700

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22 TAC §463.27

The Texas State Board of Examiners of Psychologists proposes new §463.27, Temporary License for Persons Licensed in Other States. The proposed new rule will clarify the statutory requirements for temporary licensure set forth in Texas Occupations Code Annotated §501.263 and provide fewer burdens and greater flexibility to both the public and agency staff when issuing and regulating temporary licenses.

Darrel D. Spinks, Executive Director, has determined that for the first five-year period the proposed new rule will be in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new rule. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no economic costs to persons required to comply with this new rule. There will be no effect on small businesses or local economies.

Comments on the proposed new rule may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701 within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701 or via email to brenda@tsbep.texas.gov.

The new rule is proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§463.27. Temporary License for Persons Licensed in Other States.

(a) A temporary license may be issued to an applicant seeking to practice in this state for a limited time and purpose, such as serving as an expert witness in court or assisting a patient with transitioning to a mental health practitioner in Texas. To be eligible for temporary licensure, an applicant must:

(1) submit a completed application for temporary licensure, setting forth a brief description of the type of psychological services to be provided;

(2) pay the application fee;

(3) submit proof that the applicant is currently licensed, certified, or registered as a psychologist or psychological associate by another jurisdiction having requirements substantially equal to those prescribed by the Psychologists' Licensing Act;

(4) submit documentation directly from the jurisdiction in which the applicant is licensed indicating that the applicant is in good standing with that jurisdiction;

(5) be supervised (sponsorship) by a psychologist licensed in this state; and

(6) provide documentation that the applicant has passed the Examination for Professional Practice of Psychology at the Texas cut-off for the type of temporary license sought.

(b) Substantial equivalency of another jurisdiction's requirements may be documented by the applicant providing a copy of the other jurisdiction's regulations with the pertinent sections highlighted

to indicate training and exam requirements for a particular type of license. The material is then reviewed for substantial equivalency by the Board. An applicant need not demonstrate substantial equivalency if the applicant is licensed in a jurisdiction with which the Board has reciprocity, nor must an applicant demonstrate the oral examination requirement of substantial equivalency if the applicant can show that he or she would be eligible for a waiver from the Board's oral examination pursuant to Board rule §463.15(c) of this title (relating to Oral Examination).

(c) Applicants for temporary licensure who hold a current Certificate of Professional Qualification in Psychology, status as a National Health Service Provider, or designation as a specialist from the American Board of Professional Psychology may have documentation from the credentialing entity sent directly to the Board as compliance with and in lieu of subsection (a)(3) and (6) of this section.

(d) For a psychologist practicing under a temporary license issued pursuant to this rule, the supervision required by subsection (a)(5) of this section shall consist of sponsorship by a psychologist licensed in this state. The sponsoring psychologist must be available for consultation with the temporary licensee, but otherwise has no supervisory responsibility for the temporary license holder or the services provided under the temporary license.

(e) Applicants meeting the requirements for temporary licensure shall be granted a temporary license authorizing the delivery of psychological services for no more than thirty days. Upon utilization of the full thirty days, or the expiration of one year from the date of licensure, whichever occurs first, the temporary license shall expire.

(f) A temporary licensee must submit written notification to the Board of the dates he or she intends to deliver psychological services in this state, at least 24 hours prior to the delivery of those services. Psychological services may not be provided in this state under a temporary license on any date not approved by the Board.

(g) Temporary licensees are subject to all applicable laws governing the practice of psychology in this state, including the Psychologists' Licensing Act and Board rules.

(h) An applicant for permanent licensure in this state is not eligible for temporary licensure. Upon receipt of an application for permanent licensure by a temporary license holder, any temporary license held by an applicant shall expire without further action or notice by the Board.

(i) A temporary license holder may not apply for another temporary license until the expiration of one year from the date of issuance of their last temporary license, regardless of whether that license is active or expired.

(j) A temporary license holder delivering psychological services while situated in this state, must display a copy of his or her temporary license, unless otherwise prohibited or it would be impractical to do so.

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

Filed with the Office of the Secretary of State on March 6, 2015.

TRD-201500782

Darrel D. Spinks

Executive Director

Texas State Board of Examiners of Psychologists

Earliest possible date of adoption: April 19, 2015

For further information, please call: (512) 305-7700

22 TAC §463.30

The Texas State Board of Examiners of Psychologists proposes an amendment to §463.30, Licensing of Military Spouses and Applicants with Military Experience. The proposed amendment will ensure consistency between the requirements for supervised experience needed for licensure as a psychological associate under this rule and Board rule §463.8.

Darrel D. Spinks, Executive Director, has determined that for the first five-year period the proposed amendment will be in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no economic costs to persons required to comply with this rule. There will be no effect on small businesses or local economies.

Comments on the proposed amendment may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701 within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701 or via email to brenda@tsbep.texas.gov.

The amendment is proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§463.30. *Licensing of Military Spouses and Applicants with Military Experience.*

(a) Military Spouses.

(1) A license may be issued to a military spouse, as defined by Chapter 55, Occupations Code, provided that the following documentation is provided to the Board:

(A) proof of the marriage to the spouse of an active duty member of the armed forces; and

(B) proof that the spouse holds a current license in another state and the licensing requirements for the license in the other state are substantially equivalent to the requirements for the license in Texas; or

(C) proof that within the five years preceding the application date, the spouse held the license in Texas and it expired while the applicant lived in another state for at least six months.

(2) An applicant applying for licensure under paragraph (1) of this subsection must provide documentation from all other states in which the applicant is licensed that indicate that the applicant has received no disciplinary action from those states regarding a mental health license.

(3) Alternative demonstrations of competency to meet the requirements for licensure. The following provisions provide alternative demonstrations of competency to the Board's licensing standards.

(A) Licensed Specialist in School Psychology. A spouse that meets the requirements of paragraph (1)(A) and (B) of this subsection is considered to have met the following requirements

for this type of license: three reference letters, submission of an official transcript, and evidence of the required coursework or National Association of School Psychologists certification, and passage of the National School Psychology Examination. All other requirements for licensure are still required.

(B) Licensed Psychological Associate. A spouse that meets the requirements of paragraph (1)(A) and (B) of this subsection is considered to have met the following requirements for this type of license: three reference letters, submission of an official transcript, 450 internship hours, and passage of the Examination for Professional Practice (EPPP) in Psychology at the Texas cut-off. All other requirements for licensure are still required.

(C) Provisionally Licensed Psychologist. A spouse who meets the requirements of paragraph (1)(A) and (B) of this subsection is considered to have met the following requirements for this type of license: three reference letters, submission of an official transcript, and passage of the EPPP at the Texas cut-off. All other requirements for licensure are still required.

(D) Licensed Psychologist. A spouse who meets the requirements of paragraph (1)(A) and (B) of this subsection is considered to have met the following requirements for this type of license: two years of supervised experience. All other requirements for licensure, including the requirements of this paragraph, are still required.

(4) Determination of substantial equivalency for licensing requirements in another state. The applicant must provide to the Board proof that the state in which the applicant is licensed has standards for licensure that are substantially equivalent to the requirements of this Board for the applicable license type:

(A) Licensed Specialist in School Psychology (the license required to provide psychological services in the public schools).

(i) The completion of a training program in school psychology approved/accredited by the American Psychological Association or the National Association of School Psychologists or a master's degree in psychology with specific course work as set forth in Board rule §463.9 of this title (relating to Licensed Specialist in School Psychology); and

(ii) Passage of the National School Psychology Examination.

(B) Licensed Psychological Associate (the master's level license that requires supervision by a licensed psychologist).

(i) Master's degree that is primarily psychological in nature and the degree is at least 42 hours with at least 27 hours in psychology courses; ~~and~~

(ii) Passage of the EPPP at the master's level at 55%; ~~and~~[-]

(iii) A minimum of 450 hours of practicum, internship, or experience in psychology, under the supervision of a licensed psychologist.

(C) Provisionally Licensed Psychologist (the doctoral level license that must be supervised by a licensed psychologist).

(i) Doctoral degree in psychology; and

(ii) Passage of the EPPP at the doctoral level at 70%.

(D) Licensed Psychologist (the doctoral license that is required to practice independently).

(i) Doctoral degree in psychology;

(ii) Passage of the EPPP at the doctoral level of 70%;

(iii) Two years of supervised experience by a licensed psychologist; and

(iv) Passage of an oral examination.

(5) Renewal of License Issued to Military Spouse. A license issued to a military spouse under paragraph (1)(A) and (B) of this subsection shall remain active until the licensee's birthdate following a period of one year from the date of issuance of the license, at which time it will be subject to all renewal requirements.

(b) Applicants with Military Experience.

(1) A military service member or military veteran, as defined by Chapter 55, Occupations Code, shall receive credit toward the following licensing requirements for verified military service, training, or education:

(A) Licensed Specialist in School Psychology. A military service member or military veteran who was engaged in or who has been engaged in the delivery of psychological services within the military, for at least one year, is considered to have met the following requirements for this type of license: three reference letters. All other requirements for licensure are still required.

(B) Licensed Psychological Associate. A military service member or military veteran who was engaged in or who has been engaged in the delivery of psychological services within the military, for at least one year, is considered to have met the following requirements for this type of license: three reference letters, 450 hours of supervised experience. All other requirements for licensure are still required.

(C) Provisionally Licensed Psychologist. A military service member or military veteran who was engaged in or who has been engaged in the delivery of psychological services within the military, for at least one year, is considered to have met the following requirements for this type of license: three reference letters. All other requirements for licensure are still required.

(D) Licensed Psychologist. A military service member or military veteran who was engaged in or who has been engaged in the delivery of psychological services within the military, for at least one year following conferral of a doctoral degree, is considered to have met the following requirements for this type of license: one year of post-doctoral supervised experience. All other requirements for licensure are still required.

(2) An applicant with an honorable discharge from the United States military either during the application process or within the three year period preceding the date the application is received by the Board, is considered to have met the requirement for one of the three reference letters.

(3) A military service member or military veteran may not receive credit toward licensing requirements due to military service, training, or education if they hold a license issued by another jurisdiction that has been restricted, or they have an unacceptable criminal history.

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

Filed with the Office of the Secretary of State on March 6, 2015.

TRD-201500783



TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 228. RETAIL FOOD

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes new §§228.1, 228.2, 228.31 - 228.45, 228.61 - 228.83, 228.101 - 228.125, 228.141 - 228.154, 228.171 - 228.186, 228.201 - 228.213, 228.221 - 228.225, 228.241 - 228.257, and 228.271 - 228.278, concerning the regulation of retail food establishments.

BACKGROUND AND PURPOSE

The purpose of the repeals of §§229.161 - 229.171 and 229.173 - 229.175 and the new rules is to update the rules based on the United States Food and Drug Administration (FDA) Model Food Code. The existing rules, based on an outdated version of the Model Food Code, do not reflect the latest science and knowledge regarding best practices, emerging pathogens, and new retail food technologies. The FDA partners with numerous scientific and academic organizations and is able to identify the best food safety practices and determine the best methods to prevent foodborne illness. The results of the scientific studies are reflected in the current Food Code. The new rules are being placed in a new chapter and will be based on the current 2013 FDA Model Food Code and will bring the Texas food rules into conformity with the rest of the country.

The new rules also implement House Bill 3012, 81st Legislative Session, 2009, which gave the department the authority to require food handler training for each food employee in a retail food establishment. Consequently, the number of food employees required to complete a food handler training course will increase.

The model Food Code may be accessed electronically at <http://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/ucm374275.htm>.

Government Code, §2001.039, requires that each state agency review and consider for re adoption each rule adopted by the agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 229.161 - 229.171 and 229.173 - 229.175 have been reviewed and the department has determined that reasons for adopting these sections continue to exist because rules on the subject are needed to reduce the potential for foodborne illness in Texas consumers. The new rules in Chapter 228 provide the clarification and updating of existing §§229.161 - 229.171 and 229.173 - 229.175, as a result of the rules review.

SECTION-BY-SECTION SUMMARY

Proposed new Subchapter A, General Provisions, §228.1 and §228.2, states the purpose of the Texas Food Establishment Rules, which is to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented

and adds and updates definitions based upon current national food industry practices and input from stakeholders. The amendments to the definitions reflect the current science and knowledge regarding best practices, emerging pathogens, foodborne risk factors and retail food technologies. These definitions more clearly define the meaning of mobile food establishments, food establishments, and event. In addition, new definitions are sous vide, cook-chill, self-serve food markets, cut-leafy greens, conditional employee, private water system, plumbing code, priority, priority foundation, core item violations and time/temperature control for safety (TCS) food.

Proposed new Subchapter B, Management and Personnel, §§228.31 - 228.45, specifies requirements for management and personnel including a food handler training course requirement for all food employees in all retail food establishments, reporting periods and responding to disease or medical conditions, and requirements for the person in charge to know and explain the major food allergens and the person in charge must comply with the reporting responsibilities and exclusion and restriction of food employees. This section has been amended to include non-typhoidal salmonella on the list of illnesses that require reporting and exclusion of infected food employees.

Proposed new Subchapter C, Food, §§228.61 - 228.83, specifies requirements for food including requirements for food condition, source, labeling, and processing; time and temperature controls; measures to prevent food contamination; variance requirements for specialized processing methods; new criteria, including three categories for using reduced oxygen packaging for food; current industry standards such as the inclusion of allowing cold foods to be kept out of temperature control up to 70 degrees Fahrenheit before discarding. Wording in this section has been added to reflect that the temperature required to re-heat TCS food during a non-continuous cooking process has been adjusted from 165 degrees Fahrenheit to the specific cooking temperature of that food and take-home food establishment containers may now be reused if they are constructed for reuse, provided by the food establishment, returned to the food establishment after use, visually inspected by the food establishment before reuse and properly washed, rinsed and sanitized before refilling.

Proposed new Subchapter D, Equipment, Utensils, and Linens, §§228.101 - 228.125, specifies requirements for equipment, utensils and linens and addresses requirement that exposed, unused tableware must now be changed between customers or washed, rinsed and sanitized before use.

Proposed new Subchapter E, Water, Plumbing, and Waste, §§228.141 - 228.154, specifies requirements for water, plumbing and waste and includes changing requirements for plumbing systems from according to law to according to the plumbing code.

Proposed new Subchapter F, Physical Facilities, §§228.171 - 228.186, specifies requirements for physical facilities and covers requirements for anti-slip floor coverings in food establishments; outdoor servicing areas will now require overhead protection; allowing for automatic hand washing facilities if approved by the regulatory authority; allowing chemically treated towelettes for handwashing in temporary and mobile food establishments when there is no food exposure or food handling; and new language requiring plumbing fixtures such as handwashing sinks, toilets, and urinals to be cleaned as often as necessary to keep them clean.

Proposed new Subchapter G, Poisonous or Toxic Materials, §§228.201 - 228.213, specifies requirements for poisonous and toxic materials and includes chemicals used to wash or peel raw, whole vegetables must be an approved additive and now includes Ozone as an approved antimicrobial agent.

Proposed new Subchapter H, Requirements Applicable to Certain Establishments, §§228.221 - 228.225, specifies requirements applicable to certain establishments and includes mobile food units, temporary food establishments, bed and breakfast establishments, outfitter operations and self-serve food markets respectively. Mobile food unit changes bring the State requirements up to current regulatory standards as benchmarked alongside jurisdictions such as Austin, Dallas, Plano, and San Antonio. Temporary food establishments would be required to have at least one person on site with an accredited food handler certification. The self-service food markets section rules are new for unmanned convenient stores.

Proposed new Subchapter I, Compliance, §§228.241 - 228.257, contains compliance provisions for protecting public health, variance requests, hazard analysis and critical control point (HACCP) plans, permits, inspections, reports, public information, plan review, risk-based inspection intervals and disease control. This section also contains language outlining the levels of competency for Inspectors, who should meet the basic curriculum and field training requirements in the Food and Drug Administration's National Retail Food Regulatory Program Standards, as an alternative to being a Registered Sanitarian in Texas.

Proposed new Subchapter J, Private Water Systems, §§228.271 - 228.278, are requirements to ensure safe drinking water systems at Food Establishments utilizing private, non-regulated water systems not regulated by the Texas Commission on Environmental Quality.

FISCAL NOTE

Jon Huss, Section Director, Environmental and Consumer Safety Section, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to the state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Huss has determined that there will be an effect on small businesses or micro-businesses or persons who are required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses or micro-businesses will be required to alter their business practices in order to comply with the sections.

Retail food establishments do not currently require a food handler training course for all food employees and will need to do so in the future. This is estimated to be between \$10 and \$25 per person depending on the service used. The individual employees will pay the cost themselves, not the establishment. Also, some businesses already require a food handler training course, while others will hire individuals with food handler training or a certified food manager certification. Additionally, it is not known how many employees per restaurant will actually be food employees per statute definition and will require food handler training.

There are new requirements for monthly bacteriological testing for (non-public) private water systems at retail food establishments. To comply with new Subchapter J (relating to Private Wa-

ter Systems), this may include installing an automatic chlorinator and periodically testing the water quality (monthly bacteriological testing for (non-public) private water systems for retail food establishments estimated to be \$10/month/operating month and \$100/every three years for a chemical analysis). There are currently 108 retail establishments that will fall under the provisions of Subchapter J.

IMPACT ON LOCAL EMPLOYMENT

There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Huss has also determined that for each year of the first five years that the sections will be in effect, the public will benefit from adoption of the sections. The public benefit anticipated from enforcing or administering the sections is to reduce the potential for foodborne illness from retail food establishments by requiring food handler training courses for food employees and food safety practices consistent with current science.

REGULATORY ANALYSIS

The department has determined that this is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk 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 a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed repeals and new rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Christopher Sparks, Environmental and Consumer Safety Section, Division of Regulatory Services, Department of State Health Services, Mail Code, 1987, P. O. Box 149347, Austin, Texas 78714-9347, (512) 834-6753, or by email to Christopher.Sparks@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

PUBLIC HEARING

A public hearing to receive comments on the proposal will be scheduled during the official 30-day comment period at the Department of State Health Services, Room S-125, 8407 Wall Street, Austin, Texas 78754. The information will be placed on the program website. For information, please contact Christopher Sparks at (512) 834-6753 or Christopher.sparks@dshs.state.tx.us.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §228.1, §228.2

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §437.0056, which requires the department to adopt rules for granting and maintaining retail food permits in areas not regulated by counties and public health districts; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The new sections affect Health and Safety Code, Chapters 437 and 1001; and Government Code, Chapters 531 and 2001.

§228.1. Purpose.

The purpose of this chapter is to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented. The rules in this chapter are based in part upon Code of Federal Regulations, Title 2, Food and Drugs, Parts 1 - 1499 and implement Health and Safety Code, Chapter 437, Regulation of Food Service Establishments, Retail Food Stores, Mobile Food Units, and Roadside Vendors.

§228.2. Definitions.

The following definitions apply in this chapter.

(1) Accredited program--Food manager certification program that has been evaluated and listed by the department and conforms to standards set by the department.

(2) Additive--A substance added to food that changes the characteristics of that food.

(3) Adulterated food--A food deemed to be adulterated as specified in the Health and Safety Code, §431.081.

(4) Approved--Acceptable to the regulatory authority based on a determination of conformity with principles, practices, and generally recognized standards that protect public health.

(5) Asymptomatic--Not showing obvious symptoms, not producing indications of a disease or other medical condition. An individual infected with a pathogen but not exhibiting or producing any signs or symptoms of vomiting, diarrhea, or jaundice. Symptoms are not shown because the symptoms have been resolve or have subsided, or because the symptoms never manifested.

(6) a_w --Water activity, indicated by the symbol a_w , that measures the free moisture in a food. It is the quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature.

(7) Balut--An embryo inside a fertile egg that has been incubated for a period sufficient for the embryo to reach a specific stage of development after which it is removed from incubation before hatching.

(8) Bare hand contact--Handling food with hands without any barriers as described in Subchapter C of this chapter.

(9) Bed and Breakfast Extended--An establishment with more than seven rooms for rent or an establishment that provides food service other than breakfast to overnight guests.

(10) Bed and Breakfast Food Establishment--A Bed and Breakfast that provides food service to other than to its overnight guests.

(11) Bed and Breakfast Limited--An establishment that has seven or fewer rooms for rent, serves breakfast to overnight guests, and is not a retail food establishment.

(12) Beverage--A liquid for drinking, including water.

(13) Bottled drinking water--Water that is sealed in bottles, packages, or other containers and offered for sale for human consumption, including bottled mineral water.

(14) Casing--A tubular container for sausage products made of either natural or artificial (synthetic) material.

(15) Central Preparation Facility--A facility that is an approved and permitted retail food establishment at which food is prepared, stored, and wrapped; and the Mobile Food Unit is supplied with fresh water and ice; and emptied of waste water into a proper waste disposal system, and cleaned, including washing, rinsing, and sanitizing of those food-contact surfaces or items not capable of being immersed in the Mobile Food Unit utensil-washing sink. Use of a private residence as a central preparation facility is prohibited.

(16) Certification number--A unique combination of letters and numbers assigned by a shellfish control authority to a molluscan shellfish dealer according to the provisions of the National Shellfish Sanitation Program.

(17) Cleaned in Place (CIP)--Cleaned in place by the circulation or flowing by mechanical means through a piping system of a detergent solution, water rinse, and sanitizing solution onto or over equipment surfaces that require cleaning, such as the method used, in part, to clean and sanitize a frozen dessert machine. CIP does not include the cleaning of equipment such as band saws, slicers, or mixers that are subjected to in-place manual cleaning without the use of a CIP system.

(18) *Clostridium botulinum*--The name of a group of rod-shaped bacteria that grow best in low oxygen conditions and cause a serious paralytic illness called botulism. Foodborne botulism is caused by eating foods that contain botulinum toxin.

(19) Code of Federal Regulations (CFR)--The compilation of federal regulations published in the *Federal Register* by the executive departments and agencies of the federal government which are published annually by the U.S. Government Printing Office. Citations to the CFR refer to the Title, Part, and Section numbers; for example, 21 CFR §178.1010 refers to Title 21, Part 178, §1010. The CFR contains FDA rules in Title 21, USDA rules in Titles 7 and 9, EPA rules in Title 40, and Wildlife and Fisheries rules in Title 50.

(20) Color additive--Any material imparting color to a food as defined in the Health and Safety Code, §431.002(6).

(21) Commingle--Combine shellstock harvested on different days or from different growing areas as identified on the tag or label or to combine shucked shellfish from containers with different container codes or different shucking dates.

(22) Comminuted--Reduced in size by methods including chopping, flaking, grinding, or mincing. The term includes fish or meat products that are reduced in size and restructured or reformulated such as gefilte fish, gyros, ground beef, and sausage; and a mixture of two or more types of meat that have been reduced in size and combined, such as sausages made from two or more meats.

(23) Common dining area--A central location where people gather to eat. The term does not apply to a kitchenette or dining area located within a resident's private living quarters.

(24) Conditional employee--A potential food employee to whom a job offer is made, conditional upon responses to subsequent

medical questions or examinations designed to identify potential food employees who may be suffering from a disease that can be transmitted through food and done in compliance with Title 1 of the Americans with Disabilities Act (ADA) of 1990.

(25) Confirmed disease outbreak--A foodborne disease outbreak in which laboratory analysis of appropriate specimens identifies a causative agent and epidemiological analysis implicates food as the source of the illness.

(26) Consumer--A person who is a member of the public, takes possession of food, is not functioning in the capacity of an operator of a food establishment or food processing plant, and does not offer the food for resale.

(27) Controlled atmosphere packaging--A method of packaging food in which the atmosphere of a package of food is modified such that until the package is opened, its composition is different from air, and continuous control of that atmosphere is maintained, such as by using oxygen scavengers or a combination of total replacement of oxygen, non-respiring food, and impermeable packaging material.

(28) Cook chill packaging--A method of packaging food in which cooked food is hot filled into impermeable bags that have the air expelled and are then sealed or crimped closed. Bagged food is rapidly chilled and refrigerated at temperatures that inhibit the growth of psychrotrophic pathogens.

(29) Core item--A provision in this chapter that is not designated as a Priority item or a Priority Foundation item and includes an item that usually relates to general sanitation, operational controls, sanitation operating procedures (SSOPs) facilities or structures, equipment design, or general maintenance.

(30) Corrosion-resistant material--A material that maintains acceptable surface cleanability characteristics under prolonged influence of the food to be contacted, the normal use of cleaning compounds and sanitizing solutions, and other conditions of the use environment.

(31) Counter-mounted equipment--Equipment that is not portable and is designed to be mounted off the floor on a table, counter, or shelf.

(32) Critical control point--A point or procedure in a specific food system where loss of control may result in an unacceptable health risk.

(33) Critical limit--The maximum or minimum value to which a physical, biological, or chemical parameter must be controlled at a critical control point to minimize the risk that the identified food safety hazard may occur.

(34) Cut leafy greens--Fresh leafy greens whose leaves have been cut, shredded, sliced, chopped, or torn. This does not include the harvest cut.

(35) Dealer--Person who is authorized by a shellfish control authority for the activities of shellstock shipper, shucker-packer, repacker, reshipper, or deuration processor of molluscan shellfish according to the provisions of the National Shellfish Sanitation Program.

(36) Department--The Texas Department of State Health Services, Division for Regulatory Services. The Department's Environmental and Consumer Safety Section is located at P.O. Box 149347, Mail Code 1987, Austin, Texas 78714-9347, website: www.dshs.state.tx.us.

(37) Disclosure--A written statement that clearly identifies the animal-derived foods which are, or can be ordered, raw, undercooked, or without otherwise being processed to eliminate pathogens

in their entirety, or items that contain an ingredient that is raw, undercooked, or without otherwise being processed to eliminate pathogens.

(38) Drinking water--Water traditionally known as "potable water" and that meets 30 TAC §§290.101 - 290.114, 290.117 - 290.119, and 290.121 (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems). Drinking water includes the term "water" except where the term used connotes that the water is not potable, such as "boiler water," "mop water," "rainwater," "wastewater," and "nondrinking" water.

(39) Dry storage area--A room or area designated for the storage of packaged or containerized bulk food that is not potentially hazardous time/temperature control for safety (TCS) food and dry goods such as single-service items.

(40) Easily cleanable--A characteristic of a surface that allows effective removal of soil by normal cleaning methods, is dependent on the material, design, construction, and installation of the surface, and varies with the likelihood of the surface's role in introducing pathogenic or toxigenic agents or other contaminants into food based on the surface's approved placement, purpose and use. Easily cleanable includes a tiered application of the criteria that qualifies the surface as easily cleanable as to different situations in which varying degrees of cleanability are required such as:

(A) the appropriateness of stainless steel for a food preparation surface as opposed to the lack of need for stainless steel to be used for floors or for tables used for consumer dining; or

(B) the need for a different degree of cleanability for a utilitarian attachment or accessory in the kitchen as opposed to a decorative attachment or accessory in the consumer dining area.

(41) Easily movable--Portable, mounted on casters, gliders, or rollers, or provided with a mechanical means to safely tilt a unit of equipment for cleaning. Also, having no utility connection, a utility connection that disconnects quickly, or a flexible utility connection line of sufficient length to allow the equipment to be moved for cleaning of the equipment and adjacent area.

(42) Egg--Shell egg of an avian species such as chicken, duck, goose, guinea, quail, ratites, or turkey. The definition of an egg does not include a balut, shell egg of reptile species such as an alligator, or an egg product.

(43) Egg product--All or portion of the contents found inside eggs separated from the shell and pasteurized in a food processing plant, with or without added ingredients, and that is intended for human consumption such as dried, frozen, or liquid eggs. Egg product does not include food which contains egg only in a relatively small portion such as cake mixes.

(44) Employee--The permit holder, person in charge, person having supervisory or management duties, person on the payroll, family member, volunteer, person performing work under contractual agreement, or other person working in a food establishment.

(45) EPA--U.S. Environmental Protection Agency, located at 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460, telephone (202) 272-0167, website: www.epa.gov.

(46) Equipment--An article used in the operation of a food establishment such as a freezer, grinder, hood, icemaker, meat block, mixer, oven, reach-in-refrigerator, scale, sink, slicer, stove, table, temperature measuring device for ambient air, vending machine, or warewashing machine. This term does not include items used for handling or storing large quantities of packaged foods that are received from a

supplier in a cased or overwrapped lot, such as hand trucks, forklifts, dollies, pallets, racks, and skids.

(47) Event--A unique public gathering of persons at which food products will be served directly to consumers, such as a festival, bazaar, carnival, circus, fund-raiser, public exhibition, celebration, sporting event, or other public gathering which can be civic, political, public, or educational for which an appropriate regulatory authority would grant permission for the operation of the event, whether by permit, license or other official written document.

(48) Exclude--To prevent a person from working as a food employee or entering a food establishment except for those areas open to the general public.

(49) Exotic animal--Member of a species of game animals not indigenous to this state including axis deer, Nilgai antelope, red sheep, or other cloven-hoofed ruminant animals. Exotic animals are considered livestock in this chapter and are amenable to inspection under Health and Safety Code, §433.035 (relating to Inspection and Other Regulation of Exotic Animals in Interstate Commerce).

(50) FDA--The U.S. Food and Drug Administration, Center for Food Safety and Applied Nutrition, 5100 Paint Branch Parkway, College Park, Maryland 20740, telephone 1-888-723-3366, website www.fda.gov/Food.

(51) Fish--Fresh or saltwater finfish, crustaceans and other forms of aquatic life (including alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals) other than birds or mammals, and all mollusks, if such animal life is intended for human consumption. Fish includes an edible human food product derived in whole or in part from fish, including fish that have been processed in any manner.

(52) Food--A raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(53) Food additive--A substance added to food that changes the characteristics of the food as described in Health and Safety Code, §431.002(17).

(54) Foodborne disease outbreak--The occurrence of two or more cases of a similar illness resulting from the ingestion of a common food.

(55) Food-contact surface--A surface of equipment or a utensil with which food normally comes into contact or a surface of equipment or a utensil from which food may drain, drip, or splash into a food or onto a surface normally in contact with food.

(56) Food employee--An individual working with unpackaged food, food equipment or utensils, or food-contact surfaces.

(57) Food establishment--A food establishment means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption as follows:

(A) a restaurant, retail food store, satellite or catered feeding location, catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people, market, vending location, (machine), self-service food market, conveyance used to transport people, institution, or food bank;

(B) an establishment that relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers;

(C) includes an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location is permitted by the regulatory authority and an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food; and

(D) food establishment does not include an establishment that offers only prepackaged foods that are not time/temperature control for safety food, a produce stand that only offers whole, uncut fresh fruits and vegetables, a food processing plant, a cottage food industry, an area where cottage food is prepared, sold or offered for human consumption, a Bed and Breakfast Limited facility as defined in this chapter, or a private home that receives catered or home-delivered food.

(58) Food processing plant--A commercial operation that manufactures, packages, labels, or store foods for human consumption and does not provide food directly to a consumer, and a food establishment as defined in paragraph (57) of this section.

(59) Food Protection Manager Certification--A document obtained by a person in charge who demonstrates knowledge by being a food protection manager that is certified by a food protection manager certification program that is evaluated and listed by a Conference for Food Protection-recognized accrediting agency as conforming to the Conference for Food Protection Standards for Accreditation of food Protection Manager Certification Programs.

(60) Game animal--An animal, the products of which are food, that is not classified as cattle, sheep, swine, goat, horse, mule or other equines as in 9 CFR 301, Definitions, as poultry in 9 CFR 381, Poultry Products Inspection Regulations; or as fish as defined in paragraph (51) of this section. Includes mammals such as reindeer, elk, deer, antelope, water buffalo; bison, rabbit, squirrel, opossum, raccoon, nutria or muskrat, and non-aquatic reptiles such as land snakes. A game animal does not include ratites.

(61) General use pesticide--A pesticide that is not classified by EPA for restricted use as specified in 40 CFR §152.175 or is not limited to use by or under the direct supervision of a certified applicator licensed by the Texas Department of Agriculture or by the Texas Structural Pest Control Service as applicable.

(62) Grade A standards--The requirements of the United States Public Health Service/FDA "Grade A Pasteurized Milk Ordinance" with which certain fluid and dry milk and milk products comply.

(63) Group residence--A private or public housing corporation or institutional facility that provides living quarters and meals. The term includes a domicile for unrelated persons such as a retirement home, correctional facility, or a long-term care facility.

(64) HACCP plan--A written document that delineates the formal procedures for following the Hazard Analysis Critical Control Point principles developed by The National Advisory Committee on Microbiological Criteria for Foods.

(65) Handwashing sink--A lavatory, trough, basin, or vessel for washing, a wash basin, or a plumbing fixture especially placed for use in personal hygiene and designed only for the washing of hands. It includes an automatic handwashing facility.

(66) Hazard--A biological, chemical, or physical property that may cause an unacceptable consumer health risk.

(67) Health practitioner--A physician licensed to practice medicine, or if allowed by law, a nurse practitioner, physician assistant, or similar medical professional.

(68) Hermetically sealed container--A container that is designed and intended to be secure against the entry of microorganisms and, in the case of low acid canned foods, to maintain the commercial sterility of its contents after processing.

(69) Highly susceptible population--Persons who are more likely than other people in the general population to experience food-borne disease because they are immunocompromised, preschool aged children, or older adults and are obtaining food at a facility that provides services such as custodial care, health care, or assisted living. Examples of custodial or health care facilities, or of assisted living facilities include but are not limited to child or adult day care centers, kidney dialysis centers, hospitals, nursing homes, or senior centers providing nutritional or socialization services.

(70) Imminent health hazard--A significant threat or danger to health that is considered to exist when there is evidence sufficient to show that a product, practice, circumstance, or event creates a situation that requires immediate correction or cessation of operations to prevent injury based on the number of potential injuries and the nature, severity, and duration of the anticipated injury.

(71) Injected--Manipulating meat to which a solution has been introduced into its interior by processes that are referred to as "injecting," "pump marinating," or "stitch pumping."

(72) Juice--The aqueous liquid expressed or extracted from one or more fruits or vegetables, purées of the edible portions of one or more fruits or vegetables, or any concentrates of such liquid or purée. For purposes of HAACP it does not include liquids, purées, or concentrates that are not used as beverages or ingredients of beverages.

(73) Kitchenware--Food preparation and storage utensils.

(74) Law--Applicable local, state, and federal statutes, rules, regulations, and ordinances.

(75) Leafy greens--Includes iceberg lettuce, romaine lettuce, leaf lettuce, butter lettuce, baby leaf lettuce, escarole, endive, spring mix, spinach, cabbage, kale, arugula, and chard. This term does not include herbs such as cilantro or parsley.

(76) License--The document issued by the regulatory authority that authorizes a person to operate a food establishment. Can also be referred to as a permit as defined in paragraph (92) of this section.

(77) License holder--The entity that is legally responsible for the operation of the food establishment such as the owner, the owner's agent, or other person and possesses a valid permit to operate a food establishment. Can also be referred to as a permit holder as defined in paragraph (93) of this section.

(78) Linens--Fabric items such as cloth hampers, cloth napkins, tablecloths, wiping cloths, and work garments including cloth gloves.

(79) *Listeria monocytogenes*--A rod-shaped bacteria that can be found in soil and water. Animals can carry the bacterium without appearing to be ill and can contaminate foods of animal origin. A serious infection called Listeriosis is usually caused by eating food contaminated with *Listeria monocytogenes*.

(80) Livestock--Cattle, sheep, swine, goats, horses, mules, other equine, poultry, domesticated rabbits, exotic animals, and domesticated birds. Livestock are amenable to inspection.

(81) Major Food Allergen--A food allergen is a food protein that causes an adverse immune response. The eight specific foods that are known as major food allergens include dairy, eggs, wheat, soy, peanuts, tree nuts, fish and shellfish or any food ingredients that contain protein derived from these foods. This does not include any highly refined oil derived from a food specified in this paragraph or any ingredient that is exempt under the petition or notification process specified in the Food Allergen Labeling and Consumer Protection Act of 2004 (Public Law 108-282).

(82) Meat--The flesh of animals used as food including the dressed flesh of cattle, swine, sheep, or goats and other edible animals, except fish as defined in paragraph (51) of this section, poultry as defined in paragraph (103) of this section, and game animals as defined in paragraph (60) of this section that are offered for human consumption.

(83) Mechanically tenderized--Manipulating meat with deep penetration by processes which may be referred to as "blade tenderizing," "jaccarding," "pinning," "needling," or using blades, pins, needled or any mechanical device. It does not include processes by which solutions are injected into the meat.

(84) mg/L--Milligrams per liter, which is the metric equivalent of parts per million (ppm).

(85) Mobile Food Unit (MFU)--A vehicle mounted, self or otherwise propelled, self-contained food service operation, designed to be readily movable (including, but not limited to catering trucks, trailers, push carts, and roadside vendors) and used to store, prepare, display, serve or sell food. Mobile units must completely retain their mobility at all times. A Mobile Food Unit does not include a stand or a booth. A roadside food vendor is classified as a MFU.

(86) Modified atmosphere packaging--A method of packaging food in which the atmosphere of a package of food is modified so that its composition is different from air but the atmosphere may change over time due to the permeability of the packaging material or the respiration of the food. Modified atmosphere packaging includes: reduction in the proportion of oxygen, total replacement of oxygen, or an increase in the proportion of other gases such as carbon dioxide or nitrogen.

(87) Molluscan shellfish--Any edible species of fresh or frozen oysters, clams, mussels, and scallops or edible portions thereof, except when the scallop product consists only of the shucked adductor muscle.

(88) Non-Continuous cooking--The cooking of food in a food establishment using a process in which the initial heating of the food is intentionally halted so that it may be cooled and held for complete cooking at a later time prior to sale or service. It does not include cooking procedures that only involve temporarily interrupting or slowing an otherwise continuous cooking process.

(89) Non-Time/Temperature Control for Safety (NTCS) food--(formerly non-Potentially Hazardous Food (non-PHF)), An air-cooled hard-boiled egg with shell intact, or an egg with shell intact that is not hard-boiled, but has been pasteurized to destroy all viable *salmonella*. A food in an unopened hermetically sealed container that is commercially processed to achieve and maintain commercial sterility under conditions of non-refrigerated storage and distribution. A food that because of its pH or A_w value, or interaction of A_w and pH values, is designated as a NTCS food in Table A and Table B in the Figure in §228.2(144). A food that is designated as Product Assessment Required (PA) in Table A and Table B in the Figure in §228.2(144) and has undergone a PA showing that the growth or toxin formation of pathogenic microorganisms that are reasonably likely to occur in that food is precluded due to either:

(A) intrinsic factors including added or natural characteristics of the food such as preservatives, antimicrobials, humectants, acidulants, or nutrients;

(B) extrinsic factors including environmental or operational factors that affect the food such as packaging, modified atmosphere such as reduced oxygen packaging, shelf life and use, or temperature range of storage and use;

(C) a combination of intrinsic and extrinsic factors; or

(D) a food that does not support the growth of or toxin formation of pathogenic microorganisms in accordance with one or more of the conditions above in this definition even though the food may contain a pathogenic microorganism or chemical or physical contaminant at a level sufficient to cause illness or injury.

(90) Outfitter operation--Any operation such as but not limited to trail rides, bus tours, harbor cruises or river raft trips where food is offered to patrons and which operates out of a central preparation location or food establishment.

(91) Packaged--Bottled, canned, cartoned, bagged, or wrapped, whether in a food establishment or in a food processing plant. Does not include wrapped or placed in a carry-out container to protect the food during service or delivery to the consumer by a food employee upon consumer request.

(92) Permit--The document issued by the regulatory authority that authorizes a person to operate a food establishment. Can also be referred to as a license as per paragraph (76) of this section.

(93) Permit holder--The entity that is legally responsible for the operation of the food establishment such as the owner, the owner's agent, or other person who possesses a valid permit to operate a food establishment. Can also be referred to as a license holder as per paragraph (77) of this section.

(94) Person--An association, corporation, individual, partnership, other legal entity, government, or governmental subdivision or agency.

(95) Person in charge (PIC)--The individual present at a food establishment who is responsible for the operation at the time of inspection.

(96) Personal care items--Items or substances that may be poisonous, toxic, or a source of contamination and are used to maintain or enhance a person's health, hygiene, or appearance. Includes but is not limited to medicines, first aid supplies, cosmetics, and toiletries such as tooth paste and mouthwash.

(97) pH--The symbol for the negative logarithm of the hydrogen ion concentration, which is a measure of the degree of acidity or alkalinity of a solution. Values between 0 and 7 indicate acidity and values between 7 and 14 indicate alkalinity. The value for pure distilled water is 7, which is considered neutral.

(98) Physical facilities--The structure and interior surfaces of a food establishment including accessories such as soap and towel dispensers and attachments such as light fixtures and heating or air conditioning system vents.

(99) Plumbing Code--The International Plumbing Code, 2009 edition, including appendices C, E, F, and G, published by the International Code Council as amended by 16 TAC §70.101 (relating to Amendments to Mandatory Building Codes) or a Plumbing Code adopted by a local regulatory authority, whichever is more stringent.

(100) Plumbing fixture--A receptacle or device that is either temporarily or permanently connected to the water distribution

system of the premises and demands a supply of water from the system or discharges used water, waste materials, or sewage directly or indirectly to the drainage system of the premises.

(101) Plumbing system--The water supply and distribution pipes; plumbing fixtures and traps, soil, waste, and vent pipes, sanitary and storm sewers and building drains, including their respective connections, devices, and appurtenances within the premises; and water-treating equipment.

(102) Poisonous or toxic materials--Substances that are not intended for ingestion and are in the following four categories:

(A) cleaners and sanitizers including but not limited to cleaning and sanitizing agents and agents such as caustics, acids, drying agents, polishes, and other chemicals;

(B) pesticides including substances such as insecticides and rodenticides;

(C) substances necessary for the operation and maintenance of the establishment including but not limited to nonfood grade lubricants and personal care items that may be deleterious to health; and

(D) substances not necessary for the operation and maintenance of the establishment and are on the premises for retail sale, such as petroleum products and paints.

(103) Poultry--Any domesticated bird (chickens, turkeys, ducks, geese, guineas, ratites or squabs), whether alive or dead, and any migratory waterfowl or game bird, pheasant, partridge, quail, grouse, or pigeon, whether live or dead.

(104) Premises--The physical facility, its contents, and the contiguous land or property under the control of the permit holder or the physical facility, its contents and the land or property not described previously if its facilities and contents are under the control of the permit holder and may impact food establishment personnel, facilities, or operations, and a food establishment is only one component of the larger operation such as a health care facility, hotel, motel, school, recreational camp, or prison.

(105) Primal cut--A basic major cut into which carcasses and sides of meat are separated, such as a beef round, pork loin, lamb flank, or veal breast.

(106) Priority item--Application of a provision from this chapter that contributes directly to the elimination, prevention, or reduction of hazards associated with food borne illness or injury to an acceptable level to an acceptable level. There is no other provision that more directly controls the hazard. Includes items with a quantifiable measure to show control of hazards such as cooking, reheating, cooling, and handwashing. It is denoted in this chapter with a superscript P (P).

(107) Priority Foundation Item--Application of a provision in this chapter that supports, facilitates, or enables one or more priority items. Includes an item that requires the purposeful incorporation of specific actions, equipment or procedures by industry management to attain control of risk factors that contribute to foodborne illness or injury, for example: personnel training, infrastructure or necessary equipment, HACCP plans, documentation or record keeping, and labeling. It is denoted in this chapter with a superscript Pf (Pf).

(108) Private Water System--A drinking water system that is not connected to a public water system and not regulated by the Texas Commission on Environmental Quality.

(109) Psychrotrophic organisms--Organisms or bacteria that are capable of surviving or even thriving in a cold environment. They are responsible for spoiling refrigerated foods.

(110) Public water system--A drinking water system that complies with 30 TAC §§290.101 - 290.121 (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems).

(111) Pushcart--A non-self-propelled Mobile Food Unit limited to serving foods requiring a limited amount of preparation as authorized by the regulatory authority and is readily movable by one or two persons. A pushcart is classified as a Mobile Food Unit. A pushcart does not include non self-propelled units owned and operated within a retail food store. This type of mobile unit requires the support of a Central Preparation Facility.

(112) Ratite--Diverse group of large flightless birds that includes emus, ostrich, rhea or kiwis.

(113) Ready-to-eat (RTE) food--Food in a form that is edible without additional preparation to achieve food safety, as specified in §228.71(a)(1) - (3), or (b) of this title. RTE food can be raw or partially cooked animal food and the consumer is advised as specified in §228.71(a)(4)(A) and (B) of this title. RTE food is food that is prepared in accordance with a variance that is granted as specified in §228.71(a)(4)(A) and (C). RTE food may receive additional preparation for palatability or aesthetic, epicurean, gastronomic, or culinary purposes. RTE food includes the following:

(A) raw animal food that is cooked as specified in §228.71(a)(1) or (2), or frozen as specified in §228.72(a)(1) of this title;

(B) raw fruits and vegetables that are washed as specified in §228.66(e) of this title;

(C) fruits and vegetables that are cooked for hot holding, as specified in §228.71(c) of this title;

(D) all time/temperature controlled food that is cooked to the temperature and time required for the specific food in §228.71(a) of this title, and cooled as specified in §228.75(d) of this title;

(E) plant food for which further washing, cooking, or other processing is not required for food safety, and from which rinds, peels, husks, or shells, if naturally present are removed;

(F) substances derived from plants such as spices, seasonings, and sugar;

(G) a bakery item such as bread, cakes, pies, fillings, or icing for which further cooking is not required for food safety;

(H) the following products that are produced in accordance with USDA guidelines and that have received a lethality treatment for pathogens: dry, fermented sausages, such as dry salami or pepperoni; salt-cured meat and poultry products, such as prosciutto ham, country cured ham, and Parma ham; and dried meat and poultry products, such as jerky or beef sticks; and

(I) foods manufactured according to 21 CFR 113, Thermally Processed Low-Acid Foods Packaged in Hermetically Sealed Containers.

(114) Reduced oxygen packaging (ROP)--The reduction of the amount of oxygen in a package by removing oxygen, displacing oxygen and replacing it with another gas or combination of gases, or otherwise controlling the oxygen content to a level below that normally found in the atmosphere (approximately 21% at sea level). It is a process that involves a food for which the hazards of *Clostridium*

botulinum or *Listeria monocytogenes* require control in the final packaged form. ROP includes cook chill packaging, controlled atmosphere packaging, modified atmosphere packaging, Sous vide packaging, and vacuum packaging.

(115) Refuse--Solid waste not carried by water through the sewage system.

(116) Regulatory authority--The local, state, or federal enforcement body or authorized representative having jurisdiction over the food establishment.

(117) Reminder--A written statement concerning the health risk of consuming animal foods raw, undercooked, or without otherwise being processed to eliminate pathogens.

(118) Re-service--The transfer of food that is unused and returned by a consumer after being served or sold and in the possession of the consumer to another person.

(119) Restrict--To limit the activities of a food employee so that there is no risk of transmitting a disease that is transmissible through food and the food employee does not work with exposed food, clean equipment, utensils, linens; and unwrapped single-service or single-use articles.

(120) Restricted egg--Any check, dirty egg, incubator reject, inedible, leaker, or loss as defined in 9 CFR 590.

(121) Restricted use pesticide--A pesticide product that contains the active ingredients specified in 40 CFR §152.175. Pesticides classified for restricted use, and that are limited to use by or under the direct supervision of a certified applicator licensed by the Texas Department of Agriculture or by the Texas Structural Pest Control Service as applicable.

(122) Risk--The likelihood that an adverse health effect will occur within a population as a result of a hazard in a food.

(123) Roadside food vendor--A person who operates a mobile retail food store from a temporary location adjacent to a public road or highway. Food is not prepared or processed by a roadside food vendor. A roadside food vendor is classified as a Mobile Food Unit.

(124) Safe Material--An article manufactured from or composed of materials that may not reasonably be expected to result either directly or indirectly in their becoming a component of or otherwise affecting the characteristics of any food. An additive that is used as specified in the Health and Safety Code, Chapter 431, or other materials that are not additives and that are used in conformity with applicable regulations of the FDA.

(125) Sanitization--The application of cumulative heat or chemicals on cleaned food-contact surfaces that, when evaluated for efficacy, is sufficient to yield a reduction of 5 logs, which is equal to a 99.999% reduction, of representative disease microorganisms of public health importance.

(126) Sealed--Free of cracks or other openings that allow the entry or passage of moisture.

(127) Self-Service Food Market--A market that is unstaffed and offers prepackaged TCS food and prepackaged refrigerated or frozen TCS food that is stored in equipment that complies with §228.225 of this title.

(128) Service animal--A canine that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability as specified in Health and Safety Code, §437.023.

(129) Servicing area--A base location to which a Mobile Food Unit or transportation vehicle returns regularly for such things as vehicle cleaning, discharging liquid or solid wastes, refilling water tanks and ice bins, and boarding food. No food preparation, service or utensil/warewashing is conducted at a Servicing Area.

(130) Sewage--Liquid waste containing animal or vegetable matter in suspension or solution and may include liquids containing chemicals in solution.

(131) Shellfish control authority--A state, federal, foreign, tribal, or other government entity legally responsible for administering a program that includes certification of molluscan shellfish harvesters and dealers for interstate commerce.

(132) Shellstock--Raw, in-shell molluscan shellfish.

(133) Shiga toxin-producing *Escherichia coli* (STEC)--Any *E. coli* capable of producing Shiga toxins (also called verocytotoxins or "Shiga-like" toxins). STEC infections can be asymptomatic or may result in a spectrum of illness ranging from mild non-bloody diarrhea to hemorrhagic colitis (i.e., bloody diarrhea), to hemolytic uremic syndrome (HUS--a type of kidney failure). Examples of serotypes of STEC include: *E. coli* O157:H7; *E. coli* O157:NM; *E. coli* O26:H11; *E. coli* O145:NM; *E. coli* O103:H2; and *E. coli*. STEC are sometimes referred to as VTEC, verocytotoxigenic *E. coli*, or as EHEC, Enterohemorrhagic *E. coli*. EHEC are a subset of STEC which can cause hemorrhagic colitis or HUS.

(134) Shucked shellfish--Molluscan shellfish that have one or both shells removed.

(135) Single-service articles--Tableware, carry-out utensils, and other items such as bags, containers, placemats, stirrers, straws, toothpicks, and wrappers that are designed and constructed for one time, one person use after which they are intended for discard.

(136) Single-use articles--Utensils and bulk food containers designed and constructed to be used once and discarded. Includes items such as wax paper, butcher paper, plastic wrap, formed aluminum food containers, jars, plastic tubs or buckets, bread wrappers, pickle barrels, ketchup bottles, and number 10 cans which do not meet the materials, durability, strength, and cleanability specifications in Subchapter D of this chapter.

(137) Slacking--The process of moderating the temperature of a food such as allowing a food to gradually increase from a temperature of -23 degrees Celsius (-10 degrees Fahrenheit) to -4 degrees Celsius (25 degrees Fahrenheit) in preparation for deep-fat frying or to facilitate even heat penetration during the cooking of previously block-frozen food such as shrimp.

(138) Smooth--A food-contact surface having a surface free of pits and inclusions with a cleanability equal to or exceeding that of (100 grit) number 3 stainless steel. A nonfood-contact surface of equipment having a surface equal to that of commercial grade hot-rolled steel free of visible scale. A floor, wall, or ceiling having an even or level surface with no roughness or projections that causes it to be difficult to clean.

(139) Sous vide packaging--A method of packaging food in which raw or partially cooked food is vacuum packaged in an impermeable bag, cooked in the bag, rapidly chilled, and refrigerated at temperatures that inhibit the growth of psychrotrophic pathogens.

(140) Specialized processing method--A method of preparing certain foods that includes but is not limited to smoking food as a method of food preservation not as a method of flavor enhancement, curing food, using food additives or adding components to preserve and/or render a food so it is not a time / temperature control food

for safety such as sushi rice, packaging food using a reduced oxygen method, operating a Molluscan shellfish life-support system display tank to store and display shellfish offered for human consumption, custom processing animals for personal use as food only such as indigenous deer processing, preparing food by a method determined by the regulatory authority as requiring a variance, or sprouting seeds or beans in a retail food establishment such as alfalfa or wheat grass.

(141) Tableware--Eating, drinking, and serving utensils for table use such as flatware including forks, knives, and spoons; hollowware including bowls, cups, serving dishes, tumblers, and plates.

(142) Temperature measuring device--A thermometer, thermocouple, thermistor, or other device that indicates the temperature of food, air, or water.

(143) Temporary food establishment--A food establishment that operates for a period of no more than 14 consecutive days in conjunction with a single event or celebration.

(144) Time/Temperature Control for Safety (TCS) food--(formerly Potentially Hazardous Food (PHF)), A food that requires time/temperature control for safety to limit pathogenic microorganism growth or toxin formation. An animal food that is raw or heat-treated. A plant food that is heat-treated or consists of raw seed sprouts, cut melons, cut leafy greens, cut tomatoes or mixture of cut tomatoes that are not modified in a way so that they are unable to support pathogenic microorganism growth or toxin formation, or garlic-in-oil mixtures that are not modified in a way so that they are unable to support pathogenic microorganism growth or toxin formation. Except as specified in Tables A and B of this definition, a food that because of the interaction of A₁ and pH values is designated as Product Assessment Required (PA) in Table A or B of this definition:
Figure: 25 TAC §228.2(144)

(145) USDA--The United States Department of Agriculture, 1400 Independence Ave., S.W., Washington, DC 20250, phone: (202) 720-2791, website: www.usda.gov.

(146) Utensil--A food-contact implement or container used in the storage, preparation, transportation, dispensing, sale, or service of food, such as kitchenware or tableware that is multiuse, single-service, or single-use; gloves used in contact with food; temperature sensing probes of food temperature measuring devices; and probe-type price or identification tags used in contact with food.

(147) Vacuum packaging--A method of packaging food in which air is removed from a package of food and the package is hermetically sealed so that a vacuum remains inside the package.

(148) Variance--A written document issued by the regulatory authority that authorizes a modification or waiver of one or more requirements of this chapter if, in the opinion of the regulatory authority, a health hazard or nuisance will not result from the modification or waiver.

(149) Vending machine--A self-service device that, upon insertion of a coin, paper currency, token, card, or key, or by optional manual operation, dispenses unit servings of food in bulk or in packages without the necessity of replenishing the device between each vending operation.

(150) Vending machine location--The room, enclosure, space, or area where one or more vending machines are installed and operated and includes the storage areas and areas on the premises that are used to service and maintain the vending machines. This does not include Self-Service Food Markets.

(151) Warewashing--The cleaning and sanitizing of utensils and food-contact surfaces of equipment.

(152) Whole-muscle, intact beef--Whole muscle beef that is not injected, mechanically tenderized, reconstructed, or scored and marinated, from which beef steaks may be cut.

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

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SUBCHAPTER B. MANAGEMENT AND PERSONNEL

25 TAC §§228.31 - 228.45

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §437.0056, which requires the department to adopt rules for granting and maintaining retail food permits in areas not regulated by counties and public health districts; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The new sections affect Health and Safety Code, Chapters 437 and 1001; and Government Code, Chapters 531 and 2001.

§228.31. *Responsibility.*

(a) Except as specified in subsection (b) of this section, the permit holder shall be the person in charge or shall designate a person in charge and shall ensure that a person in charge is present at the food establishment during all hours of operation.^{PF}

(b) In a food establishment with two or more separately permitted departments that are the legal responsibility of the same permit holder that are located on the same premises, the permit holder may, during specific time periods when food is not being prepared, packaged, or served, designate a single person in charge who is present on the premises during all hours of operation, and who is responsible for each separate permitted food establishment on the premises.^{PF}

§228.32. *Knowledge.*

Based on the risks inherent to the food operation, during inspections and upon request the person in charge shall demonstrate to the regulatory authority knowledge of foodborne disease prevention, application of the Hazard Analysis Critical Control Point principles, and the requirements of this rule. The person in charge shall demonstrate this knowledge by:

(1) complying with this chapter by having no critical violations/priority items during the current inspection;^{PF}

(2) being a certified food protection manager who has shown proficiency of required information through passing a test that is part of an Accredited Program;^{PF} or

(3) responding correctly to the inspector's questions as they relate to the specific food operation. The areas of knowledge include:

(A) describing the relationship between the prevention of foodborne disease and the personal hygiene of a food employee;^{PF}

(B) explaining the responsibility of the person in charge for preventing the transmission of foodborne disease by a food employee who has a disease or medical condition that may cause foodborne disease;^{PF}

(C) describing the symptoms associated with the diseases that are transmissible through food;^{PF}

(D) explaining the significance of the relationship between maintaining the time and temperature of TCS food and the prevention of foodborne illness;^{PF}

(E) explaining the hazards involved in the consumption of raw or undercooked meat, poultry, eggs, and fish;^{PF}

(F) stating the required food temperatures and times for safe cooking of TCS food including meat, poultry, eggs, and fish;^{PF}

(G) stating the required temperatures and times for the safe refrigerated storage, hot holding, cooling, and reheating of TCS food;^{PF}

(H) describing the relationship between the prevention of foodborne illness and the management and control of the following:

(i) cross contamination;^{PF}

(ii) hand contact with ready-to-eat foods;^{PF}

(iii) handwashing;^{PF} and

(iv) maintaining the food establishment in a clean condition and in good repair;^{PF}

(I) describing foods identified as major food allergens and the symptoms that a major food allergen could cause in a sensitive individual who has an allergic reaction.^{PF}

(J) explaining the relationship between food safety and providing equipment that is:

(i) sufficient in number and capacity;^{PF} and

(ii) properly designed, constructed, located, installed, operated, maintained, and cleaned;^{PF}

(K) explaining correct procedures for cleaning and sanitizing utensils and food-contact surfaces of equipment;^{PF}

(L) identifying the source of water used and measures taken to ensure that it remains protected from contamination such as providing protection from backflow and precluding the creation of cross connections;^{PF}

(M) identifying poisonous and toxic materials in the food establishment and the procedures necessary to ensure that they are safely stored, dispensed, used, and disposed of according to law;^{PF}

(N) identifying critical control points/priority items in the operation from purchasing through sale or service that when not controlled may contribute to the transmission of foodborne illness and explaining steps taken to ensure that the points are controlled in accordance with the requirements of this rule;^{PF}

(O) explaining the details of how the person in charge and food employees comply with the HACCP plan if a plan is required by the law, this chapter, or an agreement between the regulatory authority and the establishment;^{PF}

(P) explaining the responsibilities, rights, and authorities assigned by this chapter to the:

- (i) food employee;^{Pf}
- (ii) conditional employee;^{Pf}
- (iii) person in charge;^{Pf}
- (iv) regulatory authority;^{Pf} and

(Q) explaining how the person in charge, food employees comply with reporting responsibilities and exclusion or restriction of food employees.^{Pf}

§228.33. Certified Food Protection Manager and Food Handler Requirements.

(a) At least one employee that has supervisory and management responsibility and the authority to direct and control food preparation and service shall be a certified food protection manager who has shown proficiency of required information through passing a test that is part of an accredited program.^{Pf}

(b) At least one certified food protection manager must be employed by each food establishment.^{Pf}

(c) All food employees, except for the certified food manager, shall successfully complete a food handler training course, accredited by the department, within 60 days of employment.^{Pf}

(d) The requirement to complete a food handler training course shall be effective September 1, 2016.

(e) This section does not apply to certain types of food establishments deemed by the regulatory authority to pose minimal risk of causing, or contributing to, foodborne illnesses based on the nature of the operation and extent of food preparation.

§228.34. Duties.

The person in charge shall ensure that:

(1) food establishment operations are not conducted in a private home or in a room used as living or sleeping quarters as specified in Subchapter F of this chapter;^{Pf}

(2) persons unnecessary to the food establishment operation are not allowed in the food preparation, food storage, or warewashing areas, except that brief visits and tours may be authorized by the person in charge if steps are taken to ensure that exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles are protected from contamination;^{Pf}

(3) employees and other persons such as delivery and maintenance persons and pesticide applicators entering the food preparation, food storage, and warewashing areas comply with this chapter;^{Pf}

(4) employees are effectively cleaning their hands, by routinely monitoring the employees' handwashing;^{Pf}

(5) employees are visibly observing foods as they are received to determine that they are from approved sources, delivered at the required temperatures, protected from contamination, unadulterated, and accurately presented, by routinely monitoring the employees' observations and periodically evaluating foods upon their receipt;^{Pf}

(6) employees are verifying that foods delivered to the food establishment during non-operating hours are from approved sources and are placed into appropriate storage locations such that they are maintained at the required temperatures, protected from contamination, unadulterated and accurately presented;^{Pf}

(7) employees are properly cooking time/temperature control for safety (TCS) food, being particularly careful in cooking those foods known to cause severe foodborne illness and death, such as eggs and comminuted meats, through daily oversight of the employees' routine monitoring of the cooking temperatures using appropriate temperature measuring devices properly scaled and calibrated as specified in §228.105(a) and §228.112(a)(2) of this title;^{Pf}

(8) employees are using proper methods to rapidly cool TCS food, that are not held hot or are not for consumption within four hours, through daily oversight of the employees' routine monitoring of food temperatures during cooling;^{Pf}

(9) consumers who order raw or partially cooked ready-to-eat foods of animal origin are informed as specified in §228.80 of this title that the food is not cooked sufficiently to ensure its safety;^{Pf}

(10) employees are properly sanitizing cleaned multiuse equipment and utensils before they are reused, through routine monitoring of solution temperature and exposure time for hot water sanitizing, and chemical concentration, pH, temperature, and exposure time for chemical sanitizing;^{Pf}

(11) consumers are notified that clean tableware is to be used when they return to self-service areas such as salad bars and buffets as specified in §228.68(f) of this title;^{Pf}

(12) except when otherwise approved as specified in §228.65(a)(4) of this title, employees are preventing cross-contamination of ready-to-eat food with bare hands by properly using suitable utensils such as deli tissue, spatulas, tongs, single-use gloves, or dispensing equipment;^{Pf}

(13) employees are properly trained in food safety including food allergy awareness as it relates to their assigned duties;^{Pf}

(14) food employees and conditional employees are informed in a verifiable manner of their responsibility to report in accordance with law, to the person in charge, information about their health and activities as they relate to diseases that are transmissible through food, as specified in §228.32(3)(P) of this title;^{Pf} and

(15) written procedures and plans, where specified by this chapter and as developed by the food establishment, are maintained and implemented as required.^{Pf}

§228.35. Responsibilities and Reporting Symptoms and Diagnosis.

(a) Responsibility of Permit Holder, Person in Charge, and Conditional Employees. The permit holder shall require food employees and conditional employees to report to the person in charge, information about their health and activities as they relate to diseases that are transmissible through food. A food employee or conditional employee shall report the information in a manner that allows the person in charge to reduce the risk of foodborne disease transmission, such as the date of onset of symptoms and an illness, or of a diagnosis if the food employee or conditional employee:

(1) Has any of the following symptoms:

(A) vomiting;^P

(B) diarrhea;^P

(C) jaundice;^P

(D) sore throat with fever;^P or

(E) a lesion containing pus such as a boil or infected wound that is open or draining and is:

(i) on the hands or wrists, unless an impermeable cover such as a finger cot or stall protects the lesion and a single-use glove is worn over the impermeable cover;^P

(ii) on exposed portions of the arms, unless the lesion is protected by an impermeable cover;^P or

(iii) on other parts of the body, unless the lesion is covered by a dry, durable, tight-fitting bandage;^P

(2) Has an illness diagnosed by a Health Practitioner due to:

(A) Norovirus;^P

(B) Hepatitis A virus;^P

(C) *Shigella* spp.;^P

(D) Shiga toxin-producing *Escherichia coli*;^P

(E) *Salmonella typhi*;^P or

(F) non-typhoidal *salmonella*.^P

(3) Had a previous illness, diagnosed by a Health Practitioner, within the past 3 months due to *Salmonella typhi*, without having received antibiotic therapy, as determined by a Health Practitioner;^P

(4) Has been exposed to, or is the suspected source of, a confirmed disease outbreak, because the food employee or conditional employee consumed or prepared food implicated in the outbreak, or consumed food at an event prepared by a person who is infected or ill with:

(A) norovirus within the past 48 hours of the last exposure;^P

(B) Shiga Toxin-Producing *Escherichia coli* or *Shigella* spp. within the past 3 days of the last exposure;^P

(C) *Salmonella typhi* within the past 14 days of the last exposure;^P or

(D) hepatitis A virus within the past 30 days of the last exposure;^P or

(5) Has been exposed by attending or working in a setting where there is a confirmed disease outbreak, or living in the same household as, and has knowledge about, an individual who works or attends a setting where there is a confirmed disease outbreak, or living in the same household as, and has knowledge about, an individual diagnosed with an illness caused by:

(A) norovirus within the past 48 hours of the last exposure;^P

(B) Shiga Toxin-Producing *Escherichia coli* or *Shigella* spp. within the past 3 days of the last exposure;^P

(C) *Salmonella typhi* within the past 14 days of the last exposure;^P or

(D) hepatitis A virus within the past 30 days of the last exposure.^P

(b) The person in charge shall notify the regulatory authority when a food employee is:

(1) jaundiced;^{Pf} or

(2) diagnosed with an illness due to a pathogen as specified in subsection (a)(2)(A) - (F) of this section.^{Pf}

(c) The person in charge shall ensure that a conditional employee:

(1) who exhibits or reports a symptom, or who reports diagnosed illness as specified in subsection (a)(1) - (3) of this section, is prohibited from becoming a food employee until the conditional employee meets the criteria for the specific symptoms or diagnosed illness as specified in §228.37 of this title;^P and

(2) who will work as a food employee in a food establishment that serves as a highly susceptible population and reports a history of exposure as specified in subsection (a)(4) - (5) of this section, is prohibited from becoming a food employee until the conditional employee meets the criteria as specified in §228.37(10) of this title.^P

(d) The person in charge shall ensure that a food employee who exhibits or reports a symptom, or who reports a diagnosed illness or a history of exposure as specified in subsection (a)(1) - (5) of this section is:

(1) excluded as specified in §228.36(1) - (3), and paragraphs (4)(A), (5)(A), (6)(A), (7) or (8)(A) and in compliance with the provisions specified in §228.37(1) - (8) of this title;^P or

(2) restricted as specified in §228.36(4)(B), (5)(B), (6)(B), (8)(B), or §228.37(9) or (10) and in compliance with the provisions specified in §228.37(4)-(10) of this title.^P

(e) A food employee or conditional employee shall report to the person in charge the information as specified in subsection (a) of this section.^P

(f) A food employee shall:

(1) comply with an exclusion as specified in §228.36(1)-(3) and (4)(A), (5)(A), (6)(A), (7), or (8)(A) and with the provisions specified in §228.37(1) - (8);^P or

(2) comply with a restriction as specified in §228.36(4)(B), (5)(B), (6)(B), (7), (8)(B), or §228.36 (8), (9), or (10) and comply with the provisions specified in §228.37(4) - (10) of this title.^P

§228.36. Conditions of Exclusions and Restrictions.

The person in charge shall exclude or restrict a food employee from a food establishment in accordance with the following:

(1) Except when the symptom is from a noninfectious condition, exclude a food employee if the food employee is:

(A) symptomatic with vomiting or diarrhea;^P or

(B) symptomatic with vomiting or diarrhea and diagnosed with an infection from Norovirus, *Shigella* spp., non-typhoidal *salmonella*, or shiga toxin-producing *E. coli*.^P

(2) Exclude a food employee who is:

(A) jaundiced and the onset occurred within the last 7 calendar days, unless the food employee provides to the person in charge written medical documentation from a Health Practitioner specifying that the jaundice is not caused by hepatitis A virus or other fecal-orally transmitted infection;^P

(B) diagnosed with an infection from hepatitis A virus within 14 calendar days from the onset of any illness symptoms, or within 7 calendar days of the onset of jaundice or diagnosed with an infection from hepatitis A virus without developing symptoms.^P

(3) Exclude a food employee who is diagnosed with an infection from salmonella typhi, or reports a previous infection with *Salmonella typhi* within the past 3 months as specified in §228.35(a)(3) of this title.^P

(4) If a food employee is diagnosed with an infection from norovirus and is asymptomatic:

(A) exclude the food employee who works in a food establishment serving a highly susceptible population;^P or

(B) restrict the food employee who works in a food establishment not serving a highly susceptible population.^P

(5) If a food employee is diagnosed with an infection from *shigella* spp. and is asymptomatic:

(A) exclude the food employee who works in a food establishment serving a highly susceptible population;^P or

(B) restrict the food employee who works in a food establishment not serving a highly susceptible population.^P

(6) If a food employee is diagnosed with an infection from shiga toxin-producing *E. coli*, and is asymptomatic:

(A) exclude the food employee who works in a food establishment serving a highly susceptible population;^P or

(B) restrict the food employee who works in a food establishment not serving a highly susceptible population.^P

(7) If a food employee is diagnosed with an infection from non-typhoidal *salmonella* and is asymptomatic, restrict the food employee who works in a food establishment serving a highly susceptible population or in a food establishment not serving a highly susceptible population.^P

(8) If a food employee is ill with symptoms of acute onset of sore throat with fever:

(A) exclude the food employee who works in a food establishment serving a highly susceptible population;^P or

(B) restrict the food employee who works in a food establishment not serving a highly susceptible population.^P

(9) if a food employee is infected with a skin lesion containing pus such as a boil or infected wound that is open or draining and not properly covered as specified in §228.35(a)(1)(E) of this title, restrict the food employee.^P

(10) if a food employee is exposed to a foodborne pathogen as specified in §228.35(a)(4)(A) - (D) or (a)(5)(A) - (D) of this title, restrict the food employee who works in a food establishment serving a highly susceptible population.^P

§228.37. Managing Exclusions and Restrictions.

The person in charge shall adhere to the following conditions when removing, adjusting, or retaining the exclusion or restriction of a food employee.

(1) Except when a food employee is diagnosed with an infection from hepatitis A virus or *Salmonella typhi*.

(A) Reinstate a food employee who was excluded as specified in §228.36(1)(A) of this title if the food employee:

(i) is asymptomatic for at least 24 hours;^P or

(ii) provides to the person in charge written medical documentation from a health practitioner that states the symptom is from a noninfectious condition.^P

(B) If a food employee was diagnosed with an infection from norovirus and excluded as specified in §228.36(1)(B) of this title:

(i) restrict the food employee, who is asymptomatic for at least 24 hours and works in a food establishment not serving a highly susceptible population, until the conditions for reinstatement as specified in paragraph (4)(A) or (B) of this section are met;^P or

(ii) retain the exclusion for the food employee, who is asymptomatic for at least 24 hours and works in a food establishment that serves a highly susceptible population, until the conditions for reinstatement as specified in paragraph (4)(A) or (B) of this section are met.^P

(C) If a food employee was diagnosed with an infection from shigella spp. and excluded as specified in §228.36(1)(B) of this title:

(i) restrict the food employee, who is asymptomatic for at least 24 hours and works in a food establishment not serving a highly susceptible population, until the conditions for reinstatement as specified in paragraph (5)(A) or (B) of this section are met;^P or

(ii) retain the exclusion for the food employee, who is asymptomatic for at least 24 hours and works in a food establishment that serves a highly susceptible population, until the conditions for reinstatement as specified in paragraph (5)(A) or (B), or (5)(A) and (C) of this section are met.^P

(D) If a food employee was diagnosed with an infection from shiga toxin-producing *Escherichia coli* and excluded as specified in §228.36(2) of this title:

(i) restrict the food employee, who is asymptomatic for at least 24 hours and works in a food establishment not serving a highly susceptible population, until the conditions for reinstatement as specified in paragraph (6)(A) or (B) of this section are met;^P or

(ii) retain the exclusion for the food employee, who is asymptomatic for at least 24 hours and works in a food establishment that serves a highly susceptible population, until the conditions for reinstatement as specified in paragraph (6)(A) or (B) of this section are met.^P

(E) If a food employee was diagnosed with an infection from non-typhoidal *Salmonella* and excluded as specified in §228.36(2) of this title:

(i) restrict the food employee, who is asymptomatic for at least 30 days until conditions for reinstatement as specified in paragraph (7)(A) or (B) of this section are met;^P

(ii) retain the exclusion for the food employee who is symptomatic, until conditions for reinstatement as specified in paragraph (7)(A) or (B) of this section are met.^P

(2) Reinstate a food employee who was excluded as specified in §228.36(2) of this title if the person in charge obtains approval from the regulatory authority and one of the following conditions is met;

(A) the food employee has been jaundiced for more than 7 calendar days;^P

(B) the anicteric food employee has been symptomatic with symptoms other than jaundice for more than 14 calendar days;^P or

(C) the food employee provides to the person in charge written medical documentation from a health practitioner stating that the food employee is free of a Hepatitis A virus infection.^P

(3) Reinstate a food employee who was excluded as specified in §228.36(3) of this title if:

(A) the person in charge obtains approval from the regulatory authority;^P and

(B) the food employee provides to the person in charge written medical documentation from a health practitioner that states the food employee is free from *S. typhi* infection.^P

(4) Reinstatement of a food employee who was excluded as specified in §228.36(1)(B) or (4)(A) who was restricted in §228.36(4)(B) of this title if the person in charge obtains approval from the regulatory authority and one of the following conditions is met:

(A) the excluded or restricted food employee provides to the person in charge written medical documentation from a health practitioner stating that the food employee is free of a norovirus infection;^P

(B) the food employee was excluded or restricted after symptoms of vomiting or diarrhea resolved, and more than 48 hours have passed since the food employee became asymptomatic;^P or

(C) the food employee was excluded or restricted and did not develop symptoms and more than 48 hours have passed since the food employee was diagnosed.^P

(5) Reinstatement of a food employee who was excluded as specified in §228.36(2) or (5)(A) or who was restricted in §228.36(5)(B) of this title if the person in charge obtains approval from the regulatory authority and one of the following conditions is met:

(A) the excluded or restricted food employee provides to the person in charge written medical documentation from a health practitioner stating that the food employee is free of a *shigella* spp. infection based on test results showing 2 consecutive negative stool specimen cultures that are taken:

(i) not earlier than 48 hours after discontinuance of antibiotics;^P and

(ii) at least 24 hours apart;^P

(B) the food employee was excluded or restricted after symptoms of vomiting or diarrhea resolved, and more than 7 calendar days have passed since the food employee became asymptomatic;^P or

(C) the food employee was excluded or restricted and did not develop symptoms and more than 7 calendar days have passed since the food employee was diagnosed.^P

(6) Reinstatement of a food employee who was excluded or restricted as specified in §228.36(2) or (6)(A) or who was restricted in §228.36(6)(B) of this title if the person in charge obtains approval from the regulatory authority and one of the following conditions is met:

(A) the excluded or restricted food employee provides to the person in charge written medical documentation from a health practitioner stating that the food employee is free of an infection from shiga toxin producing *Escherichia coli* based on test results that show 2 consecutive negative stool specimen cultures that are taken:

(i) not earlier than 48 hours after discontinuance of antibiotics;^P and

(ii) at least 24 hours apart;^P

(B) the food employee was excluded or restricted after symptoms of vomiting or diarrhea resolved and more than 7 calendar days have passed since the food employee became asymptomatic;^P or

(C) the food employee was excluded or restricted and did not develop symptoms and more than 7 days have passed since the food employee was diagnosed.^P

(7) Reinstatement of a food employee who was excluded as specified in §228.36(2) or who was restricted as specified in §228.36(7) of this title if the person in charge obtains approval from the regulatory authority^P and one of the following conditions is met:

(A) the excluded or restricted food employee provides to the person in charge written medical documentation from a health

practitioner stating that the food employee is free of a non-typhoidal *salmonella* infection based on test results showing 2 consecutive negative stool specimen cultures that are taken:

(i) not earlier than 48 hours after discontinuance of antibiotics;^P and

(ii) at least 24 hours apart;^P

(B) the food employee was restricted after symptoms of vomiting or diarrhea resolved, and more than 30 days have passed since the food employee became asymptomatic;^P or

(C) the food employee was excluded or restricted and did not develop symptoms and more than 30 days have passed since the food employee was diagnosed.^P

(8) Reinstatement of a food employee who was excluded or restricted as specified in §228.36(8)(A) or (B) of this title if the food employee provides to the person in charge written medical documentation from a health practitioner stating that the food employee meets one of the following conditions:

(A) has received antibiotic therapy for *Streptococcus pyogenes* infection for more than 24 hours;^P

(B) has at least one negative throat specimen culture for *Streptococcus pyogenes* infection;^P or

(C) is otherwise determined by a health practitioner to be free of a *Streptococcus pyogenes* infection.^P

(9) Reinstatement of a food employee who was restricted as specified in §228.36(9) of this title if the skin, infected wound, cut, or pustular boil is properly covered with one of the following:

(A) an impermeable cover such as a finger cot or stall and a single-use glove over the impermeable cover if the infected wound or pustular boil is on the hand, finger, or wrist;^P

(B) an impermeable cover on the arm if the infected wound or pustular boil is on the arm;^P or

(C) a dry, durable, tight-fitting bandage if the infected wound or pustular boil is on another part of the body.^P

(10) Reinstatement of a food employee who was restricted as specified in §228.36(10) of this title and was exposed to one of the following pathogens as specified in §228.35(a)(4)(A) - (D) or in §228.35(a)(5)(A) - (D) of this title:

(A) norovirus and one of the following conditions is met:

(i) more than 48 hours have passed since the last day the food employee was potentially exposed;^P or

(ii) more than 48 hours have passed since the food employee's household contact became asymptomatic.^P

(B) *Shigella* spp. or shiga toxin-producing *Escherichia coli* and one of the following conditions is met:

(i) more than 3 calendar days have passed since the last day the food employee was potentially exposed;^P or

(ii) more than 3 calendar days have passed since the food employee's household contact became asymptomatic.^P

(C) *S. typhi* and one of the following conditions is met:

(i) more than 14 calendar days have passed since the last day the food employee was potentially exposed;^P or

(ii) more than 14 calendar days have passed since the food employee's household contact became asymptomatic.^P

(D) hepatitis A virus and one of the following conditions is met:

(i) the food employee is immune to hepatitis A virus infection because of a prior illness from hepatitis A;^P

(ii) the food employee is immune to hepatitis A virus infection because of vaccination against hepatitis A;^P

(iii) the food employee is immune to hepatitis A virus infection because of IgG administration;^P

(iv) more than 30 calendar days have passed since the last day the food employee was potentially exposed;^P

(v) more than 30 calendar days have passed since the food employee's household contact became jaundiced;^P or

(vi) the food employee does not use an alternative procedure that allows bare hand contact with ready-to-eat food until at least 30 days after the potential exposure, as specified in clauses (iv) and (v) of this subparagraph, and the food employee receives additional training about:

(I) hepatitis A symptoms and preventing the transmission of infection;^P

(II) proper handwashing procedures;^P and

(III) protecting ready-to-eat food from contamination introduced by bare hand contact.^P

§228.38. Hands and Arms.

(a) Clean Condition. Food employees shall keep their hands and exposed portions of their arms clean.^P

(b) Cleaning Procedure.

(1) except as specified in subsection (d) of this section, food employees shall clean their hands and exposed portions of their arms, including surrogate prosthetic devices for hands or arms for at least 20 seconds, using a cleaning compound in a handwashing sink that is equipped as specified in §228.146 and §228.175 of this title.^P

(2) food employees shall use the following cleaning procedure in the order stated to clean their hands and exposed portions of their arms, including surrogate prosthetic devices for hands and arms:

(A) rinse under clean, running warm water;^P

(B) apply an amount of cleaning compound recommended by the cleaning compound manufacturer;^P

(C) rub together vigorously for at least 10 to 15 seconds while:

(i) paying particular attention to removing soil from underneath the fingernails during the cleaning procedure;^P and

(ii) creating friction on the surfaces of the hands and arms or surrogate prosthetic devices for hands and arms, finger tips, and areas between the fingers;^P

and

(E) immediately follow the cleaning procedure with thorough drying using a method as specified in §228.175(c) of this title.^P

(3) to avoid re-contaminating their hands or surrogate prosthetic devices, food employees may use disposable paper towels or sim-

ilar clean barriers when touching surfaces such as manually operated faucet handles on a handwashing sink or the handle of a restroom door.^{Pf}

(4) if approved and capable of removing the types of soils encountered in the food operations involved, an automatic handwashing facility may be used by food employees to clean their hands or surrogate prosthetic devices.^{Pf}

(c) Special Handwash Procedures. Employees not utilizing suitable utensils or single-use gloves when handling ready-to-eat foods shall wash hands using the cleaning procedures specified in subsection (b)(2) of this section and follow the approved procedures specified in §228.65(a)(5) of this title.

(d) When to Wash. Food employees shall clean their hands and exposed portions of their arms as specified in subsection (b) of this section immediately before engaging in food preparation including working with exposed food, clean equipment and utensils, and unwrapped single-service and single-use articles^P and:

(1) after touching bare human body parts other than clean hands and clean, exposed portions of arms;^P

(2) after using the toilet room;^P

(3) after caring for or handling service animals or aquatic animals as specified in §228.44(2) of this title;^P

(4) except as specified in §228.42(b) of this title after coughing, sneezing, using a handkerchief or disposable tissue, using tobacco, eating, or drinking;^P

(5) after handling soiled equipment or utensils;^P

(6) during food preparation, as often as necessary to remove soil and contamination and to prevent cross contamination when changing tasks;^P

(7) when switching between working with raw food and working with ready-to-eat food;^P

(8) before donning gloves to initiate a task that involves working with food;^P and

(9) after engaging in other activities that contaminate the hands.^P

(e) Where to Wash. Food employees shall clean their hands in a handwashing sink or approved automatic handwashing facility and may not clean their hands in a sink used for food preparation or warewashing or in a service sink or a curbed cleaning facility used for the disposal of mop water and similar liquid waste.^{Pf}

(f) Hand Antiseptics.

(1) a hand antiseptic used as a topical application, a hand antiseptic solution used as a hand dip, or a hand antiseptic soap shall:

(A) comply with one of the following:

(i) be an approved drug that is listed in the FDA publication Approved Drug Products With Therapeutic Equivalence Evaluations as an approved drug based on safety and effectiveness;^{Pf} or

(ii) have active antimicrobial ingredients that are listed in the FDA monograph for OTC health-care antiseptic drug products as an antiseptic handwash;^{Pf} and

(B) consist only of components which the intended use of each complies with one of the following:

(i) a threshold of regulation exemption in 21 CFR 170.39 - threshold of regulation for substances used in food-contact articles;^{Pf} or

(ii) 21 CFR 178 - indirect food additives: adjuvants, production aids, and sanitizers as regulated for use as a food additive with conditions of safe use;^{Pf} or

(iii) a determination of generally recognized as safe (GRAS). partial listings of substances with food uses that are GRAS may be found in 21 CFR 182 - substances generally recognized as safe, 21 CFR 184 - direct food substances affirmed as generally recognized as safe, or 21 CFR 186 - indirect food substances affirmed as generally recognized as safe for use in contact with food, and in FDA's Inventory of GRAS Notices;^{Pf} or

(iv) a prior sanction listed in 21 CFR 181 - prior sanctioned food ingredients;^{Pf} or

(v) a Food Contact Notification that is effective;^{Pf} and

(C) be applied only to hands that are cleaned as specified in §228.38(b) of this title.^{Pf}

(2) if a hand antiseptic or a hand antiseptic solution used as a hand dip does not meet the criteria specified in paragraph (1)(B) of this subsection, use shall be:

(A) followed by thorough hand rinsing in clean water beforehand contact with food or by the use of gloves;^{Pf} or

(B) limited to situations that involve no direct contact with food by the bare hands.^{Pf}

(3) a hand antiseptic solution used as a hand dip shall be maintained clean and at a strength equivalent to at least 100 mg/L chlorine.^{Pf}

§228.39. *Fingernail Maintenance.*

(a) Food employees shall keep their fingernails trimmed, filed, and maintained so the edges and surfaces are cleanable and not rough.^{Pf}

(b) Unless wearing intact gloves in good repair, a food employee may not wear fingernail polish or artificial fingernails when working with exposed food.^{Pf}

§228.40. *Jewelry Prohibition.*

Except for a plain ring such as a wedding band, while preparing food, food employees may not wear jewelry including medical information jewelry on their arms and hands.

§228.41. *Outer Clothing, Clean Condition.*

Food employees shall wear clean outer clothing to prevent contamination of food, equipment, utensils, linens, and single-service and single-use articles.

§228.42. *Food Contamination Prevention.*

(a) Eating, Drinking, or Using Tobacco.

(1) except as specified in paragraph (2) of this subsection, an employee shall eat, drink, or use any form of tobacco only in designated areas where the contamination of exposed food; clean equipment, utensils, and linens; unwrapped single-service and single-use articles; or other items needing protection cannot result.

(2) a food employee may drink from a closed beverage container if the container is handled to prevent contamination of:

(A) the employee's hands;

(B) the container; and

(C) exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles.

(b) Discharges from the Eyes, Nose, and Mouth. Food employees experiencing persistent sneezing, coughing, or a runny nose

that causes discharges from the eyes, nose, or mouth may not work with exposed food; clean equipment, utensils, and linens; or unwrapped single-service or single-use articles.

§228.43. *Hair Restraints.*

(a) Except as provided in subsection (b) of this section, food employees shall wear hair restraints such as hats, hair coverings or nets, beard restraints, and clothing that covers body hair, that are designed and worn to effectively keep their hair from contacting exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles.

(b) This section does not apply to food employees such as counter staff who only serve beverages and wrapped or packaged foods, hostesses, and wait staff if they present a minimal risk of contaminating exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles.

§228.44. *Animals, Handling Prohibitions.*

(a) Except as specified in subsection (b) of this section, food employees may not care for or handle animals that may be present such as patrol dogs, service animals, or pets that are allowed as specified in §228.186(o)(2)(B) - (E) of this title.^{Pf}

(b) Food employees with service animals may handle or care for their service animals and food employees may handle or care for fish in aquariums or molluscan shellfish or crustaceans in display tanks if they wash their hands as specified in §228.38(b) and (d)(3) of this title.

§228.45. *Contamination Events.*

Clean-up of Vomit and Diarrheal Events. A food establishment shall have written procedures for employees to follow when responding to vomiting or diarrheal events that involve the discharge of vomitus or fecal matter onto surfaces in the food establishment the procedures shall address the specific actions employees must take to minimize the spread of contamination and the exposure of employees, consumers, food, and surfaces to vomitus or fecal matter.^{Pf}

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

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SUBCHAPTER C. FOOD

25 TAC §§228.61 - 228.83

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §437.0056, which requires the department to adopt rules for granting and maintaining retail food permits in areas not regulated by counties and public health districts; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human

services by the department and for the administration of Chapter 1001, Health and Safety Code.

The new sections affect Health and Safety Code, Chapters 437 and 1001; and Government Code, Chapters 531 and 2001.

§228.61. Condition Safe, Unadulterated, and Honestly Presented.
Food shall be safe, unadulterated, and, as specified in §228.78(b) of this title, honestly presented.^p

§228.62. Approved Sources.

(a) Compliance with food law.

(1) Food shall be obtained from sources that comply with applicable laws and are licensed by the state regulatory authority having jurisdiction over the processing and distribution of the food.^p

(2) Food prepared in a private home, except as allowed in §228.223 of this title, or from an unlicensed food manufacturer or wholesaler, is considered to be from an unapproved source and may not be used or offered for human consumption in a food establishment.^p

(3) Packaged food shall be labeled as specified in law, including 21 CFR 101, Food Labeling, 9 CFR 317, Labeling, Marking Devices, and Containers, and 9 CFR 381 Subpart N, Labeling and Containers, and as specified in §228.63(h) and (i) of this title.^{pf}

(4) Fish, other than those specified in §228.72(a)(2) of this title, that are intended for consumption in their raw form and allowed as specified in §228.71(a)(4) of this title may be offered for sale or service if they are obtained from a supplier that freezes the fish as specified in §228.72(a)(1) of this title; or frozen on the premises as specified §228.72(a)(1) of this title and records are retained as specified in §228.72(b) of this title.

(5) Whole-muscle, intact beef steaks that are intended for consumption in an undercooked form without a consumer advisory as specified in §228.71(a)(3) of this title shall be:

(A) obtained from a food processing plant that, upon request by the purchaser, packages the steaks and labels them, to indicate that the steaks meet the definition of whole-muscle, intact beef;^{pf} or

(B) deemed acceptable by the regulatory authority based on other evidence, such as written buyer specifications or invoices, that indicates that the steaks meet the definition of whole-muscle, intact beef;^{pf} and

(C) if individually cut in a food establishment:

(i) cut from whole-muscle intact beef that is labeled by a food processing plant as specified in subparagraph (A) of this paragraph or identified as specified in subparagraph (B) of this paragraph;^{pf}

(ii) prepared so they remain intact;^{pf} and

(iii) if packaged for undercooking in a food establishment, labeled as specified in subparagraph (A) of this paragraph or identified as specified in subparagraph (B) of this paragraph.^{pf}

(6) Meat and poultry that is not a ready-to-eat food and is in a packaged form when it is offered for sale or otherwise offered for consumption, shall be labeled to include safe handling instructions as specified in law, including 9 CFR §317.2(l) and 9 CFR §381.125(b).

(7) Eggs that have not been specifically treated to destroy all viable Salmonellae shall be labeled to include safe handling instructions as specified in law, including 21 CFR §101.17(h).

(b) Food in a hermetically sealed container. Food in a hermetically sealed container shall be obtained from a food processing plant that is regulated by the food regulatory agency that has jurisdiction over the plant.^p

(c) Fluid milk and milk products. Fluid milk and milk products shall be obtained from sources that comply with Grade A standards in accordance with Chapter 217 of this title.^p

(d) Fish.

(1) Fish that are received for sale or service shall be:

(A) commercially and legally caught or harvested;^p or

(B) approved for sale or service.^p

(2) Molluscan shellfish that are recreationally caught may not be received for sale or service.^p

(e) Molluscan shellfish.

(1) Molluscan shellfish shall be obtained from sources according to law and the requirements specified in the U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, National Shellfish Sanitation Program Guide for the Control of Molluscan Shellfish.^p

(2) Molluscan shellfish received in interstate commerce shall be from sources that are listed in the Interstate Certified Shellfish Shippers List.^p

(f) Wild mushrooms.

(1) Except as specified in paragraph (2) of this subsection, mushroom species picked in the wild shall not be offered for sale or service by a food establishment unless the food establishment has been approved to do so.^p

(2) This section does not apply to:

(A) cultivated wild mushroom species that are grown, harvested, and processed in an operation that is regulated by the food regulatory agency that has jurisdiction over the operation; or

(B) wild mushroom species if they are in packaged form and are the product of a food processing plant that is regulated by the food regulatory agency that has jurisdiction over the plant.

(g) Exotic animals and game animals.

(1) If exotic animals and are received for sale or service, they shall:

(A) be commercially raised for food;^p and

(i) raised, slaughtered, processed, and deemed to be "inspected and approved" under an inspection program administered by USDA in accordance with 9 CFR 352, Exotic Animals; Voluntary Inspection;^p or

(ii) raised, slaughtered, processed, and deemed to be "inspected and passed" under a meat and poultry inspection program administered by the department or any other state meat inspection program deemed equal to USDA inspection;^p

(B) as allowed by law, for exotic animals that are live caught, be slaughtered and processed as required in subparagraph (A)(i) or (ii) of this paragraph; and

(C) as allowed by law, for exotic animals that are field dressed:

(i) receive an antemortem and postmortem examination by the appropriate inspection personnel as described in subparagraph (A)(i) or (ii) of this paragraph;^p and

(ii) be field dressed, transported, and processed according to the requirements specified by the appropriate regulatory authority as described in subparagraph (A)(i) or (ii) of this paragraph.^p

(2) If game animals are received for sale or service they shall be:

(A) commercially raised for food^P and:

(i) raised, slaughtered, and processed under a voluntary inspection program that is conducted by the agency that has animal health jurisdiction;^P or

(ii) under a routine inspection program conducted by a regulatory agency other than the agency that has animal health jurisdiction;^P and

(iii) raised, slaughtered, and processed according to:

(I) laws governing meat and poultry as determined by the agency that has animal health jurisdiction and the agency that conducts the inspection program;^P and

(II) requirements which are developed by the agency that has animal health jurisdiction and the agency that conducts the inspection program with consideration of factors such as the need for ante mortem and postmortem examination by an approved veterinarian or veterinarian's designee;^P

(B) under a voluntary inspection program administered by the USDA for game animals such as exotic animals (reindeer, elk, deer, antelope, water buffalo, or bison) that are "inspected and approved" in accordance with 9 CFR 352, Exotic Animals; Voluntary Inspection of rabbits that are "inspected and certified" in accordance with 9 CFR 354, Voluntary Inspection of Rabbits and Edible Products Thereof;^P

(C) as allowed by law, for wild game animals that are live-caught:

(i) under a routine inspection program conducted by a regulatory agency such as the agency that has animal health jurisdiction;^P and

(ii) slaughtered and processed according to:

(I) laws governing meat and poultry as determined by the agency that has animal health jurisdiction and the agency that conducts the inspection program;^P and

(II) requirements which are developed by the agency that has animal health jurisdiction and the agency that conducts the inspection program with consideration of factors such as the need for antemortem and postmortem examination by an approved veterinarian or veterinarian's designee;^P or

(D) as allowed by law, for field-dressed wild game animals under a routine inspection program that ensures the animals:

(i) receive a postmortem examination by an approved veterinarian or veterinarian's designee;^P or

(ii) are field-dressed and transported according to requirements specified by the agency that has animal health jurisdiction and the agency that conducts the inspection program;^P and

(iii) are processed according to laws governing meat and poultry as determined by the agency that has animal health jurisdiction and the agency that conducts the inspection program. ^P

(3) A game animal may not be received for sale or service if it is a species of wildlife that is listed in 50 CFR 17, Endangered and Threatened Wildlife and Plants.

§228.63. Specifications for Receiving.

(a) Temperature.

(1) Except as specified in paragraph (2) of this subsection, refrigerated, time/temperature controlled for safety food shall be at a temperature of 5 degrees Celsius (41 degrees Fahrenheit) or below when received.^P

(2) If a temperature other than 5 degrees Celsius (41 degrees Fahrenheit) for a time/temperature controlled for safety (TCS) food is specified in law governing its distribution the food may be received at the specified temperature.

(3) Raw shell eggs shall be received in refrigerated equipment that maintains an ambient air temperature of 7 degrees Celsius (45 degrees Fahrenheit) or less. ^P

(4) Grade A Milk shall be received in refrigerated equipment that maintains an ambient air temperature of 7 degrees Celsius (45 degrees Fahrenheit) or less.^P

(5) Molluscan shellfish shall be received in refrigerated equipment or on ice that maintains a temperature of 7 degrees Celsius (45 degrees Fahrenheit) or less, as required in §241.61(a) of this title.^P

(6) Time/temperature controlled for safety (TCS) food that is cooked to a temperature and for a time specified in §228.71 of this title and received hot shall be at a temperature of 57 degrees Celsius (135 degrees Fahrenheit) or above.^P

(7) A food that is labeled frozen and shipped frozen by a food processing plant shall be received frozen.^{Pf}

(8) Upon receipt, TCS food shall be free of evidence of previous temperature abuse.^{Pf}

(b) Additives. Food may not contain unapproved food additives or additives that exceed amounts specified in 21 CFR 170-180 relating to food additives, generally recognized as safe or prior sanctioned substances that exceed amounts specified in 21 CFR 181-186, substances that exceed amounts specified in 9 CFR Subpart C, §424.21(b), food ingredients and sources of radiation, or pesticide residues that exceed provisions specified in 40 CFR 180, Tolerances and Exemptions From Tolerances for Pesticide Chemicals in Food.^P

(c) Eggs. Eggs shall be received clean and sound and may not exceed the restricted egg tolerances for U.S. Consumer Grade B as specified in 7 CFR 56, Voluntary Grading of Shell Eggs and United States Standards, Grades, and Weight Classes for Shell Eggs, and 9 CFR 590, Inspection of Eggs and Egg Products.^P

(d) Eggs and milk products, pasteurized.

(1) Egg products shall be obtained pasteurized. ^P

(2) Fluid and dry milk and milk products shall:

(A) be obtained pasteurized;^P and

(B) comply with grade A standards as specified in law.

^P

(3) Frozen milk products, such as ice cream, shall be obtained pasteurized in accordance with the Texas Frozen Desserts Manufacturing Licensing Act, Health and Safety Code, Chapter 440. ^P

(4) Cheese shall be obtained pasteurized unless alternative procedures to pasteurization are specified in the CFR, such as 21 CFR 133, Cheeses and Related Cheese Products, for curing certain cheese varieties.^P

(e) Package integrity. Food packages shall be in good condition and protect the integrity of the contents so that the food is not exposed to adulteration or potential contaminants.^{Pf}

(f) Ice. Ice for use as a food or a cooling medium shall be made from drinking water.^{Pf}

(g) Juice treated. Pre-packaged juice shall:

(1) be obtained from a processor with a HACCP system as specified in 21 CFR 120, Hazard Analysis and Critical Control (HACCP) Systems;^{Pf}

(2) be obtained pasteurized or otherwise treated to attain a 5-log reduction of the most resistant microorganism of public health significance as specified in 21 CFR §120.24, Process Controls.^{Pf}

(h) Shucked shellfish, packaging and identification.

(1) Raw shucked shellfish, including individual quick frozen oysters, shall be obtained in nonreturnable packages which bear a legible label that identifies the:^{Pf}

(A) name, address, and certification number of the shucker-packer or repacker of the molluscan shellfish;^{Pf} and

(B) the "sell by" or "best if used by" date for packages with a capacity of less than 1.89 L (one-half gallon) or the date shucked for packages with a capacity of 1.89 L (one-half gallon) or more.^{Pf}

(2) A package of raw shucked shellfish that does not bear a label or which bears a label which does not contain all the information as specified in paragraph (1) of this subsection, shall be subject to detention as provided in Health and Safety Code, Chapter 436.

(i) Shellstock identification.

(1) Shellstock shall be obtained in containers bearing legible source identification tags or labels that are affixed by the harvester and each dealer that depurates, ships, or reships the shellstock, as specified in §§241.50 - 241.71 of this title, and that list:^{Pf}

(A) except as specified in paragraph (3) of this subsection, on the harvester's tag or label, the following information in the following order:^{Pf}

(i) the harvester's identification number that is assigned by the shellfish control authority;^{Pf}

(ii) the date of harvesting;^{Pf}

(iii) the most precise identification of the harvest location or aquaculture site that is practicable based on the system of harvest area designations that is in use by the shellfish control authority and including the abbreviation of the name of the state or country in which the shellfish are harvested;^{Pf}

(iv) the type and quantity of shellfish;^{Pf} and

(v) the following statement in bold, capitalized type: "This tag is required to be attached until container is empty or retagged and thereafter kept on file for 90 days;"^{Pf} and

(B) except as specified in paragraph (3) of this subsection, on each dealer's tag or label, the following information in the following order:^{Pf}

(i) the dealer's name and address, and the certification number assigned by the shellfish control authority;^{Pf}

(ii) the original shipper's certification number including the abbreviation of the name of the state or country in which the shellfish are harvested;^{Pf}

(iii) the same information as specified for a harvester's tag in subparagraph (A)(ii) - (iv) of this paragraph;^{Pf}

(iv) the following statement in bold, capitalized type: "This tag is required to be attached until container is empty and thereafter kept on file for 90 days."^{Pf}

(2) A container of shellstock that does not bear a tag or label or that bears a tag or label that does not contain all the information as specified in paragraph (1) of this subsection shall be subject to detention as provided in Health and Safety Code, Chapter 436.

(3) If a place is provided on the harvester's tag or label for a dealer's name, address, and certification number, the dealer's information shall be listed first.

(4) If the harvester's tag or label is designed to accommodate each dealer's identification as specified in paragraph (1)(B)(i) and (ii) of this subsection individual dealer tags or labels need not be provided.

(j) Shellstock, condition. When received by a food establishment, shellstock shall be reasonably free of mud, dead shellfish, and shellfish with broken shells. Dead shellfish or shellstock with badly broken shells shall be discarded.

§228.64. Molluscan Shellfish, Original Container and Records.

(a) Except as specified in subsections (b) - (d) of this section, molluscan shellfish may not be removed from the container in which they are received other than immediately before sale or preparation for service.

(b) For display purposes, shellstock may be removed from the container in which they are received, displayed on drained ice, or held in a display container maintained at 41 degrees Fahrenheit, and a quantity specified by a consumer may be removed from the display or display container and provided to the consumer if:

(1) the source of the shellstock on display is identified as specified in §228.63(i) of this title and subsection (e) of this section; and

(2) the shellstock are protected from contamination.

(c) Shucked shellfish may be removed from the container in which they were received and held in a display container from which individual servings are dispensed upon a consumer's request if:

(1) the labeling information for the shellfish on display as specified in §228.63(h) of this title is retained and correlated to the date when, or dates during which, the shellfish are sold or served; and

(2) the shellfish are protected from contamination.

(d) Shucked shellfish may be removed from the container in which they were received and repacked in consumer self-service containers where allowed by law if:

(1) the labeling information for the shellfish is on each container as specified in §228.63(h) and §228.79(a)(1) and (2)(A) - (E) of this title;

(2) the labeling information as specified in subsection §228.63(h) of this title is retained which correlates with the date when, or dates during which, the shellfish are sold or served;

(3) the labeling information and dates specified in subsection (d)(2) of this section are maintained for 90 days; and

(4) the shellfish are protected from contamination.

(e) Shellstock, maintaining identification.

(1) Except as specified in paragraph (3)(B) of this subsection, shellstock tags shall remain attached to the container in which the shellstock are received until the container is empty.^{Pf}

(2) The date when the last shellstock from the container is sold or served shall be recorded on the tag or label.^{Pf}

(3) The identity of the source of shellstock that are sold or served shall be maintained by retaining shellstock tags or labels for 90 calendar days from the date that is recorded on the tag or label, as specified in paragraph (2) of this subsection, by:^{Pf}

(A) using an approved record keeping system that keeps the tags or labels in chronological order correlated to the date that is recorded on the tag or label, as specified in paragraph (2) of this subsection;^{Pf} and

(B) if shellstock are removed from their tagged or labeled container:

(i) preserving source identification by using a record keeping system as specified in subparagraph (A) of this paragraph;^{Pf} and

(ii) ensuring that shellstock from one tagged or labeled container are not commingled with shellstock from another container with different certification numbers; different harvest dates; or different growing areas as identified on the tag or label before being ordered by the consumer.^{Pf}

§228.65. Preventing Contamination by Employees.

(a) Preventing contamination from hands.

(1) Food employees shall wash their hands as specified in §228.38 of this title.

(2) Except when washing fruits and vegetables as specified in §228.66(e) of this title or as specified in paragraphs (4) and (5) of this subsection, food employees may not contact exposed, ready-to-eat food with their bare hands and shall use suitable utensils such as deli tissue, spatulas, tongs, single-use gloves, or dispensing equipment.^P

(3) Food employees shall minimize bare hand and arm contact with exposed food that is not in a ready-to-eat form.^P

(4) paragraph (2) of this section does not apply to a food employee that contacts exposed, ready-to-eat food with bare hands at the time the ready-to-eat food is being added as an ingredient to a food that:

(A) contains a raw animal food and is to be cooked in the food establishment to heat all parts of the food to the minimum temperatures specified in §228.71(a)(1) - (2) or (b) of this title; or

(B) does not contain a raw animal food but is to be cooked in the food establishment to heat all parts of the food to a temperature of at least 63 degrees Celsius (145 degrees Fahrenheit).

(5) Food employees not serving a highly susceptible population may contact exposed, ready-to-eat food with their bare hands if:

(A) the permit holder has first obtained prior approval from the regulatory authority and maintains proof of the approval at the facility for review during inspection.^P

(B) written procedures are maintained in the food establishment and made available to the regulatory authority upon request that include:

(i) for each bare hand contact procedure, a listing of the specific ready-to-eat foods and food additives that are touched by bare hands;^P

(ii) diagrams and other information showing that handwashing facilities, installed, located, equipped, and maintained as specified in §228.147(a), §228.148(a), §228.149(a), and §228.175(b),

(c) and (e) of this title, are in an easily accessible location and in close proximity to the work station where the bare hand contact procedure is conducted;^P

(C) a written employee health policy that details how the food establishment complies with §§228.35 - 228.37 of this title including:

(i) documentation that food employees and conditional employees acknowledge that they are informed to report information about their health and activities as they relate to gastrointestinal symptoms and diseases that are transmittable through food as specified in §228.35(a) of this title;^P

(ii) documentation that food employees and conditional employees acknowledge their responsibilities as specified in §228.35(e) and (f) of this title;^P and

(iii) documentation that the person in charge acknowledges the responsibilities as specified in §228.35(b), (c) and (d), and §228.36 and §228.37 of this title;^P

(D) documentation is maintained at the food establishment that food employees acknowledge that they have received training in:

(i) the risks of contacting the specific ready-to-eat foods with bare hands;^P

(ii) proper handwashing as specified in §228.38 of this title;^P

(iii) when to wash their hands as specified in §228.38(d) of this title;^P

(iv) where to wash their hands as specified in §228.38(e) of this title;^P

(v) proper fingernail maintenance as specified in §228.39 of this title;

(vi) prohibition of jewelry as specified in §228.40 of this title;

(vii) good hygienic practices as related to §228.42(a) and (b) of this title; and

(viii) employee health policies that detail how the food establishment complies with §§228.35 - 228.37 of this title;^P

(E) documentation that hands are washed before food preparation and as necessary to prevent cross contamination by food employees as specified in §228.38(a), (b), (d), and (e) of this title during all hours of operation when the specific ready-to-eat foods are prepared;^P

(F) documentation is maintained at the food establishment that food employees contacting ready-to-eat foods with bare hands utilize two or more of the following control measures to provide additional safeguards to hazards associated with bare hand contact:

(i) double handwashing;^P

(ii) nail brushes;^P

(iii) a hand sanitizer after handwashing as specified in §228.38(f) of this title;^P

(iv) incentive programs that assist or encourage food employees not to work when they are ill such as paid sick leave;^P

(v) other control measures approved by the regulatory authority;^P and

(G) documentation is maintained at the food establishment that corrective actions are taken when subparagraphs (A) - (E) of this paragraph are not followed.^P

(b) Preventing contamination when tasting. A food employee may not use a utensil more than once to taste food that is to be sold or served.^P

§228.66. Preventing Food and Ingredient Contamination.

(a) Packaged and unpackaged food - separation, packaging, and segregation.

(1) Food shall be protected from cross contamination by:

(A) except as specified in clause (iii) of this subparagraph, separating raw animal foods during storage, preparation, holding, and display from:

(i) raw ready-to-eat food including other raw animal food such as fish for sushi or molluscan shellfish, or other raw ready-to-eat food such as vegetables;^P and

(ii) cooked ready-to-eat food;^P

(iii) frozen, commercially processed and packaged raw animal food may be stored or displayed with or above frozen, commercially processed and packaged, ready-to-eat food.

(B) except when combined as ingredients, separating types of raw animal foods from each other such as beef, fish, lamb, pork, and poultry during storage, preparation, holding, and display by:

(i) using separate equipment for each type;^P or

(ii) arranging each type of food in equipment so that cross contamination of one type with another is prevented;^P and

(iii) preparing each type of food at different times or in separate areas;^P

(C) cleaning equipment and utensils as specified in §228.114(a) of this title, and sanitizing as specified in §228.118 of this title;

(D) except as specified in §228.75(e)(2)(b) of this title and paragraph (2) of this subsection, storing the food in packages, covered containers, or wrappings;

(E) cleaning hermetically sealed containers of food of visible soil before opening;

(F) protecting food containers that are received packaged together in a case or overwrap from cuts when the case or overwrap is opened;

(G) storing damaged, spoiled, or recalled food being held in the food establishment as specified in §228.184 of this title; and

(H) separating fruits and vegetables, before they are washed as specified in subsection (e) of this section from ready-to-eat food.

(2) Paragraph (1)(D) of this subsection does not apply to:

(A) whole, uncut, raw fruits and vegetables and nuts in the shell, that require peeling or hulling before consumption;

(B) primal cuts, quarters, or sides of raw meat or slab bacon that are hung on clean, sanitized hooks or placed on clean, sanitized racks;

(C) whole, uncut, processed meats such as country hams, and smoked or cured sausages that are placed on clean, sanitized racks;

(D) food being cooled as specified in §228.75(e)(2)(B) of this title; or

(E) shellstock.

(b) Food storage containers, identified with common name of food. Except for containers holding food that can be readily and unmistakably recognized such as dry pasta, working containers holding food or food ingredients that are removed from their original packages for use in the food establishment, such as cooking oils, flour, herbs, potato flakes, salt, spices, and sugar shall be identified with the common name of the food.

(c) Pasteurized eggs, substitute for raw shell eggs for certain recipes. Pasteurized eggs or egg products shall be substituted for raw shell eggs in the preparation of foods such as Caesar salad, hollandaise or Béarnaise sauce, mayonnaise, meringue, eggnog, ice cream, and egg-fortified beverages that are not:^P

(1) cooked as specified in §228.71(a)(1)(A)(i) - (ii) of this title;^P or

(2) included in §228.71(a)(4) of this title.^P

(d) Protection from unapproved additives.

(1) Food shall be protected from contamination that may result from the addition of, as specified in §228.63(b) of this title:

(A) unsafe or unapproved food or color additives;^P and

(B) unsafe or unapproved levels of approved food and color additives.^P

(2) A food employee may not:

(A) apply sulfiting agents to fresh fruits and vegetables intended for raw consumption or to a food considered to be a good source of vitamin B₁₂;^P or

(B) except for grapes, serve or sell food specified in subparagraph (A) of this paragraph that is treated with sulfiting agents before receipt by the food establishment.^P

(e) Washing fruits and vegetables.

(1) Except as specified in paragraph (2) of this subsection and except for whole, raw fruits and vegetables that are intended for washing by the consumer before consumption, raw fruits and vegetables shall be thoroughly washed in water to remove soil and other contaminants before being cut, combined with other ingredients, cooked, served, or offered for human consumption in ready-to-eat form.

(2) Fruits and vegetables may be washed by using chemicals as specified in §228.206(b) of this title.

(3) Devices used for on-site generation of chemicals meeting the requirements specified in 21 CFR 173.315, chemicals used in the washing or to assist in the peeling of fruits and vegetables, for the washing of raw, whole fruits and vegetables shall be used in accordance with the manufacturer's instructions.^{P†}

§228.67. Preventing Contamination From Ice Used as a Coolant.

(a) Ice used as exterior coolant, prohibited as ingredient. After use as a medium for cooling the exterior surfaces of food such as melons or fish, packaged foods such as canned beverages, or cooling coils and tubes of equipment, ice may not be used as food.^P

(b) Storage or display of food in contact with water or ice.

(1) Packaged food may not be stored in direct contact with ice or water if the food is subject to the entry of water because of the nature of its packaging, wrapping, or container or its positioning in the ice or water.

(2) Except as specified in paragraphs (3) and (4) of this subsection, unpackaged food may not be stored in direct contact with undrained ice.

(3) Whole, raw fruits or vegetables; cut, raw vegetables such as celery or carrot sticks or cut potatoes; and tofu may be immersed in ice or water.

(4) Raw chicken and raw fish that are received immersed in ice in shipping containers may remain in that condition while in storage awaiting preparation, display, service, or sale.

§228.68. Preventing Contamination From Equipment, Utensils, and Linens.

(a) Food shall only contact surfaces of:

(1) equipment and utensils that are cleaned as specified in §§228.113 - 228.115 of this title and sanitized as specified in §§228.116 - 228.118 of this title;^p

(2) single-service and single-use articles;^p

(3) linens, such as cloth napkins, as specified in subsection (c) that are laundered as specified in §228.119 of this title.^p

(b) In-use utensils, between-use storage. During pauses in food preparation or dispensing, food preparation and dispensing utensils shall be stored:

(1) except as specified in subsection (a) of this section, in the food with their handles above the top of the food and the container;

(2) in food that is not time/temperature controlled for safety (TCS) with their handles above the top of the food within containers or equipment that can be closed, such as bins of sugar, flour, or cinnamon;

(3) on a clean portion of the food preparation table or cooking equipment only if the in-use utensil and the food-contact surface of the food preparation table or cooking equipment are cleaned and sanitized at a frequency specified in §228.114 and §228.117 of this title;

(4) in running water of sufficient velocity to flush particulates to the drain, if used with moist food such as ice cream or mashed potatoes;

(5) in a clean, protected location if the utensils, such as ice scoops, are used only with a food that is not TCS; or

(6) in a container of water if the water is maintained at a temperature of at least 57 degrees Celsius (135 degrees Fahrenheit) and the container is cleaned at a frequency specified in §228.114(a)(4)(G) of this title.

(c) Linens and Napkins, Use Limitation. Linens, such as cloth napkins, may not be used in contact with food unless they are used to line a container for the service of foods and the linens and napkins are replaced each time the container is refilled for a new consumer.

(d) Wiping cloths, use limitation.

(1) cloths in-use for wiping food spills from tableware and carry-out containers that occur as food is being served shall be:

(A) maintained dry; and

(B) used for no other purpose.

(2) cloths in-use for wiping counters and other equipment surfaces shall be:

(A) held between uses in a chemical sanitizer solution at a concentration specified in §228.111(n) of this title; and

(B) laundered daily as specified in §228.120(d) of this title.

(3) cloths in-use for wiping surfaces in contact with raw animal foods shall be kept separate from cloths used for other purposes.

(4) dry wiping cloths and the chemical sanitizing solutions specified in paragraph (2)(A) of this subsection in which wet wiping cloths are held between uses shall be free of food debris and visible soil.

(5) containers of chemical sanitizing solutions specified in paragraph (2)(A) of this subsection in which wet wiping cloths are held between uses shall be stored off the floor and used in a manner that prevents contamination of food, equipment, utensils, linens, single-service, or single-use articles.

(6) single-use disposable sanitizer wipes shall be used in accordance with EPA-approved manufacturer's label use instructions

(e) Gloves, use limitation.

(1) If used, single-use gloves shall be used for only one task such as working with ready-to-eat food or with raw animal food, used for no other purpose, and discarded when damaged or soiled, or when interruptions occur in the operation.^p

(2) Except as specified in paragraph (3) of this subsection, slash-resistant gloves that are used to protect the hands during operations requiring cutting shall be used in direct contact only with food that is subsequently cooked as specified in §228.71 of this title such as frozen food or a primal cut of meat.^p

(3) Slash-resistant gloves may be used with ready-to-eat food that will not be subsequently cooked if the slash-resistant gloves have a smooth, durable, and nonabsorbent outer surface; or if the slash-resistant gloves are covered with a smooth, durable, nonabsorbent glove, or a single-use glove.^p

(4) Cloth gloves may not be used in direct contact with food unless the food is subsequently cooked as required in §228.71 of this title such as frozen food or a primal cut of meat.^p

(f) Using clean tableware for second portions and refills.

(1) Except for refilling a consumer's drinking cup or container without contact between the pouring utensil and the lip-contact area of the drinking cup or container, food employees may not use tableware, including single-service articles, soiled by the consumer, to provide second portions or refills.

(2) Except as specified in paragraph (3) of this subsection, self-service consumers may not be allowed to use soiled tableware, including single-service articles, to obtain additional food from the display and serving equipment. A card, sign or other effective means of notification shall be displayed to notify consumers that clean tableware is to be used upon return to self-service areas such as salad bars and buffets.

(3) Drinking cups and containers may be reused by self-service consumers if refilling is a contamination-free process as specified in §228.106(1), (2), and (4) of this title.

(g) Refilling returnables.

(1) Except as specified in paragraphs (2) - (5) of this subsection, empty containers returned to a food establishment for cleaning and refilling with food shall be cleaned and refilled in a regulated food processing plant.^p

(2) A take-home food container returned to a food establishment may be refilled at the food establishment with food if the food container is:

(A) designed and constructed for reuse as specified in Subchapter D of this chapter;^P

(B) one that was initially provided by the food establishment to the consumer, either empty or filled with food by the food establishment, for the purpose of being returned for reuse;^P

(C) returned to the food establishment by the consumer after use;^P

(D) subject to the following steps before being refilled with food:

(i) cleaned as specified in §§228.113 - 228.115 of this title;^P

(ii) sanitized as specified in §§228.116 - 228.118 of this title;^P

(iii) visually inspected by the food establishment to verify that the container, as returned, as specified in Subchapter D of this chapter.^P

(3) A take-home food container returned to a food establishment may be refilled at a food establishment with beverage if:

(A) the beverage is not a TCS food;

(B) the design of the container and of the rinsing equipment and the nature of the beverage, when considered together, allow effective cleaning at home or in the food establishment;

(C) facilities for rinsing before refilling returned containers with fresh, hot water that is under pressure and not recirculated are provided as part of the dispensing system;

(D) the consumer-owned container returned to the food establishment for refilling is refilled for sale or service only to the same consumer; and

(E) the container is refilled by:

(i) an employee of the food establishment, or

(ii) the owner of the container if the beverage system includes a contamination-free transfer process as specified in §228.106(c)(1), (2), and (4) of this title that cannot be bypassed by the container owner.

(4) Consumer-owned, personal take-out beverage containers, such as thermally insulated bottles, nonspill coffee cups, and promotional beverage glasses, may be refilled by employees or the consumer if refilling is a contamination-free process as specified in §228.106(c)(1), (2), and (4) of this title.

(5) Consumer-owned containers that are not food-specific may be filled at a water vending machine or system.

§228.69. Preventing Contamination From the Premises.

(a) Food storage.

(1) Except as specified in paragraphs (2) and (3) of this subsection, food shall be protected from contamination by storing the food:

(A) in a clean, dry location;

(B) where it is not exposed to splash, dust, or other contamination; and

(C) at least 15 cm (6 inches) above the floor.

(2) Food in packages and working containers may be stored less than 15 cm (6 inches) above the floor on case lot handling equipment as specified in §228.106(v) of this title.

(3) Pressurized beverage containers, cased food in water-proof containers such as bottles or cans, and milk containers in plastic crates may be stored on a floor that is clean and not exposed to floor moisture.

(b) Food storage, prohibited areas. Food may not be stored:

(1) in locker rooms;

(2) in toilet rooms;

(3) in dressing rooms;

(4) in garbage rooms;

(5) in mechanical rooms;

(6) under sewer lines that are not shielded to intercept potential drips;

(7) under leaking water lines, including leaking automatic fire sprinkler heads, or under lines on which water has condensed;

(8) under open stairwells; or

(9) under other sources of contamination.

(c) Vended time/temperature controlled for safety food, original container. Time/temperature controlled for safety food dispensed through a vending machine shall be in the package in which it was placed at the food establishment or food processing plant at which it was prepared.

(d) Food preparation. During preparation, unpackaged food shall be protected from environmental sources of contamination.

§228.70. Preventing Contamination by Consumers.

(a) Food display. Except for nuts in the shell and whole, raw fruits and vegetables that are intended for hulling, peeling, or washing by the consumer before consumption, food on display shall be protected from contamination by the use of packaging; counter, service line, or salad bar food guards; display cases; or other effective means.^P

(b) Condiments, protection.

(1) Condiments shall be protected from contamination by being kept in dispensers that are designed to provide protection, protected food displays provided with the proper utensils, original containers designed for dispensing, or individual packages or portions.

(2) Condiments at a vending machine location shall be in individual packages or provided in dispensers that are filled at an approved location, such as the food establishment that provides food to the vending machine location, a food processing plant that is regulated by the agency that has jurisdiction over the operation, or a properly equipped facility that is located on the site of the vending machine location.

(c) Consumer self-service operations.

(1) Raw, unpackaged animal food, such as beef, lamb, pork, poultry, and fish may not be offered for consumer self-service.^P This paragraph does not apply to:

(A) consumer self-service of ready-to-eat foods at buffets or salad bars that serve foods such as sushi or raw shellfish;

(B) ready-to-cook individual portions for immediate cooking and consumption on the premises such as consumer-cooked meats or consumer-selected ingredients for Mongolian barbecue; or

(C) raw, frozen, shell-on shrimp or lobster.

(2) Consumer self-service operations for ready-to-eat foods shall be provided with suitable utensils or effective dispensing methods that protect the food from contamination.^{Pf}

(3) Consumer self-service operations such as buffets and salad bars shall be monitored by food employees trained in safe operating procedures.^{Pf}

(d) Returned food and re-service of food.

(1) Except as specified in paragraph (2) of this subsection, after being served or sold and in the possession of a consumer, food that is unused or returned by the consumer may not be offered as food for human consumption.^P

(2) Except as specified in §228.82(7) of this title, a container of food that is not time/temperature controlled for safety may be re-served from one consumer to another if:

(A) the food is dispensed so that it is protected from contamination and the container is closed between uses, such as a narrow-neck bottle containing catsup, steak sauce, or wine; or

(B) the food, such as crackers, salt, or pepper, is in an unopened original package and is maintained in sound condition.

(e) Preventing contamination from other sources. Miscellaneous sources of Contamination. Food shall be protected from contamination that may result from a factor or source not specified in §§228.65 - 228.70 of this title.

§228.71. Cooking.

(a) Raw animal foods.

(1) Except as specified in paragraphs (2) - (4) of this subsection, raw animal foods such as eggs, fish, meat, poultry, and foods containing these raw animal foods, shall be cooked to heat all parts of the food to a temperature and for a time that complies with one of the following methods based on the food that is being cooked:

(A) 63 degrees Celsius (145 degrees Fahrenheit) or above for 15 seconds for:^P

(i) raw shell eggs that are broken and prepared in response to a consumer's order and for immediate service;^P and

(ii) except as specified in paragraph (1)(B) and (C) of this subsection, and paragraphs (2) and (3) of this subsection, fish, meat, and pork including game animals and exotic and game animals commercially raised for food as specified in §228.62(g)(1)(A) and (g)(2)(A) of this title and game animals under a voluntary inspection program as specified in §228.62(g)(2)(B) of this title;^P

(B) 68 degrees Celsius (155 degrees Fahrenheit) for 15 seconds or the temperature specified in the following chart that corresponds to the holding time for ratites and injected meats; the following if they are comminuted: fish, meat, game animals and exotic animals commercially raised for food as specified in §228.62(g)(1)(A) and (g)(2)(A) of this title and game animals and exotic animals under a voluntary inspection program as specified in §228.62(g)(2)(B) of this title; and raw eggs that are not prepared as specified in subparagraph (A)(i) of this paragraph;^P or

Figure: 25 TAC §228.71(a)(1)(B)

(C) 74 degrees Celsius (165 degrees Fahrenheit) or above for 15 seconds for poultry, baluts, wild game animals and exotic animals as specified in §228.62(g)(1)(C), (2)(C) and (D) of this title, stuffed fish, stuffed meat, stuffed pasta, stuffed poultry, stuffed ratites, or stuffing containing fish, meat, poultry, or ratites.^P

(2) Whole beef roasts, corned beef roasts, pork roasts, and cured pork roasts such as ham, shall be cooked:

(A) in an oven that is preheated to the temperature specified for the roast's weight in the following chart and that is held at that temperature;^{Pf} and

Figure: 25 TAC §228.71(a)(2)(A)

(B) as specified in the following chart, to heat all parts of the food to a temperature and for the holding time that corresponds to that temperature.^P

Figure: 25 TAC §228.71(a)(2)(B)

(3) A raw or undercooked whole-muscle, intact beef steak may be served or offered for sale in a ready-to-eat form if:

(A) the food establishment serves a population that is not a highly susceptible population;

(B) the steak is labeled to indicate that it meets the definition of "whole-muscle, intact beef" as specified in §228.62(a)(5) of this title; and

(C) the steak is cooked on both the top and bottom to a surface temperature of 63 degrees Celsius (145 degrees Fahrenheit) or above and a cooked color change is achieved on all external surfaces.

(4) A raw animal food such as raw egg, raw fish, raw-marinated fish, raw molluscan shellfish, or steak tartare; or a partially cooked food such as lightly cooked fish, soft cooked eggs, or rare meat other than whole-muscle, intact beef steaks as specified in subparagraph (C) of this paragraph, may be served or offered for sale upon consumer request or selection in a ready-to-eat form if:

(A) as specified in §228.82(3)(A) and (B) of this title, the food establishment serves a population that is not a highly susceptible population; and

(B) the food, if served or offered for service by consumer selection from a children's menu, does not contain comminuted meat;^P and

(C) the consumer is informed as specified in §228.80 of this title that to ensure its safety, the food should be cooked as specified in paragraph (1) or (2) of this subsection; or

(D) the regulatory authority grants a variance from paragraph (1) or (2) of this subsection as specified in §228.243(a) of this title based on a HACCP plan that:

(i) is submitted by the permit holder and approved as specified in §228.243(b) of this title;

(ii) documents scientific data or other information showing that a lesser time and temperature regimen results in a safe food; and

(iii) verifies that equipment and procedures for food preparation and training of food employees at the food establishment meet the conditions of the variance.

(b) Microwave cooking. Raw animal foods cooked in a microwave oven shall be:

(1) rotated or stirred throughout or midway during cooking to compensate for uneven distribution of heat;

(2) covered to retain surface moisture;

(3) heated to a temperature of at least 74 degrees Celsius (165 degrees Fahrenheit) in all parts of the food;^P and

(4) allowed to stand covered for 2 minutes after cooking to obtain temperature equilibrium.

(c) Plant food cooking for hot holding. Fruits and vegetables that are cooked for hot holding shall be cooked to a temperature of 57 degrees Celsius (135 degrees Fahrenheit).^P

(d) Non-continuous Cooking of raw animal foods. Raw animal foods that are cooked using non-continuous cooking process shall be:

(1) subject to an initial heating process that is no longer than sixty minutes in duration;^P

(2) immediately after initial heating, cooled as specified in §228.75(d) of this title;^P

(3) after cooling, held frozen or cold, as specified for time/temperature control for safety (TCS) food in §228.75(f)(1)(B) of this title;^P

(4) prior to sale or service, cooked using a process that heats all parts of the food to a temperature and for a time as specified in §228.71(1) - (3) of this title;^P

(5) cooled according to the time and temperature parameters specified for cooked time /temperature control for safety food as specified in §228.75(d)(1) of this title if not either hot held as specified in §228.75(f)(1) of this title, served immediately, or held using time as a public health control as specified in §228.75(i) of this title after complete cooking;^P

(6) prepared and stored according to written procedures that:

(A) have obtained prior approval from the regulatory authority;^{Pf}

(B) are maintained in the food establishment and are available to the regulatory authority upon request;^{Pf}

(C) describe how the requirements specified in §228.71(d)(1) - (5) of this title are to be monitored and documented by the permit holder and the corrective actions to be taken if the requirements are not met;^{Pf}

(D) describe how the foods, after initial heating, but prior to complete cooking, are to be marked or otherwise identified as foods that must be cooked as specified in paragraph (4) of this subsection prior to being offered for sale or service;^{Pf} and

(E) describe how the foods, after initial heating but prior to cooking as specified in paragraph (4) of this subsection, are to be separated from ready-to-eat foods as specified in §228.66 of this title.^{Pf}

§228.72. Freezing.

(a) Parasite destruction.

(1) Except as specified in paragraph (2) of this subsection, before service or sale in ready-to-eat form, raw, raw-marinated, partially cooked, or marinated-partially cooked fish other than Molluscan shellfish shall be:

(A) frozen and stored at a temperature of -20 degrees Celsius (-4 degrees Fahrenheit) or below for 168 hours (7 days) in a freezer;^P

(B) frozen at -35 degrees Celsius (-31 degrees Fahrenheit) or below until solid and stored at -35 degrees Celsius (-31 degrees Fahrenheit) for 15 hours;^P or

(C) frozen at -35 degree Celsius (-31 degrees Fahrenheit) or below until solid and stored at -20 degree Celsius (-4 degrees Fahrenheit) or below for a minimum of 24 hours.^P

(2) Paragraph (1) of this subsection does not apply to:

(A) molluscan shellfish;

(B) a scallop product consisting only of the shucked adductor muscle;

(C) tuna of the species *thunnus alalunga*, *thunnus albacares* (yellowfin tuna), *thunnus atlanticus*, *thunnus maccoyii* (bluefin tuna, southern), *thunnus obesus* (bigeye tuna), or *thunnus thynnus* (bluefin tuna, northern); or

(D) aquacultured fish, such as but not limited to salmon, carp, channel catfish, trout, and tilapia, that:

(i) if raised in open water, are raised in net-pens, or

(ii) are raised in land-based operations such as ponds or tanks, and

(iii) are fed formulated feed, such as pellets, that contains no live parasites infective to the aquacultured fish.

(E) fish eggs that have been removed from the skein and rinsed.

(b) Records, creation and retention.

(1) Except as specified in subsection (a)(2) of this section and paragraph (2) of this subsection, if raw, raw-marinated, partially cooked, or marinated-partially cooked fish are served or sold in ready-to-eat form, the person in charge shall record the freezing temperature and time to which the fish are subjected and shall retain and have accessible the records of the food establishment for 90 calendar days beyond the time of service or sale of the fish.^{Pf}

(2) If the fish are frozen by a supplier, a written agreement or statement from the supplier stipulating that the fish supplied are frozen to a temperature and for a time specified in subsection (a)(1) of this section, may substitute for the records specified in paragraph (1) of this subsection.

(3) if raw, raw-marinated, partially cooked, or marinated-partially cooked fish are served or sold in ready-to-eat form, and the fish are raised and fed as specified in subsection (a)(2)(C) of this section, a written agreement or statement from the supplier or aquaculturist stipulating that the fish were raised and fed as specified in subsection (a)(2)(D) of this section shall be obtained by the person in charge and retained in the records of the food establishment for 90 calendar days beyond the time of service or sale of the fish.^{Pf}

(c) Preparation for immediate service. Cooked and refrigerated food that is prepared for immediate service in response to an individual consumer order, such as roast beef sandwich au jus, may be served at any temperature.

§228.73. Reheating for Hot Holding.

(a) Except as specified in subsections (b), (c) and (e) of this subsection, time/temperature controlled for safety (TCS) food that is cooked, cooled, and reheated for hot holding shall be reheated so that all parts of the food reach a temperature of at least 74 degrees Celsius (165 degrees Fahrenheit) for 15 seconds.^P

(b) Except as specified in subsection (c) of this section, TCS food reheated in a microwave oven for hot holding shall be reheated so that all parts of the food reach a temperature of at least 74 degrees Celsius (165 degrees Fahrenheit) and the food is rotated or stirred, covered, and allowed to stand covered for 2 minutes after reheating.^P

(c) Ready-to-eat TCS food that has been commercially processed and packaged in a food processing plant that is inspected by the regulatory authority that has jurisdiction over the plant, shall be heated

to a temperature of at least 57 degrees Celsius (135 degrees Fahrenheit) when being reheated for hot holding.^P

(d) Reheating for hot holding as specified in subsections (a) - (c) of this section shall be done rapidly and the time the food is between 5 degrees Celsius (41 degrees Fahrenheit) and the temperatures specified in subsections (a) - (c) of this section may not exceed 2 hours.^P

(e) Remaining unsliced portions of meat roasts that are cooked as specified in §228.71(a)(2) of this title, may be reheated for hot holding using the oven parameters and minimum time and temperature conditions specified in §228.71(a)(2) of this title.^P

§228.74. Juice Packaged in a Food Establishment.

(a) Juice treated under a HACCP plan as specified in §228.244(d)(2) - (5) of this title (relating to Compliance) to attain a 5-log reduction, which is equal to a 99.999% reduction, of the most resistant microorganism of public health significance;^P or

(b) Juice labeled, if not treated to yield a 5-log reduction of the most resistant microorganism of public health significance:^{Pf}

(1) as specified in §228.79 of this title;^{Pf} and

(2) as specified in 21 CFR §101.17(g) food labeling, warning, notice, and safe handling statements, juices that have not been specifically processed to prevent, reduce, or eliminate the presence of pathogens with the following, "WARNING: THIS PRODUCT HAS NOT BEEN PASTEURIZED AND, THEREFORE, MAY CONTAIN HARMFUL BACTERIA THAT CAN CAUSE SERIOUS ILLNESS IN CHILDREN, THE ELDERLY, AND PERSONS WITH WEAKENED IMMUNE SYSTEMS."^{Pf}

§228.75. Temperature and Time Control.

(a) Frozen food. Stored frozen foods shall be maintained frozen.

(b) Time/temperature controlled for safety (TCS) food, slack-ing. Frozen TCS food that is slacked to moderate the temperature shall be held:

(1) under refrigeration that maintains the food temperature at 5 degrees Celsius (41 degrees Fahrenheit) or less; or

(2) at any temperature if the food remains frozen.

(c) Thawing. Except as specified in paragraph (4) of this subsection, TCS food shall be thawed:

(1) under refrigeration that maintains the food temperature at 5 degrees Celsius (41 degrees Fahrenheit) or less; or

(2) completely submerged under running water:

(A) at a water temperature of 21 degrees Celsius (70 degrees Fahrenheit) or below;

(B) with sufficient water velocity to agitate and float off loose particles in an overflow; and

(C) for a period of time that does not allow thawed portions of ready-to-eat food to rise above 5 degrees Celsius (41 degrees Fahrenheit); or

(D) for a period of time that does not allow thawed portions of a raw animal food requiring cooking as specified in §228.71(a)(1) or (2) of this title to be above 5 degrees Celsius (41 degrees Fahrenheit), for more than 4 hours including:

(i) the time the food is exposed to the running water and the time needed for preparation for cooking; or

(ii) the time it takes under refrigeration to lower the food temperature to 5 degrees Celsius (41 degrees Fahrenheit);

(3) as part of a cooking process if the food that is frozen is:

(A) cooked as specified in §228.71(a)(1) - (2) or (b) of this title; or

(B) thawed in a microwave oven and immediately transferred to conventional cooking equipment, with no interruption in the process; or

(4) using any procedure if a portion of frozen ready-to-eat food is thawed and prepared for immediate service in response to an individual consumer's order;

(5) reduced oxygen packaged fish that bears a label indicating that it is to be kept frozen until time of use shall be removed from the reduced oxygen environment:

(A) prior to its thawing under refrigeration as specified in paragraph (1) of this subsection; or

(B) prior to, or immediately upon completion of, its thawing using procedures specified in paragraph (2) of this subsection.

(d) Cooling.

(1) Cooked temperature/time controlled for safety food shall be cooled:

(A) within two hours, from 57 degrees Celsius (135 degrees Fahrenheit) to 21 degrees C (70 degrees Fahrenheit);^P and

(B) within a total of six hours, from 57 degrees Celsius (135 degrees Fahrenheit) to 5 degrees Celsius (41 degrees Fahrenheit) or less.^P

(2) Time/temperature controlled for safety food shall be cooled within four hours to 5 degrees Celsius (41 degrees Fahrenheit) or less, if prepared from ingredients at ambient temperature, such as reconstituted foods and canned tuna.^P

(3) Except as specified in paragraph (4) of this subsection, a TCS food received in compliance with laws allowing a temperature above 5 degrees Celsius (41 degrees Fahrenheit) during shipment from the supplier as specified in §228.63(a)(2) of this title, shall be cooled within four hours to 5 degrees Celsius (41 degrees Fahrenheit) or less.^P

(4) Raw shell eggs shall be received as specified in §228.63(a)(3) of this title and immediately placed in refrigerated equipment that maintains an ambient air temperature of 7 degrees Celsius (45 degrees Fahrenheit) or less.^P

(e) Cooling methods.

(1) Cooling shall be accomplished in accordance with the time and temperature criteria specified in subsection (d) of this section by using one or more of the following methods based on the type of food being cooled:

(A) placing the food in shallow pans;^{Pf}

(B) separating the food into smaller or thinner portions;^{Pf}

(C) using rapid cooling equipment;^{Pf}

(D) stirring the food in a container placed in an ice water bath;^{Pf}

(E) using containers that facilitate heat transfer;^{Pf}

(F) adding ice as an ingredient;^{Pf} or

(G) other effective methods.^{Pf}

(2) When placed in cooling or cold holding equipment, food containers in which food is being cooled shall be:

(A) arranged in the equipment to provide maximum heat transfer through the container walls; and

(B) loosely covered, or uncovered if protected from overhead contamination as specified in §228.69(a)(1)(B) of this title, during the cooling period to facilitate heat transfer from the surface of the food.

(f) Time/temperature controlled for safety food, hot and cold holding.

(1) Except during preparation, cooking, or cooling, or when time is used as the public health control as specified in subsection (i) of this section, and except as specified in paragraphs (2) and (3) of this subsection, TCS food shall be maintained:

(A) at 57 degrees Celsius (135 degrees Fahrenheit) or above, except that roasts cooked to a temperature and for a time specified in §228.71(a)(2) of this title or reheated as specified in subsection §228.73(e) of this title may be held at a temperature of 54 degrees Celsius (130 degrees Fahrenheit) or above;^P or

(B) at 5 degrees Celsius (41 degrees Fahrenheit) or less;^P

(2) Eggs that have not been treated to destroy all viable Salmonellae shall be stored in refrigerated equipment that maintains an ambient air temperature of 7 degrees Celsius (45 degrees Fahrenheit) or less.^P

(3) Time/temperature control for safety (TCS) food in a homogenous liquid form may be maintained outside of the temperature control requirements, as specified in paragraph (1) of this subsection, while contained within specially designed equipment that complies with the design and construction requirements as specified in §228.106(c)(5) of this title.

(g) Ready-to-eat, TCS food, date marking.

(1) Except when packaging food using a reduced oxygen packaging method as specified in §228.77 of this title, and except as specified in paragraphs (5) and (6) of this subsection, refrigerated, ready-to-eat, TCS food prepared and held in a food establishment for more than 24 hours shall be clearly marked to indicate the date or day by which the food shall be consumed on the premises, sold, or discarded when held at a temperature of 5 degrees Celsius (41 degrees Fahrenheit) or less for a maximum of 7 days. The day of preparation shall be counted as day 1.^{Pf}

(2) Except as specified in paragraphs (5) - (7) of this subsection, refrigerated, ready-to-eat, time/temperature controlled for safety food prepared and packaged by a food processing plant shall be clearly marked, at the time the original container is opened in a food establishment and held at a temperature of 41 degrees Fahrenheit (5 degrees Celsius) or less if the food is held for more than 24 hours, to indicate the date or day by which the food shall be consumed on the premises, sold, or discarded, based on the temperature and time combinations specified in paragraph (1) of this subsection.^{Pf}

(A) the day the original container is opened in the food establishment shall be counted as Day 1;^{Pf} and

(B) the day or date marked by the food establishment may not exceed a manufacturer's use-by date if the manufacturer determined the use-by date based on food safety.^{Pf}

(3) A refrigerated, ready-to-eat TCS food ingredient or a portion of a refrigerated, ready-to-eat, TCS food that is subsequently combined with additional ingredients or portions of food shall retain the date marking of the earliest-prepared or first-prepared ingredient.^{Pf}

(4) A date marking system that meets the criteria stated in paragraphs (1) and (2) of this subsection may include:

(A) using a method approved by the regulatory authority for refrigerated, ready-to-eat TCS food that is frequently rewrapped, such as lunchmeat or a roast, or for which date marking is impractical, such as soft serve mix or milk in a dispensing machine;

(B) marking the date or day of preparation, with a procedure to discard the food on or before the last date or day by which the food must be consumed on the premises, sold, or discarded as specified in paragraph (1) of this subsection;

(C) marking the date or day the original container is opened in a food establishment, with a procedure to discard the food on or before the last date or day by which the food must be consumed on the premises, sold, or discarded as specified in paragraph (2) of this subsection; or

(D) using calendar dates, days of the week, color-coded marks, or other effective marking methods, provided that the marking system is disclosed to the regulatory authority upon request.

(5) Paragraphs (1) and (2) of this subsection do not apply to individual meal portions served or repackaged for sale from a bulk container upon a consumer's request.

(6) Paragraphs (1) and (2) of this subsection do not apply to shellstock.

(7) Paragraph (2) of this subsection does not apply to the following foods prepared and packaged by a food processing plant inspected by a regulatory authority:

(A) deli salads, such as ham salad, seafood salad, chicken salad, egg salad, pasta salad, potato salad, and macaroni salad, manufactured in accordance with 21 CFR 110 current good manufacturing practice in manufacturing, packing, or holding human food;

(B) hard cheeses containing not more than 39% moisture as defined in 21 CFR 133 cheeses and related cheese products, such as cheddar, gruyere, parmesan and reggiano, and romano;

(C) semi-soft cheeses containing more than 39% moisture, but not more than 50% moisture, as defined in 21 CFR 133 cheeses and related cheese products, such as blue, edam, gorgonzola, gouda, and monterey jack;

(D) cultured dairy products as defined in 21 CFR 131 milk and cream, such as yogurt, sour cream, and buttermilk;

(E) preserved fish products, such as pickled herring and dried or salted cod, and other acidified fish products defined in 21 CFR 114 acidified foods;

(F) shelf stable, dry fermented sausages, such as pepperoni and genoa; and

(G) shelf stable salt-cured products such as prosciutto and parma (ham).

(h) Ready-to-eat, TCS food, disposition.

(1) A food specified in subsection (g)(1) or (2) of this section shall be discarded if it:

(A) exceeds either of the temperature and time combinations specified in subsection (g)(1) of this section, except time that the product is frozen;^P

(B) is in a container or package that does not bear a date or day;^P or

(C) is appropriately marked with a date or day that exceeds a temperature and time combination as specified in subsection (g)(1) of this subsection.^P

(2) Refrigerated, ready-to-eat, time/temperature controlled for safety food prepared in a food establishment and dispensed through a vending machine with an automatic shutoff control shall be discarded if it exceeds a temperature and time combination as specified in subsection (g)(1) of this section.^P

(i) Time as a public health control.

(1) Except as specified in paragraph (4) of this subsection if time without temperature control is used as the public health control for a working supply of TCS food before cooking, or for ready-to-eat TCS food that is displayed or held for sale or service. Written procedures shall be prepared in advance, maintained in the food establishment and made available to the regulatory authority upon request that specify.^P

(A) methods of compliance with paragraphs (2)(A) - (C) or (3)(A) - (E) of this subsection;^P and

(B) methods of compliance with subsection (d) of this section for food that is prepared, cooked, and refrigerated before time is used as a public health control.^P

(2) If time without temperature control is used as the public health control up to a maximum of 4 hours:

(A) the food shall have an initial temperature of 5 degrees Celsius (41 degrees Fahrenheit) or less when removed from cold holding temperature control, or 57 degrees Celsius (135 degrees Fahrenheit) or greater when removed from hot holding temperature control;^P

(B) the food shall be marked or otherwise identified to indicate the time that is 4 hours past the point in time when the food is removed from temperature control;^P

(C) the food shall be cooked and served, served at any temperature if ready-to-eat, or discarded, within 4 hours from the point in time when the food is removed from temperature control;^P and

(D) the food in unmarked containers or packages, or marked to exceed a 4-hour limit shall be discarded.^P

(3) If time without temperature control is used as the public health control up to a maximum of 6 hours:

(A) the food shall have an initial temperature of 5 degrees Celsius (41 degrees Fahrenheit) or less when removed from temperature control and the food temperature may not exceed 21 degrees Celsius (70 degrees Fahrenheit) within a maximum time period of 6 hours;^P

(B) the food shall be monitored to ensure the warmest portion of the food does not exceed 21 degrees Celsius (70 degrees Fahrenheit) during the 6-hour period, unless an ambient air temperature is maintained that ensures the food does not exceed 21 degrees Celsius (70 degrees Fahrenheit) during the 6-hour holding period;^P

(C) the food shall be marked or otherwise identified to indicate:^P

(i) the time when the food is removed from 5 degrees Celsius (41 degrees Fahrenheit) or less cold holding temperature control;^P and

(ii) the time that is 6 hours past the point in time when the food is removed from cold holding temperature control;^P

(D) the food shall be:

(i) discarded if the temperature of the food exceeds 21 degrees Celsius (70 degrees Fahrenheit);^P or

(ii) cooked and served, served at any temperature if ready-to-eat, or discarded within a maximum of 6 hours from the point in time when the food is removed from 5 degrees Celsius (41 degrees Fahrenheit) or less cold holding temperature control;^P and

(E) the food in unmarked containers or packages, or marked with a time that exceeds the 6-hour limit shall be discarded.^P

(4) A food establishment that serves a highly susceptible population may not use time as specified in paragraphs (1), (2) or (3) of this subsection as the public health control for raw eggs.

§228.76. Specialized Processing Methods, Variance Requirement.

A food establishment shall obtain a variance from the regulatory authority as specified in §228.243(a) and (b) of this title before:^{Pf}

(1) smoking food as a method of food preservation rather than as a method of flavor enhancement;^{Pf}

(2) curing food;^{Pf}

(3) using food additives or adding components such as vinegar;^{Pf}

(A) as a method of food preservation rather than as a method of flavor enhancement;^{Pf} or

(B) to render a food so that it is not time/temperature controlled for safety;^{Pf}

(4) packaging time/temperature control for safety (TCS) food using a reduced oxygen packaging method except where the growth of and toxin formation by Clostridium botulinum and the growth of Listeria monocytogenes are controlled as specified in §228.77 of this title;^{Pf}

(5) operating a Molluscan shellfish life-support system display tank used to store and display shellfish that are offered for human consumption;^{Pf}

(6) custom processing animals that are for personal use as food and not for sale or service in a food establishment, such as indigenous deer processing;^{Pf}

(7) preparing food by another method that is determined by the regulatory authority to require a variance;^{Pf} or

(8) sprouting seeds or beans, such as wheat grass and alfalfa sprouts.^{Pf}

§228.77. Clostridium Botulinum and Listeria Monocytogenes Controls.

Reduced oxygen packaging criteria.

(1) Except for a food establishment that obtains a variance as specified in §228.76 of this title, a food establishment that packages time/temperature controlled for safety (TCS) food using a reduced oxygen packaging method shall control the growth and toxin formation of Clostridium botulinum and the growth of Listeria monocytogenes.^P

(2) Except as specified in paragraph (6) of this section, a food establishment that packages TCS food using a reduced oxygen packaging method shall implement a HACCP plan that contains the information specified in §228.244(d)(2) and (4) of this title and that:^{Pf}

(A) identifies the food to be packaged;^{Pf}

(B) except as specified in paragraphs (3) - (6) of this section, requires that the packaged food shall be maintained at 5 degrees Celsius (41 degrees Fahrenheit) or less and meet at least one of the following criteria:^{Pf}

(i) has an a_w of 0.91 or less;^{Pf}

(ii) has a pH of 4.6 or less;^{Pf}

(iii) is a meat or poultry product cured at a food processing plant regulated by the USDA or the department using substances specified in 9 CFR §424.21, use of food ingredients and sources of radiation, and is received in an intact package;^{Pf} or

(iv) is a food with a high level of competing organisms such as raw meat, raw poultry, or raw vegetables;^{Pf}

(C) describes how the packages shall be prominently and conspicuously labeled on the principal display panel in bold type on a contrasting background, with instructions to:^{Pf}

(i) maintain the food at 5 degrees Celsius (41 degrees Fahrenheit) or below;^{Pf} and

(ii) discard the food if within 30 calendar days of its packaging it is not served for on-premises consumption, or consumed if served or sold for off-premises consumption;^{Pf}

(D) limits the refrigerated shelf life to no more than 30 calendar days from packaging to consumption, except the time the product is maintained frozen, or the original manufacturer's "sell by" or "use by" date, whichever occurs first;^P

(E) includes operational procedures that:

(i) prohibit contacting ready-to-eat food with bare hands as specified in §228.65(a)(2) of this title;^{Pf}

(ii) identify a designated area and the method by which:^{Pf}

(I) physical barriers or methods of separation of raw foods and ready-to-eat foods minimize cross contamination;^{Pf} and

(II) access to the processing equipment is limited to responsible trained personnel familiar with the potential hazards of the operation;^{Pf} and

(iii) delineate cleaning and sanitization procedures for food-contact surfaces;^{Pf} and

(F) describes the training program that ensures that the individual responsible for the reduced oxygen packaging operation understands the:^{Pf}

(i) concepts required for a safe operation;^{Pf}

(ii) equipment and facilities;^{Pf} and

(iii) procedures specified in paragraph (2)(E) of this subsection and §228.244(d)(2) and (4) of this title.^{Pf}

(G) is provided to the regulatory authority prior to implementation as specified in §228.244(c)(3) of this title.^{Pf}

(3) Except for fish that is frozen before, during, and after packaging, a food establishment may not package fish using a reduced oxygen packaging method.^P

(4) Cook-Chill or Sous Vide. Except as specified in paragraphs (3) and (6) of this subsection, a food establishment that packages TCS food using cook-chill or sous vide process shall:

(A) provide to the regulatory authority prior to implementation, a HACCP plan that contains the information specified in §228.244(d)(2) and (4) of this title;^{Pf}

(B) ensure the food is:

(i) prepared and consumed on the premises, or prepared and consumed off the premises but within the same business entity with no distribution or sale of the packaged product to another business entity or the consumer;^{Pf}

(ii) cooked and heat all parts of the food to a temperature and time as specified in §228.71(a)(1), (2) and (3) of this title;^P

(iii) protected from contamination before and after cooking as specified in §§228.65 - 228.74 of the this title;^P

(iv) placed in package with oxygen barrier and sealed before cooking, or placed in package and sealed immediately after cooking and before reaching an internal temperature below 57 degrees Celsius (135 degrees Fahrenheit);^P

(v) cooled to 5 degrees Celsius (41 degrees Fahrenheit) in the sealed package or bag as specified in §228.75(d) of this title;^P

(I) cooled to 1°C (34°F) within 48 hours of reaching 5°C (41°F) and held at that temperature until consumed or discarded within 30 days after the date of packaging;^P

(II) held at 5°C (41°F) or less for no more than 7 days, at which time the food must be consumed or discarded;^P or

(III) held frozen with no shelf life restriction while frozen until consumed or used.^P

(vi) held in a refrigeration unit that is equipped with an electronic system that continuously monitors time and temperature and is visually examined for proper operation twice daily;^{Pf}

(vii) if transported off-site to a satellite location of the same business entity, equipped with verifiable electronic monitoring devices to ensure that times and temperatures are monitored during transportation;^{Pf} and

(viii) labeled with the product name and the date packaged;^{Pf} and

(C) Maintain the records required to confirm that cooling and cold holding refrigeration time/temperature parameters are required as part of the HACCP plan and:

(i) make such records available to the regulatory authority upon request;^{Pf} and

(ii) hold such records for at least 6 months;^{Pf} and

(D) Implement written operational procedures as specified in paragraph (2)(E) of this section and a training program as specified in paragraph (2)(F) of this section.^{Pf}

(5) Cheese. Except as specified in paragraph (6) of this section, a food establishment that packages cheese using a ROP method shall:

(A) limit the cheeses packaged to those that are commercially manufactured in a food processing plant with no ingredients added in the food establishment and that meet the Standards of Identity as specified in 21 CFR 133.150 Hard cheeses, 21 CFR 133.169 Pasteurized process cheese or 21 CFR 133.187 Semisoft cheeses;^P

(B) have a HACCP plan that contains the information specified in §228.244(d)(2) and (4) of this title and as specified in paragraph (2)(A), (2)(C)(i), (2)(E) and (2)(F) of this section;^{Pf}

(C) labels the package on the principal display panel with a "use by" date that does not exceed 30 days from its packaging or the original manufacturer's "sell by" or "use by" date, whichever occurs first;^{Pf} and

(D) discards the reduced oxygen packaging cheese if it is not sold for off-premises consumption or consumed within 30 calendar days of its packaging.^{PF}

(6) A HACCP Plan is not required when a food establishment uses a reduce oxygen packaging method to package TCS food that is always:

(A) labeled with the production time and date;

(B) held at 5°C (41°F) or less during refrigerated storage; and

(C) removed from its package in the food establishment within 48 hours after packaging.

§228.78. Food Identity, Presentation, On-premises Labeling, and Accurate Representation.

(a) Standards of identity. Packaged food shall comply with standard of identity requirements in 21 CFR 131-169, and 9 CFR 319, Definitions and Standards of Identity or Composition, and the general requirements in 21 CFR 130, Food Standards: General, and 9 CFR 319, Subpart A, General.

(b) Honestly presented.

(1) Food shall be offered for human consumption in a way that does not mislead or misinform the consumer.

(2) Food or color additives, colored overwraps, or lights may not be used to misrepresent the true appearance, color, or quality of a food.

§228.79. Labeling.

(a) Food labels.

(1) Food packaged in a food establishment, shall be labeled as specified in law, including 21 CFR 101, Food Labeling, 9 CFR 317, Labeling, Marking Devices, and Containers, and 9 CFR 381, Subpart N, Labeling and Containers.^{PF}

(2) Label information shall include:

(A) the common name of the food, or absent a common name, an adequately descriptive identity statement;^{PF}

(B) if made from two or more ingredients, a list of ingredients and sub-ingredients in descending order of predominance by weight, including a declaration of artificial color or flavor and chemical preservatives, if contained in the food;^{PF}

(C) an accurate declaration of the quantity of contents;^{PF}

(D) the name and place of business of the manufacturer, packer, or distributor;^{PF} and

(E) the name of the food source for each major food allergen contained in the food unless the food source is already part of the common or usual name of the respective ingredient;^{PF}

(F) except as exempted in the Federal Food, Drug, and Cosmetic Act, §403(g)(3) - (5), nutrition labeling as specified in 21 CFR 101, Food Labeling, and 9 CFR 317, Subpart B, Nutrition Labeling;^{PF} and

(G) for any salmonid fish containing canthaxanthin or astaxanthin as a color additive, the labeling of the bulk fish container, including a list of ingredients, displayed on the retail container or by other written means, such as a counter card, that discloses the use of canthaxanthin or astaxanthin.

(3) Bulk food that is available for consumer self-dispensing shall be prominently labeled with the following information in plain view of the consumer:

(A) the manufacturer's or processor's label that was provided with the food; or

(B) a card, sign, or other method of notification that includes the information specified in paragraph (2)(A), (B), and (F) of this subsection.

(4) Bulk, unpackaged foods such as bakery products and unpackaged foods that are portioned to consumer specification need not be labeled if:

(A) a health, nutrient content, or other claim is not made;

(B) the food is manufactured or prepared on the premises of the food establishment or at another food establishment or a food processing plant that is owned by the same person and is regulated by the food regulatory agency that has jurisdiction.

(b) Other forms of information.

(1) If required by law, consumer warnings shall be provided.^{PF}

(2) Food establishment or manufacturers' dating information on foods may not be concealed or altered.

§228.80. Consumer Advisory.

(a) Consumption of Animal Foods that are Raw, Undercooked, or Not Otherwise Processed to Eliminate Pathogens. Except as specified in §228.71(a)(3), (a)(4)(D) and §228.82(3) of this title, if an animal food such as beef, eggs, fish, lamb, milk, pork, poultry, or shellfish is served or sold raw, undercooked, or without otherwise being processed to eliminate pathogens, either in ready-to-eat form or as an ingredient in another ready-to-eat food, the permit holder shall inform consumers of the significantly increased risk of consuming such foods by way of a disclosure and reminder, as specified in subsections (b) and (c) of this section, using brochures, deli case or menu advisories, label statements, table tents, placards, or other effective written means.^{PF}

(b) Disclosure shall include:

(1) a description of the animal-derived foods, such as "oysters on the half shell (raw oysters)," "raw-egg Caesar salad," and "hamburgers (can be cooked to order);"^{PF} or

(2) identification of the animal-derived foods by asterisking them to a footnote that states that the items are served raw or undercooked, or contain (or may contain) raw or undercooked ingredients.^{PF}

(c) Reminder shall include asterisking the animal-derived foods requiring disclosure to a footnote that states:

(1) regarding the safety of these items, written information is available upon request;^{PF}

(2) consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness;^{PF} or

(3) consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness, especially if you have certain medical conditions.^{PF}

§228.81. Contaminated Food, Disposition.

Discarding or reconditioning unsafe, adulterated, contaminated food.

(1) A food that is unsafe, adulterated, or not honestly presented as specified in §228.61 of this title shall be reconditioned according to an approved procedure or discarded.^P

(2) Food that is not from an approved source as specified in §228.62(a) - (g) of this title shall be discarded.^P

(3) Ready-to-eat food that may have been contaminated by an employee who has been restricted or excluded as specified in §228.36 of this title (relating to Management and Personnel) shall be discarded.^p

(4) Food that is contaminated by food employees, consumers, or other persons through contact with their hands, bodily discharges, such as nasal or oral discharges, or other means shall be discarded.^p

§228.82. Additional Safeguards, Special Requirements for Serving Highly Susceptible Populations.

Pasteurized foods and prohibited re-service, and prohibited food. In a food establishment that serves a highly susceptible population:

(1) The following criteria shall apply to juice:

(A) for the purposes of this paragraph only, children who are age nine or less and receive food in a school, day care setting or similar facility that provides custodial care are included as highly susceptible populations;

(B) prepackaged juice or a prepackaged beverage containing juice, that bears a warning label as specified in 21 CFR §101.17(g), Food Labeling, warning, notice, and safe handling requirements, juices that have not been specifically processed to prevent, reduce, or eliminate the presence of pathogens, or a packaged juice or beverage containing juice, that bears a warning label as specified in §228.74(b) of this title may not be served or offered for sale;^p and

(C) unpackaged juice that is prepared on the premises for service or sale in a ready-to-eat form shall be processed under a HACCP plan that contains the information specified in §228.244(d)(2) - (5) of this title, and as specified in 21 CFR 120, Hazard Analysis And Critical Control Point (HACCP) Systems, §120.24, Process Controls;^p

(2) pasteurized eggs or egg products shall be substituted for raw eggs in the preparation of:^p

(A) foods such as Caesar salad, hollandaise or béarnaise sauce, mayonnaise, eggnog, ice cream, and egg-fortified beverages;^p and

(B) except as specified in paragraph (6) of this subsection, recipes in which more than one egg is broken and the eggs are combined;^p

(3) the following foods may not be served or offered for sale in a ready-to-eat form:^p

(A) raw animal foods such as raw fish, raw-marinated fish, raw molluscan shellfish, and steak tartare;^p

(B) a partially cooked animal food such as lightly cooked fish, rare meat, soft-cooked eggs that are made from raw shell eggs, and meringue;^p and

(C) raw seed sprouts;^p

(4) food employees may not contact ready-to-eat food as specified in §228.65(a)(2) and (5) of this title;^p

(5) time only, as the public health control as specified in §228.75(i)(4) of this title, may not be used for raw eggs;^p

(6) paragraph (2)(B) of this subsection does not apply if:

(A) the raw eggs are combined immediately before cooking for one consumer's serving at a single meal, cooked as specified in §228.71(a)(1)(A) of this title, and served immediately, such as an omelet, soufflé, or scrambled eggs;

(B) the raw eggs are combined as an ingredient immediately before baking and the eggs are thoroughly cooked to a ready-to-eat form, such as a cake, muffin, or bread; or

(C) the preparation of the food is conducted under a HACCP plan that:

(i) identifies the food to be prepared;

(ii) prohibits contacting ready-to-eat food with bare hands;

(iii) includes specifications and practices that ensure:

(I) Salmonella enteritidis growth is controlled before and after cooking; and

(II) Salmonella enteritidis is destroyed by cooking the eggs according to the temperature and time specified in §228.71(a)(1)(B) of this title;

(iv) contains the information specified in §228.244(d)(4) of this title including procedures that:

(I) control cross contamination of ready-to-eat food with raw eggs; and

(II) delineate cleaning and sanitization procedures for food-contact surfaces; and

(v) describes the training program that ensures that the food employee responsible for the preparation of the food understands the procedures to be used;

(7) except as specified in paragraph (8) of this subsection, food may be re-served as specified in §228.70(d)(2)(A) and (B) of this title; and

(8) food may not be re-served under the following conditions:

(A) any food served to patients or clients who are under contact precautions in medical isolation or quarantine, protective environmental isolation may not be reserved to others outside.

(B) packages of food from any patients, client, or other consumers should not be re-served to persons in protective environment isolation.

§228.83. Donation of Foods.

(a) Previous service. Foods which have been previously served to a consumer may not be donated.^p

(b) Time/temperature controlled for safety foods. A time/temperature controlled for safety food may be donated if:

(1) the food has been kept at or above 57 degrees Celsius (135 degree Fahrenheit) during hot holding and service, and subsequently refrigerated to meet the time and temperature requirements in §228.75(d) and (e) of this title;^p

(2) the donor can substantiate that the food recipient has the facilities to meet the transportation, storage, and reheating requirements of this chapter;^p

(3) the temperature of the food is at or below 5 degrees Celsius (41 degrees Fahrenheit) at the time of donation, and is protected from contamination;^p and

(4) if the food is to be transported by the recipient directly to a consumer, the recipient need meet only the transportation requirements, including holding temperatures, in this chapter.^p

(c) Labeling. Donated foods shall be labeled with the name of the food, the source of the food, and the date of preparation.^P

(d) Shelf life. Donated time/temperature controlled for safety foods may not exceed the shelf life for leftover foods outlined in this chapter.^P

(e) Damaged foods. Heavily rim or seam-dented canned foods, or packaged foods without the manufacturer's complete labeling, shall not be donated.^P

(f) Distressed foods. Foods which are considered distressed, such as foods which have been subjected to fire, flooding, excessive heat, smoke, radiation, other environmental contamination, or prolonged storage shall not be directly donated for consumption by the consumer. Such foods may be sold or donated to a licensed food salvage establishment if permitted under the provisions of the Health and Safety Code, Chapter 432.^P

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

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SUBCHAPTER D. EQUIPMENT, UTENSILS, AND LINENS

25 TAC §§228.101 - 228.125

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §437.0056, which requires the department to adopt rules for granting and maintaining retail food permits in areas not regulated by counties and public health districts; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The new sections affect Health and Safety Code, Chapters 437 and 1001; and Government Code, Chapters 531 and 2001.

§228.101. *Multiuse Materials.*

(a) Characteristics. Materials that are used in the construction of utensils and food-contact surfaces of equipment may not allow the migration of deleterious substances or impart colors, odors, or tastes to food and under normal use conditions shall be:^P

(1) safe;^P

(2) durable, corrosion-resistant, and nonabsorbent;^{Pf}

(3) sufficient in weight and thickness to withstand repeated warewashing;^{Pf}

(4) finished to have a smooth, easily cleanable surface;^{Pf}
and

(5) resistant to pitting, chipping, crazing, scratching, scoring, distortion, and decomposition.^{Pf}

(b) Cast iron, use limitation.

(1) Except as specified in paragraphs (2) and (3) of this subsection, cast iron may not be used for utensils or food-contact surfaces of equipment.^{Pf}

(2) Cast iron may be used as a surface for cooking.

(3) Cast iron may be used in utensils for serving food if the utensils are used only as part of an uninterrupted process from cooking through service.

(c) Lead use limitation.

(1) Ceramic, china, crystal utensils, and decorative utensils such as hand-painted ceramic or china that are used in contact with food shall be lead-free or contain levels of lead not exceeding the limits in the following table:^P

Figure: 25 TAC §228.101(c)(1)

(2) Pewter alloys containing lead in excess of 0.05% may not be used as a food-contact surface.^P

(3) Solder and flux containing lead in excess of 0.2% may not be used as a food-contact surface.

(d) Copper, use limitation.

(1) Except as specified in paragraph (2) of this subsection, copper and copper alloys such as brass may not be used in contact with a food that has a pH below 6 such as vinegar, fruit juice, or wine or for a fitting or tubing installed between a backflow prevention device and a carbonator.^P

(2) Copper and copper alloys may be used in contact with beer brewing ingredients that have a pH below 6 in the prefermentation and fermentation steps of a beer brewing operation such as a brewpub or microbrewery.

(e) Galvanized metal, use limitation. Galvanized metal may not be used for utensils or food-contact surfaces of equipment that are used in contact with acidic food.^P

(f) Sponges, use limitation. Sponges may not be used in contact with cleaned and sanitized or in-use food-contact surfaces.^{Pf}

(g) Wood, use limitation.

(1) Except as specified in paragraphs (2) - (4) of this subsection, wood and wood wicker may not be used as a food-contact surface.^{Pf}

(2) Hard close-grained wood; such as but not limited to maple, walnut, mahogany, bamboo, and pecan; may be used for:

(A) cutting boards; cutting blocks; bakers' tables; and utensils such as rolling pins, doughnut dowels, salad bowls, chopsticks and wooden skewers;^{Pf} and

(B) wooden paddles used in confectionery operations for pressure scraping kettles when manually preparing confections at a temperature of 110 degrees Celsius (230 degrees Fahrenheit) or above.^{Pf}

(3) Whole, uncut, raw fruits and vegetables, and nuts in the shell may be kept in the wood shipping containers in which they were received, until the fruits, vegetables, or nuts are used.^{Pf}

(4) If the nature of the food requires removal of rinds, peels, husks, or shells before consumption, the whole, uncut, raw food may be kept in:

(A) untreated wood containers;^{Pf} or

(B) treated wood containers if the containers are treated with a preservative that meets the requirements specified in 21 CFR §178.3800, Preservatives for Wood.^{Pf}

(h) Nonstick coatings, use limitation. Multiuse kitchenware such as frying pans, griddles, sauce pans, cookie sheets, and waffle bakers that have a perfluorocarbon resin coating shall be used with non-scoring or nonscratching utensils and cleaning aids.

(i) Nonfood-contact surfaces. Nonfood-contact surfaces of equipment that are exposed to splash, spillage, or other food soiling or that require frequent cleaning shall be constructed of a corrosion-resistant, nonabsorbent, and smooth material.

§228.102. Single-service and Single-use, Characteristics.

Materials that are used to make single-service and single-use articles:

(1) may not:

(A) allow the migration of deleterious substances;^P or

(B) impart colors, odors, or tastes to food; and

(2) shall be:

(A) safe;^P and

(B) clean.

§228.103. Durability and Strength.

(a) Equipment and utensils. Equipment and utensils shall be designed and constructed to be durable and to retain their characteristic qualities under normal use conditions.^{Pf}

(b) Food temperature measuring devices. Food temperature measuring device may not have sensors or stems constructed of glass, except that thermometers with glass sensors or stems that are encased in a shatterproof coating such as candy thermometers may be used.^P

§228.104. Cleanability.

(a) Food-contact surfaces. Multiuse food-contact surfaces shall be:

(1) smooth;^{Pf}

(2) free of breaks, open seams, cracks, chips, inclusions, pits, and similar imperfections;^{Pf}

(3) free of sharp internal angles, corners, and crevices;^{Pf}

(4) finished to have smooth welds and joints;^{Pf} and

(5) except as specified in subsection (b) of this section, accessible for cleaning and inspection by one of the following methods:

(A) without being disassembled;^{Pf}

(B) by disassembling without the use of tools;^{Pf} or

(C) by easy disassembling with the use of handheld tools commonly available to maintenance and cleaning personnel such as screwdrivers, pliers, open-end wrenches, and Allen wrenches.^{Pf}

(b) Subsection (a)(5) of this section does not apply to cooking oil storage tanks, distribution lines for cooking oils, or beverage syrup lines or tubes.

(c) Cleaned in place (CIP) equipment.

(1) CIP equipment shall meet the characteristics specified under subsection (a) of this section and shall be designed and constructed so that:

(A) cleaning and sanitizing solutions circulate throughout a fixed system and contact all interior food-contact surfaces;^{Pf} and

(B) the system is self-draining or capable of being completely drained of cleaning and sanitizing solutions.

(2) CIP equipment that is not designed to be disassembled for cleaning shall be designed with inspection access points to ensure that all interior food-contact surfaces throughout the fixed system are being effectively cleaned.

(d) "V" threads, use limitation. Except for hot oil cooking or filtering equipment, "V" type threads may not be used on food-contact surfaces.^{Pf}

(e) Hot oil filtering equipment. Hot oil filtering equipment shall meet the characteristics specified in subsection (a) or (b) of this section and shall be readily accessible for filter replacement and cleaning of the filter.^{Pf}

(f) Can openers. Cutting or piercing parts of can openers shall be readily removable for cleaning and for replacement.^{Pf}

(g) Nonfood-contact surfaces. Nonfood-contact surfaces shall be free of unnecessary ledges, projections, and crevices, and designed and constructed to allow easy cleaning and to facilitate maintenance.^{Pf}

(h) Kick plates, removable. Kick plates shall be designed so that the areas behind them are accessible for inspection and cleaning by being:

(1) removable by one of the methods specified in subsection (a)(5) of this section or capable of being rotated open; and

(2) removable or capable of being rotated open without unlocking equipment doors.

(i) Ventilation hood systems, filters. Filters or other grease extracting equipment shall be designed to be readily removable for cleaning and replacement if not designed to be cleaned in place.

§228.105. Accuracy of Temperature Measuring Devices.

(a) Temperature measuring device, food.

(1) Food temperature measuring device that are scaled only in Celsius or dually scaled in Celsius and Fahrenheit shall be accurate to ± 1 degrees Celsius in the intended range of use.^{Pf}

(2) Food temperature measuring device that are scaled only in Fahrenheit shall be accurate to ± 2 degrees Fahrenheit in the intended range of use.^{Pf}

(b) Temperature measuring devices, ambient air and water.

(1) Ambient air and water temperature measuring devices that are scaled in Celsius or dually scaled in Celsius and Fahrenheit shall be designed to be easily readable and accurate to ± 1.5 degrees Celsius in the intended range of use.^{Pf}

(2) Ambient air and water temperature measuring devices that are scaled only in Fahrenheit shall be accurate to ± 3 degrees Fahrenheit in the intended range of use.^{Pf}

(c) Pressure measuring devices, mechanical warewashing equipment. Pressure measuring devices that display the pressures in the water supply line for the fresh hot water sanitizing rinse shall have increments of 7 kilopascals (1 pounds per square inch) or smaller and shall be accurate to ± 14 kilopascals (± 2 pounds per square inch) in the range indicated on the manufacturer's data plate.

§228.106. Functionality of Equipment.

(a) Ventilation hood systems, drip prevention. Exhaust ventilation hood systems in food preparation and warewashing areas including components such as hoods, fans, guards, and ducting shall be designed to prevent grease or condensation from draining or dripping onto

food, equipment, utensils, linens, and single-service and single-use articles.

(b) Equipment openings, closures and deflectors.

(1) A cover or lid for equipment shall overlap the opening and be sloped to drain.^{Pf}

(2) An opening located within the top of a unit of equipment that is designed for use with a cover or lid shall be flanged upward at least five millimeters (two-tenths of an inch).^{Pf}

(3) Except as specified in paragraph (4) of this subsection, fixed piping, temperature measuring device, rotary shafts, and other parts extending into equipment shall be provided with a watertight joint at the point where the item enters the equipment.^{Pf}

(4) If a watertight joint is not provided:

(A) the piping, temperature measuring device, rotary shafts, and other parts extending through the openings shall be equipped with an apron designed to deflect condensation, drips, and dust from openings into the food; and

(B) the opening shall be flanged as specified in paragraph (2) of this subsection.

(c) Dispensing equipment, protection of equipment and food. In equipment that dispenses or vends liquid food or ice in unpackaged form:

(1) the delivery tube, chute, orifice, and splash surfaces directly above the container receiving the food shall be designed in a manner, such as with barriers, baffles, or drip aprons, so that drips from condensation and splash are diverted from the opening of the container receiving the food;

(2) the delivery tube, chute, and orifice shall be protected from manual contact such as by being recessed;

(3) the delivery tube or chute and orifice of equipment used to vend liquid food or ice in unpackaged form to self-service consumers shall be designed so that the delivery tube or chute and orifice are protected from dust, insects, rodents, and other contamination by a self-closing door if the equipment is:

(A) located in an outside area that does not otherwise afford the protection of an enclosure against the rain, windblown debris, insects, rodents, and other contaminants that are present in the environment; or

(B) available for self-service during hours when it is not under the full-time supervision of a food employee; and

(4) the dispensing equipment actuating lever or mechanism and filling device of consumer self-service beverage dispensing equipment shall be designed to prevent contact with the lip-contact surface of glasses or cups that are refilled;

(5) dispensing equipment in which time/temperature control for safety (TCS) food in a homogenous liquid form is maintained outside of the temperature control requirements as specified in §228.75(f)(1) of this title shall:

(A) be specifically designed and equipped to maintain the commercial sterility of aseptically packaged food in a homogenous liquid form for a specified duration from the time of opening the packaging within the equipment;^{Pf} and

(B) conform to the requirements for this equipment as specified in NSF/ANSI 18-2006 - manual food and beverage dispensing equipment.^{Pf}

(d) Vending machine, vending stage closure. The dispensing compartment of a vending machine including a machine that is designed to vend prepackaged snack food that are not TCS foods such as chips, party mixes, and pretzels shall be equipped with a self-closing door or cover if the machine is:

(1) located in an outside area that does not otherwise afford the protection of an enclosure against the rain, windblown debris, insects, rodents, and other contaminants that are present in the environment; or

(2) available for self-service during hours when it is not under the full-time supervision of a food employee.

(e) Bearings and gear boxes, leak-proof. Equipment containing bearings and gears that require lubricants shall be designed and constructed so that the lubricant cannot leak, drip, or be forced into food or onto food-contact surfaces.

(f) Beverage tubing, separation. Except for cold plates that are constructed integrally with an ice storage bin, beverage tubing and cold-plate beverage cooling devices may not be installed in contact with stored ice.

(g) Ice units, separation of drains. Liquid waste drain lines may not pass through an ice machine or ice storage bin.

(h) Condenser unit, separation. If a condenser unit is an integral component of equipment, the condenser unit shall be separated from the food and food storage space by a dustproof barrier.

(i) Can openers on vending machines. Cutting or piercing parts of can openers on vending machines shall be protected from manual contact, dust, insects, rodents, and other contamination.

(j) Molluscan shellfish tanks.

(1) Except as specified in paragraph (2)(B) of this subsection, molluscan shellfish life support system display tanks may not be used to display shellfish that are offered for human consumption and shall be conspicuously marked so that it is obvious to the consumer that the shellfish are for display only.^P

(2) Molluscan shellfish life-support system display tanks that are used to store and display shellfish that are offered for human consumption shall be operated and maintained in accordance with a HACCP plan that:^{Pf}

(A) is submitted by the permit holder and approved by the regulatory authority as specified in §228.243(b) of this title;^{Pf} and

(B) ensures that:

(i) water used with fish other than molluscan shellfish does not flow into the molluscan tank;^{Pf}

(ii) the safety and quality of the shellfish as they were received are not compromised by the use of the tank;^{Pf} and

(iii) the identity of the source of the shellstock is retained as specified in §228.64(e) of this title.^{Pf}

(k) Vending machines, automatic shutoff.

(1) A machine vending TCS food shall have an automatic control that prevents the machine from vending food:

(A) if there is a power failure, mechanical failure, or other condition that results in an internal machine temperature that cannot maintain food temperatures as specified under Subchapter D of this chapter;^{Pf} and

(B) if a condition specified in subparagraph (A) of this paragraph occurs, until the machine is serviced and restocked with food

that has been maintained at temperatures specified in Subchapter D of this chapter.^{Pf}

(2) When the automatic shutoff within a machine vending TCS food:

(A) in a refrigerated vending machine, the ambient air temperature may not exceed 5 degrees Celsius (41 degrees Fahrenheit) for more than 30 minutes immediately after the machine is filled, serviced, or restocked;^{Pf} or

(B) in a hot holding vending machine, the ambient air temperature may not be less than 57 degrees Celsius (135 degrees Fahrenheit) for more than 120 minutes immediately after the machine is filled, serviced, or restocked.^{Pf}

(l) Temperature measuring devices.

(1) In a mechanically refrigerated or hot food storage unit, the sensor of a temperature measuring device shall be located to measure the air temperature or a simulated product temperature in the warmest part of a mechanically refrigerated unit and in the coolest part of a hot food storage unit.^{Pf}

(2) Except as specified in paragraph (3) of this subsection, cold or hot holding equipment used for TCS food shall be designed to include and shall be equipped with at least one integral or permanently affixed temperature measuring device that is located to allow easy viewing of the device's temperature display.^{Pf}

(3) Paragraph (2) of this subsection does not apply to equipment for which the placement of a temperature measuring device is not a practical means for measuring the ambient air surrounding the food because of the design, type, and use of the equipment, such as calrod units, heat lamps, cold plates, bainmaries, steam tables, insulated food transport containers, and salad bars.^{Pf}

(4) Temperature measuring devices shall be designed to be easily readable.^{Pf}

(5) Food temperature measuring devices and water temperature measuring device on warewashing machines shall have a numerical scale, printed record, or digital readout in increments no greater than 1 degrees Celsius or 2 degrees Fahrenheit in the intended range of use.^{Pf}

(m) Warewashing machine, data plate operating specifications. A warewashing machine shall be provided with an easily accessible and readable data plate affixed to the machine by the manufacturer that indicates the machine's design and operating specifications including the:

(1) temperatures required for washing, rinsing, and sanitizing;^{Pf}

(2) pressure required for the fresh water sanitizing rinse unless the machine is designed to use only a pumped sanitizing rinse;^{Pf} and

(3) conveyor speed for conveyor machines or cycle time for stationary rack machines.^{Pf}

(n) Warewashing machines, internal baffles. Warewashing machine wash and rinse tanks shall be equipped with baffles, curtains, or other means to minimize internal cross contamination of the solutions in wash and rinse tanks.^{Pf}

(o) Warewashing machines, temperature measuring devices. A warewashing machine shall be equipped with a temperature measuring device that indicates the temperature of the water:

(1) in each wash and rinse tank;^{Pf} and

(2) as the water enters the hot water sanitizing final rinse manifold or in the chemical sanitizing solution tank.^{Pf}

(p) Manual warewashing equipment, heaters and baskets. If hot water is used for sanitization in manual warewashing operations, the sanitizing compartment of the sink shall be:

(1) designed with an integral heating device that is capable of maintaining water at a temperature not less than 77 degrees Celsius (171 degrees Fahrenheit);^{Pf} and

(2) provided with a rack or basket to allow complete immersion of equipment and utensils into the hot water.^{Pf}

(q) Warewashing machines, automatic dispensing of detergents and sanitizers. A warewashing machine that is installed after adoption of this section by the regulatory authority, shall be equipped to:

(1) automatically dispense detergents and sanitizers;^{Pf} and

(2) incorporate a visual means to verify that detergents and sanitizers are delivered or a visual or audible alarm to signal if the detergents and sanitizers are not delivered to the respective washing and sanitizing cycles.^{Pf}

(r) Warewashing machines, flow pressure device.

(1) Warewashing machines that provide a fresh hot water sanitizing rinse shall be equipped with a pressure gauge or similar device such as a transducer that measures and displays the water pressure in the supply line immediately before entering the warewashing machine;^{Pf} and

(2) If the flow pressure measuring device is upstream of the fresh hot water sanitizing rinse control valve, the device shall be mounted in a 6.4 millimeter or one-fourth inch Iron Pipe Size (IPS) valve.^{Pf}

(3) Paragraphs (1) and (2) of this subsection do not apply to a machine that uses only a pumped or recirculated sanitizing rinse.^{Pf}

(s) Warewashing sinks and drainboards, self-draining. Sinks and drainboards of warewashing sinks and machines shall be self-draining.^{Pf}

(t) Equipment compartments, drainage. Equipment compartments that are subject to accumulation of moisture due to conditions such as condensation, food or beverage drip, or water from melting ice shall be sloped to an outlet that allows complete draining.

(u) Vending machines, liquid waste products.

(1) Vending machines designed to store beverages that are packaged in containers made from paper products shall be equipped with diversion devices and retention pans or drains for container leakage.

(2) Vending machines that dispense liquid food in bulk shall be:

(A) provided with an internally mounted waste receptacle for the collection of drip, spillage, overflow, or other internal wastes; and

(B) equipped with an automatic shutoff device that will place the machine out of operation before the waste receptacle overflows.

(3) Shutoff devices specified in paragraph (2)(B) of this subsection shall prevent water or liquid food from continuously running if there is a failure of a flow control device in the water or liquid

food system or waste accumulation that could lead to overflow of the waste receptacle.

(v) Case lot handling equipment, movability. Equipment, such as dollies, pallets, racks, and skids used to store and transport large quantities of packaged foods received from a supplier in a cased or overwrapped lot, shall be designed to be moved by hand or by conveniently available equipment such as hand trucks and forklifts.

(w) Vending machine doors and openings.

(1) Vending machine doors and access opening covers to food and container storage spaces shall be tight-fitting so that the space along the entire interface between the doors or covers and the cabinet of the machine, if the doors or covers are in a closed position, is no greater than 1.5 millimeters or one-sixteenth inch by:

(A) being covered with louvers, screens, or materials that provide an equivalent opening of not greater than 1.5 millimeters or one-sixteenth inch. Screening of 12 or more mesh to 2.5 centimeters (12 mesh to 1 inch) meets this requirement;

(B) being effectively gasketed;

(C) having interface surfaces that are at least 13 millimeters or one-half inch wide; or

(D) jambs or surfaces used to form an L-shaped entry path to the interface.

(2) Vending machine service connection openings through an exterior wall of a machine shall be closed by sealants, clamps, or grommets so that the openings are no larger than 1.5 millimeters or one-sixteenth inch.

(x) Acceptability. Food equipment certification, classification. Food equipment that is certified or classified for sanitation by an American National Standards Institute (ANSI)-accredited certification program is deemed to comply with §§228.101 - 228.106 of this title.

§228.107. Equipment, Numbers and Capacities.

(a) Cooling, heating, and holding capacities. Equipment for cooling and heating food, and holding cold and hot food, shall be sufficient in number and capacity to provide food temperatures as specified under Subchapter C of this chapter.^{PF}

(b) Manual warewashing, sink compartment requirements.

(1) Except as specified in paragraph (3) of this subsection, a sink with at least three compartments shall be provided for manually washing, rinsing, and sanitizing equipment and utensils.^{PF}

(2) Sink compartments shall be large enough to accommodate immersion of the largest equipment and utensils. If equipment or utensils are too large for the warewashing sink, a warewashing machine or alternative equipment as specified in paragraph (3) of this subsection shall be used.^{PF}

(3) Alternative manual warewashing equipment may be used when there are special cleaning needs or constraints and its use is approved. Alternative manual warewashing equipment may include:

(A) high-pressure detergent sprayers;

(B) low- or line-pressure spray detergent foamers;

(C) other task-specific cleaning equipment;

(D) brushes or other implements;

(E) two-compartment sinks as specified in paragraphs (4) and (5) of this subsection; or

(F) receptacles that substitute for the compartments of a multi-compartment sink.

(4) Before a two-compartment sink is used:

(A) The permit holder shall have its use approved by the regulatory authority;^{PF} and

(B) the permit holder shall limit the number of kitchenware items cleaned and sanitized in the two-compartment sink, and shall limit warewashing to batch operations for cleaning kitchenware such as between cutting one type of raw meat and another or cleanup at the end of a shift, and shall:

(i) make up the cleaning and sanitizing solutions immediately before use and drain them immediately after use; ^{PF} and

(ii) use a detergent-sanitizer to sanitize and apply the detergent-sanitizer in accordance with the manufacturer's label instructions and as specified in §228.111(o) of this title;^{PF} or

(iii) use a hot water sanitization immersion step as specified in §228.115(f)(3) of this title.^{PF}

(5) A two-compartment sink may not be used for warewashing operations where cleaning and sanitizing solutions are used for a continuous or intermittent flow of kitchenware or tableware in an ongoing warewashing process.^{PF}

(c) Drainboards. Drainboards, utensil racks, or tables large enough to accommodate all soiled and cleaned items that may accumulate during hours of operation shall be provided for necessary utensil holding before cleaning and after sanitizing.^{PF}

(d) Ventilation hood systems, adequacy. Ventilation hood systems and devices shall be sufficient in number and capacity to prevent grease or condensation from collecting on walls and ceilings.

(e) Clothes washers and dryers.

(1) Except as specified in paragraph (2) of this subsection, if work clothes or linens are laundered on the premises, a mechanical clothes washer and dryer shall be provided and used.

(2) If on-premises laundering is limited to wiping cloths intended to be used moist, or wiping cloths are air-dried as specified in §228.122(a)(2) of this title, a mechanical clothes washer and dryer need not be provided.

§228.108. Utensils, Temperature Measuring Devices, and Testing Devices.

(a) Utensils, consumer self-service. A food dispensing utensil shall be available for each container displayed at a consumer self-service unit such as a buffet or salad bar.

(b) Food temperature measuring devices. Food temperature measuring device shall be provided and readily accessible for use in ensuring attainment and maintenance of food temperatures as specified under Subchapter C of this chapter.^{PF}

(c) A temperature measuring device with a suitable small-diameter probe that is designed to measure the temperature of thin masses shall be provided and readily accessible to accurately measure the temperature in thin foods such as meat patties and fish filets.^{PF}

(d) Temperature measuring devices, manual and mechanical warewashing.

(1) In manual warewashing operations, a temperature measuring device shall be provided and readily accessible for frequently measuring the washing and sanitizing temperatures.^{PF}

(2) In hot water mechanical warewashing operations, an irreversible registering temperature indicator shall be provided and readily accessible for measuring the utensil surface temperature.^{pf}

(e) Sanitizing solutions, testing devices. A test kit or other device that accurately measures the concentration in mg/L of sanitizing solutions shall be provided.^{pf}

§228.109. Location and Installation, Equipment, Clothes Washers and Dryers, and Storage Cabinets, Contamination Prevention.

(a) Except as specified in subsection (b) of this section, equipment, a cabinet used for the storage of food, or a cabinet that is used to store cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use articles may not be located:

- (1) in locker rooms;
- (2) in toilet rooms;
- (3) in garbage rooms;
- (4) in mechanical rooms;
- (5) under sewer lines that are not shielded to intercept potential drips;
- (6) under leaking water lines including leaking automatic fire sprinkler heads or under lines on which water has condensed;
- (7) under open stairwells; or
- (8) under other sources of contamination.

(b) A storage cabinet used for linens or single-service or single-use articles may be stored in a locker room.

(c) Clothes washer and dryer location requirements. If a mechanical clothes washer or dryer is provided, it shall be located so that the washer or dryer is protected from contamination and only where there is no exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles.

§228.110. Installation.

(a) Fixed equipment, spacing or sealing.

(1) Equipment that is fixed because it is not easily movable shall be installed so that it is:

- (A) spaced to allow access for cleaning along the sides, behind, and above the equipment;
- (B) spaced from adjoining equipment, walls, and ceilings a distance of not more than one millimeter or one thirty-second inch; or
- (C) sealed to adjoining equipment or walls, if the equipment is exposed to spillage or seepage.

(2) Counter-mounted equipment that is not easily movable shall be installed to allow cleaning of the equipment and areas underneath and around the equipment by being:

- (A) sealed to the table; or
- (B) elevated on legs as specified under subsection (b)(4) of this subsection.

(b) Fixed equipment, elevation or sealing.

(1) Except as specified in paragraphs (2) and (3) of this subsection, floor-mounted equipment that is not easily movable shall be sealed to the floor or elevated on legs that provide at least a 15-centimeter (6-inch) clearance between the floor and the equipment.

(2) If no part of the floor under the floor-mounted equipment is more than 15 centimeters (6 inches) from the point of cleaning access, the clearance space may be only 10 centimeters (4 inches).

(3) This section does not apply to display shelving units, display refrigeration units, and display freezer units located in the consumer shopping areas of a retail food store, if the floor under the units is maintained clean.

(4) Except as specified in paragraph (5) of this subsection, counter-mounted equipment that is not easily movable shall be elevated on legs that provide at least a 10-centimeter (4-inch) clearance between the table and the equipment.

(5) The clearance space between the table and counter-mounted equipment may be:

(A) 7.5 centimeters (3 inches) if the horizontal distance of the table top under the equipment is no more than 50 centimeters (20 inches) from the point of access for cleaning; or

(B) 5 centimeters (2 inches) if the horizontal distance of the table top under the equipment is no more than 7.5 centimeters (3 inches) from the point of access for cleaning.

§228.111. Equipment, Maintenance and Operation.

(a) Good repair and proper adjustment.

(1) Equipment shall be maintained in a state of repair and condition that meets the requirements specified in §§228.101 - 228.106 of this title.

(2) Equipment components such as doors, seals, hinges, fasteners, and kick plates shall be kept intact, tight, and adjusted in accordance with manufacturer's specifications.

(3) Cutting or piercing parts of can openers shall be kept sharp to minimize the creation of metal fragments that can contaminate food when the container is opened.

(b) Cutting surfaces. Surfaces such as cutting blocks and boards that are subject to scratching and scoring shall be resurfaced if they can no longer be effectively cleaned and sanitized, or discarded if they are not capable of being resurfaced.

(c) Microwave ovens. Microwave ovens shall meet the safety standards specified in 21 CFR §1030.10, Microwave Ovens.

(d) Warewashing equipment, cleaning frequency. A warewashing machine; the compartments of sinks, basins, or other receptacles used for washing and rinsing equipment, utensils, or raw foods, or laundering wiping cloths; and drainboards or other equipment used to substitute for drainboards as specified in §228.107(c) of this title shall be cleaned:^{pf}

- (1) before use;^{pf}
- (2) throughout the day at a frequency necessary to prevent recontamination of equipment and utensils and to ensure that the equipment performs its intended function;^{pf} and
- (3) if used, at least every 24 hours.^{pf}

(e) Warewashing machines, manufacturers' operating instructions.

(1) A warewashing machine and its auxiliary components shall be operated in accordance with the machine's data plate and other manufacturer's instructions.^{pf}

(2) A warewashing machine's conveyor speed or automatic cycle times shall be maintained accurately timed in accordance with manufacturer's specifications.^{pf}

(f) Warewashing sinks, use limitation.

(1) A warewashing sink may not be used for handwashing as specified in §228.38(e) of this title (relating to Management and Personnel) or dumping mop water.

(2) If a warewashing sink is used to wash wiping cloths, wash produce, or thaw food, the sink shall be cleaned as specified under subsection (d) of this section before and after each time it is used to wash wiping cloths or wash produce or thaw food. Sinks used to wash or thaw food shall be sanitized as specified in §§228.116 - 228.118 of this title before and after using the sink to wash produce or thaw food.^{Pf}

(g) Warewashing equipment, cleaning agents. When used for warewashing, the wash compartment of a sink, mechanical warewasher, or wash receptacle of alternative manual warewashing equipment as specified in §228.107(b)(3) of this title, shall contain a wash solution of soap, detergent, acid cleaner, alkaline cleaner, degreaser, abrasive cleaner, or other cleaning agent according to the cleaning agent manufacturer's label instructions.^{Pf}

(h) Warewashing equipment, clean solutions. The wash, rinse, and sanitize solutions shall be maintained clean.^{Pf}

(i) Manual warewashing equipment, wash solution temperature. The temperature of the wash solution in manual warewashing equipment shall be maintained at not less than 43 degrees Celsius (110 degrees Fahrenheit) or the temperature specified on the cleaning agent manufacturer's label instructions.^{Pf}

(j) Mechanical warewashing equipment, wash solution temperature.

(1) The temperature of the wash solution in spray type warewashers that use hot water to sanitize may not be less than:

(A) for a stationary rack, single temperature machine, 74 degrees Celsius (165 degrees Fahrenheit);^{Pf}

(B) for a stationary rack, dual temperature machine, 66 degrees Celsius (150 degrees Fahrenheit);^{Pf}

(C) for a single tank, conveyor, dual temperature machine, 71 degrees Celsius (160 degrees Fahrenheit);^{Pf} or

(D) for a multitank, conveyor, multitemperature machine, 66 degrees Celsius (150 degrees Fahrenheit).^{Pf}

(2) The temperature of the wash solution in spray-type warewashers that use chemicals to sanitize may not be less than 49 degrees Celsius (120 degrees Fahrenheit).^{Pf}

(k) Manual warewashing equipment, hot water sanitization temperatures. If immersion in hot water is used for sanitizing in a manual operation, the temperature of the water shall be maintained at 77 degrees Celsius (171 degrees Fahrenheit) or above.^P

(l) Mechanical warewashing equipment, hot water sanitization temperatures.

(1) Except as specified in paragraph (2) of this subsection, in a mechanical operation, the temperature of the fresh hot water sanitizing rinse as it enters the manifold may not be more than 90 degrees Celsius (194 degrees Fahrenheit), or less than:^{Pf}

(A) for a stationary rack, single temperature machine, 74 degrees Celsius (165 degrees Fahrenheit);^{Pf} or

(B) for all other machines, 82 degrees Celsius (180 degrees Fahrenheit).^{Pf}

(2) The maximum temperature specified under paragraph (1) of this subsection, does not apply to the high pressure and tempera-

ture systems with wand-type, hand-held, spraying devices used for the in-place cleaning and sanitizing of equipment such as meat saws.

(m) Mechanical warewashing equipment, sanitization pressure. The flow pressure of the fresh hot water sanitizing rinse in a warewashing machine, as measured in the water line immediately downstream or upstream from the fresh hot water sanitizing rinse control valve, shall be specified on the machine manufacturer's data plate and may not be less than 35 kilopascals (5 pounds per square inch) or more than 200 kilopascals (30 pounds per square inch).^{Pf}

(n) Manual and mechanical warewashing equipment, chemical sanitization temperature, pH, concentration, and hardness. A chemical sanitizer used in a sanitizing solution for a manual or mechanical operation at contact times specified in §228.118(3) of this title shall meet the criteria in §228.206(a) of this title, shall be used in accordance with the EPA-approved manufacturer's label use instructions,^P and shall be used as follows:

(1) a chlorine solution shall have a minimum temperature based on the concentration and pH of the solution as listed in the following chart:^P

Figure: 25 TAC §228.111(n)(1)

(2) an iodine solution shall have a:

(A) minimum temperature of 20 degrees Celsius (68 degrees Fahrenheit);^P

(B) pH of 5.0 or less or a pH no higher than the level for which the manufacturer specifies the solution is effective;^P and

(C) concentration between 12.5 mg/L and 25 mg/L;^P

(3) a quaternary ammonium compound solution shall:

(A) have a minimum temperature of 24 degrees Celsius (75 degrees Fahrenheit);^P

(B) have a concentration as specified under §228.206 of this title (relating to Chemicals) and as indicated by the manufacturer's use directions included in the labeling;^P and

(C) be used only in water with 500 mg/L hardness or less or in water having a hardness no greater than specified by EPA-registered label use instructions.^P

(4) if another solution of a chemical specified under paragraphs (1) - (3) of this subsection is used, the permit holder shall demonstrate to the regulatory authority that the solution achieves sanitization and the use of the solution shall be approved;^P or

(5) if a chemical sanitizer other than chlorine, iodine, or a quaternary ammonium compound is used, it shall be applied in accordance with the EPA-registered label use instructions; and^P

(6) if a chemical sanitizer is generated by a device located on-site at the food establishment it shall be used as specified in paragraphs (1) - (4) of this subsection and shall be produced by a device that:

(A) complies with regulation as specified in §2(q)(1) and §12 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA);^P

(B) complies with 40 CFR 152.500 requirement for devices and 40 CFR 156.10 labeling requirements;^P

(C) displays the EPA device manufacturing facility registration number on the device;^{Pf} and

(D) is operated and maintained in accordance with manufacturer's instructions.^{Pf}

(o) Manual warewashing equipment, chemical sanitization using detergent-sanitizers. If a detergent-sanitizer is used to sanitize in a cleaning and sanitizing procedure where there is no distinct water rinse between the washing and sanitizing steps, the agent applied in the sanitizing step shall be the same detergent-sanitizer that is used in the washing step.^{Pf}

(p) Warewashing equipment, determining chemical sanitizer concentration. Concentration of the sanitizing solution shall be accurately determined by using a test kit or other device.^{Pf}

§228.112. Utensils and Temperature and Pressure Measuring Devices.

(a) Good repair and calibration.

(1) Utensils shall be maintained in a state of repair or condition that complies with the requirements specified in §§228.101 - 228.106 of this title or shall be discarded.^{Pf}

(2) Food temperature measuring devices shall be calibrated in accordance with manufacturer's specifications as necessary to ensure their accuracy.^{Pf}

(3) Ambient air temperature, water pressure, and water temperature measuring devices shall be maintained in good repair and be accurate within the intended range of use.^{Pf}

(b) Single-service and single-use articles, required use. A food establishment without facilities specified in §§228.113 - 228.118 of this title for cleaning and sanitizing kitchenware and tableware shall provide only single-use kitchenware, single-service articles, and single-use articles for use by food employees and single-service articles for use by consumers.^P

(c) Single-service and single-use articles, use limitation.

(1) Single-service and single-use articles may not be reused.

(2) The bulk milk container dispensing tube shall be cut on the diagonal leaving no more than one inch protruding from the chilled dispensing head.

(d) Shells, use limitation. Mollusk and crustacea shells may not be used more than once as serving containers.

§228.113. Cleaning of Equipment and Utensils.

Equipment, food-contact surfaces, nonfood-contact surfaces, and utensils.

(1) Equipment food-contact surfaces and utensils shall be clean to sight and touch.^P

(2) The food-contact surfaces of cooking equipment and pans shall be kept free of encrusted grease deposits and other soil accumulations.

(3) Nonfood-contact surfaces of equipment shall be kept free of an accumulation of dust, dirt, food residue, and other debris.

§228.114. Frequency of Cleaning.

(a) Equipment food-contact surfaces and utensils.

(1) Equipment food-contact surfaces and utensils shall be cleaned:

(A) except as specified in paragraph (2) of this subsection, before each use with a different type of raw animal food such as beef, fish, lamb, pork, or poultry;^P

(B) each time there is a change from working with raw foods to working with ready-to-eat foods;^P

(C) between uses with raw fruits and vegetables and with time/temperature control for safety (TCS) food;^P

(D) before using or storing a food temperature measuring device;^P and

(E) at any time during the operation when contamination may have occurred.^P

(2) Paragraph (1)(A) of this subsection does not apply if the food-contact surface or utensil is in contact with a succession of different raw meat and poultry each requiring a higher cooking temperature as specified in §228.71(a) of this title than the previous type.

(3) Except as specified in paragraph (4) of this subsection, if used with TCS food equipment food-contact surfaces and utensils shall be cleaned throughout the day at least every four hours.^P

(4) Surfaces of utensils and equipment contacting TCS food may be cleaned less frequently than every four hours if:

(A) in storage, containers of TCS food and their contents are maintained at temperatures specified under Subchapter C of this chapter and the containers are cleaned when they are empty;

(B) utensils and equipment are used to prepare food in a refrigerated room or area that is maintained at one of the temperatures in the following chart and:

(i) the utensils and equipment are cleaned at the frequency in the following chart that corresponds to the temperature; and Figure: 25 TAC §228.114(a)(4)(B)(i)

(ii) the cleaning frequency based on the ambient temperature of the refrigerated room or area is documented in the food establishment;

(C) containers in serving situations such as salad bars, delis, and cafeteria lines hold ready-to-eat TCS food that is maintained at the temperatures specified under Subchapter C of this chapter, are intermittently combined with additional supplies of the same food that is at the required temperature, and the containers are cleaned at least every 24 hours;

(D) temperature measuring devices are maintained in contact with food, such as when left in a container of deli food or in a roast, held at temperatures specified under Subchapter C of this chapter;

(E) equipment is used for storage of packaged or unpackaged food such as a reach-in refrigerator and the equipment is cleaned at a frequency necessary to preclude accumulation of soil residues;

(F) the cleaning schedule is approved based on consideration of:

(i) the characteristics of the equipment and its use;

(ii) the type of food involved;

(iii) the amount of food residue accumulation; and

(iv) the temperature at which the food is maintained during the operation and the potential for the rapid and progressive multiplication of pathogenic or toxigenic microorganisms that are capable of causing foodborne disease; or

(G) in-use utensils are intermittently stored in a container of water in which the water is maintained at 57 degrees Celsius (135 degrees Fahrenheit) or more and the utensils and container are cleaned at least every 24 hours or at a frequency necessary to preclude accumulation of soil residues.

(5) Except when dry cleaning methods are used as specified in §228.115(a) of this title, surfaces of utensils and equipment contacting food that is not time/temperature control for safety shall be cleaned:

(A) at any time when contamination may have occurred;

(B) at least every 24 hours for iced tea dispensers and consumer self-service utensils such as tongs, scoops, or ladles;

(C) before restocking consumer self-service equipment and utensils such as condiment dispensers and display containers; and

(D) in equipment such as ice bins and beverage dispensing nozzles and enclosed components of equipment such as ice makers, cooking oil storage tanks and distribution lines, beverage and syrup dispensing lines or tubes, coffee bean grinders, and water vending equipment:

(i) at a frequency specified by the manufacturer; or

(ii) absent manufacturer specifications, at a frequency necessary to preclude accumulation of soil or mold.

(b) Cooking and baking equipment.

(1) The food-contact surfaces of cooking and baking equipment shall be cleaned at least every 24 hours. This section does not apply to hot oil cooking and filtering equipment if it is cleaned as specified in subsection (a)(4)(F) of this section.

(2) The cavities and door seals of microwave ovens shall be cleaned at least every 24 hours by using the manufacturer's recommended cleaning procedure.

(c) Nonfood-contact surfaces. Nonfood-contact surfaces of equipment shall be cleaned at a frequency necessary to preclude accumulation of soil residues.

§228.115. Methods of Cleaning.

(a) Dry cleaning.

(1) If used, dry cleaning methods such as brushing, scraping, and vacuuming shall contact only surfaces that are soiled with dry food residues that are not time/temperature control for safety (TCS) food.

(2) Cleaning equipment used in dry cleaning food-contact surfaces may not be used for any other purpose.

(b) Precleaning.

(1) Food debris on equipment and utensils shall be scrapped over a waste disposal unit or garbage receptacle or shall be removed in a warewashing machine with a prewash cycle.

(2) If necessary for effective cleaning, utensils and equipment shall be preflushed, presoaked, or scrubbed with abrasives.

(c) Loading of soiled items, warewashing machines. Soiled items to be cleaned in a warewashing machine shall be loaded into racks, trays, or baskets or onto conveyors in a position that:

(1) exposes the items to the unobstructed spray from all cycles;^{Pf} and

(2) allows the items to drain.^{Pf}

(d) Wet cleaning.

(1) Equipment food-contact surfaces and utensils shall be effectively washed to remove or completely loosen soils by using the manual or mechanical means necessary such as the application of detergents containing wetting agents and emulsifiers; acid, alkaline, or abra-

sive cleaners; hot water; brushes; scouring pads; high-pressure sprays; or ultrasonic devices.^{Pf}

(2) The washing procedures selected shall be based on the type and purpose of the equipment or utensil, and on the type of soil to be removed.^{Pf}

(e) Washing procedures for alternative manual warewashing equipment. If washing in sink compartments or a warewashing machine is impractical such as when the equipment is fixed or the utensils are too large, washing shall be done by using alternative manual warewashing equipment as specified in §228.107(b)(3) of this title in accordance with the following procedures:^{Pf}

(1) equipment shall be disassembled as necessary to allow access of the detergent solution to all parts;^{Pf}

(2) equipment components and utensils shall be scrapped or rough cleaned to remove food particle accumulation;^{Pf} and

(3) equipment and utensils shall be washed as specified under subsection (d)(1) of this section.^{Pf}

(f) Rinsing procedures. Washed utensils and equipment shall be rinsed so that abrasives are removed and cleaning chemicals are removed or diluted through the use of water or a detergent-sanitizer solution by using one of the following procedures:^{Pf}

(1) use of a distinct, separate water rinse after washing and before sanitizing if using;^{Pf}

(A) a three-compartment sink;^{Pf}

(B) alternative manual warewashing equipment equivalent to a three-compartment sink as specified in §228.107(b)(3) of this title;^{Pf} or

(C) a three-step washing, rinsing, and sanitizing procedure in a warewashing system for CIP equipment;^{Pf}

(2) use of a detergent-sanitizer as specified in §228.111(o) of this title;

(A) alternative warewashing equipment as specified in §228.107(b)(3) of this title that is approved for use with a detergent-sanitizer;^{Pf} or

(B) a warewashing system for CIP equipment;^{Pf}

(3) use of a nondistinct water rinse that is integrated in the hot water sanitization immersion step of a two-compartment sink operation;^{Pf}

(4) if using a warewashing machine that does not recycle the sanitizing solution as specified under paragraph (5) of this subsection, or alternative manual warewashing equipment such as sprayers, use of a nondistinct water rinse that is:^{Pf}

(A) integrated in the application of the sanitizing solution;^{Pf} and

(B) washed immediately after each application;^{Pf} or

(5) if using a warewashing machine that recycles the sanitizing solution for use in the next wash cycle, use of a nondistinct water rinse that is integrated in the application of the sanitizing solution.^{Pf}

§228.116. Sanitization Objectives, Food-contact Surfaces and Utensils.

Equipment food-contact surfaces and utensils shall be sanitized.

§228.117. Sanitization Frequency, Before Use After Cleaning.

Utensils and food-contact surfaces of equipment shall be sanitized before use after cleaning.^P

§228.118. Sanitization Methods, Hot Water and Chemicals.

After being cleaned, equipment food-contact surfaces and utensils shall be sanitized in:

(1) hot water manual operations by immersion for at least 30 seconds and as specified in §228.111(k) of this title;^P

(2) hot water mechanical operations by being cycled through equipment that is set up as specified in §228.111(e), (l) and (m) of this title and achieving a utensil surface temperature of 71 degrees Celsius (160 degrees Fahrenheit) as measured by an irreversible registering temperature indicator;^P or

(3) chemical manual or mechanical operations, including the application of sanitizing chemicals by immersion, manual swabbing, brushing, or pressure spraying methods, using a solution as specified in §228.111(n) of this title by providing:

(A) except as specified under paragraph (B) of this subsection, an exposure time of at least 10 seconds for a chlorine solution specified in §228.111(n)(1) of this title;^P

(B) a contact time of at least 7 seconds for a chlorine solution of 50 mg/L that has a pH of 10 or less and a temperature of at least 38 degrees Celsius (100 degrees Fahrenheit) or a pH of 8 or less and a temperature of at least 24 degrees Celsius (75 degrees Fahrenheit);^P

(C) a contact of at least 30 seconds for other chemical sanitizing solutions;^P or

(D) An exposure time used in relationship with a combination of temperature, concentration, and pH that, when evaluated for efficacy, yields sanitization as defined in §228.2(125) of this title.^P

§228.119. Laundering, Clean Linens.

Clean linens shall be free from food residues and other soiling matter.

§228.120. Laundering, Frequency, Specifications.

(a) Linens that do not come in direct contact with food shall be laundered between operations if they become wet, sticky, or visibly soiled.

(b) Cloth gloves used as specified in §228.68(e)(4) of this title shall be laundered before being used with a different type of raw animal food such as beef, fish, lamb, pork or poultry.

(c) Linens and napkins that are used as specified in §229.68(c) of this title and cloth napkins shall be laundered between each use.

(d) Wet wiping cloths shall be laundered daily.

(e) Dry wiping cloths shall be laundered as necessary to prevent contamination of food and clean serving utensils.

§228.121. Laundering Methods.

(a) Storage of soiled linens. Soiled linens shall be kept in clean, nonabsorbent receptacles or clean, washable laundry bags and stored and transported to prevent contamination of food, clean equipment, clean utensils, and single-service and single-use articles.

(b) Mechanical washing.

(1) Except as specified in paragraph (2) of this subsection, linens shall be mechanically washed.

(2) In food establishments in which only wiping cloths are laundered as specified in §228.107(e)(2) of this title, the wiping cloths may be laundered in a mechanical washer, sink designated only for laundering wiping cloths, or a warewashing or food preparation sink that is cleaned as specified in §228.111(d) of this title.

(c) Use of laundry facilities.

(1) Except as specified in paragraph (2) of this subsection, laundry facilities on the premises of a food establishment shall be used only for the washing and drying of items used in the operation of the establishment.

(2) Separate laundry facilities located on the premises for the purpose of general laundering such as for institutions providing boarding and lodging may also be used for laundering food establishment items.

§228.122. Drying, Equipment and Utensils.

(a) Equipment and utensils, air-drying required. After cleaning and sanitizing, equipment and utensils:

(1) shall be air-dried or used after adequate draining as specified in the first paragraph of 40 CFR §180.940, Tolerance exemptions for active and inert ingredients for use in antimicrobial formulations (food-contact sanitizing solutions), before contact with food; and

(2) may not be cloth dried except that utensils that have been air-dried may be polished with cloths that are maintained clean and dry.

(b) Wiping cloths, air-drying locations. Wiping cloths laundered in a food establishment that does not have a mechanical clothes dryer as specified in §228.107(e)(2) of this title, shall be air-dried in a location and in a manner that prevents contamination of food, equipment, utensils, linens, and single-service and single-use articles and the wiping cloths. This section does not apply if wiping cloths are stored after laundering in a sanitizing solution as specified in §228.111(n) of this title.

§228.123. Lubricating and Reassembling.

(a) Food-contact surfaces. Lubricants as specified in §228.207 of this title shall be applied to food-contact surfaces that require lubrication in a manner that does not contaminate food-contact surfaces.

(b) Equipment. Equipment shall be reassembled so that food-contact surfaces are not contaminated.

§228.124. Storage.

(a) Equipment, utensils, linens, and single-service and single-use articles.

(1) Except as specified in paragraph (4) of this subsection, cleaned equipment and utensils, laundered linens, and single-service and single-use articles shall be stored:

(A) in a clean, dry location;

(B) where they are not exposed to splash, dust, or other contamination; and

(C) at least 15 cm (6 inches) above the floor.

(2) Clean equipment and utensils shall be stored as specified under paragraph (1) of this subsection and shall be stored:

(A) in a self-draining position that allows air drying; and

(B) covered or inverted.

(3) Single-service and single-use articles shall be stored as specified under subparagraph (A) of this paragraph and shall be kept in the original protective package or stored by using other means that afford protection from contamination until used.

(4) Items that are kept in closed packages may be stored less than 15 cm (6 inches) above the floor on dollies, pallets, racks, and skids that are designed as specified in §228.106(v) of this title.

(b) Prohibitions.

(1) Except as specified in paragraph (2) of this subsection, cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use articles may not be stored:

(A) in locker rooms;

(B) in toilet rooms;

(C) in garbage rooms;

(D) in mechanical rooms;

(E) under sewer lines that are not shielded to intercept potential drips;

(F) under leaking water lines including leaking automatic fire sprinkler heads or under lines on which water has condensed;

(G) under open stairwells; or

(H) under other sources of contamination.

(2) Laundered linens and single-service and single-use articles that are packaged or in a facility such as a cabinet may be stored in a locker room.

§228.125. Preventing Contamination.

(a) Kitchenware and tableware.

(1) Single-service and single-use articles and cleaned and sanitized utensils shall be handled, displayed, and dispensed so that contamination of food- and lip-contact surfaces is prevented.

(2) Knives, forks, and spoons that are not prewrapped shall be presented so that only the handles are touched by employees and by consumers if consumer self-service is provided.

(3) Except as specified under paragraph (2) of this subsection, single-service articles that are intended for food- or lip-contact shall be furnished for consumer self-service with the original individual wrapper intact or from an approved dispenser.

(b) Soiled and clean tableware. Soiled tableware shall be removed from consumer eating and drinking areas and handled so that clean tableware is not contaminated.

(c) Preset tableware. If tableware is preset:

(1) except as specified in paragraph (2) of this subsection, tableware that is preset shall be protected from contamination by being wrapped, covered, or inverted.

(2) preset tableware may be exposed if:

(A) unused settings are removed when a consumer is seated; or

(B) settings not removed when a consumer is seated are cleaned and sanitized before further use.

(d) Rinsing Equipment and Utensils after Cleaning and Sanitizing. After being cleaned and sanitized, equipment and utensils shall not be rinsed before air drying or use unless:^{Pf}

(1) the rinse is applied directly from a potable water supply by a warewashing machine that is maintained and operated as specified in §228.106 and §228.111 of this title;^{Pf} and

(2) the rinse is applied only after the equipment and utensils have been sanitized by the application of hot water or by the application of a chemical sanitizer solution whose EPA-registered label use instructions call for rinsing off the sanitizer after it is applied in a commercial warewashing machine.^{Pf}

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

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◆ ◆ ◆
SUBCHAPTER E. WATER, PLUMBING, AND WASTE

25 TAC §§228.141 - 228.154

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §437.0056, which requires the department to adopt rules for granting and maintaining retail food permits in areas not regulated by counties and public health districts; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The new sections affect Health and Safety Code, Chapters 437 and 1001; and Government Code, Chapters 531 and 2001.

§228.141. Source.

(a) Approved system. Drinking water shall be obtained from an approved source that is:

(1) a public water system;^P or

(2) a nonpublic water system that is constructed, maintained, and operated according to Subchapter J of this chapter.^P

(b) System flushing and disinfection. A drinking water system shall be flushed and disinfected before being placed in service after construction, repair, or modification and after an emergency situation, such as a flood, that may introduce contaminants to the system.^P

(c) Bottled drinking water. Bottled drinking water used or sold in a food establishment shall be obtained from approved sources in accordance with 21 CFR 129 - Processing and Bottling of Bottled Drinking Water.^P

§228.142. Water Quality Standards.

(a) Public and private water systems. Except as specified under subsection (b) of this section:

(1) Water from a public water system shall meet 40 CFR 141 - National Primary Drinking Water Regulations, state drinking water quality standards in accordance with 30 TAC §§290.38 - 290.47 (relating to Rules and Regulations for Public Water Systems), and 30 TAC §§290.101 - 290.114, 290.117 - 290.119, 290.121, and 290.122 (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Systems);^P and

(2) Water from a nonpublic water system shall meet the requirements in Subchapter J of this chapter.^P

(b) Nondrinking water.

(1) A nondrinking water supply shall be used only if its use is approved by the regulatory authority.^P

(2) Nondrinking water shall be used only for nonculinary purposes such as air conditioning, nonfood equipment cooling, and fire protection.^P

(c) Sampling. Except when used as specified under subsection (b) of this section, water from a nonpublic water system shall be sampled and tested at least monthly and as required by Subchapter J of this chapter.^{Pf}

(d) Sample report. The most recent sample report for the nonpublic water system shall be retained on file in the food establishment or the report shall be maintained as specified by Subchapter J of this chapter.^{Pf}

§228.143. Water Quantity and Availability.

(a) Capacity. The water source and system shall be of sufficient capacity to meet the peak water demands of the food establishment.^{Pf}

(b) Pressure. Water under pressure shall be provided to all fixtures, equipment, and nonfood equipment that are required to use water except that water supplied as specified in §228.144(b)(1) and (2) of this title to a temporary food establishment or in response to a temporary interruption of a water supply need not be under pressure.^{Pf}

(c) Hot water. Hot water generation and distribution systems shall be sufficient to meet the peak hot water demands throughout the food establishment.^{Pf}

§228.144. Water Distribution, Delivery, and Retention Systems.

(a) Distribution. Water shall be received from the source through the use of:

(1) an approved public water main;^{Pf} or

(2) one or more of the following that shall be constructed, maintained, and operated according to law:^{Pf}

(A) nonpublic water main, water pumps, pipes, hoses, connections, and other appurtenances that meet the requirements of Subchapter J of this chapter;^{Pf}

(B) water transport vehicles;^{Pf} or

(C) water containers.^{Pf}

(b) Alternative water supply. Water meeting the requirements specified in §§228.141 - 228.143 of this title shall be made available for a mobile facility, for a temporary food establishment without a permanent water supply, and for a food establishment with a temporary interruption of its water supply through:

(1) a supply of containers of commercially bottled drinking water;^{Pf}

(2) one or more closed portable water containers;^{Pf}

(3) an enclosed vehicular water tank;^{Pf}

(4) an on-premises water storage tank;^{Pf} or

(5) piping, tubing, or hoses connected to an adjacent approved source.^{Pf}

§228.145. Plumbing Systems, Approved Materials.

(a) Construction. A plumbing system and hoses conveying water shall be constructed and repaired with approved materials according to the Plumbing Code.^P

(b) Water filter. A water filter shall be made of safe materials.^P

§228.146. Plumbing Design, Construction, and Installation.

(a) Approved system and cleanable fixtures.

(1) A plumbing system shall be designed, constructed, and installed according to the Plumbing Code.^P

(2) A plumbing fixture such as a handwashing facility, toilet, or urinal shall be easily cleanable.

(b) Handwashing facility, installation.

(1) A handwashing sink shall be equipped to provide water at a temperature of at least 38 degrees Celsius (100 degrees Fahrenheit) through a mixing valve or combination faucet.^P

(2) A steam mixing valve may not be used at a handwashing sink.^{Pf}

(3) A self-closing, slow-closing, or metering faucet shall provide a flow of water for at least 15 seconds without the need to reactivate the faucet.^{Pf}

(4) An automatic handwashing facility shall be installed in accordance with manufacturer's instructions.^{Pf}

(c) Backflow prevention, air gap. An air gap between the water supply inlet and the flood level rim of the plumbing fixture, equipment, or nonfood equipment shall be at least twice the diameter of the water supply inlet and may not be less than 25 mm (1 inch).^P

(d) Backflow prevention device, design standard. A backflow or backsiphonage prevention device installed on a water supply system shall meet American Society of Sanitary Engineering (ASSE) standards for construction, installation, maintenance, inspection, and testing for that specific application and type of device.^P

(e) Conditioning device, design. A water filter, screen, and other water conditioning device installed on water lines shall be designed to facilitate disassembly for periodic servicing and cleaning. A water filter element shall be of the replaceable type.

§228.147. Plumbing, Numbers and Capacities.

(a) Handwashing facilities.

(1) Except as specified in paragraphs (2) and (3) of this subsection, at least one handwashing lavatory, a number of handwashing lavatories necessary for their convenient use by employees in areas specified in §228.148 of this title, and not fewer than the number of handwashing lavatories required by the Plumbing Code shall be provided.^{Pf}

(2) If approved and capable of removing the types of soils encountered in the food operations involved, automatic handwashing facilities may be substituted for handwashing lavatories in a food establishment that has at least one handwashing lavatory.

(3) If approved by the regulatory authority, when no food exposure exists and handwashing sinks are not conveniently available, such as in some Mobile Food Units or temporary food establishments or at some vending machine locations, employees may use chemically treated towelettes for handwashing.

(b) Toilets and urinals. At least one toilet and not fewer than the toilets required by the Plumbing Code shall be provided. If authorized by the Plumbing Code and urinals are substituted for toilets, the substitution shall be done as specified in the Plumbing Code.

(c) Service sink.

(1) At least one service sink or one curbed cleaning facility equipped with a floor drain shall be provided and conveniently located for the cleaning of mops or similar wet floor cleaning tools and for the disposal of mop water and similar liquid waste.^{Pf}

(2) Toilets, urinals and showers may not be used as a service sink for the disposal of mop water and similar liquid waste.

(d) Backflow prevention device, when required. A plumbing system shall be installed to preclude backflow of a solid, liquid, or gas contaminant into the water supply system at each point of use at the food establishment, including on a hose bibb if a hose is attached or on a hose bibb if a hose is not attached and backflow prevention is required by the Plumbing Code, by:

(1) providing an air gap as specified in §228.146(c) of this title;^P or

(2) installing an approved backflow prevention device as specified in §228.146(d) of this title.^P

(e) Backflow prevention device, carbonator.

(1) If not provided with an air gap as specified in §228.146(c) of this title, a dual check valve with an intermediate vent preceded by a screen of not less than 100 mesh to 25.4mm (100 mesh to 1 inch) shall be installed upstream from a carbonating device and downstream from any copper in the water supply line.^P

(2) A dual check valve attached to the carbonator need not be of the vented type if an air gap or vented backflow prevention device has been otherwise provided as specified under paragraph (1) of this subsection.

§228.148. Plumbing, Location and Placement.

(a) Handwashing facilities. A handwashing facility shall be located:

(1) to allow convenient use by employees in food preparation, food dispensing, and warewashing areas;^{Pf} and

(2) in, or immediately adjacent to, toilet rooms.^{Pf}

(b) Backflow prevention device, location. A backflow prevention device shall be located so that it may be serviced and maintained.

(c) Conditioning device, location. A water filter, screen, and other water conditioning device installed on water lines shall be located to facilitate disassembly for periodic servicing and cleaning.

§228.149. Plumbing, Operation and Maintenance.

(a) Using a handwashing facility.

(1) A handwashing facility shall be maintained so that it is accessible at all times for employee use.^{Pf}

(2) A handwashing facility may not be used for purposes other than handwashing.^{Pf}

(3) An automatic handwashing facility shall be used in accordance with manufacturer's instructions.^{Pf}

(b) Prohibiting a cross connection.

(1) A person may not create a cross connection by connecting a pipe or conduit between the drinking water system and a non-drinking water system or a water system of unknown quality.^P

(2) The piping of a nondrinking water system shall be durably identified so that it is readily distinguishable from piping that carries drinking water.^{Pf}

(c) Scheduling inspection and service for a water system device. A device such as a water treatment device or backflow preventer shall be scheduled for inspection and service, in accordance with manufacturer's instructions and as necessary to prevent device failure based on local water conditions, and records demonstrating inspection and service shall be maintained by the person in charge.^{Pf}

(d) Water reservoir of fogging devices, cleaning.

(1) A reservoir that is used to supply water to a device such as a produce fogger shall be:

(A) maintained in accordance with manufacturer's specifications;^P and

(B) cleaned in accordance with manufacturer's specifications or according to the procedures specified in paragraph (2) of this subsection, whichever is more stringent.^P

(2) Cleaning procedures shall include at least the following steps and shall be conducted at least once a week:

(A) draining and complete disassembly of the water and aerosol contact parts;^P

(B) brush-cleaning the reservoir, aerosol tubing, and discharge nozzles with a suitable detergent solution;^P

(C) flushing the complete system with water to remove the detergent solution and particulate accumulation;^P and

(D) rinsing by immersing, spraying, or swabbing the reservoir, aerosol tubing, and discharge nozzles with at least 50 mg/L hypochlorite solution.^P

(e) System maintained in good repair. A plumbing system shall be:

(1) repaired according to the Plumbing Code;^P and

(2) maintained in good repair.

(f) Mobile water tank and Mobile Food Unit water tank.

(1) Materials, approved. Materials that are used in the construction of a mobile water tank, Mobile Food Unit water tank, and appurtenances shall be:

(A) safe;^P

(B) durable, corrosion-resistant, and nonabsorbent;^{Pf} and

(C) finished to have a smooth, easily cleanable surface.^{Pf}

(2) Tank design and construction. A mobile water tank shall be:

(A) enclosed from the filling inlet to the discharge outlet;^{Pf} and

(B) sloped to an outlet that allows complete drainage of the tank.^{Pf}

(3) Tank inspection and cleaning port, protected and secured. If a water tank is designed with an access port for inspection and cleaning, the opening shall be in the top of the tank and:

(A) flanged upward at least 13 mm (one-half inch);^{Pf} and

(B) equipped with a port cover assembly that is:

(i) provided with a gasket and a device for securing the cover in place;^{Pf} and

(ii) flanged to overlap the opening and sloped to drain.^{Pf}

(4) "V" type threads, use limitation. A fitting with "V" type threads on a water tank inlet or outlet shall be allowed only when a hose is permanently attached.

(5) Tank vent, protected. If provided, a water tank vent shall terminate in a downward direction and shall be covered with:

(A) 16 mesh to 25.4 mm (16 mesh to 1 inch) screen or equivalent when the vent is in a protected area; or

(B) a protective filter when the vent is in an area that is not protected from windblown dirt and debris.

(6) Tank inlet and outlet, sloped to drain.

(A) A water tank and its inlet and outlet shall be sloped to drain.

(B) A water tank inlet shall be positioned so that it is protected from contaminants such as waste discharge, road dust, oil, or grease.

(7) Tank hose, construction and identification. A hose used for conveying drinking water from a water tank shall be:

(A) safe;^P

(B) durable, corrosion-resistant, and nonabsorbent;^{Pf}

(C) resistant to pitting, chipping, crazing, scratching, scoring, distortion, and decomposition;^{Pf}

(D) finished with a smooth interior surface;^{Pf} and

(E) clearly and durably identified as to its use if not permanently attached.^{Pf}

(8) Tank filter, compressed air. A filter that does not pass oil or oil vapors shall be installed in the air supply line between the compressor and drinking water system when compressed air is used to pressurize the water tank system.^P

(9) Protective cover or device. A cap and keeper chain, closed cabinet, closed storage tube, or other approved protective cover or device shall be provided for a water inlet, outlet, and hose.

(10) Mobile Food Unit tank inlet. A Mobile Food Unit's water tank inlet shall be:

(A) 19.1 mm (three-fourths inch) in inner diameter or less;^{Pf} and

(B) provided with a hose connection of a size or type that will prevent its use for any other service.^{Pf}

(11) Fill hose and water holding tank shall be labeled as "Potable Water."

(12) Water in a mobile food unit holding tank shall be tested for contamination by sampling upon request by the regulatory authority.^{Pf}

(13) Operation and maintenance, system flushing and disinfection. A water tank, pump, and hoses shall be flushed and sanitized before being placed in service after construction, repair, modification, and periods of nonuse.^P

(14) Using a pump and hoses, backflow prevention. A person shall operate a water tank, pump, and hoses so that backflow and other contamination of the water supply are prevented.

(15) Protecting inlet, outlet, and hose fitting. If not in use, a water tank and hose inlet and outlet fitting shall be protected using a cover or device as specified in paragraph (9) of this subsection.

(16) Tank, pump, and hoses, dedication.

(A) Except as specified in subparagraph (B) of this paragraph, a water tank, pump, and hoses used for conveying drinking water shall be used for no other purpose.^P

(B) Water tanks, pumps, and hoses approved for liquid foods may be used for conveying drinking water if they are cleaned and sanitized before they are used to convey water.

§228.150. Sewage Retention, Drainage, and Delivery.

(a) Mobile holding tank. Capacity and Drainage. A sewage holding tank in a Mobile Food Unit shall be:

(1) sized 15 percent larger in capacity than the water supply tank; and

(2) sloped to a drain that is 25 mm (1 inch) in inner diameter or greater, equipped with a shut-off valve.

(b) Food establishment drainage systems, including grease traps, that convey sewage shall be designed and installed as specified in §228.146(a)(1) of this title.

(c) Backflow prevention.

(1) Except as specified in paragraphs (2), (3) and (4) of this subsection, a direct connection may not exist between the sewage system and a drain originating from equipment in which food, portable equipment, or utensils are placed.^P

(2) Paragraph (1) of this subsection does not apply to floor drains that originate in refrigerated spaces that are constructed as an integral part of the building.

(3) If allowed by the Plumbing Code, a warewashing machine may have a direct connection between its waste outlet and a floor drain when the machine is located within 1.5 m (5 feet) of a trapped floor drain and the machine outlet is connected to the inlet side of a properly vented floor drain trap.

(4) If allowed by the Plumbing Code, a warewashing or culinary sink may have a direct connection.

(d) Grease trap. If used, a grease trap shall be located to be easily accessible for cleaning, operation, and maintenance.

(e) Conveying sewage. Sewage shall be conveyed to the point of disposal through an approved sanitary sewage system or other system, including use of sewage transport vehicles, waste retention tanks, pumps, pipes, hoses, and connections that are constructed, maintained, and operated according to the Plumbing Code.^P

(f) Removing Mobile Food Unit Wastes. Sewage and other liquid wastes shall be removed from a Mobile Food Unit at an approved waste servicing area or by a sewage transport vehicle in such a way that a public health hazard or nuisance is not created.^{Pf}

(g) Flushing a Waste Retention Tank. A tank for liquid waste retention shall be thoroughly flushed and drained in a sanitary manner during the servicing operation.

§228.151. Disposal Facility.

(a) Approved sewage disposal system. Sewage shall be disposed through an approved facility that is:

(1) a public sewage system;^P or

(2) an individual sewage disposal system that is sized, constructed, maintained, and operated according to 30 TAC Chapter 285, On-Site Sewage Facilities.^P

(b) Other liquid wastes and rainwater. Condensate drainage and other nonsewage liquids and rainwater shall be drained from point of discharge to disposal according to 30 TAC Chapter 285, On-Site Sewage Facilities.

§228.152. Refuse, Recyclables, and Returnables, Facilities on the Premises.

(a) Indoor storage area. If located within the food establishment, a storage area for refuse, recyclables, and returnables shall meet the requirements specified in §228.171, §228.173(a) - (h), and §228.174(e) and (f) of this title.

(b) Outdoor storage surface. An outdoor storage surface for refuse, recyclables, and returnables shall be constructed of nonabsorbent material such as concrete or asphalt and shall be smooth, durable, and sloped to drain.

(c) Outdoor enclosure. If used, an outdoor enclosure for refuse, recyclables, and returnables shall be constructed of durable and cleanable materials.

(d) Receptacles.

(1) Except as specified in paragraph (2) of this subsection, receptacles and waste handling units for refuse, recyclables, and returnables and for use with materials containing food residue shall be durable, cleanable, insect and rodent-resistant, leak-proof, and nonabsorbent.

(2) Plastic bags and wet strength paper bags may be used to line receptacles for storage inside the food establishment, or within closed outside receptacles.

(e) Receptacles in vending machines. Except for a receptacle for beverage bottle crown closures, a refuse receptacle may not be located within a vending machine.

(f) Outside receptacles.

(1) Receptacles and waste handling units for refuse, recyclables, and returnables used with materials containing food residue and used outside the food establishment shall be designed and constructed to have tight-fitting lids, doors, or covers.

(2) Receptacles and waste handling units for refuse and recyclables such as an on-site compactor shall be installed so that accumulation of debris and insect and rodent attraction and harborage are minimized and effective cleaning is facilitated around and, if the unit is not installed flush with the base pad, under the unit.

(g) Storage areas, rooms, and receptacles, capacity and availability.

(1) An inside storage room and area and outside storage area and enclosure, and receptacles shall be of sufficient capacity to hold refuse, recyclables, and returnables that accumulate.

(2) A receptacle shall be provided in each area of the food establishment or premises where refuse is generated or commonly discarded, or where recyclables or returnables are placed.

(3) If disposable towels are used at handwashing lavatories, a waste receptacle shall be located at each lavatory or group of adjacent lavatories.

(h) Toilet room receptacle, covered. A toilet room used by females shall be provided with a covered receptacle for sanitary napkins.

(i) Cleaning implements and supplies.

(1) Except as specified in paragraph (2) of this subsection, suitable cleaning implements and supplies such as high pressure pumps, hot water, steam, and detergent shall be provided as necessary for effective cleaning of receptacles and waste handling units for refuse, recyclables, and returnables.

(2) If approved, off-premises-based cleaning services may be used if on-premises cleaning implements and supplies are not provided.

(j) Storage areas, redeeming machines, receptacles and waste handling units, location.

(1) An area designated for refuse, recyclables, returnables, and, except as specified in paragraph (2) of this subsection, a redeeming machine for recyclables or returnables shall be located so that it is separate from food, equipment, utensils, linens, and single-service and single-use articles and a public health hazard or nuisance is not created.

(2) A redeeming machine may be located in the packaged food storage area or consumer area of a food establishment if food, equipment, utensils, linens, and single-service and single-use articles are not subject to contamination from the machines and a public health hazard or nuisance is not created.

(3) The location of receptacles and waste handling units for refuse, recyclables, and returnables may not create a public health hazard or nuisance or interfere with the cleaning of adjacent space.

(k) Storing refuse, recyclables, and returnables. Refuse, recyclables, and returnables shall be stored in receptacles or waste handling units so that they are inaccessible to insects and rodents.

(l) Areas, enclosures, and receptacles, good repair. Storage areas, enclosures, and receptacles for refuse, recyclables, and returnables shall be maintained in good repair.

(m) Outside storage prohibitions.

(1) Except as specified in paragraph (2) of this subsection, refuse receptacles not meeting the requirements specified in §228.152(d)(1) of this title such as receptacles that are not rodent-resistant, unprotected plastic bags and paper bags, or baled units that contain materials with food residue may not be stored outside.

(2) Cardboard or other packaging material that does not contain food residues and that is awaiting regularly scheduled delivery to a recycling or disposal site may be stored outside without being in a covered receptacle if it is stored so that it does not create a rodent harborage problem.

(n) Covering receptacles. Receptacles and waste handling units for refuse, recyclables, and returnables shall be kept covered:

(1) inside the food establishment if the receptacles and units:

(A) contain food residue and are not in continuous use;

(B) after they are filled; and

(2) with tight-fitting lids or doors if kept outside the food establishment.

(o) Using drain plugs. Drains in receptacles and waste handling units for refuse, recyclables, and returnables shall have drain plugs in place.

(p) Maintaining refuse areas and enclosures. A storage area and enclosure for refuse, recyclables, or returnables shall be maintained free of unnecessary items, as specified in §228.186(n) of this title, and clean.

(q) Cleaning receptacles.

(1) Receptacles and waste handling units for refuse, recyclables, and returnables shall be thoroughly cleaned in a way that does not contaminate food, equipment, utensils, linens, or single-service and single-use articles, and waste water shall be disposed of as specified in §228.150(e) of this title.

(2) Soiled receptacles and waste handling units for refuse, recyclables, and returnables shall be cleaned at a frequency necessary to prevent them from developing a buildup of soil or becoming attractants for insects and rodents.

§228.153. Refuse Removal.

(a) Frequency. Refuse, recyclables, and returnables shall be removed from the premises at a frequency that will minimize the development of objectionable odors and other conditions that attract or harbor insects and rodents.

(b) Receptacles or vehicles. Refuse, recyclables, and returnables shall be removed from the premises by way of:

(1) portable receptacles that are constructed and maintained according to 30 TAC Chapter 330, Municipal Solid Waste; or

(2) a transport vehicle that is constructed, maintained, and operated according to 30 TAC Chapter 330, Municipal Solid Waste.

§228.154. Facilities for Disposal and Recycling, Community or Individual Facility.

Solid waste not disposed of through the sewage system such as through grinders and pulpers shall be recycled or disposed of in an approved public or private community recycling or refuse facility; or solid waste shall be disposed of in an individual refuse facility such as a landfill or incinerator which is sized, constructed, maintained, and operated according to 30 TAC Chapter 330, Municipal Solid Waste.

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

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SUBCHAPTER F. PHYSICAL FACILITIES

25 TAC §§228.171 - 228.186

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §437.0056, which requires the department to adopt rules for granting and maintaining retail food permits in areas not regulated by counties and public health districts; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The new sections affect Health and Safety Code, Chapters 437 and 1001; and Government Code, Chapters 531 and 2001.

§228.171. Indoor Areas, Surface Characteristics.

Except as specified in §228.222(j) and (k)(1) of this title, materials for indoor floor, wall, and ceiling surfaces under conditions of normal use shall be:

(1) smooth, durable, and easily cleanable for areas where food establishment operations are conducted;

(2) closely woven and easily cleanable carpet for carpeted areas; and

(3) nonabsorbent for areas subject to moisture such as food preparation areas, walk-in refrigerators, warewashing areas, toilet rooms, Mobile Food Unit servicing areas, and areas subject to flushing or spray cleaning methods.

§228.172. Outdoor Areas, Surface Characteristics.

(a) Walking and driving areas. The outdoor walking and driving areas shall be surfaced with concrete, asphalt, or gravel or other materials that have been effectively treated to minimize dust, facilitate maintenance, and prevent muddy conditions.

(b) Exterior surfaces. Exterior surfaces of buildings and mobile food units shall be of weather-resistant materials and shall comply with law.

(c) Storage areas. Outdoor storage areas for refuse, recyclables, or returnables shall be of materials specified in §228.152(b) and (c) of this title.

§228.173. Floors, Walls, and Ceilings.

(a) Cleanability. Except as specified under subsection (d) of this section, and except for antislip floor coverings or applications that may be used for safety reasons, the floors, floor coverings, walls, wall coverings, and ceilings shall be designed, constructed, and installed so they are smooth and easily cleanable.

(b) Floors, walls, and ceilings, utility lines.

(1) Utility service lines and pipes may not be unnecessarily exposed.

(2) Exposed utility service lines and pipes shall be installed so they do not obstruct or prevent cleaning of the floors, walls, or ceilings.

(3) Exposed horizontal utility service lines and pipes may not be installed on the floor

(c) Floor and wall junctures, coved, and enclosed or sealed.

(1) In food establishments in which cleaning methods other than water flushing are used for cleaning floors, the floor and wall junctures shall be coved and closed to no larger than 1 mm (one thirty-second inch).

(2) The floors in food establishments in which water flush cleaning methods are used shall be provided with drains and be graded to drain, and the floor and wall junctures shall be covered and sealed.

(d) Floor carpeting, restrictions and installation.

(1) A floor covering such as carpeting or similar material may not be installed as a floor covering in food preparation areas, walk-in refrigerators, warewashing areas, toilet room areas where handwashing lavatories, toilets, and urinals are located, refuse storage rooms, or other areas where the floor is subject to moisture, flushing, or spray cleaning methods.

(2) If carpeting is installed as a floor covering in areas other than those specified in paragraph (1) of this subsection, it shall be:

(A) securely attached to the floor with a durable mastic, by using a stretch and tack method, or by another method; and

(B) installed tightly against the wall under the coving or installed away from the wall with a space between the carpet and the wall and with the edges of the carpet secured by metal stripping or some other means.

(e) Floor covering, mats and duckboards. Mats and duckboards shall be designed to be removable and easily cleanable.

(f) Wall and ceiling coverings and coatings.

(1) Wall and ceiling covering materials shall be attached so that they are easily cleanable.

(2) Except in areas used only for dry storage, concrete, porous blocks, or bricks used for indoor wall construction shall be finished and sealed to provide a smooth, nonabsorbent, easily cleanable surface.

(3) Walls including non-supporting partitions, wall covering and ceilings of the walk-in refrigeration units, food preparation areas, equipment washing and utensil washing areas, toilet rooms and vestibules shall be light in color.

(g) Walls and ceilings, attachments.

(1) Except as specified in paragraph (2) of this subsection, attachments to walls and ceilings such as light fixtures, mechanical room ventilation system components, vent covers, wall mounted fans, decorative items, and other attachments shall be easily cleanable.

(2) In a consumer area, wall and ceiling surfaces and decorative items and attachments that are provided for ambiance need not meet this requirement if they are kept clean.

(h) Walls and ceilings, studs, joists, and rafters. Except for temporary food establishments, studs, joists, and rafters may not be exposed in areas subject to moisture.

§228.174. Functionality.

(a) Light bulbs, protective shielding.

(1) Except as specified in paragraph (2) of this subsection, light bulbs shall be shielded, coated, or otherwise shatter-resistant in areas where there is exposed food; clean equipment, utensils, and linens; or unwrapped single-service and single-use articles.

(2) Shielded, coated, or otherwise shatter-resistant bulbs need not be used in areas used only for storing food in unopened packages; if:

(A) the integrity of the packages cannot be affected by broken glass falling onto them; and

(B) the packages are capable of being cleaned of debris from broken bulbs before the packages are opened.

(3) An infrared or other heat lamp shall be protected against breakage by a shield surrounding and extending beyond the bulb so that only the face of the bulb is exposed.

(b) Heating, ventilating, air conditioning system vents. Heating, ventilating, and air conditioning systems shall be designed and installed so that make-up air intake and exhaust vents do not cause contamination of food, food-contact surfaces, equipment, or utensils.

(c) Insect control devices, design and installation.

(1) Insect control devices that are used to electrocute or stun flying insects shall be designed to retain the insect within the device.

(2) Insect control devices shall be installed so that:

(A) the devices are not located over a food preparation area; and

(B) dead insects and insect fragments are prevented from being impelled onto or falling on exposed food; clean equipment,

utensils, and linens; and unwrapped single-service and single-use articles.

(d) Toilet rooms, enclosed. Except where a toilet room is located outside a food establishment and does not open directly into the food establishment such as a toilet room that is provided by the management of a shopping mall, a toilet room located on the premises shall be completely enclosed and provided with a tight-fitting and self-closing door.

(e) Outer openings, protected.

(1) Except as specified in paragraphs (2) - (5) of this subsection, outer openings of a food establishment shall be protected against the entry of insects and rodents by:

(A) filling or closing holes and other gaps along floors, walls, and ceilings;

(B) closed, tight-fitting windows; and

(C) solid, self-closing, tight-fitting doors.

(2) Paragraph (1) of this subsection does not apply if a food establishment opens into a larger structure, such as a mall, airport, or office building, or into an attached structure, such as a porch, and the outer openings from the larger or attached structure are protected against the entry of insects and rodents.

(3) Exterior doors used as exits need not be self-closing if they are:

(A) solid and tight-fitting;

(B) designated for use only when an emergency exists, by the fire protection authority that has jurisdiction over the food establishment; and

(C) limited-use so they are not used for entrance or exit from the building for purposes other than the designated emergency exit use.

(4) Except as specified in paragraphs (2) and (5) of this subsection, if the windows or doors of a food establishment, or of a larger structure within which a food establishment is located, are kept open for ventilation or other purposes or a temporary food establishment is not provided with windows and doors as specified under paragraph (1) of this subsection, the openings shall be protected against the entry of insects and rodents by:

(A) 16 mesh to 25.4mm (16 mesh to 1 inch) screens;

(B) properly designed and installed air curtains to control flying insects; or

(C) other effective means.

(5) Paragraph (4) of this subsection does not apply if flying insects and other pests are absent due to the location of the establishment, the weather, or other limiting condition.

(f) Exterior walls and roofs, protective barrier. Perimeter walls and roofs of a food establishment shall effectively protect the establishment from the weather and the entry of insects, rodents, and other animals.

(g) Outdoor food vending areas, overhead protection. Except for machines that vend canned beverages if located outside, a machine used to vend food shall be provided with overhead protection.

(h) Outdoor Servicing Areas, Overhead Protection. Except for areas used only for the loading of water or the discharge of sewage and other liquid waste, through the use of a closed system of hoses, servicing areas shall be provided with overhead protection.

(i) Outdoor walking and driving surfaces, graded to drain. Exterior walking and driving surfaces shall be graded to drain.

(j) Outdoor refuse areas, curbed and graded to drain. Outdoor refuse areas shall be constructed in accordance with law and shall be curbed and graded to drain to collect and dispose of liquid waste that result from the refuse and from cleaning the area and waste receptacles.

(k) Private homes and living or sleeping quarters, use prohibition. A private home, a room used as living or sleeping quarters, or an area directly opening into a room used as living or sleeping quarters may not be used for conducting food establishment operations.^P

(l) Living or sleeping quarters, separation. Living or sleeping quarters located on the premises of a food establishment such as those provided for lodging registration clerks or resident managers shall be separated from rooms and areas used for food establishment operations by complete partitioning and solid self-closing doors.

§228.175. Handwashing Sinks.

(a) Minimum number. Handwashing sinks shall be provided as specified in §228.147(a)(1) - (3) of this title.

(b) Handwashing cleanser, availability. Each handwashing sink or group of 2 adjacent sinks shall be provided with a supply of hand cleaning liquid, powder, or bar soap.^{Pf}

(c) Hand drying provision. Each handwashing sink or group of adjacent sinks shall be provided with:

(1) individual, disposable towels;^{Pf}

(2) a continuous towel system that supplies the user with a clean towel;^{Pf}

(3) a heated-air hand drying device;^{Pf} or

(4) a hand drying device that employs an air-knife system that delivers high velocity, pressurized air at ambient temperatures.^{Pf}

(d) Handwashing aids and devices, use restrictions. A sink used for food preparation or utensil washing, or a service sink or curbed cleaning facility used for the disposal of mop water or similar wastes, may not be provided with the handwashing aids and devices required for a handwashing sink as specified in subsections (b) and (c) of this section and §228.152(g)(3) of this title.

(e) Handwashing signage. A sign or poster that notifies food employees to wash their hands shall be provided at all handwashing sinks used by food employees and shall be clearly visible to food employees.

(f) Disposable towels, waste receptacle. A handwashing sink or group of adjacent sinks that is provided with disposable towels shall be provided with a waste receptacle as specified in §228.152(g)(3) of this title.

§228.176. Toilets and Urinals.

(a) Minimum number. Toilets and urinals shall be provided as specified in §228.147(b) of this title.

(b) Toilet tissue, availability. A supply of toilet tissue shall be available at each toilet.

§228.177. Lighting Intensity.

The light intensity shall be:

(1) at least 108 lux (10 foot candles) at a distance of 75 cm (30 inches) above the floor, in walk-in refrigeration units and dry food storage areas and in other areas and rooms during periods of cleaning;

(2) at least 215 lux (20 foot candles):

(A) at a surface where food is provided for consumer self-service such as buffets and salad bars or where fresh produce or packaged foods are sold or offered for consumption;

(B) inside equipment such as reach-in and under-counter refrigerators;

(C) at a distance of 75 cm (30 inches) above the floor in areas used for handwashing, warewashing, and equipment and utensil storage, and in toilet rooms; and

(3) at least 540 lux (50 foot candles) at a surface where a food employee is working with food or working with utensils or equipment such as knives, slicers, grinders, or saws where employee safety is a factor.

§228.178. Ventilation, Mechanical.

If necessary to keep rooms free of excessive heat, steam, condensation, vapors, obnoxious odors, smoke, and fumes, mechanical ventilation of sufficient capacity shall be provided.

§228.179. Dressing Areas and Lockers, Designation.

(a) Dressing rooms or dressing areas shall be designated if employees routinely change their clothes in the establishment.

(b) Lockers or other suitable facilities shall be provided for the orderly storage of employees' clothing and other possessions.

§228.180. Service Sinks, Availability.

A service sink or curbed cleaning facility shall be provided as specified in §228.147(c)(2) of this title.

§228.181. Handwashing Sinks, Conveniently Located.

Handwashing sinks shall be conveniently located as specified in §228.148(a) of this title.

§228.182. Toilet Rooms, Convenience and Accessibility.

Toilet rooms shall be conveniently located and accessible to employees during all hours of operation.

§228.183. Employee Accommodations, Designated Areas.

(a) Areas designated for employees to eat, drink, and use tobacco shall be located so that food, equipment, linens, and single-service and single-use articles are protected from contamination.

(b) Lockers or other suitable facilities shall be located in a designated room or area where contamination of food, equipment, utensils, linens, and single-service and single-use articles cannot occur.

§228.184. Distressed Merchandise, Segregation and Location.

Products that are held by the permit holder for credit, redemption, or return to the distributor, such as damaged, spoiled, or recalled products, shall be segregated and held in designated areas that are separated from food, equipment, utensils, linens, and single-service and single-use articles.^P

§228.185. Receptacles, Waste Handling Units, and Designated Storage Areas.

Units, receptacles, and areas designated for storage of refuse and recyclable and returnable containers shall be located as specified in §228.152(j) of this title.

§228.186. Premises, Buildings, Systems, Rooms, Fixtures, Equipment, Devices, and Materials.

(a) Repairing. The physical facilities shall be maintained in good repair.

(b) Cleaning, frequency and restrictions.

(1) The physical facilities shall be cleaned as often as necessary to keep them clean.

(2) Except for cleaning that is necessary due to a spill or other accident cleaning shall be done during periods when the least amount of food is exposed such as after closing.

(c) Cleaning floors, dustless methods.

(1) Except as specified in paragraph (2) of this subsection, only dustless methods of cleaning shall be used, such as wet cleaning, vacuum cleaning, mopping with treated dust mops, or sweeping using a broom and dust-arresting compounds.

(2) Spills or drippage on floors that occur between normal floor cleaning times may be cleaned:

(A) without the use of dust-arresting compounds; and

(B) in the case of liquid spills or drippage, with the use of a small amount of absorbent compound such as sawdust or diatomaceous earth applied immediately before spot cleaning.

(d) Cleaning ventilation systems, nuisance and discharge prohibition.

(1) Intake and exhaust air ducts shall be cleaned and filters changed so they are not a source of contamination by dust, dirt, and other materials.

(2) If vented to the outside, ventilation systems may not create a public health hazard or nuisance or unlawful discharge.

(e) Cleaning maintenance tools, preventing contamination. Food preparation sinks, handwashing sinks, and warewashing equipment may not be used for the cleaning of maintenance tools, the preparation or holding of maintenance materials, or the disposal of mop water and similar liquid wastes.^p

(f) Drying mops. After use, mops shall be placed in a position that allows them to air-dry without soiling walls, equipment, or supplies.

(g) Absorbent materials on floors, use limitation. Except as specified in subsection (c)(2) of this section, sawdust, wood shavings, granular salt, baked clay, diatomaceous earth, or similar materials may not be used on floors.

(h) Cleaning of Plumbing Fixtures. Plumbing fixtures such as handwashing sinks, toilets, and urinals shall be cleaned as often as necessary to keep them clean.

(i) Closing toilet room doors. Except during cleaning and maintenance operations toilet room doors as specified in §228.174(d) of this title shall be kept closed.

(j) Using dressing rooms and lockers.

(1) Dressing rooms shall be used by employees if the employees regularly change their clothes in the establishment.

(2) Lockers or other suitable facilities shall be used for the orderly storage of employee clothing and other possessions.

(k) Controlling pests. The presence of insects, rodents, and other pests shall be controlled to eliminate their presence on the premises by:

(1) routinely inspecting incoming shipments of food and supplies;

(2) routinely inspecting the premises for evidence of pests;

(3) using methods, if pests are found, such as trapping devices or other means of pest control as specified in §228.204(b) and §228.208(b) and (c) of this title;^{pr} and

(4) eliminating harborage conditions.

(l) Removing dead or trapped birds, insects, rodents, and other pests. Dead or trapped birds, insects, rodents, and other pests shall be removed from control devices and the premises at a frequency that prevents their accumulation, decomposition, or the attraction of pests.

(m) Storing maintenance tools. Maintenance tools such as brooms, mops, vacuum cleaners, and similar items shall be:

(1) stored so they do not contaminate food, equipment, utensils, linens, and single-service and single-use articles; and

(2) stored in an orderly manner that facilitates cleaning the area used for storing the maintenance tools.

(n) Maintaining premises, unnecessary items and litter. The premises shall be free of:

(1) items that are unnecessary to the operation or maintenance of the establishment such as equipment that is nonfunctional or no longer used; and

(2) litter.

(o) Prohibiting animals.

(1) Except as specified in paragraphs (2) and (3) of this subsection, live animals may not be allowed on the premises of a food establishment.

(2) Live animals may be allowed in the following situations if the contamination of food, clean equipment, utensils, linens, and unwrapped single-service and single-use articles cannot result:

(A) edible fish or decorative fish in aquariums, shellfish or crustaceans on ice or under refrigeration, and shellfish and crustaceans in display tank systems;

(B) patrol dogs accompanying police or security officers in offices and dining, sales, and storage areas, and sentry dogs running loose in outside fenced areas;

(C) in areas that are not used for food preparation and that are usually open for customers, such as dining and sales areas, service animals that are controlled by the disabled employee or person, or service animals in training when accompanied by an approved trainer if a health or safety hazard will not result from the presence or activities of the service animal;

(D) pets in the common dining areas of institutional care facilities such as nursing homes, assisted living facilities, group homes, or residential care facilities at times other than during meals if:

(i) effective partitioning and self-closing doors separate the common dining areas from food storage or food preparation areas;

(ii) condiments, equipment, and utensils are stored in enclosed cabinets or removed from the common dining areas when pets are present; and

(iii) dining areas including tables, countertops, and similar surfaces are effectively cleaned before the next meal service; and

(E) in areas that are not used for food preparation, storage, sales, display, or dining, in which there are caged animals or animals that are similarly confined, such as in a variety store that sells pets or a tourist park that displays animals.

(3) Live or dead fish bait may be stored if contamination of food, clean equipment, utensils, linens, and unwrapped single-service and single-use articles cannot result.

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

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For further information, please call: (512) 776-6972



SUBCHAPTER G. POISONOUS OR TOXIC MATERIALS

25 TAC §§228.201 - 228.213

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §437.0056, which requires the department to adopt rules for granting and maintaining retail food permits in areas not regulated by counties and public health districts; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The new sections affect Health and Safety Code, Chapters 437 and 1001; and Government Code, Chapters 531 and 2001.

§228.201. Original Containers, Identifying Information, Prominence.

Containers of poisonous or toxic materials and personal care items shall bear a legible manufacturer's label.^P

§228.202. Working Containers, Common Name.

Working containers used for storing poisonous or toxic materials such as cleaners and sanitizers taken from bulk supplies shall be clearly and individually identified with the common name of the material.^P

§228.203. Storage, Separation.

Poisonous or toxic materials shall be stored so they cannot contaminate food, equipment, utensils, linens, and single-service and single-use articles by:

(1) separating the poisonous or toxic materials by spacing or partitioning;^P and

(2) locating the poisonous or toxic materials in an area that is not above food, equipment, utensils, linens, and single-service or single-use articles. This paragraph does not apply to equipment and utensil cleaners and sanitizers that are stored in warewashing areas for availability and convenience if the materials are stored to prevent contamination of food, equipment, utensils, linens, and single-service and single-use articles.^P

§228.204. Presence and Use.

(a) Restriction.

(1) Only those poisonous or toxic materials that are required for the operation and maintenance of a food establishment, such as for the cleaning and sanitizing of equipment and utensils and the control of insects and rodents, shall be allowed in a food establishment.^P

(2) Paragraph (1) of this subsection does not apply to packaged poisonous or toxic materials that are for retail sale.

(b) Conditions of use. Poisonous or toxic materials shall be:

(1) used according to:

(A) law and this chapter;^P

(B) manufacturer's use directions included in labeling, and, for a pesticide, manufacturer's label instructions that state that use is allowed in a food establishment;^P

(C) the conditions of certification, if certification is required, for use of the pest control materials;^P and

(D) additional conditions that may be established by the regulatory authority;^P and

(2) applied so that:

(A) a hazard to employees or other persons is not constituted;^P and

(B) contamination including toxic residues due to drip, drain, fog, splash or spray on food, equipment, utensils, linens, and single-service and single-use articles is prevented, and for a restricted use pesticide, this is achieved by:^P

(i) removing the items;^P

(ii) covering the items with impermeable covers;^P or

(iii) taking other appropriate preventive actions;^P

and

(iv) cleaning and sanitizing equipment and utensils after the application.^P

(3) A restricted use pesticide shall be applied only by an applicator certified as defined in 7 USC 136(e), Certified Applicator of the Federal Insecticide, Fungicide and Rodenticide Act, or a person under the direct supervision of a certified applicator.^P

§228.205. Container Prohibitions, Poisonous or Toxic Material Containers.

A container previously used to store poisonous or toxic materials may not be used to store, transport, or dispense food.^P

§228.206. Chemicals.

(a) Sanitizers, criteria. Chemical sanitizers, including chemical sanitizing solutions generated on site, and other chemical antimicrobials applied to food-contact surfaces shall:

(1) Meet the requirements specified in 40 CFR 180.940. Tolerance exemptions for active and inert ingredients for use in antimicrobial formulations (Food-contact surface sanitizing solutions);^P or

(2) Meet the requirements as specified in 40 CFR 180.2020. Pesticide Chemicals Not Requiring a Tolerance or Exemption from Tolerance-Non-food determinations.^P

(b) Chemical for Washing, Treatment, Storage, and Processing Fruits and Vegetables, Criteria.

(1) Chemicals, including those generated on-site, used to wash or peel raw, whole fruits and vegetables shall:

(A) be an approved food additive listed for this intended use;^P

(B) be generally recognized as safe (GRAS) for this intended use;^P or

(C) be the subject of an effective food contact notification for this intended use (only effective for the manufacturer or supplier identified in the notification);^P and

(D) meet the requirements in 40 CFR 156 Labeling Requirements for Pesticide and Devices.^P

(2) Ozone as an antimicrobial agent used in the treatment, storage, and processing of fruits and vegetables in a food establishment shall meet the requirements specified in 21 CFR §173.368, Ozone.^P

(c) Boiler water additives, criteria. Chemicals used as boiler water additives shall meet the requirements specified in 21 CFR §173.310, Boiler Water Additives.^P

(d) Drying agents, criteria. Drying agents used in conjunction with sanitization shall:

(1) contain only components that are listed as one of the following:

(A) generally recognized as safe for use in food as specified in 21 CFR 182, Substances Generally Recognized as Safe, or 21 CFR 184, Direct Food Substances Affirmed as Generally Recognized as Safe;^P

(B) generally recognized as safe for the intended use as specified in 21 CFR 186, Indirect Food Substances Affirmed as Generally Recognized as Safe;^P

(C) generally recognized as safe for the intended use as determined by experts qualified in scientific training and experience to evaluate the safety of substances added, directly or indirectly, to FOOD as described in 21 CFR §170.30 Eligibility for classification as generally recognized as safe (GRAS);^P

(D) subject of an effective Food Contact Notification as described in the Federal Food Drug and Cosmetic Act (FFDCA) §409(h);^P or

(E) approved for use as a drying agent under a prior sanction as described in the FFDCA §201(s)(4);^P

(F) specifically regulated as an indirect food additive for use as a drying agent as specified in 21 CFR 175 - 178;^P

(G) approved for use as a drying agent under the threshold of regulation process established by 21 CFR §170.39, Threshold of regulation for substances used in food-contact articles;^P and

(2) when sanitization is with chemicals, the approval required in paragraph (1)(E) or (G) of this subsection or the regulation as an indirect food additive required in paragraph (1)(F) of this subsection, shall be specifically for use with chemical sanitizing solutions.^P

§228.207. Lubricants, Incidental Food Contact, Criteria.

Lubricants shall meet the requirements specified in 21 CFR §178.3570, Lubricants with incidental food contact, if they are used on food-contact surfaces, on bearings and gears located on or within food-contact surfaces, or on bearings and gears that are located so that lubricants may leak, drip, or be forced into food or onto food-contact surfaces.^P

§228.208. Pesticides.

(a) Restricted use pesticides, criteria. Restricted use pesticides specified in §228.204(b)(3) of this title shall meet the requirements specified in 40 CFR 152, Subpart I, Classification of Pesticides.^P

(b) Rodent bait stations. Rodent bait shall be contained in a covered, tamper-resistant bait station.^P

(c) Tracking powders, pest control and monitoring.

(1) Except as specified in paragraph (2) of this subsection, a tracking powder pesticide may not be used in a food establishment.^P

(2) If used, a nontoxic tracking powder such as talcum or flour may not contaminate food, equipment, utensils, linens, and single-service and single-use articles.

§228.209. Medicines.

(a) Restriction and storage.

(1) Except for medicines that are stored or displayed for retail sale, only those medicines that are necessary for the health of employees shall be allowed in a food establishment.^P

(2) Medicines that are in a food establishment for the employees' use shall be labeled as specified in §228.201 of this title and located to prevent the contamination of food, equipment, utensils, linens, and single-service and single-use articles.^P

(b) Refrigerated medicines, storage. Medicines belonging to employees or to children in a day care center that require refrigeration and are stored in a food refrigerator shall be:

(1) stored in a package or container and kept inside a covered, leak-proof container that is identified as a container for the storage of medicines;^P and

(2) located so they are inaccessible to children.^P

§228.210. First Aid Supplies, Availability.

A first aid kit shall be provided.

§228.211. First Aid Supplies, Storage.

First aid supplies that are in a food establishment for the employees' use shall be:

(1) labeled as specified in §228.201 of this title;^P and

(2) stored in a kit or a container that is located to prevent the contamination of food, equipment, utensils, and linens, and single-service and single-use articles.^P

§228.212. Other Personal Care Items, Storage.

Except as specified in §228.209(b) and §228.211 of this title, employees shall store their personal care items in facilities as specified in §228.187(j)(2) of this title.

§228.213. Storage and Display, Separation.

Poisonous or toxic materials shall be stored and displayed for retail sale so they cannot contaminate food, equipment, utensils, linens, and single-service and single-use articles by:

(1) separating the poisonous or toxic materials by spacing or partitioning;^P and

(2) locating the poisonous or toxic materials in an area that is not above food, equipment, utensils, linens, and single-service or single-use articles.^P

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

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SUBCHAPTER H. REQUIREMENTS APPLICABLE TO CERTAIN ESTABLISHMENTS

25 TAC §§228.221 - 228.225

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §437.0056, which requires the department to adopt rules for granting and maintaining retail food permits in areas not regulated by counties and public health districts; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The new sections affect Health and Safety Code, Chapters 437 and 1001; and Government Code, Chapters 531 and 2001.

§228.221. Mobile Food Units.

(a) Mobile Food Unit provisions.

(1) General. Except as otherwise provided in this paragraph and in paragraph (2) of this subsection, the regulatory authority may impose additional requirements to protect against health hazards related to the conduct of the food establishment as a mobile operation, may prohibit the sale of some or all time/temperature control for safety (TCS) food, and when no health hazard will result, may waive or modify requirements of this rule relating to physical facilities, except those requirements as specified in paragraphs (7) and (8) of this subsection; subsection (c)(1)(A) - (E) of this section and §§228.71 - 228.75 of this title. The regulatory authority shall require a Mobile Food Unit operator to demonstrate that the vehicle is readily moveable.

(2) Restricted operation. Mobile Food Units that serve only food that is prepared, packaged in individual servings, transported and stored under conditions meeting the requirements of this chapter, or beverages that are non-time/temperature control for safety (NTCS) food and are dispensed from covered urns or other protected equipment, need not comply with the requirements of this chapter relating to the necessity of water and sewage systems nor to those requirements relating to the cleaning and sanitization of equipment and utensils if the required equipment for cleaning and sanitization exists at its central preparation facility.

(3) Readily movable. The regulatory authority prohibits alteration, removal, attachments, additions, placement or change in, under, or upon the Mobile Food Unit that would prevent or otherwise reduce ready mobility. A regulatory authority may require a Mobile Food Unit to come, on an annual basis or as often as required, to a location designated by the regulatory authority as proof that the Mobile Food Unit is readily moveable.^{PF}

(4) Initial Permitting Inspection. The regulatory authority shall require a Mobile Food Unit to come to a location designated by the authority. The mobile unit must be totally operable at time of inspection, including but not limited to handwash/warewash facilities, re-

frigeration and wastewater disposal. Required documentation to have available includes:

(A) Certified Food Manager Certification.^{PF}

(B) Central Preparation Facility Authorization (if required). A signed letter of authorization is required, to verify facility use, if the Central Preparation Facility is not owned by the mobile unit operator.

(C) Central Preparation Facility Inspection Report. A copy of the most current health inspection of the central preparation facility must be maintained on the mobile unit at all times.

(D) Servicing Area Authorization. A signed letter of authorization is required, to verify service area use, if the servicing area is not owned by the mobile unit operator.

(E) Menu of all food items to be sold.

(5) Single-service articles. Mobile Food Units shall provide only single service articles for use by the consumer.

(6) Equipment, numbers and capacities.

(A) Cooling, heating, and holding capacities. Equipment for cooling and heating food, and holding cold and hot food, shall be sufficient in number and capacity to provide food temperatures as specified under Subchapter C of this chapter.^{PF}

(B) Manual warewashing, sink compartment requirements.^{PF}

(i) A sink with at least three compartments shall be provided for manually washing, rinsing, and sanitizing equipment and utensils as specified in §228.107(b)(1) of this title.^{PF}

(ii) Sink compartments shall be large enough to accommodate immersion of the largest equipment and utensils as specified in §228.107(b)(2) of this title.^{PF}

(C) At least one handwashing sink shall be available for convenient use by employees and properly provisioned in accordance with §228.175(b) - (c) of this title.^{PF}

(7) Mobile water system materials, design, and operation. Mobile Food Unit water systems shall meet the requirements of §228.149(f) of this title.

(8) Mobile Food Unit tank inlet. A Mobile Food Unit's water tank inlet shall be:

(A) 19.1 mm (3/4 inch) in inner diameter or less; and

(B) Provided with a hose connection of a size or type that will prevent its use for any other service.

(C) Fill hose and water holding tank shall be labeled as "Potable Water."

(9) Sewage and other liquid waste.

(A) Waste retention. If liquid waste results from operation of a Mobile Food Unit, the waste shall be stored in a permanently installed retention tank.

(B) Capacity and drainage. A leak-proof sewage holding tank in a Mobile Food Unit shall be:

(i) sized at least 15% larger in capacity than the water supply tank; and

(ii) sloped to a drain that is 25 millimeters (1 inch) in inner diameter or greater, equipped with a shut-off valve.

(C) All connections on the vehicle for servicing the Mobile Food Unit waste disposal facilities shall be of a different size or type than those used for supplying potable water to the Mobile Food Unit.

(D) Discharge liquid waste shall not be discharged from the retention tank while the Mobile Food Unit is in motion.^P

(E) Flushing a waste retention tank. A tank for liquid waste retention shall be thoroughly flushed and drained in a sanitary manner.^P

(F) Removing Mobile Food Unit wastes. Sewage and other liquid wastes shall be removed from a Mobile Food Unit at an approved waste servicing area or by a sewage transport vehicle in such a way that a public health hazard or nuisance is not created.^P

(G) Liquid waste holding tank shall be labeled as "waste water"

(10) Mobile Food Unit water and wastewater exemption.

(A) A roadside vendor that sells only prepackaged food is exempt from the requirements of this chapter relating to water and wastewater.

(B) A Mobile Food Unit that prepares food requiring no water for operations and no hand contact with food is exempt from the requirements of this chapter relating to water and wastewater if the required cleaning and sanitization equipment exist at its central preparation facility. Chemically treated towelettes for handwashing may be used as specified in §228.147(a)(3) of this title.^P

(11) Toilet rooms, convenience and accessibility. Toilet rooms shall be conveniently located and accessible to employees during all hours of operation.

(b) Central preparation facility.

(1) Supplies, cleaning, and servicing operations. Mobile Food Units shall operate from a central preparation facility or other fixed food establishment and shall report to such location daily for supplies and for cleaning and servicing operations.

(2) Construction. The central preparation facility or other fixed food service establishment, used as a base of operation for Mobile Food Units, shall be constructed and operated in compliance with the requirements of Subchapter F of this chapter.

(c) Servicing area and operations.

(1) Protection.

(A) A Mobile Food Unit servicing area shall include at least overhead protection for any supplying, cleaning, or servicing operation. Those areas used only for the loading of water and/or the discharge of sewage and other liquid waste, through the use of a closed system of hoses, need not be provided with overhead protection.

(B) Within the servicing area, the location provided for the flushing and drainage of liquid wastes shall be separate from the location provided for potable water servicing and for the loading and unloading of food and related supplies.^P

(C) A servicing area will not be required where only packaged food is placed on the Mobile Food Unit or where Mobile Food Units do not contain waste retention tanks.

(D) The surface of the servicing area shall be constructed of a smooth nonabsorbent material, such as concrete or machine-laid asphalt and shall be maintained in good repair, kept clean, and be graded to drain.

(E) Potable water servicing equipment shall be installed in the servicing area according to the Plumbing Code and shall be stored and handled in a way that protects the water and equipment from contamination.^{Pf}

(2) Construction exemption. The construction of the walls and ceilings of the servicing area is exempted from the provisions of §228.173(a) of this title.

§228.222. Temporary Food Establishments.

(a) General. The regulatory authority may impose additional requirements to protect against health hazards related to the conduct of the temporary food establishment, may prohibit the sale of some or all time/temperature control for safety (TCS) foods, and when no health hazard will result, may waive or modify requirements of this chapter.

(1) Foods that are not prepared on site or that require extensive preparation or cooking must be prepared at a licensed food establishment.^P

(2) Each temporary establishment shall have at least one person on-site who has an accredited certified food manager or food handler certification.^{Pf}

(b) Food temperatures. All food temperature requirements shall be met as contained in Subchapter C of this chapter.^P

(c) Ice. Ice that is consumed or that contacts food shall have been made under conditions meeting the requirements of Subchapter C of this chapter. The ice shall be obtained only in blocked, chipped, crushed, or cubed form and in single-use safe plastic or wet-strength paper bags filled and sealed at the point of manufacture. Ice for consumption shall be held in the bags until it is dispensed, and be dispensed in a way that protects it from contamination.^P

(d) Equipment and utensils.

(1) Design and construction. Equipment and utensils shall be designed and constructed to be durable and to retain their characteristic qualities under normal use conditions.^{Pf}

(2) Location and installation. Equipment shall be located and installed and cleaned in a way that prevents food contamination and that also facilitates cleaning of the establishment.

(3) Hot and cold holding equipment. Equipment for cooling or heating food, and holding cold or hot food shall be adequate in number and capacity to provide food temperatures as specified in §§228.71 - 228.75 of this title.^{Pf}

(4) Protection from contamination. Food-contact surfaces of equipment shall be protected from contamination by consumers and other sources. Where necessary to prevent contamination, effective shields for such equipment shall be provided.

(5) Alternative manual warewashing. Alternative manual warewashing equipment, such as receptacles that substitute for the compartments of a 3-compartment sink, may be used when there are special cleaning needs or constraints and the regulatory authority has approved the use of alternative equipment. Each compartment shall be large enough to immerse the largest piece of equipment that will be used. A means to heat water must also be provided.^{Pf}

(e) Single-service articles. A temporary food establishment shall provide only single-service articles for use by the consumer.

(f) Water. Water from an approved source shall be made available in a temporary food establishment for food preparation, handwashing, and for cleaning and sanitizing utensils and equipment. Water need not be under pressure but shall come from approved sources which include: commercially bottled drinking water, closed portable water

containers, enclosed vehicular water tanks, on-premise water storage tanks, or piping, tubing or hoses connected to an approved source.^P

(g) Wet storage. Packaged food may not be stored in direct contact with ice or water if the food is subject to the entry of water because of the nature of its packaging, wrapping, or container or its positioning in the ice or water.^P

(h) Sewage. All waste water and sewage generated from the establishment shall be disposed of through an approved sanitary sewage system that is:

(1) A public sewage system;^P or

(2) An individual sewage disposal system that is sized, constructed, maintained, and operated according to 30 TAC Chapter 285, On-Site Sewage Facilities.

(i) Handwashing. Handwashing facilities shall include a container with a spigot that provides potable, clean, warm water; a wastewater container; soap; disposable towels; and a waste receptacle. Handwashing facilities are not required if the only food items offered are commercially pre-packaged foods that are dispensed in their original containers.^{Pf}

(j) Floors. If graded to drain, a floor may be concrete, machine-laid asphalt, dirt, or gravel covered with mats, ply-wood, removable platforms, duckboards if covered with mats, or other suitable materials approved by the regulatory authority that effectively control dust and mud.

(k) Ceilings and outer openings of food preparation areas.

(1) Wall and Ceilings. Wall and ceilings shall be made of wood, canvas, or other materials that protect the interior of the establishment from the weather, windblown dust, birds, and debris.

(2) Outer openings. The outer openings shall be protected against entry of insects and rodents by:

(A) 16 mesh to 25.4 millimeters (16 mesh to 1 inch) screens;

(B) properly designed and installed air curtains; or

(C) other effective means.

(3) Exclusion provision. Paragraph (2) of this subsection does not apply if flying insects and other pests are absent due to the location of the establishment or other limiting condition.

§228.223. Bed and Breakfast.

(a) General. A Bed and Breakfast:

(1) shall comply with these minimum requirements of this section if the facility:

(A) has more than seven rooms for rent; or

(B) provides food service other than breakfast to overnight guests

(2) that provides food service to others than to its overnight guests must comply with the rules and regulations applicable to retail food establishments.^{Pf}

(3) Limited Bed and Breakfast:

(A) has seven or fewer rooms for rent;

(B) serves only breakfast to overnight guests;

(C) is not a retail food establishment; and

(D) complies with subsection (b) of this section.

(b) Certified food protection manager. The owner or manager shall successfully complete a food manager's certification course accredited by this department.^{Pf}

(c) Food supplies. Food shall be obtained from approved sources in accordance with §228.62 of this title, shall be in sound condition, and be safe for human consumption.^P

(d) Food preparation and protection.

(1) Food preparation and protection. Food shall be prepared and protected in accordance with Subchapter C of this chapter.^P

(2) Temperature requirements. All food temperature requirements shall be met as contained in Subchapter C of this chapter.^P

(e) Cleaning and sanitizing.

(1) Manual. A three compartment sink shall be used if washing, rinsing and sanitizing of utensils and equipment is done manually; or a two compartment sink may be utilized if single service tableware is provided, and if an approved detergent sanitizer is used.^{Pf}

(2) Mechanical. Cleaning and sanitizing may be done by spray-type or immersion dishwashing machines or by any other type of machine or device if it is demonstrated that it thoroughly cleans and sanitizes equipment and utensils either by chemical or mechanical sanitization.^{Pf}

(f) Personal hygiene. Employees shall conform to good hygienic practices as required in Subchapter B of this chapter.^{Pf}

(g) Employee restrooms. A restroom shall be available for use by employees.

(h) Equipment and utensil design and construction. All equipment and utensils shall be constructed of safe materials and maintained in good repair.^{Pf}

(i) Handsinks.

(1) Location. An accessible and conveniently located handwash sink shall be provided in or immediately adjacent to food preparation areas and restrooms.^{Pf}

(2) Intended use. Handsink(s) shall be used for no other purpose other than handwashing.^{Pf}

(j) Food-contact surfaces. All food contact surfaces, counters, or work surfaces in the establishment shall be smooth, non-absorbent and easily cleanable.^{Pf}

(k) Insect proof/rodent proof.

(1) Construction. Food service preparation and storage areas shall be constructed and maintained to prevent the entry of pests and other vermin.

(2) Chemical control. Pesticides and rodenticides shall be applied according to §228.208 of this title.^P

(l) Equipment. Equipment shall be provided to maintain time/temperature control for safety (TCS) foods at the temperatures required in accordance with Subchapter C of this chapter.^{Pf}

(m) Garbage receptacles. Impervious receptacles shall be provided for storage of garbage and refuse.

(n) Sewage. Sewage shall be disposed through an approved facility that is:

(1) a public sewage system;^P or

(2) an individual sewage disposal system that is sized, constructed, maintained, and operated according to law in 30 TAC Chapter 285, On-Site Sewage Facilities.^P

(o) Water supply. Hot and cold water under pressure^{Pf} shall be provided and shall be from an approved source that meets the standards in accordance with:

(1) state drinking water quality standards in accordance with 30 TAC §§290.38 - 290.47 (relating to Rules and Regulations for Public Water Systems), and 30 TAC §§290.101 - 290.114, 290.117 - 290.119, 290.121, and 290.122 (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Systems);^P or

(2) private water system standards as provided in Subchapter J of this chapter.^P

§228.224. Outfitter Operations.

(a) General. Requirements in this section are specific for Outfitter Operations. The regulatory authority may impose additional requirements to protect against health hazards that may be specific to these operations.

(b) Food supplies. Food supplies, including ice, shall be obtained from approved sources. No home prepared products shall be offered.^P

(c) Food temperatures. All food temperature requirements shall be met as contained in Subchapter C of this chapter.^P

(d) Food preparation and protection for excursions.

(1) Except for paragraphs (2) - (4) of this subsection. All food shall be prepared and protected in Central Preparation Facility and meet requirements contained in Subchapter C of this chapter.^P

(2) Only commercially prepackaged ready to eat foods or ready to eat foods that have been prepared and packaged with no cooking at Central Preparation Facility may be served.^P

(3) Raw time/temperature control for safety (TCS) foods may be cooked on-site if cooked and immediately served.^P

(4) All food must be stored to protect from contamination as contained in Subchapter C of this chapter.^P

(5) TCS foods that required complex preparation must be served within the first 24 hours of the excursion departure time.^P

(6) Leftovers. Leftovers shall not be re-heated or re-served.

^P

(e) Warewashing. Alternative manual warewashing equipment, such as receptacles that substitute for the compartments of a multi-compartment sink, may be used for washing and sanitizing utensils when approved by the regulatory authority. Outfitters without effective facilities for cleaning and sanitizing tableware shall only provide single-service articles for use by food employees and consumers.^{Pf}

^{Pf}

(f) Ice usage.

(1) Ice that is used for cooling food may not be used for human consumption.^P

(2) Ice used for human consumption must be stored in a clean sanitized container that is properly constructed and maintained in good repair.^{Pf}

(g) Potable water.

(1) Potable water shall be used on excursions for human consumption, food preparation, handwashing, and for cleaning and sanitizing utensils and equipment;^P and

(2) must be stored in a clean sanitized container that is easily cleanable and good condition.^{Pf}

(h) Handwashing. Handwashing facilities shall include a container with a spigot that can be turned on to allow potable, clean, water; a wastewater container; soap; disposable towels; and a waste receptacle. Handwashing facilities are not required if the only food items offered are commercially prepackaged foods that are dispensed in their original containers.^{Pf}

(i) Equipment. All equipment and utensils intended for food contact shall be approved for food use.^{Pf}

(j) Thermometers. Thermometers shall be provided, accurate, and accessible during excursions.^{Pf}

(k) Garbage receptacles. Impervious receptacles shall be provided for storage of garbage and refuse.

(l) Certified food protection manager. If food other than prepackaged ready to eat food is being served, at least one guide during the excursion shall successfully complete a food manager's certification course accredited by this department.^{Pf}

(m) An outfitter operation must have a central preparation facility as specified in Subchapter A of this chapter.

§228.225. Self-Service Food Market.

(a) Self-Service Food Markets shall comply with the minimum standards of this section.

(b) Self-Service Food Markets shall:

(1) be equipped with 24/7 video surveillance records of consumers viewing, selecting, handling, and purchasing products that identify these customers. Video surveillance records must be maintained and available for the regulatory authority;^{Pf} and

(2) provide information to the regulatory authority as to the responsible party that will be available for routine inspections.^{Pf}

(c) Pre-packaged food sold at a Self-Service Food Market shall:

(1) meet the labeling requirements as specified in §228.62(a)(3) of this title;^P and

(2) be tamper evident.^P

(d) A food specified in §228.75(g)(1) or (2) or (h) of this title shall be discarded if it:

(1) exceeds the temperature or time specified in §228.75(g)(1) and (2) of this title, except time that the product is frozen;^P

(2) is in a container or package that does not bear an expiration date or day;^P or

(3) is not appropriately marked with a date or day that exceeds the temperature and time combination as specified in §228.75(g)(1) and (2) of this title.^P

(e) All self-service food market display units offering refrigerated, time/temperature controlled for safety (TCS) food shall have an automatic shut-off control or a plan approved by the regulatory authority that prevents the market or market equipment from dispensing food if:

(1) there is a power failure, mechanical failure, or other condition that results in failure of the equipment to maintain food temperatures as specified under Subchapter D of this chapter;^{PF} and

(2) where a condition specified in paragraph (1) of this subsection occurs, until the equipment is serviced and restocked with food that has been maintained at temperatures specified on Subchapter C of this chapter.^{PF}

(f) When a condition specified in subsection (e)(1) of this section occurs, the ambient temperature may not exceed forty-one degrees Fahrenheit (five degrees Celsius) for more than thirty minutes immediately after the display is filled, serviced, or restocked.^{PF}

(g) All self-service food market display units offering TCS food, shall be:

(1) equipped with a self-closing door;^{PF} or

(2) maintained at forty-one degrees Fahrenheit (five degrees Celsius) if it is an open display unit.^{PF}

(h) Self-Service Food Markets shall have a sign readily visible from the automated payment kiosk stating:

(1) the name of the business to whom complaints/ comments shall be addressed,

(2) the address of the business responsible for the market, and

(3) the responsible business' telephone number and email or web information, when applicable.

(i) When a retail food establishment operating as a Self-Service Food Market incorporates the provision in this section, they will not be required to maintain a person in charge onsite as specified in §228.34 of this title.^{PF}

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

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SUBCHAPTER I. COMPLIANCE

25 TAC §§228.241 - 228.257

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §437.0056, which requires the department to adopt rules for granting and maintaining retail food permits in areas not regulated by counties and public health districts; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The new sections affect Health and Safety Code, Chapters 437 and 1001; and Government Code, Chapters 531 and 2001.

§228.241. Use for Intended Purpose.

Public health protection.

(1) The regulatory authority shall apply this chapter to promote its underlying purpose, as specified in §228.1 of this title, of safeguarding public health and ensuring that food is safe, unadulterated, and honestly presented when offered to the consumer.

(2) In enforcing the provisions of this chapter, the regulatory authority shall assess existing facilities or equipment that were in use before the effective date of this chapter based on the following considerations:

(A) whether the facilities or equipment are in good repair and capable of being maintained in a sanitary condition;

(B) whether food-contact surfaces comply with §228.101 of this title;

(C) whether the capacities of cooling, heating, and holding equipment are sufficient to comply with §228.107(a) of this title; and

(D) the existence of a documented agreement with the permit holder that the facilities or equipment will be replaced as specified in §228.248(7) of this title.

§228.242. Additional Requirements.

Preventing health hazards, provision for conditions not addressed.

(1) Option to impose additional requirements. If necessary to protect against public health hazards or nuisances, the regulatory authority may impose specific requirements in addition to the requirements contained in this chapter that are authorized by law.

(2) Required documentation. The regulatory authority shall document the conditions that necessitate the imposition of additional requirements and the underlying public health rationale. The documentation shall be provided to the permit applicant or permit holder and a copy shall be maintained in the regulatory authority's file for the food establishment.

§228.243. Variances.

(a) Modifications and waivers. The regulatory authority may grant a variance by modifying or waiving the requirements of this chapter if in the opinion of the regulatory authority a health hazard or nuisance will not result from the variance. If a variance is granted, the regulatory authority shall retain the information specified in subsection (b) of this section in its records for the food establishment.

(b) Documentation of proposed variance and justification. Before a variance from a requirement of this chapter is approved, the information that shall be provided by the person requesting the variance and retained in the regulatory authority's file on the food establishment includes:

(1) a statement of the proposed variance of the rule requirement citing relevant rule section numbers;^{PF}

(2) an analysis of the rationale for how the potential public health hazards and nuisances addressed by the relevant rule sections will be alternatively addressed by the proposal;^{PF} and

(3) a HACCP plan if required as specified in §228.244(c) of this title that includes the information specified in §228.244(b) of this title, as it is relevant to the variance requested.^{PF}

(c) Conformance with approved procedures. If the regulatory authority grants a variance as specified in subsection (a) of this section,

or a HACCP plan is otherwise required as specified in §228.244(c) of this title, the food establishment shall:

(1) comply with the HACCP plans and procedures that are submitted and approved as specified in §228.244(d) of this title as a basis for the modification or waiver;^{Pf} and

(2) maintain and provide to the regulatory authority, upon request, records specified in §228.244(d)(4) and (5) of this title that demonstrate that the following are routinely employed:

(A) procedures for monitoring critical control points;^{Pf}

(B) monitoring of the critical control points;^{Pf}

(C) verification of the effectiveness of an operation or process;^{Pf} and

(D) necessary corrective actions if there is failure at a critical control point.^{Pf}

§228.244. Facility and Operating Plans.

(a) When plans are required. A permit applicant or permit holder may be required to submit to the regulatory authority properly prepared plans and specifications for review and approval before:

(1) the construction of a food establishment;^{Pf}

(2) the conversion of an existing structure for use as a food establishment;^{Pf} or

(3) the remodeling of a food establishment or a change of type of food establishment or food operation as specified in Chapter 229, Subchapter Q of this title (relating to License/Permit Applications), or under the conditions set by the regulatory authority, if the regulatory authority determines that plans and specifications are necessary to ensure compliance with this code.^{Pf}

(b) Contents of the plans and specifications. The plans and specifications for a food establishment, including a food establishment specified in §228.244(c) of this title, shall include, as required by the regulatory authority based on the type of operation, type of food preparation, and foods prepared, the following information to demonstrate conformance with code provisions:

(1) intended menu;

(2) anticipated volume of food to be stored, prepared, and sold or served;

(3) proposed layout, mechanical schematics, construction materials, and finish schedules;

(4) proposed equipment types, manufacturers, model numbers, locations, dimensions, performance capacities, and installation specifications;

(5) evidence that standard procedures that ensure compliance with the requirements of this rule are developed or are being developed; and

(6) other information that may be required by the regulatory authority for the proper review of the proposed construction, conversion or modification, and procedures for operating a food establishment.

(c) When a HACCP plan is required.

(1) Before engaging in an activity that requires a HACCP plan, a food establishment shall submit to the regulatory authority for approval a properly prepared HACCP plan as specified in subsection (d) of this section and the relevant provisions of this chapter if:

(A) submission of a HACCP plan is required according to law;

(B) a variance is required as specified in §228.71(a)(4)(D) and §228.76, or §228.106(j)(2) of this title; or

(C) the regulatory authority determines that a food preparation or processing method requires a variance based on a plan submittal specified in §228.244(b) of this title, an inspectional finding or a variance request.

(2) A food establishment shall have a properly prepared HACCP plan as specified in subsection (d) of this section.

(3) Before engaging in reduced oxygen packaging without a variance as specified in §228.77 of this title, a food establishment shall submit a properly prepared HACCP plan to the regulatory authority.

(d) Contents of a HACCP plan. For a food establishment that is required in subsection (a) of this section to have a HACCP plan, the plan and specifications shall indicate:

(1) a categorization of the types of time/temperature control for safety (TCS) foods that are specified in the menu such as soups and sauces, salads, and bulk, solid foods such as meat roasts, or of other foods that are specified by the regulatory authority;^{Pf}

(2) a flow diagram by specific food or category type identifying critical control points and providing information on the following:

(A) ingredients, materials, and equipment used in the preparation of that food;^{Pf} and

(B) formulations or recipes that delineate methods and procedural control measures that address the food safety concerns involved;^{Pf}

(3) food employee and supervisory training plan that addresses the food safety issues of concern;^{Pf}

(4) a statement of standard operating procedures for the plan under consideration including clearly identifying:

(A) each critical control point;^{Pf}

(B) the critical limits for each critical control point;^{Pf}

(C) the method and frequency for monitoring and controlling each critical control point by the food employee designated by the person in charge;^{Pf}

(D) the method and frequency for the person in charge to routinely verify that the food employee is following standard operating procedures and monitoring critical control points;^{Pf}

(E) action to be taken by the person in charge if the critical limits for each critical control point are not met;^{Pf} and

(F) records to be maintained by the person in charge to demonstrate that the HACCP plan is properly operated and managed;^{Pf} and

(5) Additional scientific data or other information, as required by the regulatory authority, supporting the determination that food safety is not compromised by the proposal.^{Pf}

§228.245. Confidentiality, Trade Secrets.

The regulatory authority shall treat as confidential in accordance with the requirements of the Public Information Act, Texas Government Code, Chapter 552, information that meets the criteria specified in law for a trade secret and is contained on inspection report forms and in the plans and specifications submitted as specified in §228.244(b) and (d) of this title.

§228.246. Construction Inspection and Approval, Preoperational Inspections.

The regulatory authority may conduct one or more preoperational inspections to verify that the food establishment is constructed and equipped in accordance with the approved plans and approved modifications of those plans, has established standard operating procedures as specified in §228.244(b)(5) of this title, and is in compliance with this chapter.

§228.247. Permit Requirement, Prerequisite for Operation.

A person may not operate a food establishment without a valid permit or license to operate issued by the regulatory authority.^{PE}

§228.248. Conditions of Retention, Responsibilities of the Permit Holder.

Upon acceptance of the permit issued by the regulatory authority, the permit holder in order to retain the permit shall:

(1) post the permit in a location in the food establishment that is conspicuous to consumers;

(2) comply with the provisions of these rules including the conditions of a granted variance as specified in §228.243(c) and §228.244(b) of this title;

(3) if a food establishment is required in §228.244(c) of this title to operate under a HACCP plan, comply with the plan as specified in §228.243(c) of this title;

(4) immediately contact the regulatory authority to report an illness of a food employee as specified in §228.35(2) of this title;

(5) immediately discontinue operations and notify the regulatory authority if an imminent health hazard may exist as specified in §228.252(a) of this title;

(6) allow representatives of the regulatory authority access to the food establishment as specified in §228.250(b) of this title;

(7) replace existing facilities and equipment specified in §228.241 of this title with facilities and equipment that comply with these rules if:

(A) the regulatory authority directs the replacement because the facilities and equipment constitute a public health hazard or nuisance or no longer comply with the criteria upon which the facilities and equipment were accepted;

(B) the regulatory authority directs the replacement of the facilities and equipment because of a change of ownership; or

(C) the facilities and equipment are replaced in the normal course of operation;

(8) comply with directives of the regulatory authority including time frames for corrective actions specified in inspection reports, notices, orders, warnings, and other directives issued by the regulatory authority in regard to the permit holder's food establishment or in response to community emergencies;

(9) accept notices issued and served by the regulatory authority according to law;

(10) be subject to the administrative, civil, injunctive, and criminal remedies authorized in law for failure to comply with these rules or a directive of the regulatory authority, including time frames for corrective actions specified in inspection reports, notices, orders, warnings, and other directives; and

(11) Notify customers that a copy of the most recent establishment inspection report is available upon request by posting a sign

or placard in a location in the food establishment that is conspicuous to customers or by another method acceptable to the regulatory authority.

§228.249. Inspection Frequency, Performance-based and Risk Based.

(a) The regulatory authority shall inspect each food establishment at least once every six months.

(b) If the regulatory authority cannot meet this inspection frequency, frequency shall be prioritized and uniformly applied throughout the jurisdiction based upon assessment of a food establishment's history of compliance with these rules and the potential for causing foodborne illness by evaluating:

(1) past performance, for nonconformance with code or HACCP plan requirements that are priority items or priority foundation items;

(2) past performance, for numerous or repeat violations of code or HACCP plan requirements that are core items;

(3) past performance, for complaints investigated and found to be valid;

(4) the hazards associated with the particular foods that are prepared, stored, or served;

(5) the type of operation including the methods and extent of food storage, preparation, and service;

(6) the number of people served;

(7) whether the population served is a highly susceptible population; and

(8) any other risk factors deemed relevant to the operation by the regulatory authority.

(c) The regulatory authority should periodically inspect throughout its permit period a temporary food establishment that prepares, sells, or serves unpackaged time/temperature control for safety food and that:

(1) has improvised rather than permanent facilities or equipment for accomplishment functions such as handwashing, food preparation and protection, Food temperature control, warewashing, providing drinking water, waste retention and disposal, and insect and rodent control; or

(2) has inexperienced food employees.

§228.250. Competency of Inspectors and Access.

(a) Competency of inspectors. An individual conducting inspections of retail food establishments should be a Registered Professional Sanitarian in Texas or a Sanitarian-in-Training in Texas, as defined in §140.102 of this title, or should meet the FDA Voluntary National Retail Food Regulatory Program Standards basic curriculum and field training elements in order to:

(1) assure application of basic scientific principles, including HACCP principles of food safety, during inspections;

(2) properly conduct foodborne illness investigations;

(3) assure uniformity in the interpretations of these rules; and

(4) assure fair and uniform enforcement of these rules.

(b) Access allowed at reasonable times after due notice. After the regulatory authority presents official credentials and provides notice of the purpose of, and an intent to conduct, an inspection, the person in charge shall allow the regulatory authority to determine if

the food establishment is in compliance with these rules by allowing access to the establishment, allowing inspection, and providing information and records specified in this chapter and to which the regulatory authority is entitled according to law, during the food establishment's hours of operation and other reasonable times.

(c) Refusal, notification of right to access, and final request for access. If a person denies access to the regulatory authority, the regulatory authority shall:

(1) inform the person that:

(A) the food establishment is required to allow access to the regulatory authority as specified under this subsection;

(B) access is a condition of the acceptance and retention of a food establishment permit to operate as specified in §228.248(6) of this title; and

(C) if access is denied, an order issued by the appropriate authority allowing access, hereinafter referred to as an inspection warrant, may be obtained according to law; and

(2) make a final request for access.

(d) Refusal, reporting. If after the regulatory authority presents credentials and provides notice as specified in subsection (b) of this section, explains the authority upon which access is requested, and makes a final request for access as specified in subsection (c) of this section, the person in charge continues to refuse access, the regulatory authority shall provide details of the denial of access on an inspection report form.

(e) Inspection warrant to gain access. If denied access to a food establishment for an authorized purpose and after complying with subsection (c) of this section, the regulatory authority may issue, or apply for the issuance of, an inspection warrant to gain access as provided in law.

§228.251. *Report of Findings.*

(a) Documenting information and observations. The regulatory authority shall document on an inspection report form:

(1) administrative information about the food establishment's legal identity, street and mailing addresses, inspection date, and other information such as type of water supply and sewage disposal, status of the permit, and personnel certificates that may be required; and

(2) specific factual observations of violative conditions or other deviations from these rules that require correction by the permit holder including:

(A) failure of the person in charge to demonstrate knowledge of foodborne illness prevention, application of HACCP principles, and the requirements of these rules specified in §228.32 of this title;

(B) failure of food employees, conditional employees, and the person in charge to report a disease or medical condition as specified in §228.35(b) and (d) of this title;

(C) nonconformance with critical/priority items or priority foundation items of these rules;

(D) failure of the appropriate food employees to demonstrate their knowledge of, and ability to perform in accordance with, the procedural, monitoring, verification, and corrective action practices required by the regulatory authority as specified in §228.243(c) of this title;

(E) failure of the person in charge to provide records required by the regulatory authority for determining conformance with a HACCP plan as specified in §228.244(d)(4)(F) of this title; and

(F) nonconformance with critical limits of a HACCP plan; and

(3) a summary of the inspectional findings that totals weighted demerit values for the inspection items.

(b) Specifying time frame for corrections. The regulatory authority shall specify on the inspection report form the time frame for correction of the violations as specified in §228.252, §228.253(a) and §228.254(a) of this title.

(c) Issuing report and obtaining acknowledgment of receipt. At the conclusion of the inspection and according to law, the regulatory authority shall provide a copy of the completed inspection report and the notice to correct violations to the permit holder or to the person in charge, and request a signed acknowledgment of receipt.

(d) Refusal to sign acknowledgment. The regulatory authority shall:

(1) inform a person who declines to sign an acknowledgment of receipt of inspectional findings as specified in subsection (c) of this section that:

(A) an acknowledgment of receipt is not an agreement with findings;

(B) refusal to sign an acknowledgment of receipt will not affect the permit holder's obligation to correct the violations noted in the inspection report within the time frames specified; and

(C) a refusal to sign an acknowledgment of receipt is noted in the inspection report and conveyed to the regulatory authority's historical record for the food establishment; and

(2) make a final request that the person in charge sign an acknowledgment receipt of inspectional findings.

(e) Public information. Except as specified in §228.245 of this title, the regulatory authority shall treat the inspection report as a public document and shall make it available for disclosure to a person who requests it as provided in law.

(f) Inspection reports. For the purposes of Health and Safety Code, Chapter 437, the department adopts the Retail Food Establishment Inspection Report form as specified in the following figure: Figure: 25 TAC §228.251(f)

§228.252. *Imminent Health Hazard.*

(a) Ceasing operations and reporting.

(1) Except as specified in paragraph (2) of this subsection, a food establishment shall immediately discontinue operations and notify the regulatory authority if an imminent health hazard may exist because of an emergency such as a fire, flood, extended interruption of electrical or water service, sewage backup, misuse of poisonous or toxic materials, onset of an apparent foodborne illness outbreak, gross insanitary occurrence or condition, or other circumstance that may endanger public health.^p

(2) A permit holder need not discontinue operations in an area of an establishment that is unaffected by the imminent health hazard.

(b) Resumption of operations. If operations are discontinued as specified under subsection (a)(1) of this section or otherwise according to law, the permit holder shall obtain approval from the regulatory authority before resuming operations.

§228.253. Priority Item/Priority Foundation Item/Critical Violations, Time Frame for Correction.

(a) Timely correction.

(1) Except as specified in paragraph (2) of this subsection, the food establishment shall at the time of inspection implement immediate corrective actions of a critical violation of these rules and implement corrective actions for a HACCP plan provision that is not in compliance with its critical limit.^{pr}

(2) Considering the nature of the potential hazard involved and the complexity of the corrective action needed, the regulatory authority may agree to or specify a longer time frame, not to exceed:

(A) 3 calendar days after the inspection, for the permit holder to correct violations of a priority item; or

(B) 10 calendar days after the inspection, for the food establishment to correct critical rule violations or HACCP plan deviations.

(b) Verification and documentation of correction.

(1) After observing at the time of inspection a correction of a critical violation or a HACCP plan deviation, the regulatory authority shall enter the violation and information about the corrective action on the inspection report.

(2) As specified in subsection (a)(2) of this section, after receiving notification that the food establishment has corrected a critical violation or HACCP plan deviation, or at the end of the specified period of time, the regulatory authority shall verify correction of the violation, document the information on an inspection report, and enter the report in the regulatory authority's records.

(3) When the total cumulative demerit value of an establishment exceeds 30 demerits, the establishment shall initiate immediate corrective action on all identified critical violations and shall initiate corrective action on all other violations within 48 hours. One or more reinspections shall be conducted at reasonable time intervals to assure correction.

(4) In the case of temporary food establishments, all critical violations must be corrected immediately and other violations must be corrected within 24 hours or sooner if required by the regulatory authority. If violations are not corrected, the establishment shall immediately cease food operations until authorized to resume by the regulatory authority.

§228.254. Core Item Violations, Time Frame for Correction.

(a) Time frame. Except as specified in subsection (b) of this section, the food establishment shall correct core items/non-critical by a date and time agreed to or specified by the regulatory authority but no later than 90 calendar days after the inspection.

(b) Extension of compliance schedule. The regulatory authority may approve a compliance schedule that extends beyond the time limits specified in subsection (a) of this section if a written schedule of compliance is submitted by the food establishment and no health hazard exists or will result from allowing an extended schedule for compliance.

§228.255. Examination and Detention of Food.

The regulatory authority may examine and collect samples of food as often as necessary for the enforcement of these rules. A receipt for samples shall be issued by the regulatory authority. The department shall, upon written notice to the owner or person in charge specifying the reason therefore, place under detention any food which it has probable cause to believe is adulterated or misbranded in accordance with

the provisions of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

§228.256. Investigation and Control.

(a) Obtaining information: personal history of illness, medical examination, and specimen analysis. The regulatory authority shall act when it has reasonable cause to believe that a food employee or conditional employee has possibly transmitted disease; may be infected with a disease in a communicable form that is transmissible through food; may be a carrier of infectious agents that cause a disease that is transmissible through food; or is affected with a boil, an infected wound, or acute respiratory infection, by:

(1) securing a confidential medical history of the employee or conditional employee suspected of transmitting disease or making other investigations as deemed appropriate; and

(2) requiring appropriate medical examinations, including collection of specimens for laboratory analysis, of a suspected employee, other employees or conditional employee.

(b) Restriction or exclusion of food employee, or summary suspension of permit. Based on the findings of an investigation related to a food employee or conditional employee who is suspected of being infected or diseased, the regulatory authority may issue an order to the suspected food employee or permit holder instituting one or more of the following control measures:

(1) restricting the food employee or conditional employee;

(2) excluding the food employee or conditional employee;

or

(3) closing the food establishment by summarily suspending a permit to operate in accordance with law.

(c) Restriction or exclusion order: warning or hearing not required, information required in order. Based on the findings of the investigation as specified in subsection (a) of this section and to control disease transmission, the regulatory authority may issue an order of restriction or exclusion to a suspected food employee or the permit holder without prior warning, notice of a hearing, or a hearing if the order:

(1) states the reasons for the restriction or exclusion that is ordered;

(2) states the evidence that the food employee or permit holder shall provide in order to demonstrate that the reasons for the restriction or exclusion are eliminated;

(3) states that the suspected food employee or the permit holder may request an appeal hearing by submitting a timely request as provided in law; and

(4) provides the name and address of the regulatory authority representative to whom a request for an appeal hearing may be made.

(d) Removal of restriction or exclusion. The regulatory authority shall release a food employee or conditional employee from restriction or exclusion according to Health and Safety Code, §438.033, and the following conditions:

(1) a food employee who was infected with *Salmonella typhi* if the food employee's stools are negative for *S. typhi* based on testing of at least three consecutive stool specimen cultures that are taken:

(A) not earlier than one month after onset;

(B) at least 48 hours after discontinuance of antibiotics;

and

(C) at least 24 hours apart;

(2) if one of the cultures taken as specified in paragraph (1) of this subsection is positive, repeat cultures are taken at intervals of one month until at least three consecutive negative stool specimen cultures are obtained;

(3) a food employee who was infected with *Shigella* spp. or Shiga toxin-producing *Escherichia coli* if the employee's stools are negative for *Shigella* spp. or Shiga toxin-producing *Escherichia coli* based on testing of two consecutive stool specimen cultures that are taken:

(A) not earlier than 48 hours after discontinuance of antibiotics; and

(B) at least 24 hours apart; and

(4) a food employee who was infected with hepatitis A virus if:

(A) symptoms cease; or

(B) at least two blood tests show falling liver enzymes.

§228.257. Reporting of Communicable Diseases.

(a) Who shall report. Certain persons, as required in §97.2 of this title, shall report certain confirmed and suspected foodborne diseases.

(b) What to report. Confirmed and suspected cases of the following diseases, including, but not limited to the following, are reportable: botulism; campylobacteriosis; cryptosporidiosis; *Escherichia coli* 0157:H7; hepatitis A, acute viral; listeriosis; salmonellosis; shigellosis; trichinosis; and *Vibrio* infection.

(c) When to report. Reporting of communicable diseases shall be done in accordance with §97.4 of this title.

(d) Where to report. Persons required to report communicable diseases shall report to the local health authority, or in the case where there is no local health authority, the report shall be made to the department's Regional Director as required in §97.5 of this title.

(e) Reporting and other duties of local health authorities and regional directors. Local health authorities and regional directors shall report communicable diseases to the department as provided for in §97.6 of this title.

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

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Lisa Hernandez

General Counsel

Department of State Health Services

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For further information, please call: (512) 776-6972



SUBCHAPTER J. PRIVATE WATER SYSTEMS

25 TAC §§228.271 - 228.278

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §437.0056, which requires the department to adopt rules for granting and maintaining retail food permits in areas not regulated by counties and public health districts; and Government

Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The new sections affect Health and Safety Code, Chapters 437 and 1001; and Government Code, Chapters 531 and 2001.

§228.271. Water Supply and Pressure.

Food Service Establishments having water supplies that do not meet the definition of a public water system as defined by 30 TAC §290.38(66) or that are not regulated by the Texas Commission on Environmental Quality (TCEQ) shall comply with the requirements of this subchapter.

(1) Water supply. An adequate supply of water shall be available at all times in each food service facility, with a minimum of 24 Gallons/Person/Day (GPD) provided.^P

(2) Water pressure. The system shall be designed to maintain a minimum pressure of 35 pounds per square inch (psi) and shall be designed to provide the maximum daily demand for the various types of facilities listed in 30 TAC §290.45(d)(1) (relating to Minimum Water System Capacity Requirements). When the system is intended to provide firefighting capability, it shall also be designed to maintain a minimum pressure of 20 psi under combined fire and drinking water flow conditions. Minimum distribution pressure shall not be less than 20 psi at any time.^P

§228.272. Water Quality.

(a) Bacteriological properties. Each food establishment that uses a private water system shall have its water sampled and tested for total coliform, fecal coliform, *E. coli*, or other fecal indicator organisms as specified in this subsection.^P

(1) A food establishment shall have its water sampled and tested and must obtain negative test results one month before commencing operation.^P

(2) A food establishment shall have its water sampled and tested every six months and must obtain negative test results.^P

(3) If a test result is positive, the food establishment shall remediate the water system and have its water sampled and tested every month until test results are negative for 12 consecutive months. After achieving negative test results for 12 consecutive months, the facility shall resume water testing every six months as specified in paragraph (2) of this subsection.^P

(4) Testing for microbial contaminants shall be performed at an accredited laboratory certified in accordance with 30 TAC Chapter 25 (relating to Environmental Testing Laboratory Accreditation and Certification).

(5) If a routine distribution coliform sample is *E. coli*, then the facility shall issue a written boil water notification. The notification shall state, "To ensure destruction of all harmful bacteria and other microbes, water for drinking, cooking, and ice making must be boiled and cooled before consumption or use in preparing food or cleaning food contact surfaces and equipment. The water shall be brought to a vigorous rolling boil and then boiled for least two minutes. Instead of boiling water, the food establishment may use purchased bottled water, water obtained from some other suitable source, or ice obtained from an approved source."^P

(6) The boil water notification shall remain in effect until a repeat distribution coliform sample is coliform-negative.^P

(7) Records of all bacteriological tests and of any boil water notification shall be kept on site.^P

(b) Chemical properties.

(1) Food service facilities shall submit a water sample obtained from the entry point to the distribution system to a laboratory for chemical analysis at least once every three years.^P

(2) The chemical analysis shall be for primary and secondary constituent levels.^P

(3) Maximum primary constituent levels are as described in the following table.^P

Figure: 25 TAC §228.272(b)(3)

(4) Maximum secondary constituent levels are as described in the following table.^P

Figure: 25 TAC §228.272(b)(4)

(5) Records of all chemical testing shall be kept on site.^P

(c) Minimum residual disinfectant concentrations and maximum residual disinfectant levels (MRDLs).^P

(1) The minimum residual disinfectant concentration in the water entering the distribution system and the water within the distribution system shall be 0.2 milligrams per liter (mg/L) free chlorine.^P

(2) The MRDL of free chlorine in the water within the distribution system shall be 4.0 mg/L based on a running annual average.^P

§228.273. Backflow Prevention.

The plumbing system shall preclude backflow of a solid, liquid, or gas contaminant into the water supply system at each point of use, including on a hose bib, by:

(1) providing an air gap between the water supply inlet and the flood level rim of a plumbing fixture, equipment, or nonfood equipment that is at least twice the diameter of the water supply inlet and not less than 25 mm (1 inch);^P or

(2) installing an approved backflow prevention device that meets the American Society of Sanitary Engineering (ASSE) standards for construction, installation, maintenance, inspection, and testing for that specific application and type of device.^P

§228.274. Disinfection of New or Repaired Water System Facilities.

(a) When repairs are made to existing mains or when new main extensions are installed, they shall be disinfected using such amounts of chlorine compounds as to fill the repaired or new mains and appurtenances with water containing 50 mg/L chlorine.^P

(b) After the water containing this amount of chlorine, which is greater than that normally present in drinking water, has been in contact with the pipe and appurtenances for at least 24 hours, the main shall be flushed until the free chlorine or chloramine in the water within the new or repaired distribution system is less than 4.0 mg/L.^P

(c) A sample of water from the new or repaired main shall be submitted to a TCEQ Accredited laboratory for bacteriological examination so as to be assured that the disinfection procedure was effective.^P

(d) A supply of sodium hypochlorite or calcium hypochlorite disinfectant shall be kept on hand for use when making repairs and repairing line breaks.

§228.275. Flushing of Water System Mains.

All dead-end mains should be flushed at monthly intervals or more frequently to maintain water quality.^P

§228.276. Collection System Location.

(a) No sanitary sewers or septic tanks shall be allowed within a distance of 150 feet of any well used for drinking water. No cesspool or septic tank open-jointed drain field shall be allowed within a distance of 150 feet of any well used for drinking water.^P

(b) Storm sewers located within specified distances for sanitary sewers shall be constructed so as to prevent leakage from them.^P

(c) Water lines and sanitary sewers shall be installed no closer to each other than nine feet.^P

§228.277. Well Logs.

Copies of well material setting data, geological log, sealing information (pressure cementing and surface protection), disinfection information, bacteriological sample results, and a chemical analysis report of a representative sample of water from the well shall be kept on file. A State of Texas Well Report must be filed with the Texas Department of Licensing and Regulation (TDLR) in accordance with Texas Occupations Code, Title 12, Practices and Trades Related to Water, Health, and Safety, §1901.251.

§228.278. Interconnection.

No physical connection between the distribution system of a food service facility water supply and that of any other water supply shall be permitted. Unless that water supply meets all applicable requirements of 30 TAC Chapter 290 (relating to Public Drinking Water).^P

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

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Lisa Hernandez

General Counsel

Department of State Health Services

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For further information, please call: (512) 776-6972



**CHAPTER 229. FOOD AND DRUG
SUBCHAPTER K. TEXAS FOOD
ESTABLISHMENTS**

25 TAC §§229.161 - 229.171, 229.173 - 229.175

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes the repeal of §§229.161 - 229.171 and 229.173 - 229.175, concerning the regulation of retail food establishments.

BACKGROUND AND PURPOSE

The purpose of the repeals is to update the rules based on the United States Food and Drug Administration (FDA) Model Food Code. The existing rules, based on an outdated version of the Model Food Code, do not reflect the latest science and knowledge regarding best practices, emerging pathogens, and new retail food technologies. The FDA partners with numerous scientific and academic organizations and is able to identify the best

food safety practices and determine the best methods to prevent foodborne illness. The results of the scientific studies are reflected in the current Food Code. The new rules are being placed in a new Chapter 228 and will be based on the current 2013 FDA Model Food Code and will bring the Texas food rules into conformity with the rest of the country.

The new rules also implement House Bill 3012, 81st Legislative Session, 2009, which gave the department the authority to require food handler training for each food employee in a retail food establishment. Consequently, the number of food employees required to complete a food handler training course will increase.

The model Food Code may be accessed electronically at <http://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/ucm374275.htm>.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by the agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 229.161 - 229.171 and 229.173 - 229.175 have been reviewed and the department has determined that reasons for adopting the rules continue to exist because rules on the subject are needed to reduce the potential for foodborne illness in Texas consumers. The new rules in Chapter 228 provide the clarification and updating of the existing §§229.161 - 229.171 and 229.173 - 229.175, as a result of the rules review.

SECTION-BY-SECTION SUMMARY

Sections 229.161 - 229.171 and 229.173 - 229.175 are being repealed because these rules are based on an outdated version of the Model Food Code and do not reflect the latest science and knowledge regarding best practices, emerging pathogens, and new retail food technologies.

FISCAL NOTE

Jon Huss, Section Director, Environmental and Consumer Safety Section, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to the state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Huss has determined that there will be an effect on small businesses or micro-businesses or persons who are required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses or micro-businesses will be required to alter their business practices in order to comply with the sections.

Retail food establishments do not currently require a food handler training course for all food employees and will need to do so in the future. This is estimated to be between \$10 and \$25 per person depending on the service used. The individual employees will pay the cost themselves, not the establishment. Also, some businesses already require a food handler training course, while others will hire individuals with food handler training or a certified food manager certification. Additionally, it is not known how many employees per restaurant will actually be food employees per statute definition and will require food handler training.

There are new requirements for monthly bacteriological testing for (non-public) private water systems at retail food establishments. To comply with new Chapter 228, Subchapter J

(relating to Private Water Systems), this may include installing an automatic chlorinator and periodically testing the water quality (monthly bacteriological testing for (non-public) private water systems for retail food establishments estimated to be \$10/month/operating month and \$100/every three years for a chemical analysis). There are currently 108 retail establishments that will fall under the provisions of Subchapter J.

IMPACT ON LOCAL EMPLOYMENT

There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Huss has also determined that for each year of the first five years that the sections will be in effect, the public will benefit from adoption of the sections. The public benefit anticipated from enforcing or administering the sections is to reduce the potential for foodborne illness from retail food establishments by requiring food handler training courses for food employees and food safety practices consistent with current science.

REGULATORY ANALYSIS

The department has determined that this is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk 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 a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Christopher Sparks, Environmental and Consumer Safety Section, Division of Regulatory Services, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, (512) 834-6753, or by email to Christopher.Sparks@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

PUBLIC HEARING

A public hearing to receive comments on the proposal will be scheduled during the official 30 day comment period at the Department of State Health Services, Room S-125, 8407 Wall Street, Austin, Texas 78754. The information will be placed on the program website. For information, please contact Christopher Sparks at (512) 834-6753 or christopher.sparks@dshs.state.tx.us.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed repeals are authorized by Health and Safety Code, §437.0056, which requires the department to adopt rules for granting and maintaining retail food permits in areas not regulated by counties and public health districts; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Chapter 1001, Health and Safety Code.

The proposed repeals affect Health and Safety Code, Chapters 437 and 1001; and Government Code, Chapters 531 and 2001.

§229.161. *Purpose.*

§229.162. *Definitions.*

§229.163. *Management and Personnel.*

§229.164. *Food.*

§229.165. *Equipment, Utensils, and Linens.*

§229.166. *Water, Plumbing, and Waste.*

§229.167. *Physical Facilities.*

§229.168. *Poisonous or Toxic Materials.*

§229.169. *Mobile Food Establishments.*

§229.170. *Temporary Food Establishments.*

§229.171. *Compliance and Enforcement.*

§229.173. *Heimlich Maneuver Poster.*

§229.174. *Bed and Breakfast Extended Establishments.*

§229.175. *Outfitter Operations.*

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

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Lisa Hernandez

General Counsel

Department of State Health Services

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING

SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.7

The General Land Office (GLO) proposes amendments to §15.7 (relating to Local Government Management of the Public Beach) to allow a local government to obtain temporary approval for seaweed relocation during an extraordinary seaweed landfall event, clarify requirements applicable to the restoration of dunes on the public beach, and modify requirements for dune walkovers. The

GLO also proposes amendments to modify "natural line of vegetation" references and delete references to the "attorney general" to conform the rules to legislative amendments to the Open Beaches Act.

BACKGROUND AND SECTION BY SECTION ANALYSIS OF THE PROPOSED AMENDMENTS

During the spring and summer of 2014 the Texas Coast was inundated by Sargassum, a seaweed that grows in the Sargasso Sea and travels by current into the Gulf of Mexico, which created challenges for the maintenance and management of the public beaches throughout the Texas coast. Generally, Sargassum is a benefit to the Texas coast because it provides food and habitat for marine and beach animals, helps protect and stabilize beaches by preventing sand from eroding from the beach. It also traps sand and fertilizes dune plants which aids in the creation and stabilization of dunes.

However, Sargassum can become a significant burden to coastal communities if too much washes onto a beach at one time. Local governments routinely manage seaweed that washes onto Texas shores. When an extraordinary event happens, as it did last year, it can become more challenging. Many local governments were able to employ their routine maintenance activities to manage the Sargassum last year. It was much more difficult for some local governments to employ their routine maintenance activities in areas where the beach was restricted by an erosion response structure, such as a seawall or revetment. The use of routine maintenance activities in such situations during an extraordinary Sargassum landfall event can result in the physical impairment and restriction of public beach access and use.

GLO's rules prohibit activities that remove sand or change the profile of the beach. These provisions created difficulties for local governments in trying to identify alternative ways of managing the extraordinary seaweed landfall event last summer. In an effort to provide a framework for the development of reasonable alternatives in such a situation, the GLO proposes to amend its rules to allow a local government to seek approval from the GLO to implement alternative seaweed management practices during the extraordinary event if certain conditions are met. The amendments provide local governments with a mechanism to relocate seaweed from the public beach during an extraordinary seaweed landfall event and establish what information is necessary for the GLO to ensure that the proposed relocation of seaweed does not adversely affect the coastal environment.

The GLO is also proposing amendments to clarify language relating to the ability to restore dunes on the public beach within 20 feet seaward of the landward extent of the public beach and add the requirement that a permit applicant proposing to restore dunes seaward of that line must affirmatively demonstrate that the dunes will not restrict or interfere with public access to the beach.

In addition, the GLO is proposing amendments to the rule to make it consistent with legislative changes to the Open Beaches Act.

Section 15.7(b)

GLO proposes to delete the term "natural vegetation line" and insert the phrase "line of vegetation." This change deletes the term "natural" to be consistent with legislative amendments made to TNRC §61.0171 (Acts 2013, 83rd Legislature, Chapter 1086, effective September 1, 2013), wherein the commissioner was authorized to delineate a line of vegetation without reference to the

natural state of the LOV when the commissioner determines that a meteorological event has obliterated the LOV and replaces the term "vegetation line" with the phrase "line of vegetation" to be consistent with the terminology used elsewhere in the rules and the Open Beaches Act.

Section 15.7(e)

Proposed amendments to §15.7(e) will modify and clarify the requirements for building dunes on the public beach easement. The proposed amendment to the first sentence changes the language to reflect the findings by the Legislature in the Dune Protection Act that dunes are important to the beach environment as a protective barrier. A proposed amendment to the second sentence adds language to the sentence that states earlier in this subsection that dunes can be restored within 20 feet of the landward extent of the public beach. As this section is currently written, it is not clear until the following section that a 20-foot dune restoration area is authorized on the public beach. Language is being added to the second sentence that will require an applicant who proposes to restore a dune more than 20 feet seaward of the landward extent of the public beach to affirmatively demonstrate that the restored dunes will not impair or restrict public access and use of the public beach. This will enable the local government and the GLO to more effectively evaluate the impacts of dune restoration on the public beach easement and the public's ability to access the public beach.

GLO proposes to add the term "seaweed" to §15.7(e)(6) to specify that seaweed may be used as a material for dune restoration. GLO also proposes to delete the reference to the Attorney General in §15.7(e)(7) to conform to amendments in HB 1457 (Acts 2003, 78th Legislature, Chapter 245 effective immediately) which modified implementation and enforcement authority under the Open Beaches Act.

In an effort to more effectively organize the requirements for dune restoration the GLO proposes to delete the last two sentences of §15.7(e)(7) and move the language to a newly created subsection §15.7(e)(9). The language that references to the Attorney General in these two sentences has been deleted to conform to amendments in HB 1457 (Acts 2003, 78th Legislature, Chapter 245 effective immediately) which modified implementation and enforcement authority under the Open Beaches Act. No further modification to the language has been made.

Section 15.7(f)

GLO proposed to delete the reference to the Attorney General in §15.7(f), to conform to amendments in HB 1457 (Acts 2003, 78th Legislature, Chapter 245 effective immediately) which modified implementation and enforcement authority under the Open Beaches Act.

Section 15.7(g)

GLO proposes to add a new subsection (g)(3) which requires local governments to require permittees to construct dune walkovers in a manner that allows for the growth of dune vegetation and the migration of dunes to the greatest extent practicable. As development on the coast increases, the GLO believes that the rules must ensure that the construction of walkovers minimize the impacts to the dune system while still providing permittees with the flexibility to construct walkovers which meet their need.

GLO proposed to delete the reference to the Attorney General in §15.7(f), to conform to amendments in HB 1457 (Acts 2003, 78th Legislature, Chapter 245 effective immediately) which mod-

ified implementation and enforcement authority under the Open Beaches Act.

New §15.7(m)

GLO proposes a new subsection (m) which will provide local governments with an opportunity to request temporary approval from the GLO to relocate seaweed during an extraordinary seaweed landfall event. New subsection (m)(1) specifies that a request may only be submitted for areas in which the beach is restricted by an erosion response structure, such as a seawall or revetment, where the structure prevents the reasonable employment of routine seaweed management practices because they would significantly restrict or impair public beach access and use.

New §15.7(m)(2) describes the process for GLO's review of such a request and requires local governments to provide a comprehensive seaweed management plan as part of the request. Subsection (m) provides that an approval to relocate seaweed will be valid for up to 120 days. Proposed §15.7(m)(2)(A) - (J) require local governments to describe how the seaweed event is extraordinary, provide information explaining how routine maintenance practices cannot be reasonably employed without restricting or impairing public access and describe the seaweed management plan. The request must include a seaweed management plan that describes the scope of the proposed activities and why other alternatives are not practicable, details how the proposed activities will not materially affect the beach environment or result in significant or permanent removal of sand from the beach system, and describes the equipment that will be used. If applicable, a local government must also provide a comprehensive dune mitigation plan or provide information describing whether a wildlife monitor will be present during the activities and describe any coordination with local, state, and federal agencies. The information is necessary for the GLO to determine whether to approve a request and will ensure that the proposed relocation of seaweed does not result in the removal of sand from the public beach or otherwise adversely affect the beach, the coastal environment, or public beach access and use.

New §15.7(m)(3) requires a local government that obtains approval to relocate seaweed under this subsection to provide a detailed report assessing the activity's effects upon the beach environment. This information will be used by the GLO to evaluate how the alternative maintenance activities have impacted Texas beaches and may be used to determine whether those practices should be allowed in the future.

Old §15.7(m)

Subsection (m) is renumbered as subsection (n) without any further modification.

FISCAL AND EMPLOYMENT IMPACTS

Mrs. Helen Young, Deputy Director for the GLO's Coastal Resources Division, has determined that for each year of the first five years the amended section as proposed is in effect, there will be minimal fiscal implications for the state government as a result of enforcing or administering the amended section.

Mrs. Young has determined that there may be some fiscal impact on local governments as a result of the amended section. The GLO, however, cannot estimate the costs because this is a voluntary program and the costs are predicated upon unpredictable events such as: the scope of the seaweed landfall event, the conditions of the beach that is the subject of the request, and what the local government proposes in its seaweed management plan. Mrs. Young has determined that there will not

be costs of compliance for large and small businesses resulting from implementation of the amendments. Mrs. Young has also determined that for each year of the first five years the amended section, as proposed, is in effect, there will be no negative impacts to the local economy.

PUBLIC BENEFIT

Mrs. Young has determined that for the first five years the public will benefit from the proposed amendments because public beach access and use will be better preserved by providing local governments with the ability to more effectively deal with extreme seaweed landfall events within their jurisdiction. Modifications and clarifications made to the requirements for restoration of dunes on the public beach also benefit the public by ensuring the restoration of dunes does not restrict or impair public access and use of the public beach.

Mrs. Young has determined that there are no economic costs to persons required to comply with these amendments because these provisions are premised upon a voluntary request by a local government. Any costs associated with the relocation of seaweed would be based upon the local government's own plan. Any costs resulting from the rule will depend upon how each local government chooses to implement the requirement in its jurisdiction and the unique circumstances of each event.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "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 proposed amendments are adopted under the specific authority of §61.011 and §63.121, which provide authority for the Commissioner to promulgate rules for the protection of the public easement from erosion or reduction and the protection of critical dune areas, and do not exceed the expressed requirements of federal or state law. The proposed amendments implement TNRC §61.011 and §63.121 and are not anticipated to 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.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed rulemaking in accordance with Texas Government Code §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. The GLO has determined that the proposed amendments do not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §17 and §19 of the Texas Constitution. GLO has determined that the proposed amendments would not affect any private real property in a manner that restricts or limits any owner's right to property or use of that property.

CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM

The proposed rulemaking is subject to the Coastal Management Program as provided for in the Texas Natural Resource Code §33.2053, and 31 TAC §505.11(a)(1)(J) and §505.11(c), (relating to Actions and Rules Subject to the CMP). GLO has reviewed this proposed action for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations and it has determined that the proposed action is consistent with the applicable CMP goals and policies. The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.26 (relating to Policies for Construction in the Beach/Dune System).

The proposed rulemaking provides local governments with the ability to request approval from the GLO to relocated seaweed during an extraordinary seaweed landfall event. The proposed amendments are consistent with the CMP goals outlined in 31 TAC §501.12(3), (4), and (5). These goals seek to minimize loss of human life and property due to the impairment and loss of protective features of Coastal Natural Resource Areas (CNRAs), ensure public access to the coastal zone in a manner that is consistent with other uses of the coastal zone, and balance the benefits of economic development and multiple human uses, protecting, preserving, restoring, and enhancing CNRAs, and minimizing loss of human life and property. The proposed amendments are consistent with 31 TAC §501.12(3) as they minimize loss of human life and property from impairment and loss of protective features of CNRAs, such as dunes and dune vegetation, by requiring that local governments not materially affect the coastal environment, prevent significant or permanent removal of sand from the beach when relocating seaweed and implement, where applicable a comprehensive dune mitigation plan. The proposed amendments are consistent with 31 TAC §501.12(4) as they enable local governments to employ alternative methods of beach maintenance that help preserve public access to the beach during an extraordinary seaweed landfall event. The proposed amendments are also consistent with 31 TAC §501.12(5) as they balance the multiple human uses of the coastal zone, the preservation, protection, and restoration of the coastal natural resource, and public access to and enjoyment of the coastal zone.

The proposed rules are also consistent with CMP policies in §501.26(a)(1) and (2)(relating to Policies for Construction in the Beach/Dune System) by ensuring that construction within critical dune areas does not materially weaken dunes or materially damage dune vegetation and construction.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking or its consistency with the CMP goals and policies, please send a written comment to Mr. Walter Talley, Texas Register, Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 475-1859 or email to walter.talley@glo.texas.gov. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The amendment is proposed under Texas Natural Resources Code §61.011, which provides authority for the Commissioner to promulgate rules for the protection of the public easement from erosion or reduction and §63.121, which provides for the commissioner's authority to adopt rules for the protection of critical dune areas.

Texas Natural Resources Code §§61.011 - 61.026 and §§63.001 - 63.1814 are affected by the proposed amendments.

§15.7. *Local Government Management of the Public Beach.*

(a) (No change.)

(b) Construction of coastal and shore protection projects. Local governments shall encourage carefully planned beach nourishment and sediment bypassing for erosion response management and prohibit erosion response structures within the public beach and 200 feet landward of the line of vegetation [~~natural vegetation line~~].

(c) - (d) (No change.)

(e) Restoration of [~~Restored~~] dunes on public beaches. Sand dunes, either naturally created or restored, may aid in the preservation of the coastal environment by providing a protective barrier against [~~common law public beach rights by slowing~~] beach erosion processes. Except as otherwise provided, local governments shall allow restoration of dunes on the public beach no further than 20 feet seaward of the landward extent of the public beach. [~~only under the following conditions.~~] Restored dunes may be located farther seaward than the 20-foot restoration area only upon an affirmative demonstration by the permit applicant that substantial dunes would likely form farther seaward naturally. Such seaward extension past the 20-foot area must first receive prior written approval of the General Land Office and the attorney general's office. In the absence of such an affirmative demonstration by the applicant, a local government shall require the applicant to meet the following standards relating to the location of restored dunes.

(1) (No change.)

(2) Local governments shall not allow any person to restore dunes, even within the 20-foot corridor, if such dunes would restrict or interfere with the public use of the beach at normal high tide.

(3) - (5) (No change.)

(6) Local governments may allow persons to use the following dune restoration methods or materials:

(A) - (B) (No change.)

(C) organic brushy materials such as used Christmas trees and seaweed; and

(D) (No change.)

(7) Local governments shall protect restored dunes under the same restrictions and requirements as natural dunes under the local government's jurisdiction. [~~All applications submitted to a local government for restoring dunes on the public beach shall be forwarded to both the General Land Office and the attorney general's office at least ten working days prior to the local government's consideration of the permit. Failure of the General Land Office or the attorney general's office to submit comments on an application shall not waive, diminish, or otherwise modify the beach access and use rights of the public.~~]

(8) (No change.)

(9) All applications submitted to a local government for the restoration dunes on the public beach shall be forwarded to the General Land Office at least ten working days prior to the local government's consideration of the permit. Failure of the General Land Office to submit comments on an application shall not waive, diminish, or otherwise modify the beach access and use rights of the public.

(f) Scientific research projects. Local governments may exempt a scientific research project from the requirements of §15.4(c) of this title (relating to Dune Protection Standards) or subsection (e) of this section provided the research is conducted by an academic institution or state, federal, or local government. Prior to conducting the research, the project manager shall submit a detailed work plan and monitoring plan for approval by the General Land Office [~~and the Office of the~~

~~Attorney General~~]. The research activities shall not materially weaken existing dunes or dune vegetation, or increase erosion of adjacent properties.

(g) Dune walkovers. Local governments shall only allow dune walkovers, including other similar beach access mechanisms, which extend onto the public beach under the following circumstances.

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

(3) Local governments shall require permittees to construct dune walkovers in a manner that allows for the growth of dune vegetation and the migration of dunes under the walkovers to the greatest extent practicable.

(4) [~~3~~] Local governments shall require that permittees relocate walkovers to follow any landward migration of the public beach or seaward migration of dunes using the following procedures and standards.

(A) After a major storm or any other event causing significant landward migration of the landward boundary of the public beach, local governments shall require permittees to shorten any dune walkovers encroaching on the public beach to the appropriate length for removal of the encroachment. This requirement shall be contained as a condition in any permit and certificate issued authorizing construction of walkovers. Local governments are required to assess the status of the public beach boundary within 30 days after a major storm or other event causing significant landward migration of the public beach. After the assessment, local governments shall inform the General Land Office [~~and the attorney general's office~~] of any encroachments on the public beach within ten days of completing the assessment.

(B) In cases where the migration of the landward boundary of the public beach occurs slowly over a period of time or where a dune walkover needs to be lengthened because of the seaward migration of dunes, the permittee shall apply for a permit or certificate authorizing the modification of the structure.

(h) - (j) (No change.)

(k) State agency approval of vehicular control plan adopted or amended after the effective date of this subchapter. A local government shall submit the vehicular control plan to the General Land Office [~~and the attorney general's office~~] no later than 90 working days prior to taking any action on the plan. This provision does not prevent a local government from exercising its existing authority over vehicular controls in emergencies. The standards and procedures for such emergency vehicular controls shall be submitted to the state in the vehicular control portion of a local government's dune protection and beach access plan. A plan may be approved if the vehicular controls are found to be consistent with the Open Beaches Act and with this subchapter. Prior to final adoption or implementation of a new or amended vehicular control ordinance, the local government shall obtain state certification of the plan for vehicular control pursuant to the Open Beaches Act, Texas Natural Resources Code, §61.022.

(l) (No change.)

(m) Request for temporary approval of seaweed relocation. During an extraordinary seaweed landfall event, a local government may submit a written request to the General Land Office for approval to relocate seaweed.

(1) Approval to relocate seaweed may be requested in areas where:

(A) the beach is restricted by a physical constraint, such as an erosion response structure;

(B) the erosion response structure prevents the reasonable employment of GLO approved routine seaweed management practices, and

(C) the use of routine seaweed management practices in such areas would significantly restrict or impair public beach access and use.

(2) The General Land Office will review each request to determine whether a seaweed landfall event is extraordinary and if it impairs or restricts public beach access and use. The General Land Office will evaluate any proposed maintenance activities for consistency with the Open Beaches Act, the Dune Protection Act and the Beach/Dune rules. The General Land Office's approval will be valid for up to 120 days. The request must include a comprehensive seaweed management plan that, at a minimum, provides the following items:

(A) a description of how the seaweed event is extraordinary, including supporting documentation, such as colored photographs;

(B) information justifying how routine maintenance practices cannot be reasonably employed without restricting or impairing public beach access and use during the seaweed landfall event;

(C) a complete description of the geographic scope of proposed seaweed management activities, including a map or site plan which identifies the line of vegetation in relation to the seaweed placement area;

(D) a complete description of the proposed seaweed management activities and why other alternatives are not practicable;

(E) a detailed description of how the proposed seaweed management activities will not materially affect the beach profile, public beach access and use, dunes and dune vegetation, dune hydrology, or beach erosion;

(F) a detailed description of how the seaweed management activities will not result in significant or permanent removal of sand from the beach and dune system;

(G) a description of the equipment to be used;

(H) a comprehensive dune mitigation plan, if dunes or dune vegetation will be adversely affected;

(I) information describing whether a wildlife monitor will be present during seaweed management activities; and

(J) a description of any coordination with applicable local, state and federal agencies that will be required.

(3) Within 60 days after the expiration of the approved seaweed management plan, the local government must assess the impacts of the seaweed management activities, and provide the General Land Office with a detailed assessment report describing any benefits or challenges with implementing the activities employed and any affects those activities had on the beach profile, public beach access and use, dunes and dune vegetation, dune hydrology, and beach erosion, and any mitigation activities conducted.

(n) [(m)] Prohibitions on signs. A local government shall not cause any person to display or cause to be displayed on or adjacent to any public beach any sign, marker, or warning, or make or allow to be made any written or oral communication which states that the public beach is private property or represent in any other manner that the public does not have the right of access to and from the public beach or the right to use the public beach as guaranteed by this subchapter, the Open Beaches Act, and the common law right of the public.

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

Filed with the Office of the Secretary of State on March 9, 2015.

TRD-201500792

Larry L. Laine

Chief Clerk, Deputy Land Commissioner

General Land Office

Earliest possible date of adoption: April 19, 2015

For further information, please call: (512) 475-1859

