INTERIM DEER BREEDER/CWD PERMIT RULES

ADOPTION PREAMBLE

1. Introduction.

The Texas Parks and Wildlife Commission (Commission) in a duly noticed meeting on November 5, 2015 adopted new §§65.90 - 65.93, concerning Disease Detection and Response with changes to the proposed text as published in the October 2, 2015, issue of the *Texas Register* (40 TexReg 6856). The new rules are constituted as new Division 2 within Chapter 65, Subchapter B, entitled Chronic Wasting Disease - Movement of Deer.

The change to §65.90(20) alters the definition of "Status" to clarify that, with regard to breeding facilities, "status" is the level of testing "performed" rather than the level of testing "required." Therefore, the definition was modified to define "status" as "the level of testing performed or required by a deer breeding facility or a release site pursuant to this division."

The change to §65.90(21) alters the definition of "Tier 1 facility" for purposes of clarification. As proposed, the definition stated that a Tier 1 facility is "Any facility registered in TWIMS that has received an exposed deer within the previous five years; or transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility; and is subject to a TAHC hold order." The department has determined that the structure of the definition in the proposal, as well as the phrase "subject to a TAHC hold order" could be a source of confusion. In the interests of clarity, subparagraphs (A) and (B) have been combined and subparagraph (C) has been redesignated as subparagraph (B) and has been reworded to read "has not been released from a TAHC hold order related to activity described in (A)." Thus, if a facility has transferred deer to or accepted deer from an index facility and has not been released from a TAHC hold order, it is a Tier 1 facility.

The change to §65.91 adds new subsection (j) to provide for the expiration of the effectiveness of the division on August 31, 2016. The Texas Parks and Wildlife (department) intends the rules as adopted to be an interim replacement for the

emergency rules adopted on August 18, 2015 (40 TexReg 5566), and extended on December 14, 2015 (41 TexReg 9), hereafter referred to as "emergency CWD breeder rules." Based on additional information from the ongoing epidemiological investigation, disease surveillance data collected from captive and free ranging deer herds, guidance from the TAHC, and input from stakeholder groups, the department intends to review the interim rules and will make an initial recommendation to the Commission at its March 2016 meeting.

The change to §65.92 alters subsection (a)(1)(C) to clarify the reference to DMP facilities. As noted elsewhere in this preamble, the department adopted emergency rules to address the movement of white-tailed via Deer Management Permit (DMP) (40 TexReg 7305).A DMP is a permit issued by the department under rules adopted pursuant to Parks and Wildlife Code, Chapter 43, Subchapters R and R-1, that allows the temporary possession of free-ranging white-tailed or mule deer for breeding purposes. In addition, interim Deer Management Permit (DMP) rules have been proposed (40 TexReg 9086) and will be considered for adoption by the Commission at its January 21, 2016 meeting. As a result, the DMP regulation would include regulations in addition to those contained in 31 TAC Chapter 65, Subchapter R. Therefore, to avoid confusion, this reference is replaced with a reference to the appropriate provision of the Parks and Wildlife Code and a more generic reference to the "department's DMP regulations."

The change to §65.93 alters subsection (b)(2)(B)(i), (b)(2)(C), and (b)(3)(B)(ii) to replace the reference to the "last day of lawful deer hunting at the site in the previous year" with "August 24, 2015." Operationally, in calculating the number of CWD samples required by this subparagraph for Class II release sites, the department is basing the percentage on the number of deer released between August 24, 2015 and the last day of lawful hunting at the site in the current year. This change is necessary to ensure clarity.

2. Justification for the Rules.

Under Parks and Wildlife Code, Chapter 43, Subchapter L, the department regulates the possession of captive-raised deer within a facility for breeding purposes

and the release of such deer into the wild. A deer breeder permit affords deer breeders certain privileges, such as (among other things) the authority to buy, sell, transfer, and release captive-bred white-tailed and mule deer, subject to the regulations of the Commission and the conditions of the permit. Breeder deer may be purchased, sold, or transferred only for purposes of propagation or liberation. There are currently 1,275 permitted deer breeders operating more than 1,300 deer breeding facilities in Texas.

On June 30, 2015, the department received confirmation that a two-year-old white-tailed deer held in a deer breeding facility in Medina County ("index facility") had tested positive for chronic wasting disease (CWD). Under the provisions of the Agriculture Code, §161.101(a)(6), CWD is a reportable disease. A veterinarian, veterinary diagnostic laboratory, or person having care, custody, or control of an animal is required to report the existence of CWD to TAHC within 24 hours after diagnosis. Subsequent testing confirmed the presence of CWD in additional white-tailed deer at the index facility. The source of the CWD at the index facility is unknown at this time. Within the last five years, the index facility accepted deer from 30 other Texas deer breeders and transferred 835 deer to 147 separate sites, including 96 deer breeding facilities, 46 release sites, and two DMP facilities in Texas, as well as two destinations in Mexico. The department estimates that more than 728 locations in Texas (including 384 deer breeders) either received deer from the index facility or received deer from a deer breeder who had received deer from the index facility. At least one of those locations, a deer breeding facility in Lavaca County, has been confirmed to have CWD positive white-tailed deer acquired from the index facility.

The new rules impose CWD testing requirements and movement restrictions for white-tailed deer and mule deer held under the authority of deer breeder permits issued by the department. The new rules are a result of extensive cooperation between the department and the TAHC to protect susceptible species of exotic and native wildlife from CWD. TAHC is the state agency authorized to manage "any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl, regardless of whether the disease is communicable, even if the agent of

transmission is an animal species that is not subject to the jurisdiction" of TAHC. Tex. Agric. Code §161.041(b).

The department and TAHC have been concerned for over a decade about the possible emergence of CWD in free-ranging and captive deer populations in Texas. As a result, the department and TAHC have worked together to develop a Chronic Wasting Disease Management Plan (the Plan) to guide the department and TAHC in addressing risks, developing management strategies, and protecting big game resources from CWD in captive or free-ranging cervid populations. The most recent version of the Plan was finalized in March 2015. Much of the information provided in this preamble is also contained in the Plan.

CWD is a fatal neurodegenerative disorder that affects some cervid species, including white-tailed deer, mule deer, black-tailed deer, elk, red deer, sika, moose, and their hybrids (susceptible species). It is classified as a TSE (transmissible spongiform encephalopathy), a family of diseases that includes scrapie (found in sheep), bovine spongiform encephalopathy (BSE, found in cattle), and variant Creutzfeldt-Jakob disease (vCJD) (found in humans). Much remains unknown about CWD. The peculiarities of its transmission (how it is passed from animal to animal), infection rate (the frequency of occurrence through time or other comparative standard), incubation period (the time from exposure to clinical manifestation), and potential for transmission to other species are still being investigated. There is no scientific evidence to indicate that CWD is transmissible to humans.

What is known is that it is a progressive, fatal disease with no known immunity or treatment. CWD is known to occur via natural transmission in white-tailed deer, mule deer, black-tailed deer, red deer, sika deer, elk, and moose (Sohn et al. 2011, CWD Alliance 2012, Saunders et al. 2012). There are two primary sources of exposure to CWD for uninfected deer: (1) CWD infected deer, and (2) CWD contaminated environments (Williams et al. 2002, Miller et al. 2004, Mathiason et al. 2009). It is believed that some TSE prions may appear spontaneously and sporadically, but there is no evidence of spontaneous CWD (Chesebro 2004). The presence of infected deer over time increases

the number of infectious CWD prions in the environment. As CWD becomes established in an area, environmental contamination may become the primary source of exposure for uninfected deer. Conversely, in areas where CWD is not established, and where the environment is relatively uncontaminated, direct animal contact is considered the most likely source of transmission of CWD to uninfected deer.

In early stages of infection, limiting the growth of environmental contamination through the reduction of infected individuals may offer some control in limiting disease prevalence and distribution (Wasserberg et al. 2009, Almberg et al. 2011). However, infected individuals on the landscape serve as a reservoir for prions which will be shed into the environment. Prions are shed from infected animals in saliva, urine, blood, soft-antler material, and feces (Gough et al. 2009, Mathiason et al. 2009, Saunders et al. 2012). There are no known management strategies to mitigate the risk of indirect transmission of CWD once an environment has been contaminated with infectious prions. This makes eradication of CWD very difficult, if not impossible in areas where CWD has been established for a long period before initial detection. Although the incubation period for CWD is not fully understood, a susceptible species infected with CWD is expected to display symptoms within five years after infection.

As CWD is invariably fatal, a high prevalence of the disease in free-ranging populations has been correlated to deer population declines. Human dimensions research suggests that hunters will avoid areas of high CWD prevalence (See, e.g. Duda 2011, Needham et al. 2007, Vaske 2009, Zimmer 2012). The potential implications of CWD for Texas and its annual, multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies could be significant, unless it is contained and controlled.

The number of states and provinces in which CWD has been discovered has steadily increased in the past decade, forcing many state and provincial wildlife agencies, hunters, and stakeholders to confront the myriad of consequences and implications this disease presents. Implications of CWD are often centered on the anticipated, or unknown potential impacts to wild cervid populations, most notably

concerns for population declines resulting from infected herds. Disease eradication is expected to become less attainable as CWD becomes more established in a population, emphasizing the criticality of a sound CWD surveillance and response plan. Of course, disease prevention is the best approach to protecting cervid populations and avoiding social and economic repercussions resulting from CWD or other wildlife diseases (Sleeman & Gillin 2012).

Currently, the only test certified by the U.S. Department of Agriculture (USDA) for CWD must be conducted post-mortem by extracting and testing the obex (a structure in the brain) or medial retropharyngeal lymph node. However, the department is actively collaborating with researchers to investigate possible efficacious live-animal tests that can be integrated into the state's overall disease surveillance efforts.

In addressing CWD, the Plan sets forth three major goals: (1) Minimize CWD risks to the free-ranging and captive white-tailed deer, mule deer, and other susceptible species in Texas; (2) Establish and maintain support for prudent CWD management with hunters, landowners, and other stakeholders; and (3) Minimize direct and indirect impacts of CWD to hunting, hunting related economies, and conservation in Texas. The department is guided by these three goals in the development of rules needed to address CWD.

As part of the department's surveillance efforts, prior to July 1, 2015, more than 32,882 "not detected" CWD test results were obtained from free-ranging deer (i.e., not breeder deer) in Texas, and deer breeders had submitted 12,759 "not detected" test results as well. The intent of the new rules is to increase the probability of detecting and containing CWD where it exists.

Previous CWD Rulemaking

The department has engaged in several rulemakings over the years to address the threat posed by CWD. In 2005, the department closed the Texas border to the entry of out-of-state captive white-tailed and mule deer and increased regulatory requirements regarding disease monitoring and record keeping. The closing of the Texas border to

entry of out-of-state captive white-tailed and mule deer was updated, effective in January 2010, to address other disease threats to white-tailed and mule deer (35 TexReg 252).

On July 10, 2012, the department confirmed that two free-ranging mule deer sampled in the Texas portion of the Hueco Mountains tested positive for CWD. In response, the department and TAHC convened the CWD Task Force, comprised of wildlife-health professionals and cervid producers, to advise the department on the appropriate measures to be taken to protect white-tailed and mule deer in Texas. Based on recommendations from the CWD Task Force, the department adopted new rules in 2013 (37 TexReg 10231) to implement a CWD containment strategy in far West Texas. Those rules (31 TAC §§65.80-65.88), among other things, require deer harvested in a specific geographical area (the Containment Zone), to be presented at check stations to be tested for CWD.

Response to June 2015 CWD Discovery

Upon discovery of CWD in Medina County in June 2015, the department and TAHC convened the CWD Task Force to advise the department on the appropriate measures to be taken in response to the discovery. The CWD Task Force met on July 14, August 6, and September 1, 2015. In addition, on July 8, July 24, August 6, and September 16, 2015, the department and TAHC held stakeholder conference calls, some or all of which were attended by representatives of impacted groups, including the Texas Deer Association, the Deer Breeders Corporation, the North American Deer Farmers Association, the Exotic Wildlife Association, the Texas Wildlife Association, the Texas and Southwest Cattle Raisers Association, the Texas Chapter of Wildlife Society. Furthermore, the department convened the CWD Working Group, which is comprised of representatives from the department, TAHC, Texas A&M Veterinary Medical Diagnostic Laboratory (TVMDL), and the United States Department of Agriculture – Animal Plant Health Inspection Service – Veterinary Services (USDA-APHIS-VS). Members of the CWD Working Group with expertise in epidemiology and/or disease

management participated in numerous meetings and discussions in developing a CWD management strategy, of which the rules are a part.

Emergency CWD breeder rules were adopted on August 18, 2015 (40 TexReg 5566). The emergency CWD breeder rules were extended on December 14, 2015 (41 TexReg 9). Also as noted previously, the rules adopted in this rulemaking will supersede and replace the emergency CWD breeder rules.

Also, to address other types of deer movement that could result in the transmission of CWD, emergency rules were adopted to address movement of white-tailed or mule deer via a Trap, Transport and Transplant (Triple T) Permit (40 TexReg 7307), and via a DMP (40 TexReg 7305). In addition, as mentioned previously, interim DMP rules have been proposed (40 TexReg 9086) and will be considered for adoption by the Commission at its January 21, 2016 meeting.

In addition to the regulatory response (which includes enhanced CWD testing requirements), the department has undertaken an effort to obtain additional CWD tests from hunter-harvested deer on a voluntary basis. The department established goals for testing of hunter harvested deer for each of the state's 33 Resource Management Units (RMU). (An RMU is an area of the state with similar soils, vegetation types and land use practices.)As of December 20, 2015, department staff have collected >9,000 hunter-harvested samples statewide during the 2015-16 hunting season.

Current CWD Rulemaking

The new rules set forth specific CWD testing requirements for deer breeders, which would have to be satisfied in order to transfer deer to other deer breeders (or other captive-deer facilities), or for purposes of release. The new rules also impose CWD testing requirements on some sites where breeder deer are liberated (release sites). The testing strategy established in the rules is intended to increase surveillance and to prevent the spread of CWD through permitted activities.

One of the most effective approaches to managing infectious diseases and arresting the spread of a disease is to segregate suspicious individuals and populations from

unexposed populations. As a matter of epidemiological probability, when animals from a population at higher risk of harboring an infectious disease are introduced to a population of animals at a lower risk of harboring an infectious disease, the confidence that the receiving population will remain disease-free is reduced.

Therefore, in establishing testing and other requirements, the rules classify breeding facilities and release sites based on the epidemiological likelihood that the breeder facility or release site will contain or spread CWD. In other words, the classifications are based on the relative level of risk for CWD associated with the breeding facility or release site. Breeding facilities are classified as Transfer Category 1 (TC 1), Transfer Category 2 (TC 2), or Transfer Category 3 (TC 3). TC 1 breeding facilities are facilities that have a relatively low risk for CWD and TC 3 breeding facilities are facilities that have a higher risk for CWD. TC 1 breeding facilities are considered the highest status breeding facilities under the new rules. Similarly, release sites are classified as a Class I, Class II, or Class III release site. As with breeding facilities, a Class I release site poses less risk and a Class III site poses more risk. Class I release sites are considered the highest status release sites.

One factor in determining relative risk concerns a breeding facility's participation in TAHC's CWD Herd Certification Program. See, 4 TAC §40.3 (relating to Herd Status Plans for Cervidae). Participation in the TAHC CWD Herd Certification Program requires that breeding facilities comply with more stringent CWD testing, monitoring, and other requirements. Breeding facilities that have complied with the testing, monitoring, and other requirements of this program for five years or more are considered to be at the lowest risk for CWD.

Another factor in evaluating risk is the relationship of a breeding facility or release site to a breeding facility at which CWD has been detected. As described in more detail elsewhere in this preamble, those facilities and sites most closely related to the CWD-positive facility are referred to as "Tier 1" facilities.

Another significant component of the new rules is the requirement that breeder deer may be released (liberated) only on release sites that are surrounded by a fence of at

least seven feet in height and that is capable of retaining deer at all times. Because deer held under deer breeder permits are frequently liberated for stocking and/or hunting purposes (27,684 in 2014), the potential for disease transmission from liberated breeder deer to other free-ranging deer is of concern. Although the release of CWD-positive deer will threaten free-ranging deer within a specific release site, the existence of a high fence around this release site will reduce or slow the transmission of the disease across the broader landscape.

The new rules are necessary to protect the state's white-tailed and mule deer populations, as well as the long term viability of associated hunting, wildlife management, and deer breeding industries. To minimize the severity of biological and economic impacts resulting from CWD, the new rules implement a more rigorous testing protocol within certain deer breeding facilities and at certain release sites than was previously required. In an effort to balance the needs of the many and varied landowner, management, and deer hunting interests in the state, the department has attempted to allow all deer breeders other than those with a CWD-positive facility the opportunity (which in some instances may require additional testing or other actions) to continue to move and release breeder deer.

Changes from Emergency CWD Breeder Rules

In addition to the changes from the rule as proposed, the new rules differ from the emergency CWD breeder rules in several ways. Although the following is not an exhaustive or comprehensive comparison, it addresses the major differences between the new rules and the emergency CWD breeder rules.

Substantive Changes from Emergency Rules

There are several other differences between the emergency CWD breeder rules and the current rules:

1. Section 65.91(e) of the emergency CWD breeder rules provides that if a breeding facility or release site accepts breeder deer from a facility of lower status, then the receiving facility assumes that lower status for the purpose of the rules. Although the

emergency CWD breeder rules provide a mechanism for Transfer Category (TC) 2 status to be re-established for facilities that have dropped to TC 3 status, the emergency CWD breeder rules do not specify a timeframe for such a transition. Therefore, new §65.91(f) stipulates that a facility that has dropped in status may increase in status, either in two years (TC 3 to TC 2) or in five (TC 2 to TC 1). Following the adoption of the emergency CWD breeder rules, questions arose regarding the length of time for a facility that has dropped in status to obtain the higher status and this provision was intended to address that question. The department understands, however, that these provisions/clarifications may be moot considering the August 31, 2016 expiration of these rules. Nonetheless, the department included these provisions to address apparent ambiguity absent the expiration date.

2. Similarly, the emergency CWD breeder rules do not specifically address the status of new facilities permitted after March 31, 2015. Therefore, new §65.92(a)(4) would contain clarifying language to the effect that facilities permitted after March 31, 2015 would assume the status of the lowest status of deer accepted. In the same vein, the emergency CWD breeder rules do not explicitly state that it is possible for TC 2 facilities to become TC 1 facilities (although it would be automatic if "5th year" or "certified" status under the TAHC Herd Certification Program is attained).

3. Section 65.93(b)(3)(A) of the emergency CWD breeder rules did not note that a release site is a Class III release site if it is a Tier 1 facility. New §65.93(b)(3)(B)(i) remedies that oversight.

Clarifying and Other Changes from Emergency CWD Breeder Rules

1. The CWD emergency breeder rules did not contain a definition of "confirmed" as it relates to CWD testing. Therefore, in an effort to avoid confusion, new §65.90(3) defines the term as "a CWD test result of 'positive' received from the National Veterinary Service Laboratories of the United States Department of Agriculture."

2. The definition of "exposed" contained at §65.90(9) of the emergency CWD breeder rules did not contemplate situations in which the department is able to

determine that although a deer might otherwise be considered "exposed" to CWD, the department is able, through an epidemiological investigation, to determine that a deer is, in fact, not exposed. For example, if a deer was transferred out of a breeding facility prior to a CWD-positive deer being transferred into the facility, the department may be able to determine that the deer transferred out of the facility was not exposed to CWD. The ability to determine that a deer is not, in fact, an exposed deer is important because a facility that accepts an exposed deer becomes a "Tier 1" facility, triggering provisions that not only affect that facility, but all the facilities that received deer from the facility. Therefore, the definition of "exposed" in new §65.90(10) has been altered to allow the department to truncate the trace-back of deer movements in a facility in cases where an epidemiological investigation reveals the trace-back is not necessary.

3. The definition of "Tier 1" contained at §65.90(20) of the emergency CWD breeder rules did not contemplate situations in which a facility that received exposed deer might be able to satisfy testing requirements to become eligible to move deer, but would still be prohibited from doing so by being subject to a TAHC hold order. Therefore, new §65.90(21) stipulates that a Tier 1 facility remains a Tier 1 facility if it is under a TAHC hold order.

4. Section 65.91(i) of the emergency CWD breeder rules provided that a person who is subject to the provisions of the emergency CWD breeder rules is required to comply with the provisions of TAHC regulations at 4 TAC Chapter 40 (relating to Chronic Wasting Disease) that are applicable to white-tailed or mule deer. As worded, the provision inadvertently excludes deer released prior the effective date of the emergency CWD breeder rules, because such deer have been liberated and are not possessed under the provisions of the rules. Therefore, new §65.91(i) has been reworded to apply also to persons who receive deer for liberation.

5. New §65.93(a)(5) provides that if the owner of a release site does not comply with the CWD testing requirements, the release site is ineligible to be a destination for future releases. The emergency CWD breeder rules included a five-year timeframe for ineligibility. The five-year time frame for ineligibility is not included in the new rules.

6. The emergency CWD breeder rules contained specific dates necessary to accommodate the immediate application of the emergency CWD breeder rules. The new rules eliminate those dates where necessary and replace them with generic language.

New §65.90, concerning Definitions, sets forth the meanings of specialized words and terms in order to eliminate ambiguity and enhance compliance and enforcement.

New §65.90(1) defines "accredited testing facility" as "a laboratory approved by the United States Department of Agriculture to test white-tailed deer or mule deer for CWD." The definition is necessary in order to provide a standard for testing facilities.

New §65.90(2) defines "breeder deer" as "a white-tailed deer or mule deer possessed under a permit issued by the department pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter." The definition is necessary to establish a shorthand term for a phrase that is used frequently in the new rules but cumbersome to repeat.

New §65.90(3) defines "confirmed" as "a CWD test result of "positive" received from the National Veterinary Service Laboratories (NVSL) of the United States Department of Agriculture." The definition is necessary in order to provide a definitive standard for asserting the presence of CWD in a sample. Samples collected from breeder deer are sent initially to an accredited testing facility, such as the Texas Veterinary Medical Diagnostic Laboratory (TVMDL). A test result of "suspect" is returned when CWD is detected, and a tissue sample is forwarded to the NVSL for confirmation.

New §65.90(4) defines "CWD" as "chronic wasting disease." The definition is necessary to provide an acronym for a term that is used repeatedly in the rules.

New §65.90(5) defines "CWD-positive facility" as "a facility where CWD has been confirmed." The definition is necessary because the new rules contain provisions that are predicated on whether or not CWD has been detected and confirmed in a given deer breeding, DMP, nursing, or other facility authorized to possess white-tailed deer or mule deer.

New §65.90(6) defines "deer breeder" as "a person who holds a valid deer breeder's permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L,

and Subchapter T of this chapter." As with several other definitions in the new rules, the definition is necessary to establish a shorthand term for a phrase that is used frequently in the new rules but cumbersome to repeat.

New §65.90(7) defines "deer breeding facility (breeding facility)" as "a facility permitted to hold breeder deer under a permit issued by the department pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter." As with several other definitions in the new rules, the definition is necessary to establish a shorthand term for a phrase that is used frequently in the new rules but cumbersome to repeat.

New §65.90(8) defines "department (department)" as "Texas Parks and Wildlife Department." The definition is necessary to avoid confusion, since the new rules contain references to another state agency.

New §65.90(9) defines "eligible mortality" as "a breeder deer that has died within a deer breeding facility and is 16 months of age or older, or, if the deer breeding facility is enrolled in the TAHC CWD Herd Certification Program, is 12-months of age or older." The definition is necessary, in part, because the rules require CWD testing of eligible mortalities. CWD is difficult to detect in deer younger than 16 months of age, and more difficult in deer younger than 12 months of age. The department's previous CWD testing rules at §65.604 (e) of this title provided for testing of mortalities that were 16 months or older. The department is retaining that standard but is also recognizing that the TAHC and USDA use a standard of 12 months in their CWD herd certification program that requires testing 100 percent of eligible mortalities.

New §65.90(10) defines "exposed deer." This definition provides that "unless the department determines through an epidemiological investigation that a specific breeder deer has not been exposed to CWD, an exposed deer is a white-tailed deer or mule deer that is in a CWD-positive facility or was in a CWD-positive facility within the five years preceding the confirmation of CWD in that facility." The definition is necessary to distinguish the circumstances under which certain provisions of the new rules are applicable. The five-year timeframe was selected because a deer infected with CWD

could shed prions (the infectious agent believed to cause CWD) and infect other animals during this period before exhibiting clinical symptoms of the disease. However, if an epidemiological investigation concludes that any part of the five-year window is unnecessary, the status of "exposed" could be altered.

New §65.90(11) defines "hunter-harvested deer" as "a deer required to be tagged under the provisions of Subchapter A of this chapter (relating to Statewide Hunting Proclamation)." The definition is necessary because the rules in some instances require deer harvested by hunters (as opposed to other types of mortality) to be tested for CWD.

New §65.90(12) defines "landowner (owner)" as "any person who has an ownership interest in a tract of land, and includes a landowner's authorized agent." The definition is necessary because the new rules set forth testing requirements and other obligations for persons who own land where breeder deer are released from TC 2 and/or TC 3 breeding facilities.

New §65.90(13) defines "landowner's authorized agent" as "a person designated by a landowner to act on the landowner's behalf." The definition is necessary for the same reason set forth in the discussion of new §65.90(12).

New §65.90(14) defines "NUES tag" as "an ear tag approved by the United States Department of Agriculture for use in the National Uniform Eartagging System (NUES)." The definition is necessary because the new rules require breeder deer released from TC 3 breeding facilities to be tagged with either a RFID or NUES tag.

New §65.90(15) defines "originating facility" as "a facility that is the source facility identified on a transfer permit." The definition is necessary because the new rules allow breeder deer to be transferred between deer breeders and from deer breeders to release sites, making it necessary to distinguish the originating facility from the facility that received the deer.

New §65.90(16) defines "reconciled herd" as "the deer held in a breeding facility for which the department has determined that the deer breeder has accurately reported every birth, mortality, and transfer of deer in the previous reporting year." The definition is necessary because the rules require a deer breeder to have a reconciled herd

in order to transfer or release breeder deer.

New §65.90(17) defines "release site" as "a specific tract of land that has been approved by the department for the release of breeder deer under this division." The definition is necessary because the new rules impose CWD testing requirements for tracts of land where breeder deer are liberated if the breeder deer originate from certain types of deer breeding facilities.

New §65.90(18) defines "reporting year" as "the period of time from April 1 of one calendar year to March 31 of the next calendar year." Deer breeders are required to file annual reports with the department. The new rules condition the eligibility of deer breeders to transfer and release deer on the completeness and accuracy of those reports.

New §65.90(19) defines "RFID tag" as "a button-type ear tag conforming to the 840 standards of the United States Department of Agriculture's Animal Identification Number system." The definition is necessary because the new rules require breeder deer released from TC 3 breeding facilities be tagged with either an RFID or NUES tag.

New §65.90(20) defines "status" as "the level of testing performed or required by a deer breeding facility or a release site pursuant to this division." The definition also clarifies that the highest status for a Transfer Category is 1 and the lowest status is Transfer Category 3. Similarly, Class I is the highest status for release sites and Class III is the lowest. As noted previously, the rules categorize breeding facilities and release sites based on relative risk. The definition is necessary because the new rules predicate the eligibility of deer breeding facilities to transfer and receive breeder deer, and the testing requirements of release sites, upon the status of the breeding facility or release site.

New §65.90(21) defines "Tier 1 facility" as "any facility registered in TWIMS that (A) has received an exposed deer within the previous five years or has transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility; and (B) has not been released from a TAHC hold order related to activity described in subparagraph (A) of this paragraph." The definition is necessary to offer a shorthand reference to those facilities that have a direct

connection to a CWD-positive facility.

New §65.90(22) defines "TAHC" as "Texas Animal Health Commission." The Texas Animal Health Commission is the state agency charged with managing "any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl, regardless of whether the disease is communicable, even if the agent of transmission is an animal species that is not subject to the jurisdiction" of TAHC. Tex. Agric. Code, §161.041(b).

New §65.90(23) defines "TAHC CWD Herd Certification Program" as "the disease-testing and herd management requirements set forth in 4 TAC §40.3 (relating to Herd Status Plans for Cervidae)." The new rules have provisions specific to deer breeders who participated in the TAHC herd certification program. The definition makes it clear that references to herd certification are references to the herd certification program administered by TAHC.

New §65.90(24) defines "TAHC Herd Plan" as "a set of requirements for disease testing and management developed by TAHC for a specific facility." The new rules in some cases make eligibility to transfer or receive breeder deer contingent on compliance with a herd plan developed by TAHC. The definition makes it clear that references to herd plans are references to herd plans developed by TAHC.

New §65.90(25) defines "TWIMS" as "the department's Texas Wildlife Information Management Services (TWIMS) online application." TWIMS is the system that all deer breeders are required to use to file required notifications and reports required by current rule.

New §65.91, concerning General Provisions, sets forth a number of provisions that are applicable to the transfer or release of breeder deer.

New §65.91(a) stipulates that in the event that a provision of the new rules conflicts with any other provision of 31 TAC Chapter 65, the new rules would apply. Because of the need to quickly implement a regulatory response to the emergence of CWD there is insufficient time to harmonize the new rules with the agency's existing rules governing white-tailed deer and mule deer. Therefore, the new rules clarify that the new rules

govern in the event of conflict.

New §65.91(b) prohibits the transfer of live breeder deer for any purpose except as provided by the new rules. Because deer breeders frequently transfer deer to and receive deer from other deer breeders, as well as transfer breeder deer for release, it is necessary in light of the emergence of CWD in a Texas deer breeding facility to prohibit the movement of breeder deer except as authorized by the rules. New §65.91(c) prohibits the movement of deer to or from a deer breeding facility where CWD has been detected, beginning with the notification that a "suspect" test result has been received and lasting until the department authorizes resumption of activities. Given that CWD is an infectious disease, it is necessary to prohibit certain activities in order to contain the spread of the disease.

New §65.91(d) prohibits the transfer of exposed breeder deer from a deer breeding facility unless specifically authorized in a TAHC herd plan and then only in accordance with the provisions of the new rules. Under TAHC rules, any deer breeding facility that receives breeder deer from CWD-positive facility is automatically placed under a "hold order," which prohibits the movement of breeder deer out of the facility while TAHC conducts an epidemiological investigation and creates a herd plan for the facility based on that investigation. If the TAHC herd plan provides that movement of exposed deer can resume, then such movement may result if authorized by and if in compliance with the new rules.

New §65.91(e) stipulates that a breeding facility or release site that receives breeder deer from an originating facility of lower status would automatically assume the status of the originating facility. The new rules create a tiered system of testing performance based on the CWD monitoring and testing performance, and thus, the level of risk of transmission of CWD for each deer breeding facility and release site. The level of risk is also based on whether the facility contains or is connected to exposed animals. Epidemiological science dictates that a population receiving individuals from a higher risk population is itself at greater risk; therefore, the new rules address such transfers from higher risk to lower risk populations by requiring the receiving breeding facility, or

release site to assume the lower status.

New §65.91(f) explicitly outlines the timeframes for breeding facilities or release sites to increase status following a loss of status. A discussion of this provision was provided earlier in this preamble.

New §65.91(g) stipulates that a CWD test is not valid unless it is performed by an accredited testing facility. The department's efforts to detect and contain CWD depend on the quality of the testing itself. At the current time, USDA will not certify herd plans for cervidae unless CWD testing is performed by laboratories that have been approved by USDA. The standard for approval is compliance with 9 CFR §55.8, which sets forth the specific tests, methodology, and procedure for conducting CWD tests. Therefore, in order to ensure that CWD tests are performed in accordance with uniform standards, the new rules require all CWD tests to be performed by a laboratory approved by USDA. Additionally, the new subsection specifies which tissues must be submitted and who is authorized to collect those tissues. At the current time, the only CWD testing approved by USDA must be performed on certain tissues from eligible mortalities, such as the obex (a structure in the brain) or certain lymph nodes. The rules authorize laypersons to remove an obex, but require the extraction of appropriate lymph nodes be performed by an experienced veterinarian, technician, or biologist to ensure proper extraction and identification. Therefore, the new subsection stipulates that to be valid, a CWD test must be performed on an obex, which can be collected by anyone, but if a lymph node is to be tested in addition to the obex, it must be a medial retropharyngeal lymph node collected from the eligible mortality by an accredited veterinarian or other person approved by the department.

New §65.91(h) requires all applications and notifications required by the new rules to be submitted to the department electronically via the department's TWIMS application or by another method expressly authorized by the department. Under current rule, deer breeders are required to submit all applications and reports via TWIMS; the new rules make the same requirement, but also allow the department to authorize another method in an effort to account for unexpected situations, such as

TWIMS being unavailable.

New §65.91(i) requires compliance with TAHC rules concerning CWD, to the extent that they are applicable to white-tailed deer and mule deer. The department's response to CWD is part of a multi-agency cooperative effort with TAHC. In addition to the department's rules regarding movement of breeder deer, deer breeders must comply with TAHC rules governing herd plans. The department intends to enforce those rules under the authority of Parks and Wildlife Code, Chapter 43, Subchapter L.

New §95.91(j) provides that the division of Chapter 65 containing the new rules will expire August 31, 2016.As explained elsewhere in this preamble and in a number of other contexts, the new rules are intended to be interim rules. The department intends to review the new rules following the current hunting season and present preliminary recommendations to the Commission in March 2016.

New §65.92, concerning Transfer Categories and Requirements, sets forth provisions generally applicable to deer breeding facilities as well as delineating a tiered system of testing options and associated requirements predicated on a given deer breeding facility's exposure to deer from a CWD-positive facility.

New §65.92(a) establishes those provisions generally applicable to the transfer of breeder deer from a deer breeding facility.

New §65.92(a)(1) provides for the transfer of breeder deer pursuant to activation of a valid transfer permit for four purposes: (1) to another deer breeder; (2) to an approved release site; (3) to a DMP facility; or (4) to another person for nursing purposes. Under previous rules at §65.610 (relating to Transfer of Deer), breeder deer may be transferred only after the activation of a transfer permit and only for specific purposes (to another deer breeder; for release to the wild; to a DMP facility; to the holder of an educational display or zoological permit issued by the department; or on a temporary basis to another person for nursing purposes or to receive medical attention). Given the threat of transmission of CWD, the new rules contemplate the qualified transfer of breeder deer in a narrower context. Therefore, the new rules allow the movement of breeder deer for four purposes, contingent on the satisfaction of testing requirements imposed by the

new rules. Transfer of breeder deer to the holder of an educational display or zoological permit issued by the department is no longer authorized. The temporary transfer of breeder deer to a veterinarian for medical care is addressed in new §65.92(c).

Notwithstanding the provisions of new §65.92(a)(1), new §65.92(a)(2) prohibits the movement of breeder deer if: (1) the transfer is not authorized under a TAHC herd plan; (2) "not detected" CWD test results have been submitted for less than 20 percent of eligible mortalities at the breeding facility since May 23, 2006; (3) the breeding facility has an unreconciled herd inventory; or (4) the breeding facility is not in compliance with the provisions of §65.608 of this title (relating to Annual Reports and Records). The basis for each of these three prohibitions is explained as follows.

With regard to the first prohibition, since a TAHC herd plan will normally not authorize the movement of breeder deer if the deer breeder does not institute a testing program and/or comply with other requirements, paragraph (2)(A) prohibits movement of breeder deer from a breeding facility that is not authorized to do so under the TAHC herd plan for the facility.

With regard to the second prohibition in paragraph (2)(B), for a number of years, the rules at §65.604 of this title (relating to Disease Monitoring) allowed a deer breeder to move breeder deer if, among other things, CWD test results of "not detected" had been returned from an accredited test facility on a minimum of 20 percent of all eligible breeder deer mortalities occurring within the facility since May 23, 2006. Although this standard provides a very low statistical confidence of detecting CWD if it exists in a facility, the department reasons that any breeding facility not in compliance with this standard should not be allowed to move breeder deer until it has "tested out," or submitted sufficient test samples of "not detected" to provide a higher level of confidence that CWD will not be transmitted from the facility.

The third and fourth prohibitions in paragraphs (2)(C) and (D) are related to reconciled herds and annual reports. Current department rules at §65.608 of this title (relating to Annual Reports and Records) require deer breeders to submit an annual report. The annual report must include a herd reconciliation that accounts for every

breeder deer held, acquired, or transferred by a breeding facility, as well as births and mortalities. A breeding facility that is not in compliance with the reporting requirements or has submitted incomplete or inaccurate records frustrates efforts to determine the source and/or disposition of every deer in the facility, meaning that any number of scenarios could be possible with respect to disease transmission.

New §65.92(a)(3) prohibits the transfer of a breeder deer to a Class III release site unless the deer has been tagged with an approved RFID or NUES ear tag. As has been discussed elsewhere in this preamble, the new rules create a classification system for breeding facilities that is based on the extent to which a facility is believed to have been exposed to CWD and the testing history of the facility. The new rules also create a similar system for classifying release sites. As described in more detail later in this preamble, deer within a Class III release site are at a higher risk for CWD. The department believes that breeder deer released onto a Class III site should be readily identifiable for purposes of CWD testing and reporting. Therefore, the new rules require such deer to be ear-tagged prior to release.

New §65.92(a)(4) stipulates that a deer breeding facility initially permitted after March 31, 2015 will assume the lowest status among all originating facilities from which deer are received. New §65.92(a)(4) also provides that a breeding facility cannot assume TC 1 status unless it meets the criteria established in new §65.92(b)(1), which limits the TC 1 designation to those facilities that are not Tier 1 facilities and have a "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program.

New §65.92(b) enumerates the three categories of breeding facilities and the testing requirements for each.

New §65.92(b)(1) establishes that a breeding facility is a TC 1 facility if it is not a Tier 1 facility and has "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program. Because a TC 1 facility has achieved this status in a disease monitoring protocol and has neither accepted deer from nor transferred deer to a CWD-positive facility, a TC 1 facility is a breeding facility that is least likely to contain CWD-positive breeder deer. Additionally, because a TC 1 facility with "fifth-year" or

"certified" status in the TAHC CWD Herd Certification Program is considered to be adequately monitoring for CWD, there are no additional testing requirements imposed by the new rules on TC 1 facilities.

New §65.92(b)(2) establishes that a breeding facility is a TC 2 facility if it is not a Tier 1 facility and it has returned "not detected" CWD test results for either 4.5 percent (or more) of the average number of deer at least 16 months of age (or 12 months of age, if the facility is participating in the TAHC herd certification program) within the facility during the previous two reporting years, or 50 percent of all eligible mortalities during the previous two reporting years, whichever represents the lowest number of deer tested.

From an epidemiological point of view, not being a Tier 1 deer breeding facility is not, in and of itself, sufficient to provide any meaningful level of statistical confidence that CWD is not present within the population at the facility. However, in concert with effective surveillance, increased confidence can be obtained. The success of control and mitigation of infectious diseases is dependent on how soon the disease is detected after it is introduced, how quickly the source of the outbreak is identified, and how quickly infected animals can be isolated. The most effective first step in managing a disease outbreak in a herd of animals is to isolate those individuals known to have been in contact with infected individuals and then test those animals. Unfortunately, as noted previously, the only CWD tests for deer currently approved by USDA must be performed post-mortem (i.e., there is currently no accepted live-animal test). The department recognizes that deer breeders have a considerable investment in their facilities and permitted herds, and that preserving business continuity is an important consideration within the regulatory context.

The testing requirement to achieve TC 2 status in §65.92(b)(2) is the result of a statistical model developed by the department, in consultation with the TAHC, based on the reported average annual adult-mortality rate for all breeding facilities, which is approximately 4.5 percent. Testing 4.5 percent of the average adult population over two years is equivalent to 2.25 percent per year, which is equivalent to 50 percent of the

expected eligible mortalities (since the average adult mortality rate is 4.5 percent per year). Or stated another way, testing 4.5 percent of the adult population on an annual basis is equivalent to testing 100 percent of expected adult mortalities, and testing 4.5 percent of the adult population over two years is equivalent to testing 50 percent of expected eligible mortalities.

As an example, a breeding facility (that is not otherwise prohibited by §65.92(a) from transferring deer) that had an average population of 100 adult deer over the preceding two reporting years, and that had not tested any eligible mortalities during the previous two reporting periods would have the option to submit five (i.e., 4.5 percent of 100, rounded up the next whole number) "not detected" test results, which could include test results obtained by the deer breeder but not submitted to the department during the previous two years. Alternatively, the breeding facility could submit "not detected" test results for 50 percent of eligible mortalities from the preceding two reporting years, provided at least one eligible mortality was tested. This standard is more stringent than the disease-testing requirements prior to the adoption of the emergency CWD breeder rules. The intent of this approach is to provide an enhanced method for detection of CWD early enough to allow for an effective response.

New §65.92(b)(3) establishes that a breeding facility is a TC 3 facility if it is neither a TC 1 nor a TC 2 facility. The new paragraph also stipulates that a TC 3 facility could achieve TC 2 status by submission of "not detected" CWD test results for each breeder deer received by the facility from a CWD-positive site, each exposed deer transferred by the breeding facility to another breeding facility or released, and for 4.5 percent (or more) of the average number of adult deer within the facility during the previous two reporting years. Obviously, a TC 3 facility represents the lowest confidence with respect to the presence of CWD. However, the testing of additional deer as provided in new §65.92(b)(3)(B) sufficiently increases the confidence level to enable a TC 3 facility to increase in status to a TC 2 facility.

New §65.92(b)(3)(C) requires all deer transferred from a TC 3 breeding facility to a DMP facility, including buck deer that are returned from a DMP facility to a breeding

facility, to be eartagged with an RFID/NUES tag. As has been discussed, the new rules create a classification system for breeding facilities that is based on the extent to which the facility is believed to have been exposed to CWD and the testing history of the facility. A DMP authorizes the temporary detention of free-ranging deer for breeding purposes. A DMP may also authorize the introduction of breeder deer into a DMP facility. In addition, a breeder buck that is introduced into a DMP facility may be returned to a breeding facility. A breeder deer that is introduced to a DMP pen thus comes into contact with free-ranging deer, and when the deer are released, they come into contact with additional free-ranging deer. When a TC 3 breeder deer is transferred to a DMP facility, this scenario is epidemiologically analogous to the release of breeder deer to a Class III release site, for which new §65.92(a)(3) also imposes eartagging requirements.

New §65.92(c) allows breeder deer to be temporarily transferred to a veterinarian for medical care. The department has determined that the temporary movement of breeder deer to a veterinary medical facility for treatment poses a low risk of transmitting CWD.

New §65.93, concerning Release Sites - Qualifications and Testing Requirements, sets forth provisions generally applicable to locations where breeder deer are released to the wild. As noted previously, the new rules classify release sites based on relative level of risk. More specifically, the classification of a release site is based on the classification of the deer breeding facility from which deer were liberated onto the release site. New §65.93 establishes testing and other requirements associated with release sites generally and with specific classes of release sites.

New §65.93(a) establishes those provisions generally applicable to release sites.

New §65.93(a)(1) stipulates that an approved release site consists solely of the specific tract of land and acreage designated as a release site in TWIMS. This is necessary to ensure clarity and the ability to identify the extent of a specific release site. New §65.93(a)(2) requires all release sites to be surrounded by a fence of at least seven feet in height that is capable of retaining deer at all times, and requires the owner of the release

site to be responsible for ensuring that fencing and associated infrastructure retain the deer under ordinary and reasonable circumstances. In order to provide a measure of confidence that CWD is detected and contained, it is necessary to identify the specific location where breeder deer are authorized to be released. Similarly, it is necessary to establish a level of vigilance sufficient to give reasonable assurance that breeder deer are not allowed to leave the specific premise where they were released. Additionally, since some release sites have testing requirements for all or a portion of hunter-harvested deer, as well as harvest documentation for all deer harvested on site, it is necessary to delineate the specific acreage to which these requirements apply.

New §65.93(a)(3) sets forth the on-site harvest documentation requirements for deer harvested on Class II and Class III release sites. The new paragraph requires the owner of a Class II or Class III release site to maintain a daily harvest log at the release site. For each deer harvested from a Class II or Class III release site, the new rules require the hunter's name and hunting license number (or driver's license number, if the daily harvest log is also being used as a cold storage/processing book) to be entered into the harvest log, along with the date of kill, type of deer killed, any alphanumeric identifier tattooed on the deer, the tag number of any RFID or NUES tag affixed to the deer; and any other identifier and identifying number on the deer. The new provision enables the department to identify all deer harvested at a given release site (including deer that were released breeder deer) if an epidemiological investigation becomes necessary. The new paragraph also requires the daily harvest log to be presented to any department employee acting within the scope of official duties and for the contents of the daily harvest log to be reported to the department via TWIMS by no later March 15 of each year.

New §65.93(a)(4) provides that a release site's status cannot be altered by the sale or subdivision of a property to a related party if the purpose of the sale or subdivision is to avoid the requirements of this division. The department believes that a landowner subject to the provisions of the new rules should not be able to avoid compliance simply by selling, donating, or trading the property to another person if the purpose of the

transaction is to avoid the requirements of this division.

New §65.93(a)(5) requires the owner of a release site, as a consequence of consenting to the release of breeder deer on the release site, to submit all required CWD test results to the department as soon as possible but not later than May 1 of each year. The new rules contemplate a disease management strategy predicated on the results of CWD testing. Incomplete, inadequate, or tardy reporting of test results confounds that strategy. For this reason, the new paragraph establishes a date certain for reporting test results to the department. The new paragraph also provides that failure to timely submit test results will result in the release site being declared ineligible to be a destination for future releases. In light of the threat that CWD poses to deer, it is prudent to suspend release site privileges for any landowner who does not comply with the testing requirements for release sites.

New §65.93(a)(6) prohibits any person from intentionally causing or allowing any live deer to leave or escape from a release site. The new provision is necessary to ensure that once a release site has received breeder deer, no deer from the release site (breeder deer or free-ranging deer) are able to come into contact with surrounding populations of free-ranging deer.

New §65.93(b) enumerates the three categories of release sites and the testing requirements for each.

New §65.93(b)(1) establishes that a release site is a Class I release site if it is not a Tier 1 facility and it receives breeder deer only from TC 1 facilities. Because a TC 1 facility has a "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program, a TC 1 facility is considered to be at relatively low risk for CWD. As a result, there are no additional testing requirements imposed by the new rules on Class I release sites.

New §65.93(b)(2)(A) establishes that a release site is a Class II release site if it is not a Tier 1 facility, receives any breeder deer from a TC 2 facility, and receives no breeder deer from a TC 3 facility. The Class II designation is an intermediate category intended for release sites that have not received breeder deer from higher risk sources (i.e., Tier 1

and/or TC 3 facilities) but at the same time have not received deer solely from TC 1 facilities. Such release sites are considered to present more risk than Class I but less risk than Class III for harboring CWD.

New §65.93(b)(2)(B) imposes testing requirements for Class II release sites. Specifically, if any deer are harvested by hunters on a Class II release site during an open deer season, the landowner must test either a number of deer equivalent to 50 percent of the number of breeder deer released at the site between August 24, 2015 and the last day of lawful deer hunting on the site in the current year, or 50 percent of all deer harvested by hunters, whichever value is lower. The new paragraph also provides that if any hunter-harvested deer were breeder deer released between August 24, 2015, and the last day of lawful hunting on the site in the current deer season, 50 percent of those deer must be submitted for CWD testing, which may be counted to satisfy the requirements of §65.93(b)(2)(B).

As mentioned previously in this preamble, from an epidemiological perspective, not being a Tier 1 facility is not, in and of itself, sufficient to provide high statistical confidence that CWD is not present or has not been introduced within the population at the release site. However, in concert with effective surveillance, increased confidence can be obtained. The success of control and mitigation of infectious diseases is dependent on how soon the disease is detected after it is introduced, how quickly the source of the outbreak is identified, and how quickly infected animals can be isolated. Although the most efficacious monitoring regime on a release site would be to require 100 percent of all harvested deer to be submitted for testing, based on feedback from stakeholders, the department is requiring the testing of 50 percent of hunter-harvested deer.

New §65.93(b)(3) establishes that a release site is a Class III release site if it is a Tier 1 facility (i.e., it has received deer from a CWD-positive facility) or it receives deer from an originating facility that is a TC 3 facility. The Tier 1 and TC 3 designations represent those environments that have the highest likelihood of harboring CWD; accordingly, the rule requires the landowner of a Class III release site to test 100 percent of all hunter-

harvested deer or one hunter-harvested deer per breeder deer released between August 24, 2015 and the last day of lawful deer hunting on the site in the current year, whichever results in the greatest number of test results. As noted above, Class III release sites pose a higher risk for CWD; therefore, it is appropriate to test deer harvested from Class III release sites at a higher rate.

The department again emphasizes that the new rules are an interim replacement for the current emergency CWD breeder rules adopted on August 18, 2015. As noted previously, based on additional information from the ongoing epidemiological investigation, disease surveillance data collected from captive and free ranging deer herds, guidance from the TAHC, and input from stakeholder groups, the department intends to review the interim rules following the close of the deer season and present the results of that review to the Commission at the March 2016 Commission meeting for possible modifications.

References

Adamowicz, W. L., C. Arnot, P. Boxall, C. Dridi, E. Goddard, M. Jordan, K. Forbes, E. Laate, K. Myshaniuk, B. Parlee, M. Petigara, J. Unterschultz, and N. Zimmer. 2010. Research on socioeconomic impacts of chronic wasting disease (CWD) in Alberta. Department of Rural Economy, Project Report 10(03), Alberta, Canada.

Almberg, E. S., P. C. Cross, C. J. Johnson, D. M. Heisey, and B. J. Richards. 2011. Modeling routes of chronic wasting disease transmission: environmental prion persistence promotes deer population decline and extinction. PLoS ONE. 6(5):e19896.

Barria MA, Telling GC, Gambetti P, Mastrianni J, Soto C. 2011. Generation of a new form of human PrPSc in vitro by interspecies transmission from cervid prions. Journal of Biological Chemistry. 286:7490–5.

Belay, E. D., R. A. Maddox, E. S. Williams, M. W. Miller, P. Gambetti, and L. B. Schonberger. 2004. Chronic wasting disease and potential transmission to humans. Emerging Infectious Disease Journal. 10(6). Accessed 10 Apr 2012.

Bishop, R. C. 2004. The economic impacts of chronic wasting disease (CWD) in Wisconsin. Human Dimensions of Wildlife. 9(3):181-92.

Brown, T. L., J. Shanahan, D. Decker, W. Siemer, P. Curtis, and J. Major. 2005. Response of hunters and the general public to the discovery of chronic wasting disease in deer in Oneida County, New York. Human Dimensions Research Unit, Department of Natural Resource Cornell University. Series 5-08.

Cannon, R.M., Roe, R.T. (1982). Livestock disease surveys. A field manual for veterinarians. Bureau of Range Science, Department of Primary Industry. Australian Government Publishing Service, Canberra

Chesebro, Bruce. 2004. A fresh look at BSE. Science. 305:1918-1921.

Chronic Wasting Disease Alliance. 2012. Accessed 4 Apr 2012.

Fryer, H. R., and A. R. McLean. 2011. There is no safe dose of prions. PLoS ONE. 6(8):e23664.

Gigliotti, L. M. 2004. Hunters' concerns about chronic wasting disease in South Dakota. Human Dimensions of Wildlife. 9:233-235.

Gough, K.C., and B.C. Maddison. 2010. Prion transmission: Prion excretion and occurrence in the environment. Landes Bioscience Journal: Prion. 4:275–82.

Gould, F. W. 1975. Texas plants - a checklist and ecological summary. Texas Agricultural Experiment Station Publication 585, College Station, Texas, USA.

Johnson, C. J., J. P. Bennett, S. M. Biro, J. C. Duque-Velasquez, C. M. Rodriguez, R. Bessen, and T. Rocke. 2011. Degradation of the disease-associated prion protein by a serine protease from lichens. PLoS ONE. 6(5):e19836.

Mathiason, C. K., S. A. Hays, J. Powers, J. Hayes-Klug, J. Langenberg, et al. 2009. Infectious prions in pre- clinical deer and transmission of chronic wasting disease solely by environmental exposure. PLoS ONE. 4(6):e5916.

MaWhinney, S., W. J. Pape, J. E. Forster, C. A. Anderson, P. Bosque, M. W. Miller. 2006. Human prion disease and relative risk associated with chronic wasting disease.

Emerging Infectious Disease Journal. 12(10). http://dx.doi.org/10.3201/eid1210.060019>. Accessed 10 Apr 2012.

Miller, W., E. S. Williams, N. T. Hobbs, L. L. Wolfe. 2004. Environmental sources of prion transmission in mule deer. Emerging Infectious Disease Journal. 10(6). 10 Apr 2012.

Needham, M. D., J. Vaske, M. P. Donnelly and M. J. Manfredo. 2007. Hunting specialization and its relationship to participation in response to chronic wasting disease. Journal of Leisure Research. 39(3):413-437.

Petchenik, J. B. 2003. Chronic wasting disease in Wisconsin and the 2002 hunting season: gun deer hunters' first response. Wisconsin Department of Natural Resources, Bureau of Integrated Science Services, Madison, Wisconsin, USA.

Race, B., K. D. Meade-White, M. W. Miller, K. D. Barbian, R. Rubenstein, G. LaFauci. 2009. Susceptibilities of nonhuman primates to chronic wasting disease. Emerging Infectious Disease Journal. 15(9). Accessed 4 April 2012.

Responsive Management (2011). Hunters' attitudes toward chronic wasting disease and the effects of management efforts on hunting participation in Hampshire County, West Virginia. Harrisonburg, VA: Responsive Management.

Sandberg, M. K. , H. Al-Doujaily, C. .J. Sigurdson, M. Glatzel, C. O'Malley, C. Powell, E. A. Asante, J. M. Linehan, S. Brandner, J. D. F. Wadsworth, and J. Collinge. 2010. Chronic wasting disease prions are not transmissible to transgenic mice overexpressing human prion protein. Journal of General Virology. 91:2651-2657.

Saunders, S. E., S. L. Bartelt-Hunt, J. C. Bartz. 2012. Occurrence, transmission, and zoonotic potential of chronic wasting disease. Emerging Infectious Disease Journal. 18(3). http://dx.doi.org/10.3201/eid1803.110685. Accessed 4 April 2012.

Sigurdson, C. J. 2008. A prion disease of cervids: chronic wasting disease. Veterinary Research. 39(4):41.

Sleeman, J., C. Gillin. 2012. Ills in the pipeline: emerging infectious diseases and wildlife. The Wildlife Professional. 6(1):28-32.

Sohn, H., Y. Lee, M. Kim, E. Yun, H. Kim, W. Lee, D. Tark, and I. Cho. 2011. Chronic wasting disease (CWD) outbreaks and surveillance program in the Republic of Korea. Page 3 in Proceedings of the Prion 2011, Pre-congress Workshop: Transmissible Spongiform Encephalopathies in animals and their environment, 16 May 2011, Montreal, Quebec, Canada.

Vaske, J., L. Shelby, M. Needham. 2009. Preparing for the next disease: the human-wildlife connection. Pages 244-261 in M. J. Manfredo, J. J. Vaske, P. J. Brown, D. J. Decker, and E. A. Duke, editors, Wildlife and Society: The Science of Human Dimensions. Island Press, Washington D.C., USA.

Wang, F., X. Wang, C. G. Yuan, J. Ma. 2010. Generating a prion with bacterially expressed recombinant prion protein. Science. 327:1132-1135.

Wasserber, G., E. E. Osnas, R. E. Rolley, and M.D. Samuel. 2009 Host culling as an adaptive management tool for chronic wasting disease in white-tailed deer: a modeling study. Journal of Applied Ecology. 46:457-466.

Wyoming Game and Fish Department. 2012. Hunting season justification for the South Converse mule deer herd unit. Accessed 17 April 2012.

Williams, E. S. 2005. Chronic wasting disease. Veterinary Pathology. 42:530-549.

World Health Organization [WHO]. 2000. Proceedings of the meeting of World Health Organization consultation on public health and animal transmissible spongiform encephalopathies: Epidemiology, risk, and research requirements. Geneva, Switzerland.

Zimmer, N. P., P. C. Boxall, and W. L. Adamowicz. 2012. The impacts of chronic wasting disease and its management on recreational hunters. Canadian Journal of Agricultural Economics. 60:71-92.

3. Summary of Public Comment.

The department received 373 comments opposing adoption of the proposed rules. Those comments, accompanied by the department's response to each, follow. The

department notes that because many individual comments contained multiple statements, the number of responses is larger than the total number of comments.

Need for Regulatory Certainty

One hundred and one commenters opposed adoption and stated that the "deer industry in Texas is in dire need of a permitting process that provides regulatory certainty while maintaining a climate conducive to business growth." The department acknowledges the value of regulatory certainty, and as noted above and in the proposal preamble, the department also acknowledges that the deer industry is impacted by the regulations. However, the department disagrees that the rules are an inappropriate response to the discovery of CWD, especially when considered in light of the potential significant impacts of CWD for Texas and its annual, multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. The department also notes that the rule as adopted includes an August 2016 expiration date. It is the intent of the department to revisit the department's regulatory response to CWD in the spring of 2016 at which point a longer-term strategy will be considered.

Spread of Fear

One hundred and one commenters opposed adoption and stated that the rules have resulted in the spread of fear throughout the outdoor community. The department again disagrees and responds that the knowledge that CWD exists in captive deer populations is, in and of itself, cause for hunters and landowners to have concerns regarding the deer being hunted. As noted elsewhere in this preamble, human dimensions research suggests that hunters will avoid areas of high CWD prevalence. The department also believes that given the fact that CWD is present in at least two deer breeding facilities and the potential for exposure and spread of CWD, it is understandable that some landowners might be reluctant to obtain deer from within this highly interconnected network of deer breeding facilities in which CWD has been discovered. No changes were made as a result of the comment.

Perceived Emergency

One hundred and one commenters opposed adoption and stated that the rules

were based on a perceived emergency. The department disagrees with the comment and responds that this comment is apparently intended to address the previously adopted emergency CWD breeder rules. Since the adopted rules were adopted following the Administrative Procedure Act's notice and comment requirements, the issue of whether an emergency exists or existed is not germane to the adopted rules. However, the department also notes that CWD is a communicable, fatal disease that has the potential to profoundly alter the dynamics of deer hunting and deer management. Because there is no question that CWD exists in captive cervid populations in Texas and has been spread by the movement of captive cervids in Texas, there continues to be an immediate danger to Texas deer populations that warrants regulatory action by the department. No changes were made as a result of the comment.

Change in Circumstances Due to Index Herd Findings.

One hundred and one commenters opposed adoption and stated that "the environment upon the issuance of the [emergency] Rules in August was dramatically different than it is today." The comment also states that the test results from the index facility "validate that there is no statewide emergency to white-tailed deer" and the Commission should not adopt the rules based on the current evidence. The comment goes on to state that the department now has "a wealth of knowledge it did not have previously." The comment further states that because no additional cases of CWD have been discovered in the index facility, that fact "narrows the impact of CWD" and "narrows the scope of the investigation to find the source," that "the abundance of non-detected results significantly changes the dynamics of the rules," and that this proves there is no statewide emergency. While the department acknowledges that it is continuing to gather information, including results from additional testing, the department disagrees that the environment (assumed to mean the general state of affairs with respect to the discovery of CWD and the department's knowledge of CWD) has sufficiently changed to eliminate the need for the rules. Confronted with a transmissible, fatal disease, the department (in collaboration with TAHC and other epidemiological and disease management experts) has pursued a scientifically-based program of

isolating the index facility, identifying the source and destination of all deer that entered or left the index facility, and prescribing a testing regime for all deer breeding facilities that either transferred deer to or from the index facility or had not tested for CWD at an intensity that could reasonably exclude those facilities from being potential reservoirs for the disease (via transfer from other deer breeding facilities not immediately connected to the index facility). This situation is still the case and will remain so until a definitive characterization of the epidemiological reality of CWD in captive and free-ranging populations is resolved (i.e., the specificity, temporality, biological gradient, and other factors that become known through time via ongoing epidemiological investigation). The most effective response to a disease outbreak (even when the source is known) is possible only when the nature, magnitude, and scope of the threatening agent and its pathways are known. It follows that when such parameters are unknown, as is the case with CWD at present, there is an increased (not decreased) duty incumbent upon the department and TAHC to investigate, analyze, and respond to the threat. Additionally, it is a well-established tenet of epidemiology that a small factor of association (e.g., five deer out of 100,000 or one breeder facility out of 2,000) does not preclude a causal effect (the spread of CWD to additional breeding facilities and to free-ranging populations). Also, as noted elsewhere in this preamble, CWD has since been discovered at an additional deer breeding facility. The department further responds that, and as noted elsewhere in this preamble, the intensity of testing requirements imposed by the previous CWD rules governing deer breeders provided a very low statistical confidence of detecting CWD if it existed in a facility; therefore, the testing requirements contained in the new rules continue to be necessary.

Scope of Rules

Twelve commenters opposed adoption and stated that the rules were unfair or constituted overregulation, overreach, or persecution. The department disagrees with the comment and responds that the rules represent the minimum measures necessary to discharge the department's statutory duty to protect the state's wildlife resources. The rules' classification of breeding facilities and release sites based on risk of exposure to

CWD, with requirements based on a breeding facility's and release site's risk of exposure to CWD, was part of the department's effort to ensure that the rules were not, in fact, broader than necessary. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are unfair because they affect deer that have not been exposed to CWD. The department disagrees with the comment and responds that deer are affected by the status of the facility within which they are kept or to which they are liberated. Status is a direct indicator of the potential of a facility to contain or spread CWD. A TC 1 breeding facility or Level I release site represents a higher level of certainty that CWD is not present and cannot be spread. At other facilities there is some increased uncertainty, either because deer within the facility have at some previous time come into contact with deer from a CWD-positive facility or there has not been sufficient testing to establish confidence that CWD is not present. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules should apply only to new permittees and not to existing permittees. The department disagrees with the comment and responds that exempting current permittees from compliance would not achieve the objectives of the rules, given that CWD has been discovered and spread from a currently permitted deer breeding facility. Allowing current permittees to move breeder deer without restriction would significantly increase the risk of spreading CWD. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules shouldn't "shut down the whole state." The department disagrees with the comment and responds that the rules do not completely prohibit the movement of breeder deer in the entire state. The rules as adopted impose precautionary restrictions on the movement of breeder deer based on level of risk of exposure to CWD. Only the two deer breeding facilities in which CWD has been detected are prohibited from moving deer regardless of testing history. All other facilities have the opportunity, upon compliance with the rules, to achieve a status in which deer movement is allowed. No changes were made as a result of the comment.

Basis of Rules

Four commenters opposed adoption and stated that the department is not using science. The department disagrees with the comment and responds that, as explained in more detail elsewhere in this preamble, the department enlisted veterinarians, epidemiologists, and wildlife disease specialists, including, but not limited to members of the CWD Task Force and the CWD Working Group, which consisted of scientific experts with the TAHC, TVMDL, and USDA-APHIS-VS, to advise and guide the department in the development of the rules. No changes were made as a result of the comment.

One commenter opposed adoption and stated that no agency has the right to change rules on a whim. Similarly, five commenters opposed adoption and stated that the rules were based on personal opinions and agendas. In addition, one commenter opposed adoption and stated that the rules were politically motivated. The department disagrees with the comments and responds that the rules were developed in carrying out the department's duty to protect the state's wildlife resources. The department was guided by the three goals set out in the Chronic Wasting Disease Management Plan: (1) Minimize CWD risks to the free-ranging and captive white-tailed deer, mule deer, and other susceptible species in Texas; (2) Establish and maintain support for prudent CWD management with hunters, landowners, and other stakeholders; and, (3) Minimize direct and indirect impacts of CWD to hunting, hunting related economies, and conservation in Texas. Furthermore, as explained elsewhere in this preamble, the rules were developed in consultation and with input and guidance from veterinarians, epidemiologists, and wildlife disease specialists, including, but not limited to members of the CWD Task Force and the CWD Working Group, which consisted of scientific experts with the TAHC, TVMDL, and USDA-APHIS-VS. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are an attempt by big ranching interests to monopolize deer genetics. The department disagrees with the comment and responds that, as noted elsewhere in this preamble and in response to

other comments, the rules were developed in carrying out the department's duty to protect the state's wildlife resources, were guided by the three goals of the Plan, and were developed in collaboration with veterinarians, epidemiologists, and wildlife disease specialists. It should also be noted that the provisions of the rules applicable to landowners (release sites) do not include distinctions based on acreage. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are intended to generate additional tax revenue for the department. The department disagrees with the comment and responds that the rules as adopted contain no component to generate revenue. No changes were made as a result of the comment.

Department's Authority

One commenter opposed adoption and stated that the department should be relieved of its regulatory authority over breeder deer. The department neither agrees nor disagrees with the comment and responds that under the provisions of the Parks and Wildlife Code, the department is the agency designated by the legislature to regulate deer breeding in Texas. No changes were made as a result of the comment.

Nature of CWD

One commenter opposed adoption and stated that CWD is nothing more than dementia in deer. The department disagrees with the comment and responds that unlike dementia, CWD is a transmissible disease. No changes were made as a result of the comment.

One commenter opposed adoption and stated that CWD is not a disease that is confined to breeder deer. The department agrees with the comment and responds that the rules, as adopted, are intended to address the susceptible species of wildlife over which the department has regulatory authority. No changes were made as a result of the comment.

One commenter opposed adoption and stated that everything has been blown out of proportion. The department disagrees that the regulatory response to the discovery of CWD has been excessive and responds that as explained elsewhere in this preamble, the

threat of CWD is real and has the potential to result in population declines and to significantly impact the state's hunting-based economy. As a result, the department's response to that threat is required. No changes were made as a result of the comment.

One commenter opposed adoption and stated that deer and elk herds in other states where CWD has been confirmed are thriving. The department disagrees with the comment and responds that the long-term effects of CWD in free-ranging populations are unknown at this time. While some populations in which CWD exists may appear stable, other populations have experienced significant declines and CWD is considered to be a significant contributor to at least some of those population declines. The human dimensions research that indicates hunters will avoid areas of high CWD prevalence is cause for concern as well. Therefore, the department believes it is prudent to treat CWD as a serious threat in order to protect Texas deer populations and the economies dependent upon them. No changes were made as a result of the comment.

Fifteen commenters opposed adoption and stated, variously, that CWD is not a risk, not a threat, and not an emergency. The department disagrees with the comments and responds that CWD is a communicable, fatal disease that has the potential to profoundly alter the dynamics of deer hunting and deer management, and because there is no question that it exists in captive cervid populations in Texas and has been spread by the movement of captive cervids in Texas, there is in fact a clear and present danger to Texas deer populations that constitutes an emergency. No changes were made as a result of the comments.

Other Diseases

Three commenters opposed adoption and stated that the department does nothing about epizootic hemorrhagic disease (EHD) or anthrax. One commenter opposed adoption and stated that other diseases pose greater risks to deer populations. The department disagrees that the existence of other diseases should preclude the department from responding to CWD. Unlike EHD or anthrax, CWD is an insidious and persistent disease of long duration that may impact a deer population for many years. While EHD and anthrax can have significant short-term population impacts, the

potential for long-term population impacts caused or contributed by CWD cause much more concern. In the absence of prudent disease management, CWD continuously impacts a population and increases in prevalence through time. No changes were made as a result of the comments.

Effectiveness of or Need for Rules

One commenter opposed adoption and stated that the rules would not be effective. In addition, two commenters stated that CWD cannot be stopped, so the rules won't matter anyway. The department disagrees with the comments. The department acknowledges that stopping, containing, or attenuating CWD is very difficult once an environment has been contaminated with infectious prions and where CWD has been established for a long period before initial detection. As a result, for disease eradication, early detection of CWD infected animals is paramount. The time between introduction and detection of the disease is the most critical factor impacting the ability to control and possibly eradicate the disease before it can become established. Therefore, the rules provide for enhanced surveillance in an effort to detect CWD. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department's approach has failed in other states. The department disagrees with the comment and responds that no other state where CWD has been detected has employed the model implemented under the rules as adopted. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that the current rules work just fine. The department disagrees with the comment and responds that the current rules, which require the testing of 20 percent of eligible mortalities as a prerequisite for the movement of breeder deer, are inadequate for establishing confidence that CWD can be detected within a breeder facility where it exists. No changes were made as a result of the comment.

One commenter opposed adoption and stated that CWD has already been "found and dealt with." The department disagrees with the comment and responds that among the many unknowns surrounding this disease outbreak include how CWD was

introduced to the index facility, how many infected animals were dispersed to other locations, whether CWD has subsequently been introduced to free-ranging deer, and how long it will take to determine that CWD has been successfully isolated at the two known infection sites. Therefore, it would be incorrect to say that CWD has been dealt with. No changes were made as a result of the comment.

Intensity of Testing of Free-Ranging Deer

Several commenters opposed adoption based on the intensity of testing required by deer breeders as compared to the intensity of testing in free ranging deer. The department disagrees with those comments as follows, but as general background on the level of surveillance of free ranging deer, notes that testing a higher proportion of mortalities within a herd/population does not necessarily equate to more intensive sampling and/or a higher probability of detecting the disease. In calculating appropriate sample sizes, the department relies on probability detection tables constructed from a computation put forward by researchers Cannon and Roe that has been used extensively over many years for sample size detection determinations.

This computation and resulting tables demonstrate that testing all eligible mortalities within a captive herd for CWD in one year will not establish the same level of confidence that will be achieved for a population in which hundreds of deer are sampled in a single year, even though those hundreds of deer may represent a small percentage of all adult mortalities that occurred within that population during the year. Confidence is established by the sheer number of tests, irrespective of the number of mortalities that occurred within that population during some period of time. The larger the population, the smaller the proportion of samples required to establish sufficient confidence. For example, to establish 99 percent confidence that CWD would be detected in a population where it occurred at 1 percent prevalence, 99 samples would be required for a population of 100 deer, whereas only 367 samples would be required for a population of 1,000 deer. The same confidence can be achieved with only 433 samples in a population with an infinite number of deer.

The department has obtained a sufficient number of samples from free-ranging

deer in nine of the 10 ecological regions to provide 99 percent confidence that CWD would have been detected if it existed in 0.5 percent of any of those populations when CWD surveillance began in 2002. Because of considerably lower deer densities and lower deer harvest in the High Plains ecoregion, the department has collected enough samples in that ecoregion to achieve 95 percent confidence that CWD would be detected if only 1 out of 100 adult deer was infected when surveillance began. Additionally, the department significantly increased surveillance effort during the 2015-16 hunting season to provide considerable confidence that CWD would be detected in any of 33 Resource Management Units if CWD currently exists in low prevalence within any of those populations. As of December 20, 2015, department staff had collected >9,000 samples statewide during the 2015-16 hunting season alone. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there is no evidence that breeder deer are more likely to carry CWD than free-ranging deer, so there is no reason to test breeder deer at a dramatically higher intensity. The department disagrees with the comment and, in addition to the information above about intensity of testing, responds that the rules as adopted are not predicated on an assumption that breeder deer are more likely to carry CWD than free-ranging deer. For the reasons explained elsewhere in this preamble, because CWD was discovered in captive breeding facilities in Texas and there is a high degree of interconnectivity between deer breeding facilities in Texas, it is appropriate that movement of breeder deer be predicated upon meeting the testing and other requirements provided in the rules. No changes were made as a result of this comment.

One commenter opposed adoption and stated that breeder deer are tested at much higher rates than free-ranging deer and that hunters should be required to test at the same rate that deer breeders are. The department disagrees with the comment and as explained previously, responds that in fact, free-ranging deer populations are tested at levels that provide greater confidence than testing levels in most deer breeding facilities. No changes were made as a result of the comment.

Seven commenters opposed adoption and stated that MLDP cooperators should be required to test harvested deer. MLDP cooperators are landowners who participate in the department's Management Lands Deer Program (MLDP). (See, 31 TAC §65.26.) The MLDP allows landowners involved in a formal management program to have the state's most flexible seasons and bag limits. The program is incentive-based and habitat focused. The MLDP has been a very successful vehicle for encouraging deer harvest, deer management, and habitat conservation. The department disagrees that MLDP cooperators should be required to test at levels other than those as provided in the rules. Properties under MLDP that meet the criteria for a Level II or Level III release site under the rules would be required to test harvested deer as provided in the rules. However, from a disease management perspective, there is no reason to require MLDP cooperators to test harvested deer at a higher level because there is no additional threat of a disease being transmitted from those MLDP sites as a result of engaging in MLDP activities. However, it should also be noted that any landowners participating in MLDP who intend to trap and transport live deer from their properties pursuant to Triple T permit will be required to comply with the CWD testing requirements for Triple T trap sites, which are the most stringent testing requirements of all permit holders authorized to engage in intensive deer management practices in Texas. No changes were made as a result of the comment.

One commenter opposed adoption and stated that if free-ranging deer were tested at the same intensity as breeder deer, CWD would be discovered in the free-ranging population. The department disagrees with the comment and responds that as explained in more detail previously, breeder deer are not tested at a statistically greater intensity than free-ranging deer. Also, due to the number samples collected from free-ranging deer previously and over the 2015-2016 hunting season, the probability of detecting CWD in free-ranging deer populations is actually greater than the probability of detecting CWD in captive deer under current rules. No changes were made as a result of this comment.

Four commenters opposed adoption and stated that the testing intensity should be

the same for everyone. The department disagrees with the comment and responds that as explained in more detail previously, the testing intensities that the rules impose for deer breeders and release sites are predicated on the low occurrence of mortalities within the discrete populations in those facilities, whereas the testing of free-ranging deer over time has created a sample size that allows greater statistical confidence; thus, it is not necessary to mandate CWD testing on free-ranging deer. To the extent the commenters are suggesting that all classes of breeding facilities and release sites should be required to test at the same level, the department disagrees and responds that the levels of testing provided or required are based on the level of risk associated with a specified breeding facility or release site. No changes were made as a result of the comment.

Six commenters opposed adoption and stated that all deer, including hunter-harvested deer, should be required to be tested for CWD. While the department agrees that the testing of hunter harvested deer is an important component of disease management, and notes that the rules, as adopted, address the testing of hunter harvested deer at release sites, the department disagrees that all hunter-harvested deer should be required to be tested for CWD. As explained in more detail in the response to other comments, through voluntary cooperation by hunters, the department has obtained sufficient samples from free-ranging deer to provide an enhanced level of assurance of detection of CWD. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules require 90 percent of deer breeders to test 50 percent of released deer, but free-ranging deer harvested by hunters are not required to be tested. The department agrees that the rules require CWD testing at certain intensities at certain breeding facilities and release sites but do not otherwise mandate CWD testing; however, as explained above, free-ranging deer are already being tested on a voluntary basis to a high degree of statistical confidence, which makes the mandatory testing of free-ranging deer unnecessary. As of December 20, 2015, department staff have collected >9,000 hunter-harvested samples statewide during the 2015-16 hunting season. No changes were made as a result of the comment.

Level of Deer Breeder Testing

One commenter opposed adoption and stated that a TC 2 breeder facility that meets the requirement to test 4.5 percent of the deer within the facility or 50 percent of the eligible mortalities should be allowed to transfer deer to anyone and should not be considered to have "at-risk" deer. The department disagrees with the comment and responds that in order to be deemed a low risk facility (TC 1 status), a deer breeding facility must not have received deer from the index and facility and must have "fifth-year" or "certified" status in the TAHC herd certification program. The reason for this is that a five-year period is believed to be a sufficient period of time for the clinical manifestations of CWD to present in a mature deer; therefore, a five-year testing history of all eligible mortalities, coupled with the TAHC herd certification program requirement that "fifth-year" or "certified" herds cannot receive deer from herds of a lower status, gives reasonable confidence that CWD is not present and will not be spread. The two-year window for the TC 2 testing requirements does not afford equivalent confidence. No changes were made as a result of the comment.

One commenter opposed adoption and stated that TC 1 status should be afforded to every deer breeder who tests 100 percent of mortalities. The department disagrees with the comment and responds that TC 1 status is assigned to facilities for which sufficient confidence that CWD is not present has been established. Such confidence is gained not simply by the percentage of mortalities tested, but continuing to test all eligible mortalities for five consecutive years (and thereafter) while also verifying a reconciled herd inventory during annual inspections. As stated previously, certified herds also maintain a "closed population," as they receive deer only from other certified herds. No changes were made as a result of the comment.

One commenter opposed adoption and stated that a TC 3 breeding facility should be given TC 2 status upon one year of testing 4.5 percent of a population. The department disagrees with the comment and responds that one year of test results is not a sufficient sample size to conclude with confidence that a deer breeding facility does not contain CWD. Also, as noted elsewhere in this preamble, a deer that has been

exposed to CWD may not display symptoms for several years. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the testing requirements of the current rules were more than sufficient to stop CWD. The department disagrees with the comment and responds that the efficacy of the previous testing requirements provide an extremely low level of confidence for detecting the disease. No changes were made as a result of the comment.

Testing Responsibility

One commenter opposed adoption and stated that testing should be the responsibility of the deer breeder. The department agrees that deer breeders should undertake testing responsibility as provided in the rules. However, the department disagrees that only deer breeders should be responsible for all testing. The department also disagrees that only deer in breeding facilities should be required to be tested. Given the number of breeder deer that have been liberated onto release sites, samples collected from liberated breeder deer that are ultimately harvested by hunters is necessary to enhance the probability of detecting the disease where it exists. No changes were made as a result of the comment.

Three commenters opposed adoption and stated either that the department should pay for the testing of breeder deer or that it is unfair that deer breeders must bear the cost of testing while deer from free-ranging populations are tested at no cost. The department disagrees with the comment and notes that the required testing of free-ranging hunter-harvested deer on release sites is the responsibility of the landowner. The department acknowledges that department is absorbing the costs for testing hunter-harvested deer voluntarily provided. The risk of exposure to CWD is enhanced by the artificial movement of deer; therefore, it is appropriate for the recipient of a permit or authorization that allows such movement of deer to be responsible for the cost of testing associated with such movement. No changes were made as a result of the comment.

Release Site Testing

One hundred and one commenters opposed adoption and stated that the testing

and surveillance standards should be amended. The comment goes on to state specifically that the testing requirements of the rules should be altered to end all mandatory CWD testing at Class II release sites, which "would not impact the functions of the Department in containing the spread of CWD." One commenter opposed adoption and stated that testing should not be required at release sites unless the release site is linked to a positive test result. Three commenters opposed adoption and stated that most Class II release sites have nothing to do with the index facility. Two commenters opposed adoption and stated that there should be no testing requirements for Class II release sites. The department disagrees with the comments and responds that since a deer infected with CWD may not display symptoms of the disease for several years, the ability of the department to identify facilities directly impacted (i.e., facilities that received deer from the index facility, referred to as "Tier 1 facilities") does not eliminate the need to test deer at release sites that receive deer from TC 2 breeding facilities. A release site is designated as a Class II release site on the basis of increased risk of containing exposed deer. Under the rules, a release site is a Class II release site if deer from a TC 2 breeding facility have been released on it. TC 2 breeding facilities do not have a testing history that provides sufficient confidence that CWD does not exist in those facilities; therefore, testing of hunter harvested deer on Class II release sites is necessary in order to establish additional confidence that CWD was not introduced from the originating breeding facilities. As noted previously, the department estimates that within the last five years at more than 728 locations in Texas (including 384 deer breeders) either received deer from the index facility or received deer from a deer breeder who had received deer from the index facility. As a result, the department cannot assume that a facility is free of CWD simply because it did not receive deer directly from the index facility. The department also disagrees that ending testing requirements for Class II release sites wouldn't impact department efforts to contain CWD. Given the previous CWD testing requirements, CWD could very well exist in additional deer breeding facilities and release sites directly or indirectly linked to CWD-positive facilities. To cease enhanced testing requirements would reduce the

department's ability to detect and contain the disease. No changes were made as a result of the comments.

One commenter opposed adoption and stated that released deer should not be tested. Similarly, one commenter opposed adoption and stated that testing should not be required at release sites. The department acknowledges that under the rules as adopted, release sites that receive deer from a TC 2 or TC 3 deer breeding facility are required to test hunter-harvested deer at a level stipulated in the rules. However, the department disagrees with the comments and responds that in light of the discovery of CWD in a breeding facility that transported breeder deer to more than 728 locations in Texas (including 384 deer breeders), including to deer breeders who subsequently transported breeder deer to additional locations, the previous testing history for TC 2 and TC 3 breeding facilities is not sufficient to provide the necessary confidence that CWD does not exist in those facilities. Therefore, since Class II and Class III release sites received breeder deer from TC 2 or TC 3 breeding facilities, the rules as adopted require testing of hunter harvested deer on Class II and Class III release sites in order to establish additional confidence that CWD was not transmitted from the originating breeding facilities. No changes were made as a result of the comments.

One commenter opposed adoption and stated that no other private property owners are required to test for CWD. The department disagrees with the comment and responds that in addition to the testing of deer by release sites, private property owners engaged in Triple T activities have been required to test for CWD for a number of years. In addition, as noted elsewhere in this preamble, emergency rules were adopted to address movement of white-tailed or mule deer via a Trap, Transport and Transplant (Triple T) Permit (40 TexReg 7307) and Deer Management Permit (DMP) (40 TexReg 7305). In addition, interim DMP rules have been proposed (40 TexReg 9086) and will be considered for adoption by the Commission at its January 21, 2016 meeting. Those rules also involve the testing of deer by private property owners for CWD in order to engage in certain regulated activities. No changes were made as a result of this comment.

Method of Testing

Thirteen commenters opposed adoption and stated in one way or another that the rules should not require breeder deer to be killed. Similarly, one commenter opposed adoption and stated that the department doesn't have the right to decide if deer should live or die. To the extent that the commenters are suggesting that a deer breeder should not be required to test deer for CWD (which, under the rules as adopted, must be conducted post-mortem), the department agrees with the comment and responds that the rules do not require the testing of breeder deer unless the breeder seeks to engage in certain activities related to the transfer of deer. However, to the extent that the commenter is suggesting that deer breeders should not be required to test deer (including natural mortalities and/or deer euthanized for testing) as a prerequisite to engaging in certain activities under the rule, the department disagrees with the commenter and responds that, as explained elsewhere in this preamble, in order to provide a higher level of confidence that CWD will be detected, if it exists, testing of deer is necessary. As noted previously in this preamble, the only test currently certified by the USDA for CWD must be conducted post-mortem by extracting and testing the obex (a structure in the brain) or a medial retropharyngeal lymph node. Although the department is actively collaborating with researchers to investigate possible efficacious live-animal tests that can be integrated into the state's overall disease surveillance efforts, live animal testing standards that provide an equivalent level of predictability of detecting the disease in an infected herd (as compared to approved post-mortem tests) have yet to be developed. No changes were made as a result of the comments.

Seven commenters opposed adoption and stated that the rules should allow live-animal test results to count towards satisfaction of the testing requirements of the rules. The department disagrees with the comments and responds, as noted above, that although the department is collaborating with researchers to investigate possible efficacious live-animal tests, at this point, live animal testing standards that provide an equivalent level of predictability of detecting the disease in an infected herd (as compared to approved post-mortem tests) have yet to be developed. No changes were made as a result of the comments.

Fencing Requirements

One commenter opposed adoption and stated that the rules will impose economic hardship on deer breeders who are restricted to releasing deer only to high-fenced properties. The department disagrees with the comment and responds that department records indicate that the vast majority of breeder deer that are liberated are released on high-fenced properties. In addition, the potential for disease transmission from liberated breeder deer to other free-ranging deer is of concern, given that the source of CWD in the index facility is currently unknown and the large number of deer that have been released to the wild. In addition, in order to provide a measure of confidence that CWD is detected and contained, it is necessary to establish a level of vigilance sufficient to give reasonable assurance that liberated deer are not allowed to leave the specific premise where they were released. No changes were made as a result of this comment.

One commenter opposed adoption and stated that if breeder deer are the property of the people of the state they should be allowed to be released to low-fenced properties. The department disagrees with the comment and responds that white-tailed deer and mule deer are among the wildlife that are the property of the people of the state regardless of whether the deer are located in high-fenced, low-fenced, or unfenced property. However, the department disagrees that this fact should impact the rule's requirement regarding the release of breeder deer only to high-fenced properties. As explained elsewhere in this preamble, in order to provide a measure of confidence that CWD is detected and contained, it is necessary to establish a level of vigilance sufficient to give reasonable assurance that breeder deer are not allowed to leave the specific premise where they were released. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the high-fence requirement for release sites is illegal because the rules must apply to everyone equally. The department disagrees and notes that the high-fence requirement applies equally to all properties on which breeder deer are liberated. No changes were made as a result of the comment.

Genetics

One commenter opposed adoption and stated that prohibiting the release of

breeder deer to low-fenced properties would prevent landowners from improving genetics. One commenter opposed adoption and stated that deer breeders keep the state's deer population restocked with good genetics. The department disagrees with the comment and responds that the desire to enhance genetics must be balanced against the need to protect captive and free-ranging deer. A landowner seeking to enhance genetics on the landowner's property will normally seek to contain liberated breeder deer to ensure that the landowner benefits from the genetics of the liberated deer. No changes were made as a result of the comment.

One commenter opposed adoption and stated that breeder deer could be used to breed out susceptibility to CWD and the offspring could be released to inoculate the free-ranging deer. The department disagrees with the comment and responds that very little is known about CWD, including whether or not susceptibility to it can be eliminated via selective breeding or line breeding and subsequently introduced to a wild population with any efficacy. No changes were made as a result of the comment.

Impact of Rules on Deer Breeders

One hundred and one commenters opposed adoption and stated that the deer breeding industry has been profoundly negatively impacted by the emergency CWD breeder rules and that the emergency CWD breeder rules have resulted in tens of millions of dollars of economic loss to deer breeders across the state, severely diminished a once-thriving market, resulting in hundreds of lost jobs, and are significantly injuring the deer breeding industry without due cause. Five commenters opposed adoption and stated that the purpose of the rules is to destroy or hinder deer breeders. Six commenters opposed adoption and stated that the rules will destroy the deer breeding business. Nine commenters opposed adoption and stated that the rules create hardship. One commenter opposed adoption and stated that deer breeders are being penalized for improving the deer herd. Although some of these comment appears to be directed at the emergency CWD breeder rules, since the provisions of the proposed rule and the rule as adopted are very similar to the emergency CWD breeder rules discussed in the comment, and since the comment was submitted as a comment on the

proposed rule, the department will respond to the comment as a comment on the proposed rule. The department disagrees that the rules were intended to place an unwarranted burden on the regulated community. The department does acknowledge, as noted in the proposal preamble, that depending on a breeding facility's classification under the rules and the types of activities that the breeding facility seeks to undertake, there may be costs associated with additional testing. If the comments' reference to "tens of millions of dollars" is referring to marketplace behavior, the proposal preamble also noted that to the extent that any marketplace analysis can be conducted, it is difficult, if not impossible, to accurately separate and distinguish marketplace behavior that is the result of the proposed rules from marketplace behavior that is the result of the discovery of CWD. However, detection and containment of CWD is necessary to protect state's multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rules are "significant and costly to breeders whose conditions and risk haven't changed." The department understands the intent of the comment to be similar to other comments asserting that breeders who have not received breeder deer directly from the index facility should not be required to test for CWD. The department disagrees with the comment and responds that a direct link to a facility where CWD has been detected is simply the highest, but not the only, level of risk. Facilities that have accepted deer from a TC 2 or TC 3 breeding facility, in the absence of reasonable test results over time, are not statistically excludable from being potential reservoirs for CWD; therefore, the rules require testing for all breeding facilities that do not meet the criteria for TC 1 breeding facility as a prerequisite to engaging in certain activities. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department does not have the right to affect hardworking families. The department assumes that this comment is intended to refer to families involved in deer breeding and families associated with properties on which breeder deer have been liberated. The department disagrees with the comment and responds that, as noted above, while the department recognizes that

there could be costs associated with additional testing under the rules, the detection and containment of CWD is necessary to protect the state from the threat of CWD to the state's multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the rules discriminated against deer breeders. Similarly, seven commenters opposed adoption and stated that because the proposed rules affect only deer breeders, the department is guilty of profiling. The department disagrees with the comments and responds that since CWD was discovered in two deer breeding facilities and the degree of interconnectivity of among deer breeders, it is appropriate for the rules to address activities undertaken by deer breeders. However, as noted elsewhere in this preamble, the department has adopted requirements regarding other regulated activities associated with the movement of deer. Furthermore, the provisions of the rules are only a part of the department's overall CWD management strategy. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department's economic analysis of the proposed rule ignored the fact that persons will not buy breeder deer for release and breeders will not release to their own land because of the testing requirements. The department disagrees with the comment and responds that the department's economic analysis (including the small and microbusiness impact) noted that new rules would cause an adverse economic impact to deer breeders and release site owners who must undertake disease-testing requirements to continue certain activities. The analysis also noted that because CWD has been proven to be transmissible by direct contact (including through fences) and via environmental contamination, there may be adverse economic impacts unrelated to the proposed new rules in the event that CWD is confirmed in a breeding facility due to the possible reluctance of potential customers to purchase deer from a facility that accepted deer from a CWD-positive facility. Additionally, even in the absence of the rules, if CWD is detected within a breeding facility that accepted deer from a CWD-positive facility, there could be lost revenue to the permittee since potential purchasers who are aware of CWD would likely

refrain from purchasing deer from such a facility. Therefore, the proposed new rules, by providing a mechanism to minimize the spread of CWD, could also protect the economic interests of the regulated community. The department also notes that the rules as adopted do not prohibit deer breeders from releasing deer to their own properties, provided the deer breeding facility is not an index facility and the release site is surrounded by a high fence. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules will impose economic hardship on deer breeders who are not connected to the index facility. Similarly, one commenter opposed adoption and stated that the department shouldn't change the rules in the middle of the game to affect deer breeders not connected to the index facility. One commenter opposed adoption and stated that rules penalize innocent deer breeders. One commenter opposed adoption and stated that CWD was found in only five breeder deer but the rules penalize everyone. One commenter opposed adoption and stated that deer breeders are being penalized for not testing. The department agrees that deer breeders who have not tested for CWD at sufficient intensity or who have accepted breeder deer from a TC 2 or TC 3 facility could incur increased operational costs as a result of the testing requirements imposed by the new rules as a prerequisite to the transfer of deer. The department also notes that while TC 1 breeding facilities have tested for CWD at a level that provides a higher level of confidence that the disease is not present and cannot be spread, there is some uncertainty associated with other breeding facilities, either because deer within the facility have at some previous time come into contact with individuals from a suspect facility or there has not been sufficient testing to establish confidence that CWD is not present. The department notes that the emergency CWD breeder rules and the new rules will provide regulatory certainty through the 2015-2016 hunting seasons. The Commission will reassess the new rules in the spring of 2016 to consider a longer-term response. The department also notes that the rules do not prevent a deer breeder from improving movement status by accumulating test results over time. No changes were made as a result of the comment.

Nature of Breeder Deer

One commenter opposed adoption and stated that breeder deer are livestock. The department disagrees with the comment and responds that white-tailed deer and mule deer are indigenous wildlife and therefore the property of the people of the state under Parks and Wildlife Code, §1.011. See, also, Tex. Agric. Code §1.003(3). No changes were made as a result of the comment.

Role of Deer Breeders

One commenter opposed adoption and stated that deer breeders are necessary because otherwise many people would not be able to hunt. The department disagrees with the comment and responds that while deer breeders are involved in hunting operations, most hunting opportunity does not involve breeder deer. No changes were made as a result of the comment.

Impact on Hunting

One commenter opposed adoption and stated that the rules will cause fear in hunters. Two commenters opposed adoption and stated that rules will be detrimental to hunting for years to come. The department disagrees with the comments and responds that the rules are part of an effort to protect hunting. Given the potential impact of CWD on hunting and hunting-related economies in Texas, for the reasons explained elsewhere in this preamble, regulatory action is necessary to protect hunting and related economies. No changes were made as a result of the comments.

Impact on Land Values

One commenter opposed adoption and stated that the rules will decrease land values because no one will purchase land if there are testing requirements for that land. The department, while agreeing that uncertainty surrounding the potential presence of CWD on a given tract of land could affect the land's value, disagrees that the rules impose testing requirements on anyone who purchases a tract of land; however, new §65.93(a)(4) provides that a release site's status cannot be altered by the sale or subdivision of a property to a related party if the purpose of the sale or subdivision is to avoid the requirements of the rules. No change was made as a result of the comment.

Impact on Rural Economy

Six commenters opposed adoption and stated that the rules will hurt the economy of rural Texas and result in reduced employment. The department disagrees with the comment and responds that the department's response to the discovery of CWD, including the rules, is in recognition that healthy wildlife populations are important to the state's multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. No changes were made as a result of the comment.

CWD in Mule Deer

One commenter opposed adoption and stated that the department's response to the discovery of CWD in free-ranging mule deer was not as drastic. The department disagrees with the comment and responds that the department's response to the discovery of CWD in free-ranging mule deer populations (codified at 31 TAC §§65.80-65.88) was more intensive than the new rules as adopted. The rules at §§65.80-65.88 require the mandatory testing of all deer harvested in the containment zone, prohibit the movement of breeder deer into, within, or from the containment zone, and prohibit the movement of breeder deer into, within, or from the high risk zone (unless the movement is from a deer breeder with certified status in the TAHC CWD herd certification program), . Those rules also prohibit movement of deer pursuant to Triple T and DMP permitting activities into, within, or from the containment and high risk zones, although those activities are permitted in the buffer zone following the submission of considerably more "not detected" CWD test results than is required anywhere else in Texas. No changes were made as a result of the comment.

Duration of Rules

Five commenters opposed adoption and stated that the department was reneging on a promise that the emergency CWD breeder rules would not be permanent. The department disagrees with the comment and responds that the rules as adopted contain an expiration date of August 31, 2016. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules do not specify a time limit for movement restrictions on deer breeders. The department agrees with the

commenter and responds that because the rules were intended to function on a temporary basis until a long-term strategy is developed, the department did not consider it necessary to address the applicability of the rules beyond the 2015-16 deer season and deer breeder reporting period. However, questions from the regulated community have caused the commission to adopt the rules with changes to clarify that a TC 3 breeding facility can attain TC 2 status by complying with the testing requirements of the rules for two years. No changes were made as a result of the comment.

Texas Wildlife Information Management Service

One hundred and one commenters opposed adoption and stated that the department's online reporting application (Texas Wildlife Information Management Service, or TWIMS) allowed the department to identify, contain, and manage CWD, resulting in the elimination of the emergency. The comment goes on to state that the deer industry "adamantly adheres to the direct traceability of movement through the TWIMS system" and that the facts "do not suggest there is any considerable threat to captive or wild white-tailed herds, based on the ability to transfer animals through the TWIMS system." The comment further states that the department "can immediately identify the facilities directly impacted by the five positives found and any positives found in future herds." Four commenters opposed adoption and stated that because TWIMS functioned perfectly, there is no need for the rules. The department disagrees with these comments. As noted elsewhere in this preamble, the issue of whether an emergency existed is not germane to this rulemaking. The department further notes that TWIMS is a database that functions to automate formerly manual reporting and notification conventions. While the department acknowledges that the TWIMS database is a valuable resource, from a disease management perspective, the availability of information does not obviate the need for an appropriate regulatory response to the discovery of CWD in a deer breeding facility. No changes were made as a result of the comment.

Other Comments

Five commenters opposed adoption and stated that the release of breeder deer

should be prohibited. The department disagrees with the comments and responds that releases to high-fenced environments is defensible, since the population is contained and can be tested through time. No changes were made as a result of the comments.

One commenter opposed adoption and stated that testing should be required at Class 1 release sites. The department disagrees with the comments and responds that because a Class 1 release site receives deer only from sources that have been tested to the extent that there is a high statistical confidence that CWD is not present, there is no reason to require additional testing at the release site. No changes were made as a result of the comment.

One commenter opposed adoption and stated that deer breeding should be abolished. The department disagrees with the comments and responds that Parks and Wildlife Code, §43.352(a), authorizes the department to issue a permit to a qualified person to possess live deer in captivity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that wildlife should not be genetically enhanced or farmed. The department disagrees with the comments and responds that Parks and Wildlife Code, §43.352(a), authorizes the department to issue a permit to a qualified person to possess live deer in captivity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that release sites should be required to maintain fencing of greater than eight feet in height. The department disagrees with the comments and responds that the seven-foot standard established by the rule is sufficient to prevent deer from easily leaving a release site. No changes were made as a result of the comment.

The department received 701 comments supporting adoption of the rules as proposed.

The following groups and associations commented in support of adoption of the rules as proposed: Texas Farm Bureau, King Ranch, Texas and Southwestern Cattle Raisers Association, Ducks Unlimited, Archery Trade Association, Plateau Land and

Wildlife Management, Audubon Texas, Pope and Young Club, Austin Woods and Waters Club, Quality Deer Management Association, Bexar Audubon Society, Rocky Mountain Elk Foundation, Boone and Crockett Club, Safari Club International – Houston Chapter, Coastal Bend Bays and Estuaries Program, Sierra Club – Lone Star Chapter, Hill Country Alliance, Texans For Saving Our Hunting Heritage, Hill Country Conservancy, Texas Bighorn Society, Texas Cattle Feeders Association, Lone Star Bow Hunters Association, Texas Chapter of The Wildlife Society, National Wild Turkey Federation, Texas Sportsman's Association, National Wildlife Federation, Texas Wildlife Association, Orion - The Hunters Institute, Wildlife Forever, Texas Conservation Alliance, and East Texas Woods and Waters Club.

The Texas Deer Association and the Deer Breeder Corporation commented against adoption of the rules as proposed.

The new rules are adopted under the authority of Parks and Wildlife Code, Chapter 43, Subchapter L, which authorizes the commission to make regulations governing the possession of breeder deer held under the authority of the subchapter; Subchapter R, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that white-tailed deer may be temporarily detained in an enclosure; Subchapter R-1, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that mule deer may be temporarily detained in an enclosure (although the department has not yet established a DMP program for mule deer authorized by Subchapter R-1); and§61.021, which provides that no person may possess a game animal at any time or in any place except as permitted under a proclamation of the commission.

4. Rule Text.

§65.90.Definitions. The following words and terms shall have the following meanings, except in cases where the context clearly indicates otherwise.

(1) Accredited testing facility--A laboratory approved by the United States

Department of Agriculture to test white-tailed deer or mule deer for CWD.

(2) Breeder deer--A white-tailed deer or mule deer possessed under a permit issued by the department pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter.

(3) Confirmed--A CWD test result of "positive" received from the National Veterinary Service Laboratories of the United States Department of Agriculture.

(4) CWD--chronic wasting disease.

(5) CWD-positive facility--A facility registered in TWIMS and in which CWD has been confirmed.

(6) Deer breeder--A person who holds a valid deer breeder's permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter.

(7) Deer breeding facility (breeding facility)--A facility permitted to hold breeder deer under a permit issued by the department pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter.

(8) Department (department)--Texas Parks and Wildlife Department

(9) Eligible mortality-- A breeder deer that has died within a deer breeding facility and:

(A) is 16 months of age or older; or

(B) if the deer breeding facility is enrolled in the TAHC CWD Herd Certification Program, is 12-months of age or older.

(10) Exposed deer--Unless the department determines through an epidemiological investigation that a specific breeder deer has not been exposed, an exposed deer is a white-tailed deer or mule deer that:

(A) is in a CWD-positive facility; or

(B) was in a CWD-positive facility within the five years preceding the confirmation of CWD in that facility.

(11) Hunter-harvested deer--A deer required to be tagged under the provisions of Subchapter A of this chapter (relating to Statewide Hunting Proclamation).

(12) Landowner (owner)--Any person who has an ownership interest in a tract of land, and includes a landowner's authorized agent.

(13) Landowner's authorized agent--A person designated by a landowner to act on the landowner's behalf.

(14) NUES tag--An ear tag approved by the United States Department of Agriculture for use in the National Uniform Eartagging System (NUES).

(15) Originating facility-- The source facility identified on a transfer permit.

(16) Reconciled herd--The deer held in a breeding facility for which the department has determined that the deer breeder has accurately reported every birth, mortality, and transfer of deer in the previous reporting year.

(17) Release site--A specific tract of land that has been approved by the department for the release of breeder deer under this division.

(18) Reporting year--For a deer breeder, the period of time from April 1 of one calendar year to March 31 of the next calendar year.

(19) RFID tag--A button-type ear tag conforming to the 840 standards of the United States Department of Agriculture's Animal Identification Number system.

(20) Status--The level of testing performed or required by a breeding facility or a release site pursuant to this division. For the transfer categories established in §65.92(b) of this title (relating to Transfer Categories and Requirements), the highest status is Transfer Category 1 (TC 1) and the lowest status is Transfer Category 3 (TC3). For the release site classes established in §65.93(b) of this title (relating to Release Sites - Qualifications and Testing Requirements), Class I is the highest status and Class III is the lowest.

(21) Tier 1 facility--Any facility registered in TWIMS that:

(A) has received an exposed deer within the previous five years or has transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility; and

(B) has not been released from a TAHC hold order related to activity described in subparagraph (A) of this paragraph.

(22) TAHC--Texas Animal Health Commission.

(23) TAHC CWD Herd Certification Program--The disease-testing and herd management requirements set forth in 4 TAC §40.3 (relating to Herd Status Plans for Cervidae).

(24) TAHC Herd Plan--A set of requirements for disease testing and management developed by TAHC for a specific facility.

(25) TWIMS--The department's Texas Wildlife Information Management Services (TWIMS) online application.

§65.91. General Provisions.

(a) To the extent that any provision of this division conflicts with any other provision of this chapter, this division prevails.

(b) Except as provided in this division, no live breeder deer may be transferred anywhere for any purpose.

(c) Notwithstanding any other provision of this chapter, no person shall introduce into or remove breeder deer from or allow or authorize breeder deer to be introduced into or removed from any deer breeding facility for which a CWD test result of 'suspect' has been obtained from an accredited testing facility. The provisions of this subsection take effect immediately upon the notification of a CWD 'suspect' test result for a deer breeding facility, and continue in effect until the department expressly authorizes the resumption of permitted activities at that facility.

(d) No exposed breeder deer may be transferred from a breeding facility unless expressly authorized in a TAHC herd plan and then only in accordance with the provisions of this division.

(e) A breeding facility (including a facility permitted after the effective date of this subsection) or release site that receives breeder deer from an originating facility of lower status automatically assumes the status associated with the originating facility and becomes subject to the testing and release requirements of this division at that status.

(f) A facility that has dropped in status may increase in status as follows:

(1) from TC 3to TC 2: by complying with the provisions of §65.92(b)(3)(B) of this title (relating to Transfer Categories and Requirements) for a period of two consecutive years;

(2) from TC 2 to TC 1 status: by attaining "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program.

(g) A CWD test is not valid unless it is performed by an accredited testing facility on the obex of an eligible mortality, which may be collected by anyone. A medial retropharyngeal lymph node collected from the eligible mortality by an accredited veterinarian or other person approved by the department may be submitted to an accredited testing facility for testing in addition to the obex of the eligible mortality.

(h) Unless expressly provided otherwise in this division, all applications and notifications required by this division shall be submitted electronically via TWIMS or by another method expressly authorized by the department.

(i) A person who possesses or receives white-tailed deer or mule deer under the provisions of this division and Subchapter T of this chapter is subject to the provisions of TAHC regulations at 4 TAC Chapter 40 (relating to Chronic Wasting Disease) that are applicable to white-tailed or mule deer.

(j) Unless amended to provide for a longer period of effectiveness, the provisions of this division cease effect on August 31, 2016.

§65.92. Transfer Categories and Requirements.

(a) General.

(1) A breeding facility that is a TC 1, TC 2, or TC 3 facility may transfer breeder deer under a valid transfer permit that has been activated and approved by the department as provided in §65.610(e) of this title (relating to Transfer of Deer) to:

(A) another breeding facility;

(B) an approved release site as provided in §65.93 of this division (relating to Release Sites - Qualifications and Testing Requirements);

(C) a DMP facility permitted under Parks and Wildlife Code, Chapter 43, Subchapter R (relating to White-Tailed Deer Management Permits) and

department's DMP regulations; or

(D) to another person for nursing purposes.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, a breeding facility is prohibited from transferring breeder deer anywhere for any purpose if:

(A) such a transfer is not authorized pursuant to a TAHC Herd Plan associated with a hold order or quarantine;

(B) "not detected" CWD test results have been submitted for less than 20percent of eligible mortalities at the breeding facility since May 23, 2006;

(C) the breeding facility has an unreconciled herd inventory; or

(D) the breeding facility is not in compliance with the provisions of §65.608 of this title (relating to Annual Reports and Records).

(3) A deer breeder may not transfer a breeder deer to a Class III release site unless the deer has been tagged by attaching a button-type RFID or NUES tag approved by the department to one ear.

(4) A deer breeding facility that was initially permitted after March 31, 2015 will assume the lowest status among all originating facilities from which deer are received; provided, however, a breeding facility shall not assume TC 1 status unless it meets the criteria established in subsection (b)(1) of this section.

(b) Types of Facilities.

(1) TC 1. A breeding facility is a TC 1 facility if:

(A) it is not a Tier 1 facility; and

(B) it has "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program.

(2) TC 2. A breeding facility is a TC 2 facility if:

(A) it is not a Tier 1 facility; and

(B) CWD test results of "not detected" have been returned for one of the following values, whichever represents the lowest number of tested breeder deer:

(i) 4.5 percent or more of the breeder deer held within the

facility during the immediately preceding two reporting years, based on the average population of deer in the facility that were at least 16 months of age on March 31 of each year (including eligible mortalities for those years); or

(ii) 50 percent of all eligible mortalities from the preceding two reporting years, provided at least one eligible mortality was tested.

(3) TC 3.

(A) A breeding facility is a TC 3 facility if it is neither a TC 1 facility nor a TC 2 facility.

(B) A breeding facility may increase status from TC 3 to TC 2 if CWD test results of "not detected" have been obtained for:

(i) each breeder deer received by the breeding facility from any CWD-positive site;

(ii) each exposed breeder deer that has been transferred by the breeding facility to another breeding facility or released; and

(iii) 4.5 percent or more of the breeder deer held within the breeding facility during the immediately preceding two reporting years, based on the average population of deer in the facility that were at least 16 months of age on March 31 of each year (including eligible mortalities for those years).

(C) All deer transferred from a TC 3 breeding facility to a DMP facility, including buck deer that are returned from a DMP facility to a breeding facility, must be eartagged with an RFID/NUES tag.

(c) Breeder deer may be temporarily transferred to a veterinarian for medical care.

§65.93. Release Sites - Qualifications and Testing Requirements.

(a) General.

(1) An approved release site consists solely of the specific tract of land and acreage designated as a release site in TWIMS.

(2) All release sites must be surrounded by a fence of at least seven feet in height that is capable of retaining deer at all times. The owner of the release site is

responsible for ensuring that the fence and associated infrastructure retain the deer under ordinary and reasonable circumstances.

(3) The owner of a Class II or Class III release site shall maintain a legible daily harvest log at the release site.

(A) The daily harvest log shall be on a form provided or approved by the department and shall be maintained until the report required by subparagraph (E) of this paragraph has been submitted to and acknowledged by the department.

(B) For each deer harvested on the release site and tagged under the provisions of Subchapter A of this chapter (relating to Statewide Hunting Proclamation), the landowner must, on the same day that the deer is harvested, legibly enter the information required by this subparagraph in the daily harvest log.

(C) The daily harvest log shall contain the following information for each deer harvested on the release site:

(i) the name and hunting license of the person who harvested the deer;

(ii) the date the deer was harvested;

(iii) the species (white-tailed or mule deer) and type of deer harvested (buck or antlerless);

(iv) any alphanumeric identifier tattooed on the deer;

(v) any RFID or NUES tag number of any RFID or NUES tag affixed to the deer; and

(vi) any other identifier and identifying number on the deer.

(D) The daily harvest log shall be made available upon request to any department employee acting in the performance of official duties.

(E) By not later than March 15 of each year, the owner of a release site shall submit the contents of the daily harvest log to the department via TWIMS or other format authorized by the department.

(4) Release site status cannot be altered by the sale or subdivision of a property to a related party if the purpose of the sale or subdivision is to avoid the

requirements of this division.

(5) The owner of a release site agrees, by consenting to the release of breeder deer on the release site, to submit all required CWD test results to the department as soon as possible but not later than May 1 of each year. Failure to comply with this paragraph will result in the release site being declared ineligible to be a destination for future releases.

(6) No person may intentionally cause or allow any live deer to leave or escape from a release site.

(b) Types of Release Sites

(1) Class I.

(A) A release site is a Class I release site if it:

(i) is not a Tier 1 facility; and

(ii) receives breeder deer only from TC 1 facilities.

(B) There are no testing requirements for a Class I release site.

(2) Class II.

(A) A release site is a Class II release site if it:

(i) is not a Tier 1 facility;

(ii) receives any breeder deer from TC 2 facility; and

(iii) receives no deer from a TC 3 facility.

(B) The landowner of a Class II release site must obtain valid CWD test results for one of the following values, whichever represents the lowest number of deer tested:

(i) if deer are hunter-harvested, a number of deer equivalent to 50 percent of the number of breeder deer released at the site between August 24, 2015 and the last day of lawful deer hunting at the site in the current year; or

(ii) 50 percent of all hunter-harvested deer.

(C) If any hunter-harvested deer were breeder deer released between August 24, 2015 and the last day of lawful deer hunting at the site in the current, 50 percent of those hunter-harvested deer must be submitted for CWD testing,

which may be counted to satisfy the requirements of subparagraph (B) of this paragraph.

(3) Class III.

(A) A release site is a Class III release site if:

(i) it is a Tier 1 facility; or

(ii) it receives deer from an originating facility that is a TC 3 facility.

(B) The landowner of a Class III release site must obtain valid CWD test results for one of the following values, whichever represents the greatest number of deer tested:

(i) 100 percent of all hunter-harvested deer; or

(ii) one hunter-harvested deer per breeder deer released between August 24, 2015 and the last day of lawful deer hunting at the site in the current year.