

**Department of State Health Services
Agenda Item for State Health Services Council
September 15, 2005**

<p>Agenda Item Title: Proposed Repeal and New 25 TAC §§295.181 - 295.183 related to compliance with the Community Right-to-Know Acts.</p> <p>Agenda Number: 4c</p>	
<p>Recommended Council Action: <input type="checkbox"/> For Discussion Only <input checked="" type="checkbox"/> For Discussion and Action by the Council</p>	
<p>Background: The repeal of current rules and adoption of new rules is necessitated by substantive changes made to consolidate the Manufacturing Facility Community Right-to-Know, the Public Employer Community Right-To-Know, and the Nonmanufacturing Facilities Community Right-To-Know sections for better flow of the rules and reorganization for clarity.</p>	
<p>Summary: Specific changes from the previous rules include consolidating the regulations into one set of rules for all three of the Texas Community Right-to-Know Acts (TCRAs), as opposed to the current rule structure, which provides a separate rule section for each individual act; updating agency references that resulted from the creation of DSHS and the functionalization of programs within the new agency; requiring electronic submission of Tier Two Chemical Inventory Reports and specifying the procedures for submitting these electronic files; amending the Complaints and Investigations sections to clarify that specific actions that interfere with agency inspections shall be considered violations of the TCRAs and the rules; and amending the Administrative Penalties sections to clarify that penalties may be assessed on a per day basis for failure to file the Tier Two Report by required deadlines.</p>	
<p>Summary of Stakeholder Input to Date (including advisory committees): All respondents are in favor of the proposed changes. One respondent wanted language added that would permit a Fire Chief designee, rather than the Fire Chief, to handle requests to submit electronic forms to the Fire Department. Another wanted electronic submission to LEPC's and Fire Departments only with express approval (which is already included in the proposed rules). Lastly, one LEPC representative wanted the authority to charge a submission fee, which is not authorized under the Community Right-to-Know Acts.</p>	
<p>Proposed Motion: Motion to recommend HHSC approval for publication of rules contained in agenda item # 4c.</p>	
<p>Agenda Item Approved by: _____ Presented by: _____ Title: _____ Program/Division: Tier Two Chemical Contact Name/Phone: Michael J. Minoia /Reporting Program (512) 834-6600 ext. 2305</p>	<p>Date Submitted September 7, 2005</p>

Title 25. HEALTH SERVICES
Part 1. DEPARTMENT OF STATE HEALTH SERVICES
Chapter 295. Occupational Health
Subchapter H. Hazardous Chemical Right-to-Know
Repeal §§295.181 - 295.183
New §§295.181 - 295.183

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes the repeal of §§295.181 - 295.183 and new §§295.181 - 295.183, concerning the criteria needed to comply with the Community Right-to-Know Acts.

BACKGROUND AND PURPOSE

The repeal of current rules and adoption of new rules is necessitated by substantive changes made to consolidate the Manufacturing Facility Community Right-to-Know, the Public Employer Community Right-To-Know, and the Nonmanufacturing Facilities Community Right-To-Know sections for better flow of the rules and reorganization. Duplicate verbiage has been removed and similar sections of the three sections have been combined.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 295.181 - 295.183 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Section 295.181 provides for the purpose, scope and compatibility of these rules with federal laws. It also defines exclusions to these rules for certain hazardous chemicals and other items. This section includes all definitions used in the other sections of this rule.

Section 295.182 defines the responsibilities and requirements of facility operators with the specific criteria needed to comply with the Health and Safety Code, Chapters 505-507.

Section 295.183 details the department's right to conduct compliance inspections and investigate complaints. This section also defines the department's administrative penalty authority and lists the registration fees.

Specific changes from the previous rules include consolidating the regulations into one set of rules for all three of the Texas Community Right-to-Know Acts (TCRAs), as opposed to the current rule structure, which provides a separate rule section for each

individual act; updating agency references that resulted from the creation of the department and the functionalization of programs within the new agency; requiring electronic submission of Tier Two Chemical Inventory Reports and specifying the procedures for submitting these electronic files; amending the Complaints and Investigations sections to clarify that specific actions that interfere with agency inspections shall be considered violations of the TCRAs and the rules; and amending the Administrative Penalties sections to clarify that penalties may be assessed on a per day basis for failure to file the Tier Two Report by required deadlines.

FISCAL NOTE

Susan E. Tennyson, 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 state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Tennyson has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by an interpretation of the rules that although small businesses and micro-businesses will be required to alter their business practices slightly in order to comply with the sections, the upgrade to electronic submission software is free. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Tennyson has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing the sections will be increased safety for communities where hazardous chemicals are stored or used due to improved accessibility to chemical data and greater accuracy of mapping data. The proposed new rules are anticipated to improve consistency in reporting forms and data formats.

REGULATORY ANALYSIS

The department has determined that this proposal 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.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed repeals and new sections 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 Michael J. Minoia, Environmental and Consumer Safety Section, Division of Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, 512/834-6600 ext. 2305 or by email to michael.minoia@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the Texas Register.

STATUTORY AUTHORITY

The proposed repeal and new sections are authorized by Health and Safety Code, §§505.016, 506.017, and 507.013, which provide the former Texas Board of Health (board) with the authority to adopt necessary rules to administer and enforce Chapters 505, 506, and 507; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission, notwithstanding any other law, to adopt rules and policies necessary for the operation and provision of health and human services by the department and for administration of Chapter 1001, Health and Safety Code.

The proposed repeal and new sections affect the Health and Safety Code, Chapters 505-507, and 1001; and Government Code, Chapter 531.

SECTIONS FOR REPEAL

§295.181. Manufacturing Facility Community Right-to-Know.

§295.182. Public Employer Community Right-To-Know.

§295.183. Nonmanufacturing Facilities Community Right-To-Know.

Legend: (Proposed New Rule)
Regular Print = Proposed new language

§295.181. General Provisions and Definitions.

(a) Purpose. The purpose of these rules is to provide facility operators with specific criteria needed to comply with the Manufacturing Facility Community Right-to-Know Act, Health and Safety Code (HSC), Chapter 505; the Public Employer Community Right-to-Know Act, HSC, Chapter 506; and the Nonmanufacturing Facilities Community Right-to-Know Act, HSC, Chapter 507.

(b) Scope. These rules are applicable to operators of all facilities covered by HSC, Chapters 505, 506, or 507.

(c) Compatibility with Federal Laws. In order to avoid confusion among manufacturing employers, public employers, nonmanufacturing facilities, and persons living in this state, the Texas Department of State Health Services shall implement the Manufacturing Facility Community Right-To-Know Act, the Public Employer Community Right-to-Know Act, and the Nonmanufacturing Facilities Community Right-to-Know Act compatibly with the federal Emergency Planning and Community Right-To-Know Act (EPCRA), which is also known as the Superfund Amendments and Reauthorization Act of 1986 (SARA), Title III (42 USC §11001 et seq.), and related regulations (Title 40 Code of Federal Regulations (CFR), Parts 355-370), promulgated by the United States Environmental Protection Agency (EPA).

(d) Exclusion for Certain Hazardous Chemicals. These rules do not apply to a hazardous chemical in a sealed package that is received and subsequently sold or transferred in that package if:

(1) the seal remains intact while the chemical is in the facility;

(2) the chemical does not remain in the facility longer than five working days; and

(3) the chemical is not an extremely hazardous substance at or above the threshold planning quantity or 500 pounds, whichever is less, as listed by the EPA in 40 CFR Part 355, Appendices A and B.

(e) Other Exclusions. This rule does not apply to:

(1) any hazardous waste, as that term is defined by the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. §6901 et seq.), when subject to regulations issued under that Act by the EPA;

(2) tobacco or tobacco products;

(3) wood or wood products;

(4) articles;

(5) food, drugs, cosmetics, or alcoholic beverages in a retail food sale establishment that are packaged for sale to consumers;

(6) foods, drugs, or cosmetics intended for personal consumption by an employee while in the facility;

(7) any consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. Section 2051 et seq.) and Federal Hazardous Substances Act (15 U.S.C. §1261 et seq.), respectively, if the employer can demonstrate it is used in the facility in the same manner as normal consumer use and if the use results in a duration and frequency of exposure that is not greater than exposures experienced by consumers;

(8) any drug, as that term is defined by the Federal Food, Drug, and Cosmetic Act (21 U.S.C. §301 et seq.), when it is in solid, final form for direct administration to the patient, such as tablets or pills;

(9) the transportation, including storage incident to that transportation, of any substance or chemical subject to this chapter, including the transportation and distribution of natural gas; and

(10) radioactive waste.

(f) Severability. Should any section or subsection in this subchapter be found to be void for any reason, such finding shall not affect any other sections.

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

(1) 505 Act - The Manufacturing Facility Community Right-To-Know Act, Health and Safety Code, Chapter 505.

(2) 506 Act - The Public Employer Community Right-To-Know Act, Health and Safety Code, Chapter 506.

(3) 507 Act - The Nonmanufacturing Facilities Community Right-To-Know Act, Health and Safety Code, Chapter 507.

(4) Appropriate facility identifiers - A physical location identification which provides a physical street address or other location identifiers, which are sufficient for emergency planning purposes and for data management by the department.

(5) Article - a manufactured item:

(A) that is formed to a specific shape or design during manufacture;

(B) that has end-use functions dependent in whole or in part on its shape or design during end use; and

(C) that does not release, or otherwise result in exposure to, a hazardous chemical under normal conditions of use.

(6) Commissioner - The Commissioner of the Department of State Health Services. The Commissioner is referred to as the "director" in the 505 Act §505.004(6), the 506 Act §506.004(6), and the 507 Act §507.004(6).

(7) Current Tier Two threshold - A quantity which is assigned to a specific hazardous chemical or extremely hazardous substance in the most recent version of Title 40 CFR, Part 370, and which determines whether a specific hazardous chemical or extremely hazardous substance must be included on the Tier Two form.

(8) Department - The Department of State Health Services.

(9) Electronic Tier Two file - An electronic data file that contains, at a minimum, all of the information required for submission in a hard copy Tier Two form, and which provides the required Tier Two information for each individual reportable chemical. This data file must be prepared using software that has been approved by the department.

(10) EPCRA or SARA, Title III - The federal Emergency Planning and Community Right-To-Know Act, also known as the Superfund Amendments and Reauthorization Act of 1986, Title III, 42 USC, §§11001-11050, and regulations promulgated by the EPA in Title 40 CFR, Parts 355-370.

(11) EHS or extremely hazardous substance - Any substance as defined in EPCRA, §11002, or listed by the EPA in Title 40 CFR, Part 355, Appendices A and B.

(12) Facility - All buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person or by any person who controls, is controlled by, or is under common control with that person.

(13) Facility chemical list--A chemical inventory that provides information for all reportable hazardous chemicals and EHSs present at a reporting facility, and which is submitted to the department in the form of a completed electronic Tier Two file.

(14) Facility operator - The person who controls the day-to-day operations of the facility.

(15) Fire chief - The elected or paid administrative head of the fire department having jurisdiction over a facility.

(16) Headquarters facility - Either the facility itself when the facility is staffed more than 20 hours per week, or, for facilities which are staffed less than 20 hours per week, the headquarters facility is an office which is staffed full time by the facility operator and which serves as the central office for staff who are responsible for overseeing the operations of the facility.

(17) Latitude and longitude - A mapping coordinate system, designated in units of decimal degrees, which serves as a facility location description on the Tier Two form in lieu of a street address.

(18) LEPC--The Local Emergency Planning Committee, a group of individuals representing a designated emergency planning district and whose membership on the committee has been approved by the Texas State Emergency Response Commission as meeting the requirements of EPCRA, §11001.

(19) Manufacturing facilities - Facilities in Standard Industrial Classification (SIC) Codes 20-39 or North American Industrial Classification System (NAICS) Codes 31-33.

(20) Nonmanufacturing facilities - Facilities, other than those facilities operated by the state or political subdivisions of the state, and which are classified in SIC Codes 01-19 or SIC Codes 40-99 or NAICS Codes 11-23 or NAICS Codes 42-92.

(21) North American Industrial Classification System (NAICS) Code – The six digit number which describes a facility's primary activity, which is determined by its principal product or group of products produced. The NAICS Codes were developed jointly by the U.S., Canada, and Mexico to provide comparability in statistics about business activity across North America and has replaced the U.S. Standard Industrial Classification (SIC) system. For the purposes of these rules, the NAICS Code is the one that is assigned to a facility by the Texas Workforce Commission. If a facility does not have a NAICS Code assigned by the Texas Workforce Commission, then the department must be consulted for assistance in determining the correct code.

(22) Public employer facilities - Facilities operated by the state or political subdivisions of the state. These include educational institutions such as the University of Texas.

(23) Research laboratory - A laboratory that engages in only research or quality control operations. Chemical specialty product manufacturing laboratories, full

scale pilot plant operation laboratories that produces products for sale, and service laboratories are not research laboratories.

(24) Standard Industrial Classification (SIC) Code - The four digit number which describes a facility's primary activity, which is determined by its principal product or group of products produced. This code is outdated and has been replaced with the NAICS Code.

(25) Submission or required submission - The facility chemical list information which is submitted to the department in the form of an electronic Tier Two file for a single facility. When facility chemical list information for multiple facilities is submitted to the department as one electronic Tier Two file, then the electronic Tier Two file shall be counted by the department as multiple required submissions.

(26) Technically qualified individual - An individual with a professional education and background working in the research or medical fields, such as a physician, a registered nurse, or an individual holding a college bachelor's degree in science.

(27) Texas Tier Two Cover Sheet form - A form developed by the department to collect general information about each reporting facility which is submitting an electronic Tier Two file.

(28) Tier Two form - An electronic document that provides information for all reportable hazardous chemicals and EHSs present at a reporting facility. An "annual Tier Two form" provides the information for all hazardous chemicals and EHSs present at a facility at any time during the previous calendar year in quantities that met or exceeded the then current Tier Two thresholds. An "initial Tier Two form" is one that provides information for hazardous chemicals or EHSs that meet or exceed the current Tier Two thresholds, but which were not reported on a previously submitted annual Tier Two form. An "updated Tier Two form" is one that provides significant new information concerning an aspect of one or more hazardous chemicals or EHSs which were previously reported on either the annual or first time Tier Two forms submitted by a facility, and contains all the required information for hazardous chemicals or EHSs at the facility that meet or exceed the current Tier Two thresholds. A "modified Tier Two form" provides information for all hazardous chemicals and EHSs that are present at a facility at a threshold of 500 pounds; this type of report may be prepared in response to a request from a citizen for information, in lieu of the workplace chemical list.

(29) Workplace chemical list--A list of hazardous chemicals developed under Title 29 CFR, §1910.1200(e)(1)(i) or the Texas Hazard Communication Act, §502.005(a).

§295.182. Responsibilities and Requirements.

(a) Responsibility for implementation of program. The department's responsibilities under the 505 Act, the 506 Act, and the 507 Act are carried out through

the Department of State Health Services, Tier Two Chemical Reporting Program. Compliance documents and routine inquiries regarding this Rule shall be addressed to the Department of State Health Services, Tier Two Chemical Reporting Program, 1100 West 49th Street, Austin, Texas 78756-3199, or at toll free telephone number 1-800-452-2791.

(b) Facility chemical list.

(1) A facility operator covered by the 505 Act, the 506 Act, or the 507 Act shall compile and maintain a facility chemical list using the most current version of the electronic Tier Two software program.

(2) Facility operators shall file an annual Tier Two form and the appropriate filing fee with the department no later than March 1 of each year.

(3) A facility operator required to submit an annual Tier Two form under paragraph (2) of this subsection shall furnish a copy of this form no later than March 1 of each year to the following entities:

(A) the appropriate fire chief; and

(B) the appropriate LEPC.

(4) A facility operator shall submit an initial Tier Two form and the appropriate filing fee to the department within 90 days after the date that the facility operator:

(A) begins operation and acquires one or more hazardous chemicals or EHSs which meet or exceed any of the current Tier Two thresholds; or

(B) first acquires one or more hazardous chemicals or EHSs which meet or exceed any of the current Tier Two thresholds and which were not reported on the most recently submitted annual Tier Two form; or

(C) determines that one or more hazardous chemicals or EHSs which meet or exceed any of the current Tier Two thresholds were omitted from the most recently submitted annual Tier Two form.

(5) A facility operator required to submit an initial Tier Two form under paragraph (4) of this subsection shall furnish a copy of this form within 90 days after the date that the facility operator first becomes subject to the requirements of paragraph (4) of this subsection to the following entities:

(A) the appropriate fire chief; and

(B) the appropriate LEPC.

(6) A facility operator shall file an updated Tier Two form with the department not later than the 90th day after the date on which the operator discovers significant new information concerning an aspect of a previously reported hazardous chemical or EHS which was reported on either an annual or initial Tier Two form submitted by the facility. No fee will be charged for filing this report.

(7) A facility operator required to submit an updated Tier Two form under paragraph (6) of this subsection shall furnish a copy of this form within 90 days after the date that the facility operator first becomes subject to the requirements of paragraph (6) of this subsection to the following entities:

(A) the appropriate fire chief; and

(B) the appropriate LEPC.

(8) A facility operator covered by this section must submit to the department an electronic Tier Two file of the facility chemical list using software and a submission procedure that has been approved by the department. A copy of the completed versions of the electronic Tier Two file, any other document required by the department, and the appropriate filing fee shall be submitted to the department to comply with this subsection.

(9) A facility operator must contact the fire chief for approval to submit an electronic Tier Two file of the facility chemical list in lieu of the printed copy of the electronic Tier Two file. If approved by the fire chief, a facility operator may submit an electronic Tier Two file of the facility chemical list and be in compliance with this subsection. A facility operator must contact the chair of the LEPC for approval to submit an electronic Tier Two file of the facility chemical list in lieu of the printed copy of the electronic Tier Two file. If approved by the LEPC chair, a facility operator may submit an electronic Tier Two file of the facility chemical list and be in compliance with this subsection.

(10) A facility operator shall maintain at the headquarters facility either an electronic file or a printed copy of the facility's current annual Tier Two form until such time as the facility operator files the following year's annual Tier Two form with the department.

(11) Multiple facilities may be reported in the same Tier Two electronic file, as long as all of the facilities are under the control of a single facility operator.

(12) In providing appropriate facility identifiers, a facility operator shall provide under the Facility Identification sections of the Texas Tier Two form one of the following descriptions:

(A) for a facility located within a city's limits, the description must provide the following information:

- (i) the street address;
- (ii) the name of the city; and
- (iii) the zip code for the facility.

(B) for a facility located in an area outside of a city's limits, the description must include either a street address or the latitude and longitude for the facility. Latitude and longitude values shall be given in units of decimal degrees to four decimal places. Latitude and longitude values shall be obtained using a Global Positioning System instrument which has been calibrated to either the North American Datum of 1983 or the World Geodesic System of 1984.

(c) Direct citizen access to information.

(1) A manufacturing or public employer facility must provide within 10 working days of the date of receipt of a citizen's request under the 505 Act, §505.007(a), or the 506 Act, §506.007(a), a paper copy of the facility's existing workplace chemical list or a paper copy of the modified Tier Two form using a 500-pound threshold for each hazardous chemical at the facility. Except as otherwise provided in this section, such documents shall be furnished or mailed to the citizen requesting the information. The modified Tier Two form must include completed chemical description blocks for each chemical reported.

(2) A manufacturing or public employer facility that has received five requests under paragraph (1) of this subsection in a calendar month, four requests in a calendar month for two or more months in a row, or more than 10 requests in a year may elect to furnish the material to the department so the department may respond to further requests for information about hazardous chemicals at the facility.

(3) A manufacturing or public employer facility electing to furnish materials to the department must notify the department in writing, and must provide to the department copies of the previous requests which meet the request frequency rate as specified in paragraph (2) of this subsection. The facility must inform persons making requests under paragraph (1) of this subsection of the availability of the information at the department and refer the request to the department for that filing period. The notice to persons making requests shall state the address of the department and shall be mailed within seven days of the date of receipt of the request, if by mail, and at the time of the request if in person.

§295.183. Compliance and Fees.

(a) Complaints and investigations.

(1) The department has the right to inspect. The commissioner or his

designated representatives may enter a facility at reasonable times to conduct compliance inspections. Advance notice is not required. It is a violation of these rules for a person to interfere with, deny, or delay an inspection or investigation conducted by a department representative.

(2) The commissioner or his designated representative shall investigate in a timely manner a complaint relating to an alleged violation of the 505 Act, the 506 Act, the 507 Act or these rules. Such complaints do not have to be submitted to the department in writing and may be anonymous. An inspection based on a complaint is not limited to the specific allegations of the complaint. A facility operator who refuses to allow such an investigation shall be in violation of these rules. Complaints are not necessary to conduct an inspection.

(3) The department may find multiple violations by a facility operator based on specific requirements of the 505 Act, the 506 Act, the 507 Act or these rules.

(4) Upon request from a representative of the commissioner, a facility operator shall make or allow photocopies of documents to be made and permit the representative to take photographs to verify the compliance status of the employer. Such requests may be made during a compliance inspection or a follow-up request after an inspection.

(b) Administrative penalties.

(1) Inspections may be conducted by the commissioner or his designated representative to determine if persons are in violation of the 505 Act, the 506 Act, the 507 Act or these rules. Persons found to be in violation will be notified in writing of any alleged violations and proposed penalties or other enforcement action.

(2) Manufacturing facility operators found to be in violation of the 505 Act or these rules are subject to administrative penalties, as authorized by the 505 Act, to be administered in accordance with the procedures detailed in the 505 Act, §§505.010, 505.011, and 505.012, and this section.

(3) Public employer facility operators found to be in violation of the 506 Act or these rules are subject to administrative penalties, as authorized by the 506 Act, to be administered in accordance with the procedures detailed in the 506 Act, §§506.010, 506.011, and 506.012, and this section.

(4) Nonmanufacturing facility operators found to be in violation of the 507 Act or these rules are subject to administrative penalties, as authorized by the 507 Act, to be administered in accordance with the procedures detailed in the 507 Act, §§507.009, 507.010, and 507.011, and this section.

(5) Each violation may be assessed as a separate penalty. The total penalty for a violation is the sum of all per day violation penalties.

(6) Penalties shall be due after an order is issued by the commissioner. An order may be issued on or after the 16th business day following the date that a written notification of violation is received by the facility operator, unless the department receives an acceptable written response that documents that each violation has been corrected, an informal conference has been requested, or a formal hearing has been requested. If an informal conference is held, the facility operator must respond as set forth in paragraph (8) of this subsection within 10 days after the facility operator receives a summary letter following the informal conference.

(7) If a violation involves a failure to make a good faith effort to comply with these rules by a manufacturing facility or a nonmanufacturing facility, the commissioner may assess the administrative penalty at any time.

(8) The written response to the department's summary letter from the facility operator must address each violation separately and must provide the documentation requested by the department or an acceptable alternative agreed to by the department. An inappropriate or unacceptable response may result in a penalty being assessed for the underlying violations.

(9) Violations will be classified in one of three severity levels:

(A) a minor violation is related to a minor records keeping deficiency;

(B) a serious violation is related to failure to pay filing fees for required submissions, minor omissions of information from Tier Two forms, or substantial records keeping deficiencies; or

(C) a critical violation is related to substantial omissions of information from Tier Two forms, failure to submit required information, or denial of entry.

(10) For manufacturing facilities, a penalty may be assessed, not to exceed \$500 a day for each day a violation continues, with a total penalty not to exceed \$5,000 for each violation.

(11) For public employer facilities and nonmanufacturing facilities, a penalty may be assessed, not to exceed \$50 a day for each day a violation continues, with a total penalty not to exceed \$1,000 for each violation.

(12) Individual penalties may be reduced or enhanced based on consideration of the history of previous violations, the degree of hazard to the health and safety of the public, good-faith efforts made to correct violations promptly, and on any other consideration that justice may require.

(13) Failure to file a Tier Two form with the department will be considered a violation that may not require an inspection. Other violations may be confirmed by the department through correspondence with authorized company officials and may not warrant an inspection.

(14) At its option, the department may accept appropriate documentation provided by the facility as evidence of compliance status.

(15) Examples of violations for the various severity levels include, but are not limited to:

(A) minor violations having a penalty of \$100 per day for manufacturing facilities and \$10 per day for public employer facilities and nonmanufacturing facilities:

(i) failure to sign or date Tier Two forms filed with the department;

(ii) failure to maintain a copy of an updated Tier Two form at the facility; or

(iii) failure to provide adequate chemical description information required for each hazardous chemical on the Tier Two form.

(B) serious violations having a penalty of \$300 per day for manufacturing facilities and \$30 per day for public employer facilities and nonmanufacturing facilities:

(i) failure to include significant information regarding reportable quantity hazardous chemicals on any Tier Two form submitted to the department, the fire chief, or the LEPC;

(ii) failure to file an initial Tier Two form with the department, the fire chief, or the LEPC, within 90 days after the date on which the operator begins operation or the facility exceeds the reporting threshold for a previously unreported hazardous chemical;

(iii) failure to submit the appropriate Tier Two form filing fee to the department;

(iv) failure to provide significant information required for the Texas Tier Two Cover Sheet; or

(v) failure to provide a map when required for submission of a Tier Two form.

(C) critical violations having a penalty of \$500 per day for manufacturing facilities and \$50 per day for public employer facilities and nonmanufacturing facilities:

(i) failure to include significant information related to hazardous chemicals on a Tier Two form submitted to the department, the fire chief, or the LEPC;

(ii) failure to submit a required Tier Two form to the department, the fire chief, or the LEPC;

(iii) interfering with, denying or delaying an inspection or investigation conducted by a representative of the department;

(iv) interfering with, denying or delaying an on site inspection of a facility conducted by the fire chief or the fire chief's representative;

(v) upon request from a fire chief or LEPC, failure to provide such additional information as is needed for planning purposes; or

(vi) upon request from a citizen, failure to provide within the time limits specified in §295.182(c)(1) a copy of the facility's existing workplace chemical list or a modified Tier Two form using a 500-pound threshold for all hazardous chemicals at the facility.

(c) Fees.

(1) The department shall charge a fee for each required annual and initial Tier Two form. The fee must accompany the Tier Two form when submitted to the department.

(2) Annual fees for the annual and initial Tier Two forms are based on the number of hazardous chemicals present at a facility and shall be:

(A) For a manufacturing facility:

(i) \$100 for each required submission having no more than 25 hazardous chemicals;

(ii) \$200 for each required submission having no more than 50 hazardous chemicals;

(iii) \$300 for each required submission having no more than 75 hazardous chemicals;

(iv) \$400 for each required submission having no more

than 100 hazardous chemicals; or

(v) \$500 for each required submission having more than 100 hazardous chemicals.

(B) For a public employer facility or nonmanufacturing facility:

(i) \$50 for each required submission having no more than 75 hazardous chemicals or hazardous chemical categories; or

(ii) \$100 for each required submission having more than 75 hazardous chemicals or hazardous chemical categories.

(3) For the purpose of minimizing fees, the department shall provide for consolidated filing of multiple Tier Two forms for facility operators if:

(A) each of the Tier Two forms contain fewer than 25 chemicals;

(B) each of the Tier Two forms are filed by a single operator or a single operator's authorized representative, with an identical operator's name and address on each Tier Two form in the consolidated filing;

(C) all consolidated Tier Two forms are mailed to the department in the same package; and

(D) the number of required submissions that are consolidated do not exceed the following:

(i) for manufacturing facilities, no more than two required submissions; or

(ii) for public employer facilities or nonmanufacturing facilities, no more than seven required submissions.

(4) Fees paid by mail must be paid by check or money order (cash payments are not acceptable) to the Department of State Health Services and must be addressed to: Department of State Health Services, Tier Two Chemical Reporting Program, ZZ109-180, P.O. Box 149200, Austin, Texas 78714-9200. Checks or money orders must contain the following information: "Budget ZZ109 Fund 180."

(5) No receipt will be provided for payment of fees which are mailed, but a canceled check may be considered adequate proof of payment.

(6) The department may refund a fee overpayment to a facility operator provided that:

(A) the facility operator provides, in writing, proof of payment, the date(s) on which the required submissions and fees were sent to or received by the department, the circumstances that caused the overpayment, and the reasons why it would have been considered an overpayment under the rules in force at the time of the original filing;

(B) the facility operator requests the refund in writing within 90 calendar days of the date on which the required submissions and fee were received by the department; and

(C) the facility operator pays the department a processing fee of \$20 per refund.