COMPREHENSIVE CWD MANAGEMENT RULES

ADOPTION PREAMBLE

1. Introduction.

The Texas Parks and Wildlife Commission (Commission) in a duly noticed meeting on June 20, 2016 adopted the repeal of §§65.90-65.94 and new §§65.90-65.99 concerning Chronic Wasting Disease - Movement of Deer. New §§65.90-65.92 and 65.94-65.98 are adopted with changes to the proposed text as published in the April 22, 2016, issue of the *Texas Register* (41 TexReg 2853). The repeals, new §65.93, and new §65.99 are adopted without changes and will not be republished.

Change to Definitions

The change to §65.90, concerning Definitions, adds a definition for "Interim Breeder Rules." The rules as adopted, include provisions predicated upon compliance with previous rules. Therefore, a definition of "Interim Breeder Rules" was added to provide a shorthand reference for those rules.

Changes to General Provisions

The change to §65.91, concerning General Provisions, alters subsection (a). As proposed, the subsection provided that to the extent any provision of the proposed new rules conflicted with any other provision of Chapter 65, the new rules would control; however, Chapter 65, Subchapter B, Division 1 contains provisions regarding Chronic Wasting Disease (CWD) management zones that are intended to function on their own terms. Therefore, it is necessary to clarify that fact.

The change to §65.91 also adds new subsection (d) to clarify that a deer breeding facility is prohibited from moving deer out of the breeding facility if such movement is prohibited under a hold order or quarantine imposed on the breeding facility by the Texas Animal Health Commission (TAHC). Under the rules as proposed, and as adopted, the lawful movement of breeder deer is predicated on a facility's designation as Movement Qualified (MQ). Although the provisions of §65.99 as adopted, concerning Violations and Penalties, provide that a person who possesses or receives white-tailed deer or mule deer pursuant to a Triple T permit, DMP or

a deer breeder permit is subject to the provisions of TAHC regulations regarding Chronic Wasting Disease, subsection (d) was clarified to state that if a facility is prohibited from moving deer under a hold order or quarantine issued by TAHC, movement of deer under those circumstances is prohibited.

In addition, a change was made to §65.91(e) (which was §65.91(d) as proposed) to modify the cross-reference to the subsection regarding receipt of deer by a release site. The rules as adopted adjust the time period for release site testing. As a result, it is more appropriate to reference the entirety of §65.95(c) regarding release sites, rather than the more specific §65.95(c)(1)(D).

Changes to CWD Testing

The change to §65.92, concerning CWD Testing, clarifies who may collect the tissue upon which ante-mortem tests are to be conducted and provides additional detail to ensure that a valid sample is collected. As proposed, §65.92(b) required ante-mortem test samples be collected "by or under the supervision of a qualified licensed veterinarian." However, to ensure compliance with statutory requirements regarding the practice of veterinary medicine, as well as regulatory requirements of TAHC and the Texas Board of Veterinary Medical Examiners regarding the collection of ante-mortem samples, the change to §65.92(b) provides that ante-mortem samples must be collected by a "licensed veterinarian authorized pursuant to statutes and regulations governing the practice of veterinary medicine in Texas and regulations of the TAHC." In addition, to ensure that samples are sufficient to accommodate ante-mortem testing, §95.92(b) was modified to require that at least six lymphoid follicles be collected.

The change to §65.92(b) also eliminates the 16-month residency requirement for ante-mortem testing of breeder deer imposed by proposed subsection (b)(2). The intent of proposed subsection (b)(2) was to ensure that animals subjected to ante-mortem testing had been in a facility long enough to have contracted CWD if it were present. However, while a deer with a residency in a facility of less than 16 months may not have had sufficient incubation time to detect CWD if it was contracted in that facility, a test of that deer would provide information about any previous facility in which the deer was held. Therefore, the residency requirement was eliminated.

Another change to §65.92 reduces the interval of ante-mortem testing eligibility established in subsection (b)(3) from 36 months to 24 months. The intent of proposed subsection (b)(3) was to ensure that the epidemiological value of ante-mortem testing is not compromised. Repeated testing of a single animal for which "not detected" test results have been obtained would compromise the value of ante-mortem testing within a deer herd. In addition, ante-mortem testing is an invasive procedure that removes tissues and those tissues do not immediately regenerate; therefore, after several biopsies, sample quality may diminish. However, because most breeding facilities contain fewer than 50 deer, the rule as proposed would have made compliance with the 36-month interval between testing difficult for small herds. In addition, veterinarians have indicated that testing a deer every 24 months can be accomplished without significantly compromising sample quality. Therefore, the department reduced the testing frequency interval.

The change to proposed §65.92 also removes proposed subsection (c)(3), which imposed a five-month "window" for ante-mortem test results to be submitted to the department for purposes of increasing status. The rules as proposed included a mechanism to enable a deer breeding facility to achieve Transfer Category (TC) 1 by annually submitting "not detected" ante-mortem CWD tests of at least 25 percent of eligible-aged deer in the facility's inventory at the time the testing is conducted and annual post-mortem tests of at least 50 percent of eligible mortalities. As a result, the proposal included a testing "window" to preserve administrative efficiency by restricting testing for the purpose of "upgrading" from a lower status to the time of year when deer breeders are typically handling deer for other purposes. However, because this option for "upgrading" has been eliminated as described in the discussion of changes to §65.95, the department has determined that year-round submission of ante-mortem test results can be sustained.

The change to §65.92 also clarifies who may collect tissue samples for post-mortem CWD testing. As proposed, §65.92(c) (proposed §65.92(d)) stipulated that to be valid for testing, an obex had to be collected by a qualified licensed veterinarian or other person certified by TAHC, and that a medial retropharyngeal lymph node collected by a qualified licensed veterinarian or other person approved by the department could be submitted in addition to or in lieu of an

obex. In the interests of simplification, the provision has been altered to state that a sample is not valid unless it was collected by a qualified licensed veterinarian, TAHC-certified CWD sample collector, or other person approved by the department.

Finally, the change to §65.92 alters the ratio of ante-mortem test results that may be substituted for post-mortem test results in subsection (d)(proposed subsection (e)). As proposed, the ratio was two ante-mortem test results for every required post-mortem test result, provided at least two eligible mortalities had occurred in the facility during the corresponding reporting year and post-mortem test results equivalent to 50 percent of the total required results had been submitted. In other words, ante-mortem test results could be substituted for no more than 50 percent of the required post-mortem test results. As adopted, that ratio is three ante-mortem test results for every required post-mortem test result (i.e., a 3:1 ratio), but there is no limit on the number of post-mortem tests for which ante-mortem tests can be substituted. An ante-mortem to post-mortem ratio that is higher than 1:1 is necessary to compensate for the fact that deer that have died from natural causes are far more epidemiologically valuable than live and apparently healthy deer selected for ante-mortem testing. A deer that has died naturally, by definition, died as a result of some causal agent. As a result, it is more likely that a deer that has died naturally would test positive for CWD than an apparently healthy deer. During the public comment period, there was discussion of eliminating the maximum use of ante-mortem substitution. However, if no mortalities are tested, a higher number of ante-mortem tests would be required to achieve the same epidemiological benefits as post-mortem tests, perhaps as much as 6:1. There was stakeholder input suggesting a 4:1 substitution if less than 50 percent of mortalities were tested, and retaining the 2:1 ratio if the number of post-mortem tests submitted was equal to at least 50 percent of eligible mortalities. The department also received public comment and discussion suggesting the simplification of the regulations wherever possible. Therefore, in an effort to simplify this requirement, an ante-mortem substitution ratio of 3:1 was selected. From an epidemiological perspective, while more testing is preferred, a substitution ratio of 3:1 was determined to be adequate.

Changes to Breeding Facility Minimum Movement Qualifications (§65.94) and Movement of Breeder Deer (§65.95)—Generally

With regard to the changes to §65.94, concerning Breeding Facility Minimum Movement Qualification, and §65.95 concerning Movement of Breeder Deer, several changes were made in response to comments, stakeholder input, and public testimony.

The rules as proposed and as adopted (as well as the Emergency and Interim Breeder Rules) establish three categories of breeding facilities based on level of epidemiological risk, with Transfer Category 1 (TC 1) representing the lowest risk of harboring or transmitting CWD and TC 3 representing the highest risk. Similarly, three levels of release sites (sites onto which breeder deer had been liberated) are established, also based on the level of epidemiological risk, with Class I release sites representing the lowest risk of harboring or transmitting CWD and Class III release sites representing the highest risk.

The Emergency Rules and the Interim Breeder Rules required testing of hunter-harvested deer from sites on which breeder deer had been released, except for release sites that received deer only from Transfer Category 1 (TC 1) facilities. Under the Emergency and Interim Breeder Rules, only breeding facilities that had achieved "fifth year" or "certified status" in the TAHC CWD Herd Certification Program were TC 1 facilities.

As the department worked with stakeholders to develop the proposed rules, deer breeders continued to state that the elimination or reduction of testing at release sites was important to them. Out of the facilitated process, described elsewhere herein, came additional options for achieving TC 1 status that also incorporated ante-mortem testing. More specifically, three additional options were developed to enable breeding facilities that were not "fifth year" or "certified status" facilities to obtain TC 1 status and to provide for the use of ante-mortem tests to achieve TC 1 status more quickly.

As with previous rules, the proposed rules also established minimum testing requirements that a deer breeder must meet to transfer deer to another facility, including a release site. A breeding facility that met the minimum requirements for the transfer of deer (i.e., a breeding facility that was "movement qualified" or "MQ") but did not meet the requirements for being a TC 1 facility (and was not a TC 3 facility) would be classified as TC 2 facility. Because TC 2 represented a higher risk of harboring or transmitting CWD than a TC 1 breeding facility, under the proposed rules, a release site (which was not a Class III release site) onto which a deer from

a TC 2 facility was liberated (classified as a Class II release site) would be required to submit CWD tests for hunter-harvested deer as provided in the rules.

During the public comment period and in testimony before the Commission, concerns continued to be raised about the continuation of required testing at release sites that received deer from TC 2 facilities (Class II release sites). As a result of those comments and additional discussions among stakeholders, the rules, as adopted, provide for the elimination of release site testing at Class II release sites after the 2018-2019 hunting year. To accomplish the elimination of Class II release site testing, it was necessary to adjust the provisions for classifying a facility as MQ or NMQ so that the probability of detection of CWD in all breeding facilities would increase to an acceptable level by the time no release site testing (except for Class III release sites) was required. As a result, changes were made in the rules as adopted to §65.94 concerning Breeding Facility Minimum Movement Qualifications and to §65.95 concerning Movement of Breeder Deer. In the rules as proposed and as adopted, the classification of TC 3 for breeding facilities and Class III for release sites is reserved for those breeding facilities and release sites that have been received deer from an originating facility that is a TC 3 facility, received an exposed deer within the previous five years, transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility, and have not been released from a TAHC hold order).

Changes to Breeding Facility Minimum Movement Qualifications (§65.94)

Changes were made to §65.94 concerning Breeding Facility Minimum Movement Qualifications to clarify the MQ requirements applicable upon the rules' effective date, to incorporate the modified MQ requirements that will go into effect April 1, 2017, and to make minor clarifying changes.

With regard to §65.94(a)(1)(A), under the proposed rules as well as the adopted rules, upon the rule's effective date, a breeding facility will be MQ if it has complied with the historic CWD testing requirement which required submission of CWD "not detected" test results for at least 20 percent of the total number of eligible mortalities that occurred in the facility since May 23, 2006. However, to accommodate facilities (mostly newer facilities) that had experienced a low number of mortalities, a provision was added that incorporated §65.604(d)(2) of the

previous MQ requirements to provide that no testing was required if a breeding facility has had less than five eligible mortalities from May 23, 2006 through March 31, 2016.

The change to §65.94(a)(1)(B) sets out the MQ testing standard that will be effective with the reporting year beginning April 1, 2017. Under the rules as proposed, a deer breeder seeking to be MQ would be required to submit a number of "not-detected" post-mortem test results equal to least 50 percent of the total number of eligible mortalities in the facility each year, and beginning April 1, 2021, a minimum number of post-mortem "not detected" results for each of the previous five years of 2.25 percent of the eligible-aged population in the breeding facility. This standard is replaced with a requirement that to be MQ, a deer breeder must submit "not detected" test results for at least 80 percent of the eligible mortalities that occurred in the facility during the previous reporting year (i.e., the report year that ended March 31), with a minimum annual number of post-mortem "not detected" results for facilities that have been permitted for six months or more that is equal to at least 3.6 percent of the eligible aged population in the breeding facility. As explained below, 3.6 percent is 80 percent of the average expected annual mortality in a breeding facility. In addition, a provision was added to clarify that a breeding facility that had achieved "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program meets the testing requirements to be considered MQ.

The change to §65.94 also inserts the word "or" after subsection (a)(3) because the list of criteria in subsection (a) is intended to be a list of criteria that are individually grounds for being designated NMQ.

The change to §65.94 also alters subsection (a)(4) to clarify that in addition to the recordkeeping and reporting provisions of 31 TAC §65.608, a permittee must be compliant with the recordkeeping and reporting provisions of the rules as adopted.

Finally, the change to §65.94 alters subsections (b) and (c) to clarify that "facility" as used in those subsections means deer breeding facility, and alters subsection (d) by replacing the word "received" with the phrase "have been in possession of," which is intended to clarify that the provision applies to deer that were ever in a facility as well as to deer that are within the facility at the current time.

Changes to Movement of Breeder Deer (§65.95)

The changes to §65.95, concerning Movement of Breeder Deer, consists of several alterations. As noted in the general discussion of the changes to §65.94 and §65.95, as a result of public comment and extensive outreach to the regulated community and stakeholders, the rule as adopted provides a testing program that eventually eliminates release site testing for all release sites (except for Class III release sites), and offers an ante-mortem testing component as a pathway for TC 2 breeding facilities to achieve TC 1 status (which would eliminate release-site testing obligations immediately).

Proposed §65.95(b)(1) would have assigned TC 1 status to a breeding facility if it satisfied one of three testing regimes: (1) submission of "not detected" post-mortem test results for at least 80 percent of eligible mortalities in each of the preceding five report years and then 80 percent of eligible mortalities annually thereafter, provided the "not detected" post-mortem test results for the five-year period were equal to or greater than the annual sum of the eligible-aged population and the eligible mortalities during the five-year period, multiplied by 3.6 percent; (2) a one-time ante-mortem "not detected" test result for 80 percent of the population of eligible-aged deer in the facility, followed by annual "not detected" post-mortem testing of 80 percent of eligible mortalities, provided that after April 1, 2021, "not detected" post-mortem test results for the preceding five-year period are equal to or greater than the sum of the eligible-aged population in the facility at the end of each report year and the eligible mortalities during the five-year period, multiplied by 3.6 percent; or (3) the annual submission of "not detected" ante-mortem test results for 25 percent of the facility's eligible-aged population and 50 percent of eligible mortalities.

In response to comments, §65.95(b)(1) was modified to simplify the mechanisms for obtaining TC 1 status by providing two methods of achieving TC 1 status, in addition to the "fifth year" or "certified" TAHC herds. The first method recognizes that there are some deer breeding facilities that, although not "fifth year" or "certified status," have been testing at a high level for a number of years. Under the first method, a breeding facility will be designated as a TC 1 breeding facility if it has submitted "not detected" test results for at least 80 percent of the total number of eligible mortalities over the preceding five report years, provided the number of "not detected" results is equivalent to or greater than the sum of the eligible-aged

population in the facility at the end of each report year and the eligible mortalities during the five-year period, multiplied by 3.6 percent. This option is similar to the option provided in §65.95(b)(1)(A)(ii) of the proposed rules. However, the rule as adopted allows TC 1 status to be attained by providing "not detected" test results for 80 percent of the *total* number of eligible mortalities over the preceding five-year period, rather than 80 percent of eligible mortalities in *each year* of the preceding five-years.

In lieu of the other two options contained in proposed §65.95(b)(1)(A)(iii) and (iv) for achieving TC 1 status more quickly, the rules as adopted provide a simplified option for achieving TC 1 status more quickly. Under this option, a deer breeder can obtain TC 1 status by submitting "not detected" ante-mortem test results for at least 50 percent of the eligible-aged deer in the facility as of the date on which ante-mortem testing begins. However, to facilitate the transition to the new rules, and recognizing that in anticipation of the adoption of these rules some deer breeders may have already begun conducting ante-mortem testing but not yet tested 50 percent of eligible-aged deer, a temporary provision is included to allow a breeding facility that submits "not detected" ante-mortem test results for at least 25 percent of the eligible aged deer in the facility to be temporarily classified as TC 1; however, the facility must provide the balance of the required tests by May 15, 2017.

In addition, the change eliminates proposed §65.95(b)(B) regarding the failure to comply with TC 1 testing requirements. Under the rules as proposed, a TC 1 breeding facility that ante-mortem tested 80% of the eligible deer in the facility but failed to submit the required post-mortem test results to retain its TC 1 status would be reduced in status to a TC 2 facility, but would have been given a 60-day window to submit the substitution test results necessary to regain TC 1 status. If, however, a TC 1 breeding facility that had been reduced in status for failure to provide sufficient post-mortem test results did not provide sufficient substitution test results within the 60-day period to regain TC 1 status, the breeding facility would not be eligible to regain TC 1 status for two years. This was necessary due to the higher minimum post-mortem testing standard set forth for TC 1 status as opposed to the lower standard for basic MQ testing requirements. Conversely, the MQ requirements in §65.94(b), as proposed and as adopted, provide that a breeding facility that has been designated as NMQ for failure to comply

with the MQ testing requirements, would be restored to MQ upon submission of the required test results. Because the adopted rule applies a standard MQ testing requirement to all facilities, it is unnecessary to retain the requirement for regaining TC 1 status within 60-days, as the provisions for regaining MQ status will suffice, so long as lower status breeder deer are not introduced into the TC 1 facility.

The change to §65.95(b) also modifies proposed paragraph (3)(A) and (C) to add the word "quarantine" to the list of TAHC actions that could result in the designation of a breeding facility as a TC 3 facility. A TAHC quarantine would prevent movement of deer. As a result, it is necessary to include quarantine, in addition to other TAHC actions impacting the movement of deer.

Several changes are made to §65.95(c), which addresses release sites. As proposed, §65.95(c)(1)(A) stipulated that a release site consisted solely of the specific tract of land to which deer are released and acreage designated as a release site. However, commenters were concerned that this provision would prevent a landowner from altering the release site by removing cross-fencing or making other changes following changes in ownership. The department has determined that such release site modifications need not be prohibited, although any testing obligations should also apply to the new acreage. Therefore, the change allows modification of the release site description provided the department is notified prior to the physical modification.

As proposed, §65.95(c)(1)(B) stipulated that liberated breeder deer must have complete, unrestricted access to the entirety of the release site. This provision was intended to ensure clarity regarding the sites on which release site testing obligations apply. As a result of public comment, the department determined that there are circumstances under which a landowner legitimately should be able to exclude deer from certain areas, such as landing strips and crops. Therefore, the change allows the exclusion of deer for purposes of human safety or the protection of agricultural resources.

As proposed, §65.95(c)(1)(C) stipulated that breeder deer could be liberated only to release sites surrounded by a fence capable of retaining deer at all times and that the owner of the release site was required to ensure the integrity of gates and fencing. As a result of public

comment, the department determined that it was necessary to acknowledge that the provision is subject to mitigating circumstances such as natural disasters and other unintentional disruptors. Therefore, the change specifies that infrastructure integrity be maintained under "reasonable and ordinary" circumstances.

As proposed, §65.95(c)(1)(D) would have release-site testing requirements continue in effect for five consecutive years following the date of each liberation that resulted in release-site testing. With the elimination of the proposed release-site testing requirements after March 1, 2019 (except for sites that have not submitted the required test results), the five-year time period is no longer necessary. In addition, for consistency with subsection (c)(3), a statement was added regarding the requirement that a release site submit release site test results until the release site's testing obligations have been satisfied, regardless of the March 1, 2019 general expiration of Class II release site testing.

The change to §65.95 also rewords subsection (c)(2) to provide that a facility will be considered a Class I release site if (in addition to not being a Class II of Class III release site), it receives deer only from a TC 1 facility after August 15, 2016. As noted elsewhere in this preamble, the department intends for the rules to go into effect August 15, 2016. Under the provisions of §65.98 as adopted, a release site that is in compliance with the provisions of the Interim Breeder Rules as of August 15, 2016 will not be subject to release site testing until deer are liberated onto the release site that would trigger release site testing under the rules as adopted. Since release sites that were compliant with the Interim Rules will be "reset," it is necessary to clarify that the release of deer from other than a TC 1 facility prior to August 15, 2016 will not result in a compliant release site being considered other than a Class I release site, so long as the only breeder deer released on the release site after August 15, 2016, are from TC 1 facilities.

The change to §65.95 also alters (c)(3) to replace the testing obligations for Class II release sites with a less complicated standard and to provide for the expiration of Class II release site testing. As discussed earlier in this preamble, the changes to the proposed rulemaking are intended to address public comment and reflect intensive interactions with the regulated community and stakeholder groups, particularly the desire to minimize or eliminate release-

testing obligations. Therefore, the change to §65.95(c) requires Class II release sites to test the first deer harvested and every deer harvested after the first deer, with no release-site owner required to test more than 15 deer in a single season for each year that release site testing is required. As proposed, Class II release site owners would have been required to provide "not detected" test results for 50 percent of harvested liberated breeder deer or, if no liberated breeder deer were harvested, 50 percent of hunter-harvested deer, and would have been required to test for a minimum of five years following any release of TC 2 deer. However, in an effort to simplify the requirements, which will in turn facilitate compliance and enforcement, the rules as adopted provide for testing up to the first 15 deer harvested at the release site. After analyzing 2015-2016 harvest data at Class II release sites, the department concluded that requiring every deer harvested at a site (but not more than 15) to be tested would enhance the level of release site testing at most sites. Thus, the change results in a simpler standard that is easier to comply with and enforce while remaining epidemiologically efficacious.

The change to §65.95(c)(3) also provides for the expiration of release site testing for Class II release sites in subparagraph (C). As discussed above, in response to comments and concerns about release site testing, required release site testing is being eliminated after March 1, 2019. However, the expiration of release site testing does not obviate the requirement that release sites provide required tests. Therefore, §65.95(c)(3)(C) provides that release site testing for Class II release sites expires on March 1, 2019, for release sites that are in compliance with the release site testing requirements. For release sites that are not compliant with release site testing requirements, the requirements shall continue until the required tests have been submitted.

Finally, the change to §65.95 adds an inadvertently omitted pronoun "it" and to add the term "quarantine" in subsection (c)(4)(A)(ii), for the same reason discussed in the change to §65.95(b) previously in this preamble.

Changes to Movement of DMP Deer

The change to §65.96, concerning Movement of DMP Deer, replaces the CWD testing obligations in proposed paragraph (1)(B) with a requirement for the landowner of the release site to test the first hunter-harvested deer and every hunter-harvested deer thereafter, but no more than 15 hunter-harvested deer are required to be tested in a single season. The change is

made for the same reasons discussed in the change to testing requirements for Class II release sites discussed in the changes to §65.95(c).

The change to §65.96(1) also adds subparagraph (C) to clarify the expiration of release site testing on March 1, 2019, and the obligation to continue to provide test results until test result submission requirements have been met, regardless of the March 1, 2019 release site testing expiration. The reason for this change is the same as was discussed in connection with the changes to §65.95(c)(3)(C), above.

The change to §65.96 also alters paragraph (2) to clarify that the department will not authorize the transfer of deer to a DMP facility from a Class III release site or from a release site or breeding facility that is not in compliance with the testing requirements of the section. As proposed, the transfer of a deer to a DMP facility from a TC 3 breeding facility would not be authorized. However, like deer in a TC 3 breeding facility, deer from a Class III release site or a release site that is not in compliance with applicable rules also pose a higher risk of having been exposed to CWD. A Class III release site is an unsuitable source of deer for DMP activities because it has received exposed deer or is under a hold order or quarantine issued by TAHC. Also, under §65.97 as proposed and as adopted, the department will not issue a Triple T permit for any trap site that has received breeder deer within the previous five years. A Triple T permit is the only method by which deer may be introduced to a DMP facility other than by deer breeder permit or by trapping of free-ranging deer resident on the property for which the DMP is issued. Additionally, any source of deer that is delinquent or deficient in complying with CWD testing obligations should not be authorized to transfer deer because of the possibility of spreading CWD. The change to §65.96(2) will provide greater consistency with the provisions regarding Triple T permits in §65.97.

Changes to Testing and Movement of Deer Pursuant to Triple T or TTP Permit

The change to §65.97(a)(1) stipulates that "unless expressly provided otherwise in this section," the disease detection provisions of 31 TAC §65.102 cease effect upon the effective date of the new section. Because of the change to §65.97(a)(5) to reference the marking requirements of §65.102, it is necessary to recognize that a provision of §65.102 will continue to apply.

The change to §65.97, concerning Testing and Movement of Deer Pursuant to a Triple T or

TTP Permit, alters subsection (a)(5) to clarify that the tagging requirements imposed by the rule as adopted are in addition to existing identification requirements imposed by current regulation at 31 TAC §65.102. The department received several comments concerning the tagging of deer released pursuant to a Triple T permit. This change is necessary to ensure clarity. In addition, as a result of public comment, the testing requirement for Triple T release sites was eliminated. As a result, provisions requiring or referencing release site testing in subsection (a)(9)-(12) have been removed. The requirement to conduct trap site testing, in addition to the limitations on the sites from which deer may be trapped, has been determined to be epidemiologically sufficient to dispense with required Triple T release site testing.

Changes to Transition Provisions

The change to §65.98, concerning Transition Provisions, alters the provisions of proposed subsection (c) to harmonize the rule with the changes made to §65.94 and §65.95, discussed earlier in this preamble. The change allows Class I release sites that receive breeder deer from a TC 2 breeding facility after the effective date of the rule to be designated Class I at the close of the 2016/17 hunting year if release site complies with all testing requirements in that season and the source breeding facility or facilities have subsequently become TC 1 or all deer received from TC 2 source facilities are harvested and tested with "not detected" test results. In addition, subsection (d)(1) (subsection (c)(1) as proposed) was modified to specify that noncompliant release sites must comply with the adopted rules' requirements for three "consecutive" years. In addition, subsection (d)(2) (subsection (c)(2) as proposed) was modified to clarify that noncompliant release sites would be ineligible to receive deer transferred pursuant to a DMP, in addition to a Triple T permit.

2. Justification for the Rules.

Regulatory Authority

Under Parks and Wildlife Code, Chapter 43, Subchapter E, the department may issue permits authorizing the trapping, transporting, and transplanting of game animals and game birds for better wildlife management (popularly referred to as "Triple T" permits). In addition, the department may issue permits authorizing the trapping, transporting and processing of

surplus white-tailed deer (popularly referred to as TTP permits) and permits for the removal of urban white-tailed deer.

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. A deer breeder permit affords deer breeders certain privileges, such as (among other things) the authority to buy, sell, transfer, lease, 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, transferred, leased, or received only for purposes of propagation or liberation. There are currently approximately 1,200 permitted deer breeders (operating more than 1,250 deer breeding facilities) in Texas.

Under Parks and Wildlife Code, Chapter 43, Subchapters R and R-1, and Deer Management Permit (DMP) regulations for white-tailed deer at 31 TAC Chapter 65, Subchapter D, the department may allow the temporary possession of free-ranging white-tailed or mule deer for propagation within an enclosure on property surrounded by a fence capable of retaining deer. At the current time, there are no rules authorizing DMP activities for mule deer.

In addition, department regulations authorize the introduction of a deer from a deer breeding facility into a DMP facility for propagation. Deer breeders are permitted under Parks and Wildlife Code, Chapter 43, Subchapter L and 31 TAC Chapter 65, Subchapter T.

The new rules include requirements regarding the release, retention and movement of deer pursuant to DMPs, Triple T permits, TTP permits, and deer breeder permits.

CWD Background

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. 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).

As a result, the department and the TAHC have worked closely to protect susceptible species of exotic and native wildlife from CWD, and developed 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.

CWD is an additional mortality factor in deer populations, and data indicate that mortality rates can surpass fawn recruitment in local populations with high CWD prevalence. This additive mortality can result in declining population trends. CWD does not have the immediate

short-term impacts to deer populations that may be seen with some other diseases such as anthrax or epizootic hemorrhagic disease (EHD); however, insidious, persistent diseases that increase in prevalence in early years with no noticeable impacts, such as CWD, may be more likely to influence long-term population dynamics. CWD prevalence is much higher and has increased more rapidly in some populations than what is often proclaimed. For example, the Wyoming Game and Fish Department has been monitoring an infected mule deer population in southeast Wyoming since 2001, when there were an estimated 14,393 mule deer and a CWD prevalence of 15%. Ten years later, the disease prevalence was 57% and the mule deer population was estimated at less than 7,500 deer.

In addition, studies have found that CWD-positive deer were much more likely to die as compared to their uninfected counterparts. While CWD-positive deer in the studies that did survive to the clinical stages of the disease did eventually succumb to CWD, preclinical CWD-positive animals were also shown to be more vulnerable to other mortality factors such as predation, hunter harvest, and vehicle collisions.

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).

In addressing CWD, the CWD Management 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. The intent of the new rules is to increase the probability of detecting and containing CWD where it exists.

Discovery of CWD

As noted above, the department has been concerned for over a decade about the possible emergence of CWD in free-ranging and captive deer populations in Texas. Since 2002, more than 45,000 "not detected" CWD test results have been obtained from free-ranging (i.e., not breeder) deer in Texas, and deer breeders have submitted approximately 20,000 "not detected" test results as well. The intent of the proposed new rules is to reduce the probability of CWD being spread from facilities where it might exist and to increase the probability of detecting and containing CWD if it does exist.

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

CWD. Under the provisions of the Agriculture Code, §161.101(a)(6), CWD is a reportable disease and requires a veterinarian, veterinary diagnostic laboratory, or person having care, custody, or control of an animal 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 five years preceding the discovery of CWD in the index facility, the index facility had 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, was also confirmed to have a CWD positive white-tailed deer acquired from the index facility.

Heightened testing requirements resulted in additional discoveries. A total of 25 white-tailed breeder deer have now been confirmed positive at four facilities (including the index facility). A total of four CWD positive deer were found in the index facility. Five CWD positive deer that originated from the index facility were discovered in the Lavaca County facility. A CWD positive deer was harvested from a Medina County release site and another CWD positive deer was sampled in the associated breeding facility located on the same ranch. While this breeding facility is epidemiologically linked to the index facility, neither positive deer at this location originated from the index facility. More recently, another CWD positive deer was reported in another Medina County deer breeding facility and subsequent testing revealed an additional thirteen CWD positive deer from the same facility, totaling 14. A free-ranging hunter-harvested mule deer in Hartley County was also confirmed to have CWD, as well as another hunter-harvested deer in the Hueco Mountains.

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 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. The 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.

In response to the first discovery of CWD in a deer breeding facility in Medina County, the department adopted emergency rules on August 18, 2015 (40 TexReg 5566) to address deer breeding facilities and release sites for breeder deer. The department followed the emergency rulemaking with the "interim" rules that are proposed for repeal as part of this rulemaking, which were published for public comment in the October 2, 2015, issue of the *Texas Register*, adopted by the Commission on November 5, 2015, and published for adoption in the January 29, 2016, issue of the *Texas Register* (41 TexReg 815).

The department also adopted emergency rules governing DMP and Triple T activities (effective October 5, 2015, published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7305, 7307) and followed with interim DMP rules published for public comment in the December 18, 2015, issue of the *Texas Register* (40 TexReg 9086), adopted by the Commission on January 21, 2016, and published for adoption in the February 19, 2016, issue of the *Texas Register* (41 TexReg 1250).

Current Rulemaking

To ensure that the concerns and interests of the regulated community were fully understood and considered, the department engaged the Center for Public Policy Dispute Resolution (CPPDR) at the University of Texas School of Law to provide facilitation services for

the spectrum of stakeholders (including deer breeders, landowners and land managers, hunters, veterinarians, wildlife enthusiasts, the Texas Animal Health Commission (TAHC), and the department), the purpose of which was to negotiate and develop a consensus concerning the essential components of eventual regulations to comprehensively address and implement effective chronic wasting disease (CWD) management strategies. The stakeholder group convened three times during February and March, at which time apparent consensus was reached. The stakeholders also participated in a final phone conference on March 21. The official report of the facilitator is available on the department's website at http://tpwd.texas.gov/huntwild/wild/diseases/cwd/.

At the March 23, 2016 meeting of the Texas Parks and Wildlife Commission (Commission), department staff briefed the Commission on the process and results of the facilitation and presented a synoptic overview of the substantive regulatory provisions being recommended for proposal by staff to address both the consensus issues that emerged from the facilitation and additional regulatory components necessary to operationalize consensus decisions, as well as other regulatory components deemed necessary but on which there was no consensus.

Following the publication of the proposed rules in the *Texas Register*, on April 11, 2016, as part of the process for soliciting public comment, the department staff, as well as a facilitator from CPPDR continued to engage stakeholders. At the May 26, 2016 Commission meeting, the Commission heard public testimony regarding the rules. However, the Commission postponed action on the proposed rules in order to facilitate additional efforts to arrive at consensus with stakeholders and the regulated community. A special Commission meeting was held on June 20, 2016, at which time the Commission heard additional public testimony.

In addition to the facilitated process, and responses to comments and public testimony, the new rules, as adopted, are a result of extensive cooperation between the department and 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).

Although a lasting consensus among all participants was not achieved through the facilitated rulemaking, the basis for the rules as proposed was developed through this process.

3. How the Rules Will Function.

The rules being repealed were intended to function as interim rules (referred to herein as Interim Deer Breeder Rules) in order to maintain regulatory continuity for the duration of the 2015-16 deer season and the period immediately thereafter. As stated in previous rulemakings, the department's intent was to review the interim rules, as well as the emergency rules regarding Triple T and TTP permits and DMP, and, based on additional information from the ongoing epidemiological investigation, disease surveillance data collected from captive and free ranging deer herds, guidance from TAHC, and input from stakeholder groups, present the results of that review to the Commission in the spring of 2016 for possible modifications. The rules adopted herein resulted from that process.

Definitions

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 "ante-mortem" testing as "a CWD test performed on a live deer." The definition is necessary because the new rules allow or require ante-mortem testing in addition to post-mortem testing.

New §65.90(3) 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(4) 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(5) 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(6) 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, deer management permit (DMP), nursing, or other facility authorized to possess white-tailed deer or mule deer.

New §65.90(7) 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(8) 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(9) 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(10) defines "Deer Management Permit (DMP)" as "a permit issued under the provisions of Parks and Wildlife Code, Subchapter R or R-1 and Subchapter D of this chapter (relating to Deer Management Permit (DMP)) that authorizes the temporary detention of deer for the purpose of propagation." The new rules regulate certain aspects of activities conducted under a DMP and a definition is necessary to avoid any confusion as to what is meant by the

term.

New §65.90(11) defines "eligible-aged deer." This definition provides two standards for determining if a deer is an "eligible-aged deer." Under §65.90(11)(A), "if the deer is held in a breeding facility enrolled in the TAHC CWD Herd Certification Program" an eligible-aged deer is a deer that is "12 months of age or older." However, for any other deer, an eligible-aged deer is a deer that is "16 months of age or older." CWD is difficult to detect 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 the United States Department Agriculture (USDA) use a standard of 12 months.

New §65.90(12) defines "eligible mortality" as "an eligible-aged deer that has died." Because the rules provide for post-mortem testing of deer, it is necessary to define an "eligible" mortality" from which a valid post-mortem sample can be collected and tested. As mentioned earlier, CWD is difficult to detect in younger animals; therefore, the test results required to engage in certain activities under the new rules must be obtained from eligible aged deer.

New §65.90(13) defines "exposed deer." This definition replaces the former definition used in the Interim Breeder Rules for "Tier 1," which proved to be easily confused with other terms used in the rules, such as "TC 1." The 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(14) defines "facility" as "any location required to be registered in TWIMS under a deer breeder permit, Triple T permit, or DMP, including release sites and/or trap sites."

The definition is necessary to provide a shorthand term for the locations to which the new rules apply, rather than having to enumerate a cumbersome list of sites. (As explained below, TWIMS is the department's Texas Wildlife Information Management Services online application.)

New §65.90(15) 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 proposed rules in some instances require deer harvested by hunters (as opposed to other types of mortality) to be tested for CWD.

New §65.90(16) defines "hunting year." Because the new rules stipulate the testing of deer harvested by lawful hunting, it is necessary to create a term that covers hunting under the normal seasons and bag limits established for each county by the Commission and hunting that occurs during the period of validity of tags issued pursuant to the Managed Lands Deer program; therefore, "hunting year" is defined as "that period of time between September 1 and August 31 of any year when it is lawful to hunt deer under the provisions of Subchapter A of this chapter (relating to Statewide Hunting Proclamation)."

New §65.90(17) defines "Interim Breeder Rules" as "rules regarding Chronic Wasting Disease – Movement of Deer, approved by the Commission on November 5, 2015, and published in the *Texas Register* on January 29, 2016 (41 TexReg 815)." The definition is necessary because the new rules reference compliance with the Interim Breeder Rules; therefore, a definition is necessary to establish a shorthand term for a phrase that is used in the new rules but cumbersome to repeat.

New §65.90(18) 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.

New §65.90(19) defines "landowner's authorized agent (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(18).

New §65.90(20) defines "liberated deer" as "a free-ranging deer that bears evidence of a tattoo (including partial or illegible tattooing) or of having been eartagged at any time (holes,

rips, notches, etc. in the ear tissue)." The definition is necessary because the new rules, in certain circumstances, require the testing of hunter-harvested deer that could be identified as deer that have been liberated.

New §65.90(21) defines "Movement Qualified (MQ) as "a designation made by the department pursuant to this division that allows a deer breeder to lawfully transfer breeder deer." The new rules impose requirements, including a minimum level of testing, that deer breeding facilities must meet in order to be authorized by the department to transfer breeder deer under the rules. It is therefore necessary to create a shorthand term to reference that ability.

New §65.90(22) defines "Not Movement Qualified (NMQ)" as "a designation made by the department pursuant to this division that prohibits the transfer of deer by a deer breeder." Because the new rules prohibit the movement of deer from any facility that is not MQ, a definition for that condition is necessary.

New §65.90(23) 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 certain breeder deer and Triple T deer released to a release site to be tagged with either a RFID or NUES tag.

New §65.90(24) defines "originating facility" as "any facility from which deer have been transported, transferred, or released, as provided in this division or as determined by an investigation of the department, including for breeder deer, the source facility identified on a transfer permit and for deer being moved under a Triple T permit, the trap site." The new rules impose certain requirements, restrictions, or prohibitions, based on the status of the property or facility from which deer are moved. Therefore, a shorthand definition is necessary to ensure clarity.

New §65.90(25) defines "post-mortem test" as "a CWD test performed on a dead deer," which is necessary in order to delineate post-mortem testing from ante-mortem testing. The new rules impose requirements and restrictions based on the type of test being performed.

New §65.90(26) defines "properly executed." Because the new rules require the submission of electronic reports and forms that provide critical information to the department, it is necessary to make clear that all information on such a form or report must be provided.

Therefore, the new rules define "properly executed" as "a form or report required by this division on which all required information has been entered."

New §65.90(27) 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 proposed rules require a deer breeder to have a reconciled herd in order to transfer or release breeder deer. Herd reconciliation is a necessary component of disease management.

New §65.90(28) defines "release site" as "a specific tract of land that has been approved by the department for the release of deer under this division." The definition is necessary because the new rules impose CWD testing and other requirements for certain tracts of land where breeder deer are liberated or transferred.

New §65.90(29) 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. In addition, the new rules contain provisions that begin or end with a specified reporting year. Therefore, it is necessary to clarify the definition of "reporting year."

New §65.90(30) 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 certain breeder deer and Triple T deer released to release sites to be tagged with either an RFID or NUES tag.

New §65.90(31) defines "status" as "the level of testing required by this division for any given deer breeding facility or release site." The definition also clarifies that the highest status for a deer breeder is 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 new rules categorize breeding facilities and release sites based on relative risk. The definition is necessary because the new rules include regulatory requirements that are predicated upon the status of a breeding facility or release site.

New §65.90(32) defines "submit." In order to eliminate lengthy repetition throughout the

new rules, "submit" is defined as "when used in the context of test results, provided to the department, either directly from a deer breeder or via an accredited testing laboratory."

New §65.90(33) defines "suspect." The testing process for determining that a deer is, in fact, infected with CWD is two-fold. If the initial test on a sample indicates the presence of the disease, the sample or another sample from the same animal is re-tested by the National Veterinary Service Laboratories of the United States Department of Agriculture. Because the new rules make any facility NMQ pending confirmation (i.e., the re-test), it is necessary to create a term for the initial test result that causes the re-test. Therefore, "suspect" is defined as "an initial CWD test result of "detected" that has not been confirmed."

New §65.90(34) defines "TAHC" as "Texas Animal Health Commission." As noted elsewhere in this preamble, the Texas Animal Health Commission is the Texas 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). Because the new rules include provisions that are based on determinations or actions of TAHC, a short-hand reference to the agency is necessary.

New §65.90(35) 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(36) defines "TAHC Herd Plan" as "a set of requirements for disease testing and management developed by TAHC for a specific facility." In response to the discovery of a disease over which TAHC has jurisdiction, including CWD, the TAHC may issue a herd plan which imposes certain testing requirements and movement restrictions. 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(37) defines "Test, Test Result(s), or Test Requirement" as "a CWD test, CWD test result or CWD test requirement as provided in this division." This definition is provided to ensure clarity regarding the type of test referenced whenever the word "test" is used without the acronym "CWD."

New §65.90(38) defines "trap site" as "a specific tract of land approved by the department for the trapping of deer under this chapter and Parks and Wildlife Code, Chapter 43, Subchapters E, L, R, and R-1," which is necessary because the new rules impose testing and reporting requirements on trap sites under various permits.

New §65.90(39) defines "Triple T permit." Because the new rules affect certain activities conducted under Triple T permits, the term is defined in order to eliminate any confusion. A Triple T permit is "a permit issued under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter E, and Subchapter C of this chapter (relating to Permits for Trapping, Transporting, and Transplanting Game Animals and Game Birds)." In the context of the new rules, a reference to Triple T permit is limited to a Triple T permit for activities involving white-tailed and mule deer.

New §65.90(40) defines "Trap, Transport and Process (TTP) permit"—as "a permit issued under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter E, and Subchapter C of this chapter (relating to Permits for Trapping, Transporting, and Transplanting Game Animals and Game Birds), to trap, transport, and process surplus white-tailed deer (TTP permit)." The proposed definition is necessary to clarify and distinguish TTP and Triple T permit requirements.

New §65.90(41) defines "TWIMS" as "the department's Texas Wildlife Information Management Services (TWIMS) online application." TWIMS is the system that is required to be used to file required notifications and reports under the rules.

General Provisions

New §65.91, concerning General Provisions, sets forth a number of provisions that are applicable to the transfer or release of 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, other than Division 1 of Subchapter B (regarding

Disease Detection and Response), the new rules apply. This provision is necessary to avoid confusion resulting from a conflict between the new rules and the agency's existing rules governing white-tailed deer and mule deer. Provided, however, in the event of a conflict between the new rules and Division 1 of Subchapter B of Chapter 65, Division 1 would control. Division 1 addresses the establishment of zones within which movement and testing requirements apply to minimize the risk of CWD expanding beyond the area(s) in which it currently exists in free-ranging deer populations. Although the new rules are intended to be independent of the rules in Division 1, there may be instances in which the new rules would appear to authorize an activity that is prohibited by Division 1. In such a case, the provisions of Division 1 would control.

New §65.91(b) prohibits the transfer of live breeder deer or deer trapped under a Triple T permit, TTP permit or DMP for any purpose except as provided by the new rules. Because deer breeders, landowners, and wildlife managers frequently transfer deer under various permits, it is necessary in light of the emergence of CWD in Texas deer breeding facilities as well as in free-ranging deer to prohibit the movement of breeder deer except as authorized by the proposed rules.

New §65.91(c) prohibits the movement of deer to or from any facility where CWD has been detected, beginning with the notification that a "suspect" test result has been received from an accredited testing laboratory, irrespective of how the sample was obtained or who collected the sample. New §65.91(c) also stipulates that such prohibition takes effect immediately upon the notification of a CWD "suspect" test result and continues in effect until the department expressly authorizes the resumption of permitted activities at that facility. The new provision is necessary because CWD is an infectious disease, which makes it necessary to prohibit certain activities that could result in the spread of the disease while test results are confirmed. If a "suspect" test result is determined to be "not detected" then the department may authorize resumption of permitted activities. However, if the result is "confirmed" then provisions of the rule regarding exposed facilities would govern.

New §65.91(d) provides that notwithstanding any provisions of the division, a facility may not move deer to any location if prohibited by a TAHC herd plan associated with a TAHC hold

order or TAHC quarantine. As noted elsewhere in this preamble, 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). In accordance with that authority, TAHC may issue a hold order or quarantine preventing the movement of deer. New §65.91(c) clarifies that movement of deer in violation of a TAHC hold order or quarantine is not authorized.

New §65.91(e) provides that a facility (including a facility permitted after the effective date of this division) 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 the division at that status for a minimum of two years, if the facility is a breeding facility, or for the period specified for release sites in §65.95(c) of this title (relating to Movement of Breeder Deer). The new rules create a tiered system of testing requirements based on the level of risk of transmission of CWD for each deer breeding facility or release site. The level of risk is based on the degree to which the facility has been monitored for the presence of CWD, or 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 facility or release site to comply with the testing requirements associated with the originating facility, and stipulates a duration for the application of continued testing requirements.

New §65.91(f) provides that a deer breeding facility that was initially permitted after March 31, 2016 will assume the lowest status among all originating facilities from which deer are received. The new subsection is necessary for the same reasons addressed in the discussion of new §65.91(e).

New §65.91(g) provides that the designation of status by the department in and of itself does not authorize the transfer or movement of deer. New §65.91(g) also prohibits any person from removing or causing the removal of deer from a facility that has been designated NMQ by the department. The provision is necessary because a breeding facility of any status can be

designated NMQ.

New §65.91(h) requires all applications, notifications, and requests for change in status required by this division shall be submitted electronically via TWIMS or by another method expressly authorized by the department. To provide greater regulatory efficiency, it is necessary to require the use of an automated system.

New §65.91(i) provides that in the event that technical or other circumstances prevent the development or implementation of automated methods for collecting and submitting the data required by this division via TWIMS, the department may prescribe alternative methods for collecting and submitting the data required by this division, which is necessary to provide for continuity of administration in the event of technical disruptions.

CWD Testing

New §65.92, concerning CWD Testing, establishes the general provisions regarding the collection and submission of CWD test samples.

New §65.92(a) requires all CWD test samples at the time of submission for testing to be accompanied by a properly executed, department-prescribed form provided for that purpose. The technical response being developed by the department provides for Texas Veterinary Medical Diagnostic Laboratory (TVMDL), an accredited laboratory that performs CWD testing, to notify the department of test results electronically. By requiring persons who submit test samples to those laboratories to use a department-supplied form that contains data fields that can be entered by the laboratory, the process of notification and the sharing of records is enhanced by eliminating the need for manual upload of test results by the permitted deer breeder and manual data entry by the department after the test results have been received.

New §65.92(b) sets forth the requirements for valid ante-mortem testing, including the identification of the specific tissues that may be used. New §65.92(b) also requires that tissue samples be collected by a licensed veterinarian, that the testing be done by an accredited laboratory, that at least six lymphoid follicles be collected, and that samples be submitted within six months of submission from a live deer that is at least 16 months of age and that has not been the source of a "not detected" ante-mortem test result submitted within the previous 24 months. To ensure consistency with the Texas Veterinary Practices Act (Occupations Code,

Chapter 801), regulations applicable to the practice of veterinary medicine in Texas, and regulations of the TAHC, this subsection requires that ante-mortem samples be collected by a licensed veterinarian authorized to do so by the referenced statutes and regulations. Additionally, in order to be epidemiologically valuable, tissue samples must be extracted from deer older than 16 months of age. Finally, the most significant epidemiological distinction between ante-mortem testing and post-mortem testing is that the testing of animals that have died provides a much higher likelihood of detecting the presence of disease, since diseased animals are more likely to die than healthy animals. In order to prevent the repeated use of tissues from an animal that has produced "not detected" results in the recent past, it is necessary to stipulate a minimum frequency that an animal may be used to provide tissue samples. The department has chosen the 24-month interval to increase the likelihood that sufficient host tissues are available for testing and to prevent the continued use of a single deer to provide tests. It should also be noted that although ante-mortem testing has not yet been acknowledged as an official test protocol by the USDA, the submission of a "suspect" ante-mortem test may cause the subject animal to be euthanized and subjected to post-mortem testing for confirmation.

New §65.92(c) sets forth the requirements for post-mortem testing, stipulating that a post-mortem CWD test is not valid unless it is performed by an accredited testing laboratory on the obex or the medial retropharyngeal lymph node of an eligible mortality and may be collected only by a qualified licensed veterinarian, TAHC-certified CWD sample collector, or other person approved by the department. Obviously, 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 deer unless post-mortem 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 post-mortem CWD tests. Therefore, in order to ensure that post-mortem 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. To ensure that valid samples are collected, the new subsection also stipulates that the sample may only be collected by a qualified licensed veterinarian, TAHC-certified CWD sample collector, or other person approved by the department.

New §65.92(d) allows ante-mortem tests to be substituted for required post-mortem tests at a ratio of 3:1. The department acknowledges that natural mortality is unpredictable and that there will be time periods when test results for a sufficient number of mortalities cannot be submitted; therefore, the new rule allows substitution of ante-mortem tests for post-mortem tests. For reasons noted earlier in this preamble, test results from natural mortalities have a higher epidemiological value than ante-mortem tests; therefore, if ante-mortem tests are being conducted in lieu of post-mortem tests, the new rules provide that three "not detected" ante-mortem test results are required for each "not detected" post-mortem test result required.

New §65.92(e) prohibits the use of a single ante-mortem test result more than once to satisfy any testing requirement of the division. From an epidemiological perspective, the use of one test result to satisfy more than one testing requirement (especially if the submissions take place in more than one reporting year) creates a weakness in disease mitigation because the different ante-mortem testing requirements were developed to be used in combination, and to submit one test to meet two independent criteria does not provide the probability of detection anticipated by the department and on which the rules were based.

New §65.92(f) stipulates that the testing requirements of the division 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 person subject to the provisions of the new rules should not be able to avoid compliance simply by selling, donating, or trading property to another person related to the seller for the purpose of avoiding the requirements of the rules.

New §65.92(g) provides that 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 for as long as CWD testing is required at

the release site under the provisions of this division. The new rules contemplate a disease management strategy predicated on the results of CWD testing. Incomplete, inadequate, or tardy reporting of test results confound that strategy. For this reason, the new rule establishes a date certain for reporting test results to the department.

Harvest Log

New §65.93, concerning Harvest Log, sets forth the elements and requirements for on-site harvest documentation. The new rules require a harvest log to be maintained on Class II and Class III release sites. For each deer harvested from a Class II or Class III release site for which a harvest log is required, 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 will enable 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 than April 1 of each year, and also provides for the format and retention of the harvest log.

Breeding Facility Minimum Movement Qualification

New §65.94, concerning Breeding Facility Minimum Movement Qualification, sets forth the testing requirements necessary for a breeding facility to be able to transfer deer to other deer breeders or for purposes of liberation.

New §65.94(a) provides that a breeding facility will be NMQ (Not Movement Qualified--prohibited from transferring breeder deer anywhere for any purpose) if it has not met the testing, inventory, reporting, and recordkeeping, and TAHC Herd Plan requirements set forth in that subsection.

New §65.94(a)(1) sets forth the CWD testing requirements that must be met to avoid being NMQ. Pursuant to new §65.94(a)(1)(A), from the effective date of the rules through March 31,

2017, a breeding facility must have either had less than five eligible mortalities from May 23, 2006 through March 31, 2016, or obtained "not detected" test results for at least 20 percent of the eligible mortalities that occurred in the facility since May 23, 2006. The provisions of §65.94(a)(1)(A) are essentially the same as that provided in the deer breeder movement rules that existed prior to the June 2015 discovery of CWD in a deer breeding facility. Although this standard provides a very low statistical confidence of detecting CWD if it exists in a facility, this standard is the standard contained in previous rules, as well as the Interim Rules. In addition, 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.

New §65.94(a)(1)(B)(i) provides that beginning April 1, 2017, and each April 1 thereafter, a breeding facility that has achieved "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program will be considered to have met the testing requirements necessary to be considered MQ. In order to achieve and maintain "fifth-year" or "certified" status, a deer breeder must comply with certain disease monitoring protocols, including the testing of 100% of eligible mortalities and not receiving deer from facilities that have not obtained that "fifth year" or "certified" status. See, 4 TAC §40.3. For breeding facilities that have not achieved "fifth-year" or "certified status," beginning April 1, 2017 and each April 1 thereafter, annual CWD "not detected" test results for at least 80% of eligible mortalities occurring in the facility during the previous reporting year must be submitted. However, the department recognizes that if a breeding facility has an unusually low number of eligible mortalities, this provision could result in the submission of few test results. Therefore a provision is included to require that for breeding facilities that have been permitted at least six months, the number of "not detected" post-mortem test results submitted during each reporting year must be equal to or greater than the eligible-aged population in the breeding facility at the end of the reporting year, plus the eligible mortalities that occurred within the breeding facility in the reporting year, multiplied by 3.6 percent. This provision is intended to provide a minimum number of tests that must be submitted each year to achieve the epidemiological goals of the rules . To develop this number,

the department considered that the average natural mortality in a deer breeding facility is approximately 4.5 percent of the eligible-aged deer population in the breeding facility each year. Therefore, if a deer breeding facility that has an average natural mortality rate among eligible-aged deer tested 80% of those mortalities, the breeding facility would test 3.6 percent (i.e., 80% of 4.5%) of the eligible-aged population each year. As explained elsewhere in this preamble, the rules provide for ante-mortem substitution for these test results at ratio of three "not detected" ante-mortem test results for each required "not detected" post-mortem test result.

New §65.94 also provides additional criteria for designating NMQ status. Section 65.94(a)(2)-(3) provides that a breeding facility may be NMQ if it is not authorized to transfer deer pursuant to a TAHC Herd Plan associated with a TAHC hold order or quarantine, does not have a reconciled herd inventory, or is not in compliance with reporting and recordkeeping requirements. 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, as a reconciled herd inventory is a necessary component of disease management. Also, as noted elsewhere in this preamble, a TAHC Herd Plan may contain provisions that impose movement restrictions in which case the TAHC Herd Plan will control. In addition, to ensure compliance with applicable regulatory provisions, it is imperative that the facility have an accurate herd inventory that accounts for the movement of breeder deer into and out of the breeding facility, as well as deaths and births within the facility.

New §65.94(b) provides that a breeding facility that has been designated NMQ for failure to comply with testing requirements will be restored to MQ when sufficient "not detected" test results are submitted. The department has determined that once a breeding facility is compliant with applicable testing requirements, MQ status should be restored, so long as all other requirements for MQ status are met. The "not detected" test results can be provided through ante-mortem substitution as provided in §65.92(d) or by the submission of additional post-

mortem test results. It should be noted, however, that if post-mortem test results are being submitted to satisfy the requirement to submit "not detected" post-mortem test results for 80% of the annual mortalities, the creation of additional mortalities will alter the calculation (i.e., the total number of mortalities will change, which will, in turn, alter the number of post-mortem tests required to achieve 80%).

New §65.94 (c) requires a breeding facility designated NMQ to report all mortalities within the facility to the department immediately upon discovery. From an epidemiological perspective, once a breeding facility cannot provide the minimum assurance that adequate disease surveillance is being maintained, there is an increased risk that if CWD is present it could be spread. Therefore, the new rule requires facilities that are not in compliance with movement qualification requirements to report all mortalities immediately, rather than at the end of the reporting year.

New §65.94(d) provides that immediately upon the notification that a facility has received a "suspect" test result, all facilities that have been in possession of deer that were held in the suspect facility within the previous five years will be designated NMQ until a determination is made that the facility is not epidemiologically linked to the suspect deer, or upon further testing, the "suspect" deer is determined not to be positive. The new rules are intended to detect CWD if it is present and prevent the spread of CWD once it is detected; therefore, once a "suspect" test result has been returned, all movement to and from all connected facilities should be stopped until the "suspect" test is either confirmed or determined to be non-positive.

Movement of Breeder Deer

New §65.95, concerning Movement of Deer, establishes the various status levels and attendant testing requirements for breeding facilities and release sites.

New §65.95(a) allows a TC 1 or TC 2 breeding facility designated MQ and in compliance with the applicable provisions of the division to transfer breeder deer under existing rules to another breeding facility, an approved release site, a DMP facility, or to another person for nursing purposes. This subsection is necessary to set out the types of transfers that may be authorized by the rules.

New §65.95(b) establishes three categories of breeding facilities based on level of

epidemiological risk: Transfer Category (TC) 1, TC 2, and TC 3. As noted in the discussion of the definition of "status" earlier in this preamble, the highest level/status (i.e., the level with the least risk for CWD) for a breeding facility is TC 1 and the lowest level is TC 3.

Under new §65.95(b)(1)(A), a breeding facility will be classified as a TC 1 facility if it has achieved "fifth-year" or "certified" status in the TAHC Herd Certification Program. Under new §65.95(b)(1)(B)(i), a breeding facility will be classified as a TC 1 facility if it has obtained "not detected" CWD test results for at least 80% of total eligible mortalities over the last five report years, with a minimum number of post-mortem test results over that five-year period equal to at least 3.6% of the eligible-aged population during that period. The 3.6% minimum testing requirement is calculated as the sum of the eligible-aged population in the breeding facility at the end of each of the previous five consecutive reporting years, plus the sum of the eligible mortalities that have occurred within the breeding facility for each of the five consecutive years, multiplied by 3.6 percent. To develop this number, the department considered that the average natural mortality in a deer breeding facility is 4.5 percent of the eligible-aged deer population in the breeding facility each year. Therefore, if a breeding facility with an average number of natural mortalities among eligible-aged deer tested 80% of those mortalities, the breeding facility would test 3.6 percent (i.e., 80% of 4.5%) of the eligible-aged population each year. In order to calculate this number over a five-year period, the eligible-aged population of the breeding facility plus eligible-aged mortalities for each of the previous five report years is added together, and that sum is then multiplied by 3.6 percent. The resulting number is 80 percent of the average expected eligible-aged mortality for a deer breeding facility over a five-year period.

Alternatively, under new §65.95(b)(1)(B)(ii), a breeding facility that has submitted ante-mortem "not detected" CWD test results for 50% of eligible-aged deer in the breeding facility will be considered a TC 1 facility. The department understands that in anticipation of being able to use ante-mortem test results to achieve TC 1 status, some deer breeders may already have been conducting ante-mortem tests. Therefore, to facilitate the transition to the new rules for the report year beginning April 1, 2016 and ending March 31, 2017, a breeding facility that has submitted "not detected" ante-mortem test results for at least 25% of eligible-aged deer in the

facility will be temporarily considered a TC-1, so long as the remaining "not detected" results are submitted by May 15, 2017.

New §65.95(b)(2) establishes that the testing requirements for TC 2 breeding facilities are the minimum testing requirements for MQ status stipulated in §65.94, relating to Breeding Facility Minimum Movement Qualification. A TC 2 breeding facility is a facility that is neither a TC 1 breeding facility nor a TC 3 facility.

New §65.95(b)(3) establishes provisions regarding classification and requirements for TC 3 breeding facilities. A TC 3 breeding facility is any breeding facility registered in TWIMS that is under a TAHC hold order, quarantine and/or herd plan and received an exposed deer within the previous five years, transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility, or possessed a deer that was in a CWD-positive facility within the previous five years. As such, TC 3 breeding facilities are the facilities with the highest risk of harboring and spreading CWD. Therefore, the new rule prohibits the transfer of deer from any TC 3 facility unless such transfer is expressly authorized in a TAHC herd plan, and then only in accordance with the provisions of the division and the TAHC herd plan, and requires all transferred deer to be tagged in one ear with a NUES tag or button-type RFID tag approved by the department. The tagging requirement is necessary because breeder deer translocated from a TC 3 breeding facility are epidemiologically valuable. Should a released breeder deer test positive, the department and TAHC can use the eartag to quickly identify the source facility and initiate necessary epidemiological investigations and responses to prevent additional spread of CWD.

New §65.95(c) sets forth provisions governing release sites. New §65.95(c)(1)(A) provides that an approved release site consists solely of the specific tract of land to which deer are released and the acreage designated as a release site in TWIMS. In order to determine where release site testing requirements apply, and to provide a measure of confidence that CWD is not spread from those places where breeder deer are released, it is necessary to identify the specific locations where breeder deer are authorized to be released. However, this provision does allow a release site owner to modify the registered release site in order to reflect changes in acreage (such as the removal of cross-fencing), so long as the release site owner notifies the department

of such modifications prior to the acreage modification. Any release site requirements provided in this subsection will also fully apply to the modified release site.

New §65.95(c)(1)(B) requires that liberated breeder deer have complete, unrestricted access to the entirety of the release site. Such a provision is necessary to ensure that released deer are not confined in smaller enclosures within a permitted release site. The testing requirements are based on the assumption that liberated deer commingle with the rest of the population, to which testing requirements apply. To keep the populations segregated defeats the purpose of release-site testing on the larger site. Additionally, for potential epidemiological investigations it is necessary that the release site information registered with the department be an accurate reflection of the acreage on which the deer were released. However, a release site owner is not prohibited from fencing areas that may be considered part of the release site, but from which deer should be excluded for safety reasons (e.g., air strips) or to prevent depredation (e.g., crops, ornamental plants).

New §65.95(c)(1)(C) stipulates that all release sites onto which breeder deer are liberated be surrounded by a fence of at least seven feet in height that is capable of retaining deer at all times under reasonable and ordinary circumstances. In addition, the owner of the release site is responsible for ensuring that the fence and associated infrastructure retain deer under reasonable and ordinary circumstances. 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.

New §65.95(c)(1)(D) provides that any testing requirements of the division continue in effect until all required "not detected" test results are submitted and that a release site not in compliance with the testing requirements of the subsection is ineligible to receive deer and must continue to submit testing results until the testing requirements are satisfied. The epidemiological value of release site testing is compromised if release site tests are not submitted. Therefore, the department reasons that release sites should not be allowed to obtain liberated breeder deer until the release site demonstrates compliance with existing or previous requirements.

New §65.95(c)(1)(E) prohibits any intentional act that allows any live deer to leave or

escape from a release site. As noted elsewhere in this preamble, it is important to ensure that breeder deer do not escape from the acreage onto which the deer have been liberated.

New §65.95(c)(1)(F) requires the owner of a Class II or Class III release site to maintain a harvest log. The requirements for the harvest log are set out in new §65.93. A harvest log is necessary to ensure that the release site keeps accurate records of deer harvested on the property.

New §65.95(c)(2)-(4) establishes classes of release sites. New §65.95(c)(2) establishes that a Class I release site is a release site that has received deer only from TC 1 facilities since August 15, 2016 (the effective date of the new rules). Class I release sites represent the lowest risk of harboring or spreading CWD and are therefore not required to perform CWD testing.

New §65.95(c)(3) establishes criteria and requirements for Class II release sites. New §65.95(c)(3)(A) provides that a Class II release site is a release site that receives deer from a TC 2 breeding facility (but not a breeding facility of lower status). New §65.95(c)(3)(B) requires that for each hunting year following the release of deer from a TC 2 breeding facility, the owner of the release site must submit "not detected" post-mortem test results for the first deer harvested and every deer harvested thereafter up to the first 15 deer harvested. Because a Class II release site has received breeder deer that represent a higher risk of harboring or transmitting CWD, some level of testing is necessary. However, as described elsewhere in this preamble, as a result of changes to the MQ requirements, the rules as adopted provide for the elimination of release-site testing at Class II release sites after the 2018-2019 hunting year. Therefore, §65.95(c)(3)(C) provides that the Class II testing requirements contained in §65.95(c)(3)(B) expire March 1, 2019 for Class II release sites that have submitted all of the required test results. For release sites that have not submitted the required test results, testing obligations continue until all required test results are submitted.

New §65.95(c)(4) establishes criteria and requirements regarding Class III release sites. New §65.95(c)(4)(A) establishes that a Class III release site is a release site that has received deer from an originating facility that is a TC 3 facility, received an exposed deer within the previous five years, transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility and has not been released from a TAHC hold

order. Class III release sites represent the highest level of risk of harboring or transmitting CWD. As a result, new §65.95(c)(4)(B) requires the landowner of a Class III release site to submit post-mortem CWD test results for 100 percent of all hunter-harvested deer or one hunter-harvested deer per liberated deer released on the release site between the last day of lawful hunting on the release site in the previous hunting year and the last day of lawful hunting on the release site during the current hunting year, whichever is greater, and provides that the minimum harvest and testing provisions may be as prescribed in a TAHC herd plan. Similarly, new §65.95(c)(4)(C) prohibits the transfer of a breeder deer to a Class III release site unless the deer has been tagged in one ear with a NUES tag or button-type RFID tag. Since deer released onto a Class III release site pose a much higher epidemiological risk, it is important that such deer be easily identifiable as liberated deer.

Movement of DMP Deer

New §65.96, concerning Movement of DMP Deer, sets forth the movement and testing requirements associated with DMP activities. The new rule requires a DMP release site to which breeder deer from a TC 2 breeding facility are released, or if the DMP property from which deer are trapped for DMP purposes is a Class II release site, to submit "not detected" test results for the first deer harvested and every deer harvested thereafter up to the first 15 deer harvested. As discussed elsewhere in this preamble, a TC 2 breeding facility or Class II release site represents a higher risk of transmitting CWD than a TC 1 breeding facility or Class I release site; therefore some level of testing is appropriate. The department has determined that testing the first 15 deer harvested each year through March 1, 2019, provides a reasonable assurance that CWD will be detected if it were present. The new rule prohibits the transfer of deer from a TC 3 breeding facility, Class III release site or from a release site or deer breeding facility that is not in compliance with applicable testing requirements. Breeder deer in a TC 3 breeding facility, deer in a Class III release site and deer from breeding facilities and release sites that are not in compliance with the applicable regulatory requirements pose an unacceptable risk of spreading CWD to free-ranging populations. The rule does not impose testing requirements on any DMP facility that either does not receive breeder deer or receives breeder deer solely from TC 1 deer breeding facilities.

Testing and Movement of Deer Pursuant to a Triple T or TTP Permit

New §65.97, concerning Testing and Movement of Deer Pursuant to a Triple T or TTP Permit, sets forth general provisions and testing requirements applicable to the movement of deer under a Triple T or TTP permit.

New §65.97(a)(1) stipulates that unless expressly provided otherwise, the disease detection provisions of 31 TAC §65.102 cease effect upon the effective date of the new section. This is necessary to prevent regulatory conflict.

New §65.97(a)(2) provides that the department may require a map of any prospective Triple T trap site to be submitted as part of the application process, which is necessary to address situations in which the exact nature of a prospective Triple T site and its relationship to nearby or adjoining tracts of land is unclear with respect to previous releases.

New §65.97(a)(3) further enumerates the criteria under which the department will not authorize deer to be trapped for Triple T purposes, including a release site that has received breeder deer within five years of the application for a Triple T permit, a release site that has failed to fulfill testing requirements, any site where a deer has been confirmed positive for CWD, any site where a deer has tested "suspect" for CWD, or any site under a TAHC hold order or quarantine.

Further, new §65.97(a)(4) provides that in addition to the reasons for denying a Triple T permit listed in 31 TAC §65.103(c) (concerning Trap, Transport, and Transplant Permit), the department will not issue a Triple T permit if the department determines, based on epidemiological assessment and consultation with TAHC that to do so creates an unacceptable risk for the spread of CWD. Each of the enumerated criteria for permit refusal represents an unacceptable risk of spreading CWD to free-ranging populations.

In addition, new §65.97(a)(5) requires all Triple T deer to be tagged prior to release in one ear with a button-type RFID tag approved by the department, in addition to the marking required by §65.102 (relating to Permits for Trapping, Transporting, and Transplanting Deer – Disease Detection Requirements) and for the RFID tag information to be submitted to the department. The new provision enables the department to identify all released deer harvested at a given release site (including deer that were released breeder deer) if an epidemiological

investigation becomes necessary.

New §65.97(a)(6) further stipulates that a Triple T permit does not authorize the take of deer except as authorized by applicable laws and regulations, including but not limited to laws and regulations regarding seasons, bag limits, and means and methods as provided in Subchapter A of this chapter (relating to Statewide Hunting Proclamation), which is necessary to ensure that all deer are harvested by hunters under the regulations established for lawful hunting.

New §65.97(a)(7) requires all test samples to be collected or tested after the Saturday closest to September 30 (the first day of lawful hunting in any year), which is necessary to ensure that test samples are temporally linked to the year for which activities of the permit are authorized; however, new §65.97(a)(8) clarifies that this requirement does not apply to permits issued for the removal of urban deer, for which test samples may be collected between April 1 and the time of application.

New §65.97(b)(1) establishes the testing requirements for Triple T trap sites. At a Triple T trap site, the new rule requires 15 "not detected" post-mortem test results to be submitted prior to permit issuance. The department is confident that a sample of 15 deer from a prospective trap site that is not otherwise prevented from being a trap site by the new rules is sufficient to establish that CWD is not present and will not be spread.

New §65.97(b)(2) stipulates that CWD testing is not required for deer trapped on any property if the deer are being moved to adjacent, contiguous tracts owned by the same person who owns the trap site property. The department does not believe that deer trapped from a free-ranging population to be released elsewhere within that same population represent a significant disease-transmission risk.

New §65.97(c) sets forth the testing requirements for TTP permits. The new provision requires "not detected" test results for at least 15 eligible-aged deer from the trap site to be submitted and requires the landowner of a Class III release site where TTP deer are trapped to submit CWD test results for 100% of the deer trapped. The new rule also requires test results related to a TTP permit to be submitted to the department by the method prescribed by the department by the May 1 immediately following the completion of permit activities.

Transition Provisions

New §65.98, concerning Transition Provisions sets forth provisions to clarify enforcement of regulations with respect to the effective dates of various provisions and stipulates that the department's executive director develop a transition plan and issue appropriate guidance documents to facilitate an effective transition to this division from previously applicable regulations.

New §65.98(a) provides that offenses committed before the effective date of the new rules will be governed by the law in effect at the time, which is necessary to provide clear guidance for enforcement and judicial processes.

New §65.98(b) provides that a release site in compliance with the Interim Breeder Rules as of August 15, 2016 (the effective date of the new rules) is not subject to the testing requirements of the new rules until deer are liberated onto the release site.

New §65.98(c) provides that if a Class I release site becomes a Class II release site as a result of the release of deer onto the release site on or after August 15, 2016, the release site will be designated a Class I release site if all TC 2 breeding facilities that provided deer to the release site achieve TC 1 status by May 15, 2017, or if all breeder deer released on the release site between August 15, 2016 and October 1, 2016 are harvested during the 2016-2017 hunting season and return "not detected" CWD results and no deer from a TC 2 or TC 3 facility are released on the release site after October 1, 2016. This provision is intended to provide breeding facilities and release sites an opportunity to "test up" to a level sufficient to eliminate the requirement for future release-site testing. However, it should be noted that the "reset" will occur after the 2016-2017 hunting season and that release sites will be required to fulfill the release-site testing requirements for the 2016-2017 hunting season.

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4. Summary of Public Comment.

NOTE: Between the publication date of the proposed rules (April 22, 2016) and the Commission meeting held on May 26, 2016, the department received a total of 605 comments regarding adoption of the proposed new rules (501 comments submitted via the department's website, 77 comments in writing, and 27 comments submitted in person at the May 26, 2016 Commission meeting.

A total of 414 comments opposing adoption were received, including a form letter submitted by 72 commenters. At the June 20, 2016, special Commission meeting, an additional 52 comments opposing adoption were received. The department notes that because many individual comments contained multiple statements, and multiple individuals made similar comments, the number of responses does not equal the total number of comments.

Perceived Emergency

Seventy-three commenters opposed adoption and stated that the rules were based on a perceived emergency. The department disagrees with the comments and responds that if the comments refer to the previously adopted emergency CWD breeder rules, since the rules being adopt herein are not being adopted as emergency rules, the issue of whether an emergency exists or existed is not germane to the adopted rules. If the commenters intend to suggest that the rules are unnecessary, the department disagrees and 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 comments.

Scientific Methodology

Four commenters opposed adoption and stated that the department should use or follow science to develop rules, two commenters opposed adoption and stated that the department should listen to the experts, and one commenter opposed adoption and stated that the department should look at history and facts. The department agrees with the comments and responds that, as explained elsewhere in this preamble, the importance of the role of science was paramount in the development of the rules as adopted. The department sought the expertise of numerous highly qualified veterinarians, epidemiologists, and wildlife disease specialists to advise and guide the department in the development of the rules. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that more research is needed before making rules. The department disagrees with the comment and responds that there is sufficient scientific evidence to conclude that CWD is a credible and potent threat to native wildlife and that the use of the regulatory process to protect native cervid species from that threat is justified. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department should "look into genetics." The department agrees that there is value and promise in continued research into the

role of genetics in contracting CWD. However, the department disagrees with the comment and responds that although there appears to be a predisposition to susceptibility for the contraction of CWD in certain white-tailed deer genotypes, genetics is not germane to the intent of the rulemaking, which is to implement a reasonable surveillance program to detect CWD if it exists so that it can be contained. No changes were made as a result of the comment.

One commenter opposed adoption and stated that by restricting CWD testing to deer breeders, the "sample survey" was "too small for scientific study." The department disagrees with the comment and responds that the rules are intended to address disease mitigation in processes involving the unnatural movement of deer by human agency (deer breeder, Triple T, DMP), are based on epidemiological models for disease-testing and propagation in captive populations, and produce meaningful data that allow the department to characterize and qualify the status of captive populations with regard to risk for the spread of CWD. The department also notes that voluntary CWD testing by landowners and hunters has been more than sufficient in most parts of the state to establish confidence that if CWD exists on the landscape, it is at extremely low prevalence. No changes were made as a result of the comment.

Epidemiology

Seventy-four commenters opposed adoption and stated that the department doesn't know how CWD spreads. The department disagrees with the comments and responds that scientific studies have demonstrated that CWD can be transmitted by animal-to-animal contact, by contact with bodily fluids, and by environmental contamination. No changes were made as a result of the comments.

Seventy-four commenters opposed adoption and stated that the department doesn't know where CWD originated. The department agrees with the comments and responds that although CWD has been detected in three free-ranging mule deer, 24 white-tailed deer from four deer-breeding facilities, and one white-tailed deer that had been liberated from one of the four positive breeding facilities, the source of CWD is unknown. However, although the exact source of CWD is unknown, given the high interconnectivity of breeding facilities in Texas, only those facilities with rigorous testing histories can categorically be excluded as disease reservoirs. No changes were made as a result of the comments.

Eighteen commenters opposed adoption and stated that CWD cannot be either controlled or stopped. 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 management and control, 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 comments.

Eleven commenters opposed adoption and stated that CWD isn't a problem, has no impact, and deer herds in states where CWD has been detected are thriving and growing. The department disagrees with the comments and responds that in most states where CWD has been detected in free-ranging deer, its prevalence has increased over time, and in some cases is exerting measurable negative impacts on deer populations and hunting behaviors. The long-term results of CWD are pernicious, because prions (the infectious agent) remain viable in the environment long after a host organism has died, which potentially exposes new animals to the infectious agent even after the infected animal has expired. In addition, human dimensions research indicating that 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 comments.

Three commenters opposed adoption and stated that CWD has no impacts on human health. The department agrees that there has been no scientific evidence of transmission of CWD to humans; however, the department notes that although at the current time there is no evidence that CWD is transmissible to humans, the World Health Organization advises that no part or product of an animal which has shown signs of a TSE (i.e., the family of diseases that includes CWD) should enter the food chain. No changes were made as a result of the comments.

One commenter opposed adoption and stated that CWD has been around for centuries.

The department disagrees with the comment and responds that although TSEs have been known since the 18th century, CWD was first recognized in 1967 but was not identified as a TSE until 1978. No changes were made as a result of the comment.

One commenter opposed adoption and stated that deer will die of something anyway. The department agrees that deer have a finite lifespan, but disagrees that this fact reduces or eliminates the need to implement regulatory provisions to address disease detection and response measures. No changes were made as a result of the comment.

One commenter opposed adoption and stated that CWD is not contagious. The department disagrees with the comment and responds that scientific evidence has established that CWD is a transmissible infectious disease. No changes were made as a result of the comment.

One commenter opposed adoption and stated that nothing should be done about CWD because it will run its course and the deer that survive will be resistant. The department disagrees that doing nothing is an option. The department is unaware of any strain of white-tailed deer or mule deer that can survive CWD if contracted. No changes were made as a result of the comment.

One commenter opposed adoption and stated that no animals have died from CWD so the increased prevalence is due to increased testing. The department disagrees with the assertion that there is a causal relationship between the magnitude of testing and the prevalence of CWD and responds that those two values are independent of one another. The department does acknowledge that increased testing, particularly in herds that have not been testing adequately, has resulted in more CWD discoveries, but such testing does not increase the prevalence rate of the disease. With regard to CWD causing the death of deer, although the deer in Texas that tested positive for CWD died from a cause other than CWD, the science evidence clearly establishes that CWD is a fatal disease and does result in mortalities. In addition, it should also be noted that CWD is an additional mortality factor in deer populations; data indicate that mortality rates can surpass fawn recruitment in local populations with high CWD prevalence. Studies have found that CWD-positive deer were much more likely to die as compared to their uninfected counterparts. (See, e.g., Edmunds 2013, DeVivo 2015). While CWD-positive deer in

the studies that did survive to the clinical stages of the disease did eventually succumb to CWD, preclinical CWD-positive animals were also shown to be more vulnerable to other mortality factors such as predation, hunter harvest, and vehicle collisions. This additive mortality can result in declining population trends. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that CWD is political disease. The department disagrees with the comments and responds that, as noted elsewhere in this preamble (and in response to the previous comment), CWD is an insidious, persistent disease that, if not controlled, increases in prevalence in early years with no noticeable impacts, but can have long-term negative impacts on population dynamics. No changes were made as a result of the comments.

Impact on Deer Breeders

One commenter opposed adoption and stated that breeder deer are the most tested and protected deer in the state. The department disagrees with the comment and responds that while there are many deer breeders who have taken appropriate, necessary, and effective steps to ensure that CWD is not present in their inventories, that fact alone cannot be extrapolated to provide epidemiological confidence for the entirety of the regulated community. No changes were made as a result of the comment.

One commenter opposed adoption and stated that breeder deer are tested and regulated 1,000 times more than wild deer. The department disagrees with the comment and responds that white-tailed deer and mule deer are public resources and cannot be lawfully possessed alive except as provided by law. In addition, the assertion that breeder deer are tested 1,000 times more than free-ranging deer is not correct; in fact, free-ranging deer populations in most areas of the state have been sampled at statistical confidence levels higher than most deer breeding facilities. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the first case of CWD in the wild was found with .1% testing, but many deer breeders test at 100%; deer breeders test at 20-100% to find it, but it was found in the wild with little testing. The department infers that the commenter believes that the rules impose testing requirements on deer breeders are more intensive than those used to detect CWD in free-ranging deer. If that is the case, the department disagrees with

the comment and responds that the sampling of free-ranging deer in most parts of the state has been sufficient to detect CWD if it exists at very low prevalence. No changes were made as a result of the comment.

One commenter opposed adoption and stated that deer breeders shouldn't have to analyze failures in other states because that is the department's job. The department disagrees with the comment and responds that the rules as adopted do not require deer breeders to analyze events occurring in another state. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules will not work because CWD has nothing to do with breeder deer. The department disagrees with the comment and responds that CWD has, in fact, been discovered within deer breeding facilities and the rules as adopted have been in part developed according to accepted principles of epidemiological response for the purpose of detecting it if it exists in any given deer breeding facility. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that CWD is not a deer breeder disease. The department agrees that breeder deer are not the only deer susceptible to CWD, but responds that CWD has been discovered in deer breeding facilities, which by necessity means that deer breeding facilities must be addressed by any rules intended to detect and control CWD. No changes were made as a result of the comments.

Seventy-two commenters opposed adoption and stated that "it is absolutely imperative that deer breeders and release sites must have the ability to live test out of loss of status" and suggested that the rules be changed to allow "for the facility that received the originating deer secures a "non detected" test result through post-mortem or live tonsil test from the specific deer transferred to the facility." The department interprets this comment to suggest that a facility or release site should be able to regain TC 1 or Class I status by conducting ante-mortem tests on TC 2 deer received at breeding facilities or by performing post-mortem testing of all TC 2 deer received at a release site. The department disagrees with the comment and responds that the statistical confidence used to establish minimum testing standards is based on herd-level sampling, and cannot be used to determine the probability of detection for individual animals. It should be noted that the rules as adopted provide a means for breeding facilities to "test up"

to TC 1 status. It should also be noted that rules allow release sites an opportunity to "test-up" during the 2016-2017 season in order to regain Class I status. No changes were made as a result of the comments.

One commenter opposed adoption and stated that rules shouldn't punish facilities unconnected to the index herd. The department disagrees that the rules are intended to be punitive. With regard to facilities believed to be unconnected to the index herd, the department responds that during the epidemiological investigation of the first CWD-positive in a breeding facility, the department determined that over 75 percent of the deer breeders in Texas were linked to the CWD-positive facility by no more than three degrees of separation. Although many deer breeders may believe they are "unconnected" to a CWD-positive facility, the investigation alluded to demonstrates that most facilities were epidemiologically connected to the CWD-positive facility to some degree. As a result, it is necessary to obtain sufficient epidemiological evidence through testing to establish a level of confidence that CWD is not present in a facility prior to deer being transferred from the facility. No changes were made as a result of the comment.

Ninety-one commenters opposed adoption and stated that deer breeders are being singled out, targeted, punished, discriminated against, destroyed, and/or decimated by the department. The department disagrees that the rules are intended to be punitive or otherwise harm deer breeders. The risk of inadvertently moving CWD to new areas of the state is highest with the artificial movement of deer (i.e., in trailers). The only lawful methods for moving deer via human agency are permits for that purpose issued by the department (Triple T, DMP, deer breeder); therefore, rules designed to address the epidemiological risk associated with such confinement and movement in order to protect a public resource must necessarily regulate the persons authorized by permit to engage in those activities. For approximately a decade the department has required CWD testing at all sites of origin, whether these sites were deer breeding facilities or Triple T trap sites. Under the proposed and adopted rules (as well as previous rules), those who do not wish to move deer by Triple T permit are not required to CWD test, and deer breeders who do not wish to move deer are not required to CWD test. In comparing the level of CWD testing conducted in the last five years, deer breeders tested

liberated deer for CWD at much lower percentage compared to CWD testing of deer moved via TTT permits. It should also be noted that when CWD was discovered in free-ranging mule deer in the Hueco Mountains of West Texas in 2012, the department established a 3.1 million acre Containment Zone (CZ). Within this zone no artificial movement of deer has been allowed. Additionally, every white-tailed deer and mule deer harvested by hunters in the CZ has been required to be presented at a check station for CWD testing. The CWD regulations in the CZ apply not only to the CWD-positive population, but to adjoining and surrounding populations as well. Given the high degree of interconnectivity of the deer breeding network in Texas (deer moving back and forth between and among deer breeders), if the regulations for deer breeders were consistent with the regulations in West Texas, all deer breeders would be required to test 100% of all mortalities, which would include hunter-harvested deer. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the state is imposing rules, but only deer breeders are paying. The department disagrees with the comment and responds that the rules as adopted are intended to prevent the spread of CWD as a result of human agency. Because deer breeders, Triple T permit holders, and DMP holders (under some circumstances) are agents of unnatural deer movement, they are directly affected by the rules while other parties (those who don't possess or move deer) are not. No changes were made as a result of the comment.

Fifteen commenters opposed adoption and stated that the intent of the department is to put deer breeders out of business or trample an industry. The department disagrees with the comment and responds that sole intent of the rules as adopted is to protect a public resource. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that third-party associations and "anti-breeders" are trying to put deer breeders out of business. The department disagrees with the comment and responds that the rules as adopted were created with the invited input of a number of stakeholder groups, including deer breeders. The department is not aware of any groups or associations trying to put deer breeders out of business. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department is trying to control deer breeders. The department disagrees with the comment and responds that the department has a statutory duty to protect and conserve the wildlife resources of the state; therefore, rules designed to address the epidemiological risks associated with the confinement and artificial movement of wildlife resources, such as those associated with deer breeding, are necessary. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the increase in CWD proves there is no connection to captive deer. The department disagrees with the comment and responds that CWD has been found in multiple deer breeding facilities. No changes were made as a result of the comment.

One commenter opposed adoption and stated that all testing is aimed at deer breeders. The department disagrees with the comment and responds that in some cases there are CWD testing requirements for certain release sites that receive breeder deer or deer from certain DMP facilities. No changes were made as a result of the comment.

One commenter opposed adoption and stated that CWD isn't being handled properly because the rules are being forced on deer breeders, forcing people out of business and severely hurting the deer breeding industry. The department disagrees with the comment and responds that the rules are the minimum necessary to allow the department to determine the extent and combat the spread of CWD. As mentioned elsewhere in this preamble, because deer breeders physically move deer in ways that nature does not, and in the process magnify the possibility of spreading disease, the rules as adopted must necessarily affect deer breeders. The department also disagrees that the rules force anyone out of business. A relatively small number of breeding facilities are prohibited from transferring deer (i.e., buying and selling deer) because they either received deer from an infected herd or cannot provide epidemiological evidence that CWD is not present. Even if the rules of the department and TAHC allowed such facilities to move deer, it is unlikely that possible customers (other deer breeders and persons who wish to have breeder deer released on their property) would consider obtaining deer from such sources because of the possibility of exposure to CWD. No changes were made as a result of the comment.

Nine commenters opposed adoption and stated that the rules are unfair to deer breeders and that breeders should be treated the same as any other landowner. The department disagrees with the comments and responds that deer breeders are afforded the privilege of possessing live deer (a public resource) under rules promulgated by the department. The department also has a statutory duty to protect and conserve the wildlife resources of the state. The rules as adopted represent the minimum measures necessary to discharge the department's statutory duty to protect the state's wildlife resources and were promulgated with the intent to minimize intrusiveness and regulatory burden as much as possible while achieving the goals of the department to determine the extent and prevent the spread of CWD. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the status of a deer breeding facility should not be determined by a five-year testing history. The department disagrees with the comment and responds that if the commenter is referring to one of the options for obtaining TC 1 status under the rules, the scientifically accepted incubation period for CWD is up to five years, therefore it is important to calculate risk based on a five-year testing history. However, the department also notes that the rules as adopted provide another method of obtaining TC 1 status for the 2016-2017 hunting year that does not include a five-year testing history. In addition, as explained elsewhere in this preamble, beginning in 2019 the distinctions between TC 1 and TC 2 will be of no consequence. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department focuses on deer breeders, high-fences, and white-tailed deer when 50 percent of CWD is found in mule deer. The department disagrees with the comment and responds that even if half the CWD cases in Texas were found in mule deer (which is not the case), the fact remains that CWD has been discovered in captive white-tailed deer populations and must be addressed in order to protect all deer populations. No changes were made as a result of the comment.

One commenter opposed adoption and stated that CWD did not originate in Texas white-tails or breeder deer. The department agrees that while an exact understanding of the source or origin of CWD is unknown, what is known is that it has been detected in captive white-tailed in deer breeding facilities and must be addressed in order to protect all deer populations. No

changes were made as a result of the comment.

Breeding Facility Testing

Seventy-four commenters opposed adoption and stated that the rules should not include a testing "window" for ante-mortem testing. The department agrees with the comments and the rules have been changed accordingly.

Seventy-two commenters opposed adoption and stated that the rules should be altered to change "the definitions for "Failure to Comply" for TC 1 facilities, including clarification of testing language to reflect both ante- and post-mortem testing, as well as setting a 90-day window for the TC 1 breeder to furnish necessary test results to return to his TC 1 status and setting a one-year moratorium on reapplication to TC 1 status if the breeder does not meet this 90-day requirement." The department agrees that the "testing window" for regaining TC 1 status should be eliminated and the rule as adopted does not contain a "testing window". The department infers that the comment relates to the provisions of proposed §65.95(b)(1)(B) which would have imposed a 60-day window for a TC 1 facility that had failed to submit sufficient test results to retain TC 1 status to submit substitution test results or be classified as a TC 2 facility for a two-year period. Because the adopted rule applies a standard MQ testing requirement to both TC 1 and TC 2 facilities, it is unnecessary to retain the requirement for regaining TC 1 status within 60-days, as the provisions for regaining MQ status will suffice, so long as lower status breeder deer are not introduced into the TC 1 facility.

Seventy-two commenters opposed adoption and stated that "timeframes need to maximize the breeder's ability to achieve a higher status - not set them up for certain failure." The department agrees that the rules as adopted impose standards that prevent the movement of breeder deer under circumstances in which the epidemiological risk is significant, but disagrees that any aspect of the rules as adopted are designed or intended to prevent breeding facilities from increasing in status, or to coerce any person into imprudent or unwise decisions. No changes were made as a result of the comments.

Seventy-two commenters opposed adoption and stated that the rules' testing requirements should be "realistic and reliable" instead of punishing "those facilities with the best stewardship of their animals by being below an arbitrary standard of "average mortality." The

department disagrees with the comment and responds that the rules as adopted are not intended to be punitive. In addition, the testing requirements within the rules as adopted were developed based on principles of science and epidemiology, including the use of an average mortality rate as a reasonable baseline to determine the level of testing within any given facility, which is necessary to generate statistical confidence through time that CWD is not present. If anything, the rules provide the greatest degree of flexibility to those with the highest testing performance. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rules shouldn't apply to deer breeders who haven't received deer in "awhile." The department disagrees with the comment and responds that the rules are designed to achieve a level of confidence that CWD is not present in any given breeding facility, irrespective of the length of time since breeder deer were acquired. No changes were made as a result of the comment.

Seventy-two commenters opposed adoption and stated that proposed §65.95 should be altered to allow "the at least 80 percent of the total number of eligible mortalities that occurred in the breeding facility of the immediately preceding five-year period and each year thereafter, rather than making this requirement applicable annually." The department interprets this comment to mean that the commenters opposed the portion of the proposed rule that provided an option to achieve TC 1 status by providing "not detected" results for 80% of the mortalities that occurred in each of the preceding five report years, and that instead a facility should be allowed to provide "not detected" results for 80% of the cumulative mortalities that occurred in the previous five report years. If this interpretation is correct, the department agrees with the comment and the rules have been changed accordingly.

Seventy-two commenters opposed adoption and stated that there must be "an additional option added to ensure deer tested prior to trade or release are allowed to move freely with a TC 1 classification. The new option requested would include (I) ante-mortem tests of any deer transferred from the facility; and (II) post-mortem tests of at least 50 percent of eligible mortalities. This would ensure that any deer that moves from a facility which had received a "not-detected" live test result carries no movement restrictions or further testing with it." The department interprets part (I) of this comment to suggest that even if a deer comes from a TC 2

facility, if it has been live-tested it should be treated as coming from a TC 1 facility. The department disagrees and responds that the statistical confidence used to establish minimum testing standards is based on herd-level sampling, and cannot be used to determine the probability of detection for individual animals. The department interprets part (II) of this comment to recommend that a 50 percent post-mortem testing standard be the new standard for obtaining TC 1 status. The department disagrees with the comment and responds that given the strong desire on the part of the regulated community to eliminate release-site requirements, a higher post-mortem testing standard is necessary. No changes were made as a result of the comments.

Seventy-two commenters opposed adoption and stated that the rules should be adopted with the following provisions to "allow breeders the ability to test cumulatively over the course of one reporting year" as follows: (i) Upon the processing of the annual report, if a facility has met any of the requirements of this section, the facility shall be designated a TC 1 facility for the next reporting year, so long as the facility does not accept a breeder deer from a lower status breeding facility; and (ii) Upon the processing of the annual report, if a facility has cumulatively tested equal to or greater than any of the ante-mortem testing requirements of this section during the entire reporting year, the facility shall be designated a TC 1 facility based upon their cumulative testing percentages." The department disagrees with the comments and responds that risk mitigation is not achieved by conferring TC 1 status on the random satisfaction of testing requirements. Allowing breeding facilities to achieve TC 1 status when the facility is not compliant with TC 1 testing requirements defeats the purpose of the rules. No changes were made as a result of the comments.

One commenter stated that he had recommended a testing regime which provided for 100% post-mortem testing, but that the recommendation had been rejected by staff. The department understands that this recommendation was combined with a more immediate elimination of release site testing. While the department acknowledges the value of a testing regime that tests 100% of mortalities in a breeding facility, the evaluation of the adequacy of such a regime must take into consideration the breeding facility's previous testing history. As noted elsewhere in this preamble, even with a higher level of mortality testing it would take

several years to achieve a sufficient level of confidence that CWD would be detected in a facility if it existed at a low prevalence. No changes were made as a result of this comment.

May 6 Recommendation

Twenty-six commenters opposed adoption of rules and urged the Commission to adopt what was referred to as the "May 6 proposal," the "Texas Deer Association proposal" or the "unified industry proposal." The department interprets these comments to refer to a proposal put forth in a stakeholder meeting held on May 6, 2016, during the public comment period. This meeting, among other things, sought comments on the proposed rules. At the meeting, certain representatives of the deer breeding community put forth recommendations for revisions to the rules as proposed. The elements of this recommendation (referred to herein as the "May 6 recommendation") were documented in a letter dated May 7, 2016, signed by representatives of the Texas Deer Association, the Deer Breeders Corporation, the Exotic Wildlife Association and the North American Deer Farmers Association. The department disagrees with the comment and responds generally that although certain elements of the recommendation were determined to be effective in enhancing efforts for the surveillance and detection of CWD and have been incorporated into the rule as adopted, when considered as a whole the recommendation would not provide an adequate level of confidence that CWD would be detected if it existed a low prevalence. As a result, when the May 6 recommendation taken a whole is considered, it was determined to be inadequate. The various elements of the recommendation are set forth separately as follows.

Twenty-six commenters opposed adoption of the proposed rules and urged the Commission to adopt the portion of the May 6 recommendation that would have made a deer breeder that meets the following criteria movement qualified (MQ): has "fifth year" or "certified" status in the TAHC CWD Herd Certification Program; has tested 80% of its eligible mortalities; and, has a minimum number of tests equal to or greater than 3.6% of the herd inventory at the end of the reporting year, with at least half of the required test conducted post-mortem. The department agrees that each of these elements has value and has incorporated some of these into the rules as adopted. Specifically, the department agrees that "fifth-year" or "certified status" breeding facilities should be MQ and the rules as proposed and adopted

provide for that. The department also agrees that a breeding facility that tests 80% of its eligible mortalities each year with a minimum number of post-mortem tests equal to or greater than 3.6% of the herd inventory at the end of each reporting year provides sufficient confidence to be designated as MQ. Therefore, the rules as adopted include a provision that beginning with the report year that starts April 1, 2017, and for each report year thereafter, a deer breeder that has "fifth year" or "certified status" in the TAHC CWD Herd Certification Program is considered MQ, as is a deer breeder that has submitted CWD "not detected" test results for at least 80% of eligible mortalities occurring in the facility during the previous reporting year, so long as the number of "not detected" test results submitted during the previous reporting year are equal to or greater than 3.6% of the eligible-aged deer reported in the breeding facility inventory at the end of the previous reporting year. However, a release site that receives deer from a breeding facility that only meets the minimum MQ requirements in the 2016-2017 permit year (and is not a "fifth year" or "certified" facility), would be subject to release-site testing as provided in the rules as adopted. Changes were made to the rules as adopted to incorporate an annual testing level of 80% of eligible mortalities with a minimum number of post-mortem tests required, in part in response to these comments. However, although changes were made to the rules as adopted to eventually eliminate release site testing, such changes are not a result of the May 6 recommendation.

Twenty-six commenters opposed adoption of rules and urged the Commission to adopt the portion of the May 6 recommendation that would have required a deer breeder to test half of the 80% of eligible mortalities through post-mortem testing (i.e., ante-mortem substitution would not be authorized for more than 50% of the tests required to achieve 80% testing of mortalities). In addition, the commenters requested that substitution of ante-mortem tests be allowed at a ratio of two ante-mortem mortem tests for one post-mortem test. The ante-mortem substitution ratio included in the May 6 recommendation is consistent with provisions of the proposed rules; however, the department disagrees with the comments and responds that, as noted elsewhere in this preamble and in response to comments about maximizing ante-mortem testing, the department considered several options that would allow ante-mortem substitution for all required post-mortem tests. If no mortalities are tested, a higher number of ante-mortem

tests would be required to achieve the same epidemiological confidence as post-mortem tests, perhaps at as much as a 6:1 substitution ratio. Stakeholders suggested a 4:1 substitution if less than 50 percent of mortalities were tested but retaining the 2:1 ratio if the number of post-mortem tests submitted was equal to at least 50 percent of eligible mortalities. The department also received public comment and engaged in discussions concerning the simplification of the regulations. Therefore, in an effort to simplify this requirement, an ante-mortem substitution ratio of 3:1 was selected. From an epidemiological perspective, while more testing is preferred, a substitution ratio of 3:1 was determined to be adequate. Although changes in the use of ante-mortem substitution were made in the adopted rules, no changes were made as a result of these comments.

Twenty-six commenters opposed adoption of rules and urged the Commission to adopt the portion of the May 6 recommendation that recommended elimination of all release site testing after the 2016-2017 hunting year. The department disagrees with this comment and responds that, as noted elsewhere in this preamble, while breeding facility testing of 80% of eligible mortalities with a minimum number of post-mortem tests equal to or greater than 3.6% of the herd inventory at the end of each reporting year, will, over time, provide sufficient confidence that CWD would be detected if it existed in a breeding facility at a low prevalence, given the historic variability among deer breeders' testing history, not until March 1, 2019 will there be sufficient testing history at this level to dispense with release-site testing for deer released from facilities that meet only the MQ requirement. No changes were made in response to the comments.

Twenty-six commenters opposed adoption of the rules and urged the Commission to adopt the portion of the May 6 recommendation that urged elimination of release-site testing for the first year of the rule's effectiveness for release sites that met the following: received deer only from breeding facilities with "fifth year" or "certified" status in the TAHC Herd Certification program; was classified as a Class I release site and was in full compliance with the Interim Breeder Rules; only received deer from a breeding facility that had tested 80% of its eligible mortalities in the preceding reporting year; or received deer only from a breeding facility that had obtained ante-mortem test results for more than 25% of eligible-aged deer. The

commenters also recommended that any release site in compliance with the requirements of the Interim Breeder Rules be "reset" to Class I for the 2016-2017 hunting season. The department agrees that a release site in compliance with the requirements of the Interim Breeder Rules should be "reset" to Class I for the 2016-2017 hunting season (so long as the release site does not receive deer of a lower status after the effective date of the rules). The department also agrees with the portion of the recommendation seeking the elimination of release-site testing in the 2016-2017 hunting year for release sites that received deer only from herds with "fifth year" or "certified" status in the TAHC Herd Certification program (Class I release sites) and notes that this part of the May 6 recommendation is consistent with the rules as proposed. However, the department disagrees with the remainder of this portion of the May 6 recommendation. As explained elsewhere in this preamble, given the historic variability among deer breeders' testing history, not until March 1, 2019, will there be sufficient testing history at the 80% level to dispense with release-site testing for deer released from such breeding facilities. Further, statistical analyses conducted by the department found that a breeding facility that has submitted "not detected" ante-mortem test results for at least 50 percent of the eligible-aged deer in the facility as of the date on which ante-mortem testing begins has a sufficiently low level of risk to be classified as TC 1, meaning deer released from that facility would not trigger release-site testing requirements. However, to facilitate the transition to the new rules and recognizing that in anticipation of the adoption of these rules some deer breeders may have already begun conducting ante-mortem testing but not yet tested 50 percent of eligible-aged deer, a temporary provision is included in the rules as adopted to allow a breeding facility that submits "not detected" ante-mortem test results for at least 25 percent of the eligible aged deer in the facility to be temporarily classified as TC 1; however, the facility must provide the balance of the required testing by May 15, 2017 to maintain TC 1 status. No changes were made as a result of these comments.

Twenty-six commenters opposed adoption of the rules and urged the Commission to adopt the portion of the May 6 recommendation that recommended that there be only one year of release site testing following the adoption of the rules (i.e., the 2016-2017 hunting year) and that those release sites be required to test the first 15 hunter-harvested deer (but not to exceed

15). As explained elsewhere in this preamble, the department agrees that the number of tests required to be submitted from release sites where hunter-harvested deer are required to be tested should be modified to require such tests from the first 15 hunter-harvested deer at the site and the rules as adopted, contain such a modification. However, for reasons explained in response to the previous comments, the department disagrees that release site testing should cease after the 2016-2017 hunting year. No changes were made in response that portion of the comments.

Ante-Mortem Testing

Seventy-two commenters opposed adoption and stated that proposed §65.92(f) "undermines the value of a non-detected live test. A result of non-detected should have the same weight and value in all applicable sections of this division. To suggest that a non-detected result should not count towards other sections or portions of this rules, directly devalues the finding of a non-detected result." The provision in question prohibits the use of an ante-mortem test result more than once to satisfy any testing requirement of the division. The department understands the comment to mean that a permittee should be able to use the same "not detected" test result multiple times to satisfy any testing requirement of the proposed rules. The department disagrees with the comment and responds that the epidemiological value of a "not detected" ante-mortem test result is unique in time and application and cannot be used to satisfy multiple requirements. For example, the epidemiological importance of the 3.6% requirement is independent of the 50% ante-mortem testing, and thus independent samples must be used to achieve the level of confidence intended. No changes were made as a result of the comments.

Seventy-two commenters opposed adoption and stated that "live animal testing protocols must maximize and value "not detected" results. Restricting animals that can be tested and limiting the number of times an animal can be tested undermines the true value of "not detected" results as well as the producer's willingness to comply." The department disagrees that the rules as adopted do not "maximize and value" test results of "not detected." While the department agrees that ante-mortem testing can be an effective component of an overall testing regime, as explained previously in this preamble in connection with the substitution of ante-

mortem for post-mortem tests provided in §65.92(b), testing animals that have died provides a much higher likelihood of detecting the disease, since diseased animals are more likely to die than healthy animals. The rules as adopted contain changes to allow for the more frequent ante-mortem testing of a single animal (from no more than once every 36 months to once every 24 months). In addition, the rules as adopted were changed to eliminate the minimum number of test results that must be post-mortem (i.e., to allow ante-mortem substitution for all required post-mortem test results). To compensate for the enhanced use of ante-mortem testing, the ratio at which ante-mortem tests may be substituted was adjusted from two ante-mortem test results for each required post-mortem test results to three ante-mortem test results for each required post-mortem test result. In addition, the rules as adopted were modified to eliminate the residency prerequisite (i.e. the time in which a breeder deer must have been in the breeding facility) for testing validity. The rules as adopted retain a minimum age requirement and testing frequency limitation for ante-mortem test validity. The literature indicates that animals younger than 16 months of age are problematic because if they are infected, the disease may not have had enough time to manifest itself in lymphatic or brain tissue. The testing frequency limitation is necessary because the affected tissues must be given sufficient time to regenerate before they can be tested again with efficacy. The department also disagrees that the standards contained in the rules as adopted function to discourage compliance. No additional changes were made as a result of the comments.

One commenter opposed adoption and stated that live testing should be allowed. The department agrees with the comment and responds that, as noted above, both the rules as proposed and the rules as adopted allow for ante-mortem (live) testing of deer. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should not be residency requirements for ante-mortem testing. The department agrees with the comment and responds that, as previously noted, changes have been made accordingly.

One commenter opposed adoption and stated that the rules do not specifically provide for live testing. The department disagrees with the comment and responds that the rules as proposed and as adopted contain provisions that specifically provide for and allow ante-

mortem testing of breeder deer. No changes were made as a result of the comment.

Seventy-two commenters opposed adoption and stated that the provisions of proposed §65.92(e)(1) should be eliminated because there are small facilities that may not experience two natural mortalities in one year. As proposed, §65.92 would have limited the number of post-mortem tests for which ante-mortem substitution was allowed. As noted elsewhere in this preamble, the department agrees with the comment and has made changes accordingly.

Release Site Requirements

Seventy-two commenters opposed adoption and stated that release-site testing should be required for three years following release, rather than five. The department agrees and responds that as explained in the discussion of §65.95(c)(1), the rules as adopted eliminate release-site testing requirements for Class II release sites after March 1, 2019 (except for sites that have not submitted the required test results).

Seventy-two commenters opposed adoption and stated that release-site testing should be a "three consecutive hunting year period for the submission of "non-detected" post-mortem results, specifying a threshold of 50% of either liberated or hunter-harvested deer, whichever is less." With regard to the time period for release site testing and as explained in response to the previous comment, the department agrees and responds that as explained in the discussion of §65.95(c)(1), the rules as adopted eliminate release-site testing requirements for Class II release sites after March 1, 2019 (except for sites that have not submitted the required test results). However, the department disagrees that Class II release-site testing requirements should be the lesser of 50 percent of either liberated or hunter-harvested deer as provided in the proposed rules. Instead, the department responds that after analyzing 2015-2016 harvest data at Class II release sites, the department concluded that requiring every deer harvested at a site (but not more than 15) to be tested would enhance the level of release site testing at most sites. Thus, the change results in a simpler standard that is easier to comply with and enforce while remaining epidemiologically efficacious.

Seventy-two commenters opposed adoption and stated that the testing requirements for DMP facilities affected by the proposed rules should apply for three years. The department agrees and responds that as explained in connection with the discussion of §65.96, the rules as

adopted eliminate the proposed release-site testing requirements for Class II release sites after March 1, 2019 (except for sites that have not submitted the required test). It should also be noted that §65.98 as adopted reduces the time period for which release sites not in compliance with the Interim Breeder Rules must submit tests (from five years to three years).

Seventy-two commenters opposed adoption and stated that proposed §65.98 should be changed "to only require testing for one year." The department disagrees with the comment and responds that although §65.98 is adopted with changes to reduce the number of years that testing is required by release sites not in compliance with Interim Breeder Rules (from five years to three years), further reduction of such release site testing is insufficient to establish epidemiological confidence that CWD is not likely present. No changes were made as a result of the comments.

Seventy-two commenters opposed adoption and stated that "the five year testing protocols for unconnected, currently tested Class II release sites is excessive and unwarranted. Deer that are released on Class II release sites come from tested, unconnected breeding facilities. They should not be treated similarly to exposed release sites." The department disagrees with the comment and responds that the proposed five-year testing history under the rules as proposed was not excessive or unwarranted; however, in light of changes made to the testing requirements as adopted, and as explained in the discussion of §65.95, modification of release-site testing requirements is appropriate. Therefore, the rules as adopted eliminate the proposed release-site testing requirements for Class II release sites after March 1, 2019, thus reducing the five-year time period to three years or less. It should also be noted that §65.98 as adopted reduces the time period for which release sites not in compliance with the Interim Breeder Rules must submit tests (from five years to three years). With regard to the portion of this comment regarding "unconnected" breeding facilities, the department disagrees and responds that during the epidemiological investigation of the first CWD-positive in a breeding facility, it was determined that over 75% of deer breeders in Texas were linked to the CWD-positive facility by no more than three degrees of separation. As a result, although many deer breeders may believe they are "unconnected" to a CWD-positive facility, the investigation demonstrated that most facilities were epidemiologically connected to a CWD-positive facility to some degree.

However, the rules as proposed and as adopted do make a distinction between breeding facilities that are more directly exposed to CWD (TC 3 facilities) and other breeding facilities. Except with regard to the change to the time period for which release-site testing is required, no changes were made as a result of this comment.

Seven commenters opposed adoption and stated that there should be no release-site testing. The department agrees that except for Class III release sites (which have been more directly exposed to CWD), when deer breeders seeking to move deer have uniformly achieved a higher level of testing (80% of mortalities each year, with a minimum expected annual post-mortem test equal to at least 3.6% of the eligible aged population), the confidence level of detecting CWD if it exists in a breeding facility will be at a level sufficient to dispense with release-site testing for most release sites beginning in 2019. However, the department disagrees that release-site testing can be eliminated immediately and responds that epidemiological science dictates that it is prudent to require release-site testing in conjunction with testing at deer breeding facilities until the statistical probability of detecting CWD has reached an acceptable level. With regard to testing at Class III release sites, the department disagrees with the comment and responds that if deer are released from a facility that is either connected to another facility where CWD has been confirmed or cannot provide adequate testing history to conclude that CWD is not present in facility, the release site poses a much higher epidemiological risk; therefore, continued Class III release site testing is appropriate. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there should be no testing required of any deer breeding facility or release site. The department disagrees with the comment and responds that the only way to prevent CWD from threatening all deer in the state is to determine its prevalence and spread by sampling free-ranging and captive populations of deer. No changes were made as a result of the comment.

One commenter opposed adoption and stated that release site owners shouldn't have to test 50 percent of harvested deer for five years. The department agrees with the comment and responds that the release-site testing requirements of the rules as adopted have been changed to require the first harvested deer and every deer subsequently harvested to be tested, but require

no release site owner to test more than 15 deer in any year. In addition, as explained in connection with the discussion of §65.96, the rules as adopted eliminate release-site testing requirements for Class II release sites after March 1, 2019 (except for sites that have not submitted the required test).

Seventy-two commenters opposed adoption and stated that "release site requirements must maintain a commitment to the best practices for deer management, promoting the health and vitality of the deer herd by allowing soft release and transition sites as options." The department disagrees that "soft release" is not allowed by the rules as adopted and notes that current regulations in 31 TAC §65.610 provide for "soft release" of breeder deer to allow acclimation, so long as such "soft release" complies with the requirements of that section. The department is uncertain what the commenters mean by "transition sites" or the intended purpose of such sites. To the extent that the commenter is referring to alterations in fencing, the department notes that the rules as adopted allow for release sites to be modified, but continue to require that deer have access to the entirety of the release site (with certain exceptions for safety and protection of agriculture), which is necessary to establish epidemiological certainty regarding the exact locations where liberated deer are confined. Except for the changes to clearly allow modification of a release site and the fencing of areas for safety and to prevent depredation, no changes were made as a result of these comments.

Seventy-two commenters opposed adoption and stated that a release site should consist of the specific tract of land to which deer are released and the acreage designated as a release site in TWIMS or any contiguous tract of land owned by the landowner designated as a release site in TWIMS. The department disagrees with the comments and responds that for purposes of disease management, if the department is to allow the release of breeder deer, it must be able to know the exact geographical parameters of the release site. The rules as adopted have been changed to allow for release sites to be modified with the prior notification of the department and to allow for enclosures for the purpose of safety or the protection of crops. No changes otherwise were made as a result of the comments.

Seventy-four commenters opposed adoption and stated that the department does not have the authority to stipulate fence height requirements for release sites, especially when a breeding

facility is releasing deer directly from the facility to adjoining low-fenced property owned by the same person. The department disagrees with the comments and responds that under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter L, the Commission is authorized to regulate the possession of deer held under a deer breeder permit, which includes establishing the circumstances under which the possession of breeder deer may legally cease. No changes were made as a result of the comments.

Testing of Free-Ranging Deer

Three commenters opposed adoption and stated that testing requirements should apply to all wild deer and all landowners. Four commenters opposed adoption and stated that all deer should be tested. The department assumes that these commenters are all referring to testing of free-ranging deer. The department disagrees with the comment and responds that there is a common misperception that free-ranging deer populations and captive deer populations present identical epidemiological contexts for disease sampling. Free-ranging deer populations are resident for the entirety of their lifespans within an extremely narrow geospatial extent (compared to the range of the species), whereas captive deer are commingled within facilities with deer from various other populations and are quite often relocated to destinations far beyond what would occur with normal natural movement. The sizes of the populations of inference are also disparate. Therefore, the two types of populations present two entirely different epidemiological situations that require different responses. The department's long-term CWD sampling efforts in free-ranging deer in almost every region of the state have produced epidemiological results that allow the department to conclude with 99 percent confidence that if CWD exists, it is at a prevalence of less than 1 percent. This statistical confidence cannot be achieved in captive populations (because even large breeding facilities contain an infinitesimally small statistical sample size) except over long periods of time. No changes were made as a result of the comments.

One commenter opposed adoption and stated that hunter-killed deer should be tested at the same rate as breeder deer. 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 require the testing of hunter-harvested deer at some 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 and sampling of road-kills, the department has obtained sufficient samples from free-ranging deer to provide an enhanced level of assurance of detection of CWD in the free-ranging population. The department also notes that the rate of testing is immaterial; the sheer number of hunter-harvested deer tested (over time) is more significant, from a statistical point of view, than the rate of testing. As noted elsewhere in this preamble, at the current time the department is confident that surveillance of free-ranging populations is adequate in almost every region of the state to detect CWD in free-ranging populations at a very low prevalence. No changes were made as a result of the comments.

One commenter opposed adoption and stated that TPWD should test wild deer. The department assumes the commenter is referring to free-ranging deer. The department agrees with the comment and responds the department conducts a robust sampling effort on a continual basis. No changes were made as a result of the comment.

One commenter opposed adoption and stated that 50 percent of hunter killed deer should be tested. The department disagrees with the comment and responds that it is not necessary to sample 50 percent of hunter-harvested to achieve confidence that CWD can be detected at extremely low prevalence, which is explained in detail elsewhere in this preamble. As general background regarding the level of surveillance of free ranging deer, the department 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. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that low-fenced deer aren't being tested or aren't being tested at the same intensity as breeder deer. The department disagrees with the comments and responds that if by "low-fenced deer" the commenter means free-ranging deer (which, it should be noted, includes deer on high-fenced properties), sufficient numbers of deer

have been tested to yield high confidence that if CWD exists on the landscape, even at extremely low prevalence, it would have been detected in most regions of Texas. No changes were made as a result of the comment.

One commenter opposed adoption and stated that only a small percentage of native deer are tested. The department assumes the commenters are referring the testing of free-ranging deer. The department agrees with the comment and responds that with regard to the level of surveillance of free ranging deer, 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 have been used extensively over many years for sample-size detection determinations. Simply put, as the population size increases, the proportion of the population that must be sampled to yield an equivalent confidence level decreases. No changes were made as a result of the comment.

One commenter opposed adoption and stated that more wild deer have tested positive for CWD than captive deer. The department disagrees with the comment and responds that although it is a fact that more breeder deer than free-ranging deer have been confirmed with CWD, it is irrelevant because the presence of the disease in even a single deer in either captive or free-ranging populations is cause for concern and action. No changes were made as a result of the comment.

Triple T

Seventy-two commenters opposed adoption and stated that the rules should not include the provision prohibiting the issuance of a Triple T permit to trap deer at a site that has been a release site for breeder deer within the previous five years and should be changed to allow for deer to be trapped at Class I release site for Triple T purposes. The department disagrees with the comments and responds that any release site that received breeder deer within the last five years cannot be definitively excluded as a possible place where CWD has been introduced; similarly, a Class I status for a release site reflects only the source of breeder deer that have been released at that site since August of 2015 and does not account for the epidemiological status of

deer that were previously released or resident on the site prior to the liberation of breeder deer. Therefore, the rules prohibit the trapping of deer for Triple T purposes at any location where breeder deer have been liberated within the previous five years (the accepted incubation period for CWD).

Seventy-two commenters opposed adoption and stated that the identification requirements for released Triple T deer should be eliminated. The department disagrees with the comment and responds that it is imperative that translocated deer be identifiable in order to facilitate epidemiological investigations in the event that CWD is discovered in a free-ranging deer population that has received Triple T deer. No changes were made as a result of the comments.

Twelve commenters opposed adoption by stating in identical or nearly identical fashion that the rules would severely limit Triple T activities. The commenters stated that instead of release site testing, the requirement should be for 10% testing at the trap site (no more than 10 deer per year per trap site) and that there should be uniformity of test requirements between all classes and levels. The department disagrees with the comments and responds that both trap site testing and release testing are imperative under certain circumstances. As proposed, the rules would have required 15 "not detected" post-mortem test results from the trap site to be submitted prior to permit issuance. For release sites, the proposed rules would have required the landowner of a Triple T release site to submit "not detected" post-mortem test results for a period of five consecutive hunting years immediately following the release for either 50 percent of liberated deer that are harvested at the Triple T release site, or if no liberated deer were harvested at the Triple T release site in any hunting year, 50 percent of hunter-harvested deer. However, the rules as adopted retain the requirement for 15 deer from the trap site to be tested with "not detected" results, but release-site testing has been eliminated.

Four commenters opposed adoption and stated that there should be no Triple T release-site testing. The department agrees with the comments and has made changes accordingly.

One commenter opposed adoption and stated that the proposed Triple T provisions are burdensome, excessive, and unnecessary. The department disagrees that the rules as proposed were onerous, but responds that the rules have been adopted with changes to facilitate

compliance while still achieving a scientifically acceptable level of surveillance.

Administrative Procedure, Governmental Efficiency, and Public Policy

Ninety-four commenters opposed adoption and stated that the rules are overregulation, overreach, overkill, overreaction, overbearing, unwarranted, unjustified, or unnecessary. The department disagrees with the comments and responds that the rules as adopted are intended to represent a narrowly drawn, scientifically efficacious mechanism for increasing disease surveillance in captive populations and populations that receive deer from captive populations. In addition, the rules' requirements are based on the risk of exposure to and spread of CWD and the need for surveillance as part of the department's effort to ensure that the rules were not, in fact, broader than necessary. In addition, the department is undertaking efforts to educate those required to comply about the rules' requirements and modifying TWIMS (the department's online reporting system) to facilitate compliance. No changes were made as a result of the comments.

Eighty commenters opposed adoption and stated that the rules are an excessive expenditure of or waste of tax money. The department disagrees with the comments and responds that the administration and enforcement of fish and game laws in Texas is funded primarily by revenues from the sale of hunting and fishing licenses and permits; therefore, the cost of administering and enforcing the rules as adopted is already part of the department's existing duties. No changes were made as a result of the comments.

Eight commenters opposed adoption and stated that the rules are shady, the result of political influence and backroom dealing, promulgated according to a hidden agenda, or written by unknown "stakeholders" in closed-door meetings with no notice. The department disagrees with the comments and responds that the rules were developed in an open, inclusive, and transparent process that involved the invited participation of the regulated community and stakeholders (including trade associations representing deer breeders) with facilitation provided by of the Center for Public Policy Dispute Resolution of the University of Texas School of Law and regular contact with interested legislators. No changes were made as a result of the comments.

Seventy-four commenters stated that the rules are burdensome. One commenter opposed

adoption and stated that the rules are too stringent. The department disagrees with the comments and responds that as noted in the proposal preamble, the department recognizes that the rules will have an impact on those required to comply. However, 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. In addition, the department is undertaking efforts to educate those required to comply about the rules' requirements and modifying TWIMS (the department's online reporting system) to facilitate compliance. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that rules are excessively complicated. The department disagrees with the comment and responds that the rules as adopted to the greatest extent possible avoid complexity, but that by the very nature of the regulatory terrain (disease management in a large state with large populations of landowners and deer, and more than 1,000 deer breeders, Triple T, and DMP cooperators), some regulatory complexity is unavoidable. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the costs of the rules outweigh the benefits and the risk of CWD is less than the value of the rules. The department disagrees with the comments and responds that that the cost of not having the rules could be severe if CWD becomes established at landscape scale, affecting the state's deer populations and the multi-billion dollar economies surrounding hunting, ranching, real estate, and conservation. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rules were arbitrary and inefficient. The department disagrees with the comment and responds that, as explained elsewhere in this preamble, the rules were developed based on scientific principles of epidemiology and disease management, and are intended to be as efficient as possible under the circumstances. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there were now over 500 pages of regulations governing deer breeders. The department disagrees with the comment and responds that depending on how the rules and statutes are quantified, there appears to be fewer

than 20 pages of regulatory material that applies to deer breeders. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the Commission should adopt the recommendation of the Texas Deer Association. The department disagrees with the comment and responds that persons associated with the Texas Deer Association made a number of recommendations, some of which have been incorporated into the rules adopted, although other recommendations from the Texas Deer Association were insufficient to meet responsible disease-management goals. With regard to the recommendations made by the Texas Deer Association and others on May 6, 2016, the department's response to the comments regarding those recommendations are provided elsewhere in this preamble. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules cause landowners to buy deer only from TC 1 breeding facilities. The department disagrees with the comment and responds that the rules do not determine who buys or sells deer for whatever reason, rather, it is the emergence of CWD acting to make potential customers anxious about the health of breeder deer being purchased. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the federal government was regulating where they have no business at taxpayer expense. The department disagrees with the comment and responds that the rules are not the result of a requirement of the federal government. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the government tells people how to raise deer but not cattle. The department disagrees with the comment and responds that unlike cattle, which are considered livestock, mule deer and white-tailed deer are public resources. In addition, it should be noted that state and federal agencies have enacted regulations regarding cattle production. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that government shouldn't be involved in deer breeding and that deer breeding is a private enterprise that government should stay out of. The department disagrees with the comment and responds that under Parks and Wildlife Code, Chapter 43, Subchapter L, the department is required to regulate the possession of live deer

under a deer breeder's permit. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that TPWD violated the Open Meeting Act. The department disagrees with the comment and responds that although the commenter did not specify the actions that the commenter believes violated the Open Meetings Act or when they occurred, the rules were adopted by the Parks and Wildlife Commission in a lawfully noticed meeting in compliance with applicable provisions of the Texas Open Meetings Act, following publication of a Notice of Proposed Rulemaking in the *Texas Register* and solicitation of public comment as required under the Texas Administrative Procedure Act. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rules constituted a destruction of freedom of commerce. The department disagrees with the comment and responds that the rules as adopted are not for the purpose of regulating commercial activity. As noted in the proposal preamble, the department acknowledges that the rules may have an economic impact on persons required to comply. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the stakeholder groups that provided input to the department were not representative of the public. The department agrees that the various stakeholder groups are not demographically reflective of the state's population as a whole; however, the stakeholder groups were representative of the persons impacted by the rules. The department considers that a stakeholder is a person or organization that has a direct interest in the department's actions, objectives, and policies. On that basis, the composition of the stakeholder groups was focused on the parties directly affected by potential rules addressing the nexus of disease management and the unnatural movement of a popular game species. The stakeholder groups therefore included individuals and associations that could knowledgably inform the department about the perspectives of affected regulatory agencies, landowners, wildlife managers, hunters, and deer breeders. In addition, through the notice and comment process required for the adoption of the rules, any person with an interest in the rules was given an opportunity to participate. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department is too political, and one commenter opposed adoption and stated that the rules are part of TPWD's political agenda. The

department disagrees with the comments and responds that, as explained in more detail elsewhere in this preamble, the basis for the rules was the protection of a public resource using biologically defensible measures intended to minimize CWD risks to free-ranging and captive white-tailed deer, mule deer, and other susceptible species in Texas while minimizing direct and indirect impacts of CWD to hunting, hunting-related economies, and conservation in Texas. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rules are just a way for the department to create more government jobs. The department disagrees with the comment and responds that, as mentioned elsewhere in this preamble, the rules are for the purpose of protecting a public resource. Although the department has engaged additional manpower on a temporary basis to enhance customer service to the regulated community, the administration and enforcement of the rules as adopted will be effected by existing personnel. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are a "cash cow" for the department and one commenter opposed adoption and stated that the department was trying to add more government jobs and increase budget. The department disagrees with the comment and responds that the rules are not motivated by and do not affect the department's revenue stream. No changes were made as a result of the comment.

One commenter opposed adoption and stated that politics should be kept out of rulemaking. The department agrees with the comment and responds that the rules as adopted are for the purpose of protecting a public resource based on the best epidemiological science available. No changes were made as a result of the comment.

One commenter opposed adoption and stated that TPWD is corrupt because testing goals in the two counties where CWD was discovered were not attained. The department assumes that the commenter is referring to the fact that although the department exceeded its goal for collection of CWD samples from hunter-harvested deer on a statewide basis, the department did not achieve its goal for hunter-harvest sample collection in the Central Texas areas surrounding the sites on which CWD was detected. The department disagrees with the comment and responds that every effort was and is being made to accumulate an

epidemiologically complete picture of the prevalence of CWD in every part of the state. The department also responds that suboptimal sampling in any given location does not make the department "corrupt" or the rules as adopted unnecessary. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules change constantly, which is illegal. The department disagrees with the comment and responds that as explained elsewhere in this preamble, while the department acknowledges that there have been several iterations of regulations regarding CWD, the emergency rules and the Interim Breeder Rules were developed for the stated purpose of providing an immediate response in the wake of the June 2015 discovery of CWD in a breeding facility, to enable breeders, release sites, land managers, hunters, and wildlife enthusiasts some degree of certainty through the 2015-2016 hunting season, and to afford the department an opportunity, through a process that included extensive stakeholder input, to develop regulations that would provide a mechanism for responding to CWD for the long term. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the per-animal testing costs in the preamble are too high. The department disagrees with the comment and responds that because the procedures for CWD sample collection were relatively new and only a small number of persons at the time the proposed rules were published had been trained or certified to perform those procedures, the department based the estimates of the cost of compliance on information solicited from a number of private veterinarians. As more people become trained and certified to become sample collectors, the cost of compliance will be reduced, which has proven to be the case. No changes were made as a result of the comment.

One commenter opposed adoption and stated that TPWD admitted there were no goals. The department disagrees with the comment and responds that it is unaware of any statement to the effect that there is no goal for this rulemaking. The department stated numerous times in numerous rulemakings, as well as continuously to the public via the department's communications efforts since the discovery of CWD in a deer breeding facility in June 2015, that the department is guided by the three major goals set forth in the CWD 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. No changes were made as a result of the comment.

One commenter opposed adoption and stated that it is unethical to have unreasonable rules. The department disagrees that the rules are unethical or unreasonable and responds that as explained elsewhere in this preamble, the department has undertaken considerable efforts to involve affected parties in the process of developing these rules to ensure that the rules as adopted provide a reasonable mechanism for the surveillance and containment of CWD based on scientific principles of disease management while still allowing regulated activities to occur. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that the original rules worked just fine. The department disagrees with the comment and responds that the while the original rules (i.e., the rules that existed at the time CWD was discovered in a Medina County breeding facility in June 2015) provided an adequate initial baseline for testing, the rules were inadequate to provide a level of assurance that CWD would be detected if it existed in a breeding facility. It should be noted that although the minimum testing requirement under the original rule was 20%, the average testing rate for breeding facilities was previously 40%. Also, every Texas deer breeding facility where CWD has been discovered had tested more than 90% of eligible mortalities. In the first deer breeding facility where CWD was discovered (Medina County), 95% of the eligible mortalities were tested. In the second facility (Lavaca County), the facility owner was required as prescribed in a TAHC herd plan to test 100% of eligible mortalities, and it was under this testing rate that CWD was discovered. The third and fourth discoveries of CWD in white-tailed deer occurred at facilities under a TAHC herd plan or subject to enhanced testing under the Interim Breeder Rules. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rules have too many traps and holes. The department disagrees with the commenter, especially in the absence of the identification of specific problematic provisions, and responds that the rules were not intended to include traps and holes. In addition, as noted in response to other comments, through

outreach and modifications to TWIMS, the department is seeking to address concerns about compliance with the rules.

One commenter opposed adoption and stated that the rules are "not right." The department understand this comment to be stating a general objection to the rules. The department disagrees with the comment and responds that it is discharging a statutory duty to protect the wildlife resources of the state. No changes were made as a result of the comment.

One commenter opposed adoption and stated that CWD cannot be regulated away. The department agrees with the comment and responds that the rules as adopted are not intended to eliminate CWD, but to detect it where it exists so that it can be contained. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules do not account for long-term impacts. The department disagree with the comment and responds that the rules actually are intended to avoid long-term impacts. By providing a pathway for most, if not all, breeding facilities to achieve movement status without release-site testing requirements, the rules intentionally seek to minimize long-term impacts for those deer breeders who are willing to conduct adequate testing. No changes were made as a result of the comment.

Nature of Breeder Deer

Seventy-two commenters opposed adoption and stated that the rules shouldn't "interfere with the private property rights of the individual landowner." The department agrees with the comments and responds that the rules as adopted do not affect the private property rights of any individual landowner. No changes were made as a result of the comments.

Seventy-five commenters opposed adoption and stated that the rules should not require breeder deer to be killed. The department disagrees that the rules require breeder deer to be killed. The rules provide for testing requirements that must be met in order to be able to move deer and provide the option of sacrificing deer in order to meet those requirements, but do not require any deer breeder to kill any deer. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that breeder deer are private property and should be treated like cattle. The department disagrees with the comments and responds that breeder deer are the property of the people of the state under the provisions of the Parks and

Wildlife Code, while cattle are considered livestock. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules violate property rights. The department disagrees with the comment and responds that the rules as adopted do not regulate the acquisition, use, or transfer of private property, real or personal. No changes were made as a result of the comment.

One commenter opposed adoption and stated that breeder deer are livestock and shouldn't be regulated by the state. The department disagrees with the comment and responds that deer are not livestock under the laws of this state, and that under the Parks and Wildlife Code, white-tailed deer and mule deer are the property of the people of the state. No changes were made as a result of the comment.

Economic Impacts

Two commenters opposed adoption and stated that the rules will destroy property values. The department disagrees with the comments and responds that the presence of CWD in an area, rather than the presence of rules designed to detect and contain CWD, would seem to be the major determinant of the effect of CWD on property values. In addition, 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, which should positively impact property values. No changes were made as a result of the comments.

Eighty-one commenters opposed adoption and stated that the rules will hurt state and local economies and cost jobs. Six commenters opposed adoption and stated that the rules will kill the deer breeding industry and put people out of business. Two commenters opposed adoption and stated that the rules will create financial burdens, economic hardship, and hurt families. Similarly, one commenter opposed adoption and stated that the rules will hurt thousands of businesses and people. One commenter opposed adoption and stated that the rules will jeopardize 800,000 jobs. The department disagrees with the comments and responds 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 comment 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. With regard to the comment about jeopardizing jobs, an unpublished study conducted by the Agricultural and Food Policy Center at Texas A&M University in 2007 estimated the number of jobs created by the deer breeding industry at that time to be 7,335 jobs with the "multiplier effect." The department further responds that detection and containment of CWD is necessary to protect 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 comments.

One commenter opposed adoption and stated that the rules will result in a loss of at least $1.2 million in revenue to the department in the form of deer breeders going out of business and lost license revenue from non-resident hunters. The department disagrees with the comment and responds that department data indicate a steady trend line for the number of permitted deer breeders, that there is no data to estimate what percentage of non-resident hunters hunt released breeder deer, and that significant revenue loss and economic harm could result if CWD is not contained and managed. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules constituted an unfunded mandate, because deer breeders must bear the cost of CWD testing while free-ranging deer are tested by the state at no cost to hunters and landowners. The department disagrees with the comment and responds that deer breeding is a commercial enterprise that is voluntarily engaged in by deer breeders and much the same as the cost of fencing, feed, and medical care, the testing requirements imposed by the rules are a cost of doing business that can be passed to the consumer if the business operator so chooses. It should also be noted that persons transporting deer pursuant to Triple T or TTP permit must pay costs associated with the movement of deer, including the cost of CWD testing. Hunter-harvested deer are tested at no cost because the department finds an imperative need to develop an epidemiological characterization of CWD in free-ranging populations everywhere in the state. No changes were

made as a result of the comment.

Two commenters opposed adoption and stated that the rules will hurt or kill hunting. The department disagrees with the comments and responds that the rules adopted will protect hunting by protecting the resources that are hunted. No changes were made as a result of the comments.

One commenter opposed adoption and stated that because deer breeders provide the lion's share of hunting opportunity, and the rules will hurt department revenue and the economy. The department disagrees with the comment and responds that although breeder deer compose a very small percentage of the deer harvest, the threat to the economy arises from failing to respond responsibly to CWD, which, if not managed, has the potential to negatively impact the state's hunting economy. No changes were made as a result of the comment.

Compliance and Enforcement

Seventy-two commenters opposed adoption and stated that "Any penalties for non-compliance must accurately reflect the actions and requirements of the current rules, not extending penalties beyond what is reasonable or just." The department is uncertain exactly what is meant by the comment, but responds that the penalties for violations of the rules as adopted are stipulated by statute and do not differ from the penalties currently in effect. No changes were made as a result of the comments.

Miscellaneous

One commenter opposed adoption and stated that there should be no rules whatsoever. The department disagrees with the comment and responds that the department has a statutory duty to protect public wildlife resources and it is imperative to do so because CWD poses a threat to those resources. No changes were made as a result of the comment.

Seventy-two commenters opposed adoption and stated that "It is imperative that any rules regarding standards for testing and release be based on the overall stewardship and health of the deer herd, the true impacts of this disease on the population in Texas, the continuity, applicability, and practicality within a once-prosperous business environment, and should account for the economic burden they place on the producer, permit holder, or release site registrant." The department agrees with the comment, with the caveat that the assertion of a

"once-prosperous business environment" is an unsubstantiated comparative. No changes were made as a result of the comments.

Rules Not Stringent Enough

Twelve commenters opposed adoption and stated that deer breeding should not be legal. The department disagrees with the comment and responds that pursuant to Parks and Wildlife Code, §43.352(a), the department is required to issue a permit to a qualified person to possess live breeder deer in captivity. No changes were made as a result of the comments.

Nine commenters opposed adoption and stated that all released breeder deer should bear visible tags or other means of ready identification and released only to double-fenced release sites. The department disagrees with the comments and responds that the rules as adopted require only Triple T deer and breeder deer being released from a TC 3 breeding facility to be eartagged. The department also believes that the current standard for release-site fencing, which requires a fence to be at least seven feet in height, and more importantly, capable of retaining deer at all times, to be sufficient for keeping liberated deer from commingling with free-ranging deer. The department notes that Parks and Wildlife Code, §43.3561, does include identification requirements associated with breeder deer. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that the fence requirement should be eight feet, not seven feet. The department disagrees with the comments and responds that the rules as adopted require release-site fencing to be at least seven feet in height, which the department believes is sufficient to reasonably retain breeder deer on the release site under ordinary circumstances. The department also notes that the rules as adopted do not prevent a landowner from erecting a fence of greater than seven feet in height. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rules do not require notification of neighboring landowners when a CWD-positive deer is found. The department acknowledges that the rules do not require adjoining landowners to be notified if CWD is discovered on a property, but disagrees that such a requirement would increase the department's ability to detect and contain CWD. The department reasons that because it notifies the public when CWD

is discovered and under other rules may designate any area of the state as a Containment Zone or Surveillance Zone for purposes of CWD management, landowners of property surrounding a site where CWD is discovered will quickly learn of the disease's emergence, if it occurs. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules should not allow release to low-fenced property. The department agrees with the comment and responds that the rules prohibit the release of deer to low-fenced acreage. No changes were made as a result of the comment.

One commenter opposed adoption and stated that ante-mortem testing at 25 percent will allow young animals that have CWD that is not yet detectable to be moved, thus spreading the disease. The department disagrees with the comment and responds that the 25 percent ante-mortem test value is a preliminary testing requirement to temporarily achieve TC 1 status during the initial year of the new rules effectiveness; to maintain TC 1 status, another 25 percent of the source facility's inventory would have to be ante-mortem tested by May 1. The department is attempting to allow as many TC 2 facilities as possible to "test up" to TC 1 status and reasons that some facilities might not be able to ante-mortem test 50 percent of their inventory immediately; therefore, the 25 percent value was selected. It should also be noted that irrespective of the testing level, young animals could be moved with CWD because it is not normally yet detectable, even with 100% ante-mortem testing. The department also notes that if CWD is present in a breeding facility it will be discovered through time, and because breeder deer can be liberated only to high-fenced release sites, if CWD is discovered in a breeding facility after it has met an initial 25 percent "not detected" ante-mortem standard, the department will know the exact location where deer from the facility have been transferred or liberated and will be able to take immediate steps to address the situation. No changes were made as a result of the comment.

The department received a total of 422 comments supporting adoption of the proposed rules. Between April 22, 2016 and May 26, 2016 the department received 178 comments supporting adoption: 111 comments via the department's website and 67 written comments. At the June 20, 2016, special Commission meeting, the department received 244 comments

supporting adoption of the rules.

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

The following groups and associations commented in support of adoption of the rules: Texas Farm Bureau, King Ranch, Texas and Southwestern Cattle Raisers Association, Ducks Unlimited, Archery Trade Association, Caesar Kleberg Wildlife Management Institute, 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, Mule Deer Foundation, Shikar Safari Club International, Texans For Saving Our Hunting Heritage, Hill Country Conservancy, Texas Bighorn Society, Texas Agricultural Land Trust, 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, Native American Seed, Association of Fish and Wildlife Agencies, Bear Trust, Catch a Dream Foundation, Council to Advance Hunting and the Shooting Sports, National Shooting Sports Foundation, National Trappers Association, North American Grouse Partnership, Pheasants Forever – Quail Forever, Tennessee Wildlife Foundation, Theodore Roosevelt Conservation Partnership, Tread Lightly!, Wildlife Management Institute, Wildlife Mississippi, Wildlife Forever, Texas Conservation Alliance, Nina Sinclair Trust, Whitetails Unlimited, Wild Sheep Foundation, and the East Texas Woods and Waters Club.

5. Statutory Authority.

The repeals are adopted under the authority of Parks and Wildlife Code, Chapter 43, Subchapter L, which authorizes the commission to make regulations governing the possession, transfer, purchase, and sale 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.

§65.90. Definitions.

§65.91. General Provisions.

§65.92. Transfer Categories and Requirements.

§65.93. Release Sites – Qualifications and Testing Requirements.

§65.94. Chronic Wasting Disease – Deer management Permit Provisions.

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, transfer, purchase, and sale 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.

6. 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 laboratory--A laboratory approved by the United States

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

(2) Ante-mortem test—A CWD test performed on a live deer.

(3) 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.

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

(5) CWD--chronic wasting disease.

(6) CWD-positive facility--Any facility in or on which CWD has been confirmed.

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

(8) Deer breeding facility (breeding facility)--A facility authorized 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 (Deer Breeder's Permit).

(9) Department (department)--Texas Parks and Wildlife Department.

(10) Deer Management Permit (DMP)-- A permit issued under the provisions of Parks and Wildlife Code, Subchapter R or R-1 and Subchapter D of this chapter (relating to Deer Management Permit (DMP)) that authorizes the temporary detention of deer for the purpose of propagation.

(11) Eligible-aged deer—

(A) if the deer is held in a breeding facility enrolled in the TAHC CWD Herd Certification Program, 12 months of age or older; or

(B) for any other deer, 16 months of age or older.

(12) Eligible mortality—An eligible-aged deer that has died.

(13) Exposed deer--Unless the department determines through an epidemiological investigation that a specific 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 the CWD-positive facility.

(14) Facility – Any location required to be registered in TWIMS under a deer breeder's permit, Triple T permit, or DMP, including release sites and/or trap sites.

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

(16) Hunting year—That period of time between September 1 and August 31 of any year when it is lawful to hunt deer under the provisions of Subchapter A of this chapter (relating to Statewide Hunting Proclamation).

(17) Interim Breeder Rules – 31 TAC §§65.90-65.93, concerning Chronic Wasting Disease – Movement of Deer, adopted by the Texas Parks and Wildlife Commission on November 5, 2015, and published in the January 29, 2016 issue of the *Texas Register* (41 TexReg 815).

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

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

(20) Liberated deer—A free-ranging deer that bears evidence of having been liberated including, but not limited to a tattoo (including partial or illegible tattooing) or of having been eartagged at any time (holes, rips, notches, etc. in the ear tissue).

(21) Movement Qualified (MQ)—A designation made by the department pursuant to this division that allows a deer breeder to lawfully transfer breeder deer.

(22) Not Movement Qualified (NMQ).—A designation made by the department pursuant to this division that prohibits the transfer of deer by a deer breeder.

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

(24) Originating facility—Any facility from which deer have been transported, transferred, or released, as provided in this definition or as determined by an investigation of the department, including:

(A) for breeder deer, the source facility identified on a transfer permit; and

(B) for deer being moved under a Triple T permit, the trap site.

(25) Post-mortem test—A CWD test performed on a dead deer.

(26) Properly executed—A form or report required by this division on which all required information has been entered.

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

(28) Release site--A specific tract of land to which deer are released, including the release of deer under the provisions of this chapter or Parks and Wildlife Code, Chapter 43, Subchapters E, L, R, or R-1.

(29) Reporting year—For a deer breeder's permit, the period of time from April 1 of one calendar year through March 31 of the next calendar year.

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

(31) Status--A level assigned under this division for any given facility on the basis of testing performance and the source of the deer. For the transfer categories established in §65.95(b) of this title (relating to Movement of Breeder Deer), the highest status is Transfer Category 1 (TC 1) and the lowest status is Transfer Category 3 (TC 3). For the release site classes established in §65.95(c) of this title, Class I is the highest status and Class III is the lowest.

(32) Submit-- When used in the context of test results, provided to the department, either directly from a deer breeder or via an accredited testing laboratory.

(33) Suspect—An initial CWD test result of "detected" that has not been confirmed.

(34) TAHC--Texas Animal Health Commission.

(35) 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).

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

(37) Test, Test Result(s), or Test Requirement--A CWD test, CWD test result, or CWD test requirement as provided in this division.

(38) Trap Site -- A specific tract of land approved by the department for the trapping of deer under this chapter and Parks and Wildlife Code, Chapter 43, Subchapters E, L, R, and R-1.

(39) Triple T permit--A permit to trap, transport, and transplant white-tailed or mule deer (Triple T permit) issued under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter E, and Subchapter C of this chapter (relating to Permits for Trapping, Transporting, and Transplanting Game Animals and Game Birds),

(40) Trap, Transport and Process (TTP) permit--A permit issued under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter E, and Subchapter C of this chapter (relating to Permits for Trapping, Transporting, and Transplanting Game Animals and Game Birds), to trap, transport, and process surplus white-tailed deer (TTP permit).

(41) 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 subchapter conflicts with any provision of this chapter other than Division 1 of this subchapter, this subchapter prevails.

(b) Except as provided in this division, no live breeder deer or deer trapped under a Triple T permit, TTP permit or DMP may be transferred anywhere for any purpose.

(c) Except as provided in this division, no person shall introduce into or remove deer from or allow or authorize deer to be introduced into or removed from any facility for which a CWD test result of "suspect" has been obtained from an accredited testing laboratory, irrespective of how the sample was obtained or who collected the sample. The provisions of this subsection take effect immediately upon the notification of a CWD "suspect" test result, and continue in effect until the department expressly authorizes the resumption of permitted activities at that facility.

(d) Notwithstanding any provision of this division, no person may cause or allow breeder deer to be moved from a facility for any purpose if such movement is prohibited by a TAHC Herd Plan associated with a TAHC hold order or TAHC quarantine.

(e) A facility (including a facility permitted after the effective date of this division)

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 for:

(1) a minimum of two years, if the facility is a breeding facility; or

(2) for the period specified in §65.95(c) of this title (relating to Movement of Breeder Deer), if the facility is a release site.

(f) A deer breeding facility that was initially permitted after March 31, 2016 will assume the lowest status among all originating facilities from which deer are received.

(g) The designation of status by the department in and of itself does not authorize the transfer or movement of deer. No person may remove or cause the removal of deer from a facility that has been designated NMQ by the department pursuant to this division.

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

(i) In the event that technical or other circumstances prevent the development or implementation of automated methods for collecting and submitting the data required by this division via TWIMS, the department may prescribe alternative methods for collecting and submitting the data required by this division.

§65.92. CWD Testing.

(a) All CWD test samples at the time of submission for testing shall be accompanied by a properly executed, department-prescribed form provided for that purpose.

(b) For the purposes of this division, an ante-mortem CWD test is not valid unless it is performed by an accredited laboratory on retropharyngeal lymph node, rectal mucosa, or tonsillar tissue with at least 6 lymphoid follicles collected within six months of submission by a licensed veterinarian authorized pursuant to statutes and regulations governing the practice of veterinary medicine in Texas and regulations of the TAHC from a live deer that:

(1) is at least 16 months of age; and

(2) has not been the source of a "not detected" ante-mortem test result submitted within the previous 24 months.

(c) A post-mortem CWD test is not valid unless it is performed by an accredited testing laboratory on the obex or medial retropharyngeal lymph node of an eligible mortality, and may be collected only by a qualified licensed veterinarian, TAHC-certified CWD sample collector, or other person approved by the department.

(d) To meet the requirements of §65.94(a)(1)(A) and (B) of this title (relating to Breeding Facility Minimum Movement Qualifications), or §65.95 of this title (relating to Movement of Breeder Deer), ante-mortem test results may be substituted for post-mortem test results at a ratio of three "not detected" ante-mortem test results for each required "not detected" post-mortem test result.

(e) Except as provided in this section, an ante-mortem test result may not be used more than once to satisfy any testing requirement of this division.

(f) The testing requirements of this division 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.

(g) 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 for as long as CWD testing is required at the release site under the provisions of this division.

§65.93. Harvest Log.

(a) When a release site is required by this division to maintain a harvest log, the harvest log shall be maintained daily and shall meet the requirements of this section.

(b) For each deer harvested on the release site the landowner must, on the same day that the deer is harvested, legibly enter the following information in the daily harvest log:

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

(2) the date the deer was harvested;

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

(4) any alphanumeric identifier tattooed on the deer;

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

and

(6) any other identifier and identifying number on the deer, including a description of any evidence or indication that the deer was a liberated deer including, but not limited to evidence of having been eartagged at any time (holes, rips, notches, etc. in ear tissue).

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

(d) By not later than April 1 of each year, the owner of a release site shall submit the contents of the daily harvest log to the department via TWIMS or via another method specified by the department.

(e) The daily harvest log shall be on a form provided or approved by the department and shall be retained for a period of one year following submission and acceptance by the department.

§65.94. Breeding Facility Minimum Movement Qualification.

(a) Notwithstanding any other provision of this division, a breeding facility is designated NMQ and is prohibited from transferring breeder deer anywhere for any purpose if the breeding facility:

(1) has not:

(A) met the provisions of this subparagraph:

(i) had less than five eligible mortalities from May 23, 2006 through March 31, 2016; or

(ii) submitted CWD "not detected" test results for at least 20% of the total number of eligible mortalities that occurred in the facility since May 23, 2006; and

(B) beginning with the report year that starts April 1, 2017, and each April 1 thereafter

(i) achieved "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program; or

(ii) submitted CWD "not detected" test results for at least 80% of eligible mortalities occurring in the facility during the previous reporting year; provided, however, if the facility has been permitted for six months or more, the number of "not detected"

test results submitted during the previous reporting year must be equal to or greater than the following number: the sum of the eligible-aged deer reported in the breeding facility inventory on March 31 of the previous reporting year, plus the sum of the eligible mortalities that occurred within the breeding facility for the previous reporting year, multiplied by 3.6 percent;

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

(3) does not have a reconciled herd inventory; or

(4) is not in compliance with the reporting and recordkeeping provisions of this division and §65.608 of this title (relating to Annual Reports and Records).

(b) A breeding facility that has been designated as NMQ for failure to comply with the testing requirements specified in subsection (a) of this section will be restored to MQ when the required "not detected" test results prescribed by subsection (a) of this section are submitted.

(c) A breeding facility designated NMQ shall report all mortalities within the facility to the department immediately upon discovery of the mortality.

(d) Immediately upon the notification that a facility has received a CWD "suspect" test result (a CWD suspect facility), all facilities that have been in possession of a deer that was held in the CWD suspect facility within the previous five years shall be designated NMQ by the department until it is determined that the facility is not epidemiologically linked to the CWD suspect deer, or it is determined upon further testing that the "suspect" deer is not a confirmed positive.

§65.95. Movement of Breeder Deer.

(a) General. Except as otherwise provided in this division, a TC 1 or TC 2 breeding facility may transfer breeder deer under a 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:

(1) another breeding facility;

(2) an approved release site as provided in paragraph (3) of this subsection;

(3) a DMP facility; or

(4) to another person for nursing purposes.

(b) Breeder Facilities.

(1) TC 1. Except as may be otherwise provided in this division, a breeding facility that is in compliance with the requirements in 65.94(a) of this title(relating to Breeding Facility Minimum Movement Qualification) is a TC 1 facility if:

(A) the breeding facility has "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program; or

(B) the breeding facility has submitted one of the following:

(i) "not detected" post-mortem test results for at least 80 percent of the total number of eligible mortalities that occurred in the breeding facility over the previous five consecutive reporting years, so long as the total number of "not detected" post-mortem test results submitted during the previous five consecutive reporting years is equal to or greater than the following number: the sum of the eligible-aged population in the breeding facility at the end of each of the previous five consecutive reporting years, plus the sum of the eligible mortalities that occurred within the breeding facility for each of the previous five consecutive reporting years, multiplied by 3.6 percent; or

(ii) "not detected" ante-mortem test results for at least 50 percent of eligible-aged deer in the facility's inventory as of the date the facility initiates the ante-mortem testing process. For the report year beginning April 1, 2016, a breeding facility will be construed to have temporarily complied with this item upon submission of "not detected" ante-mortem test results for at least 25 percent of eligible-aged deer in the facility as of the date the facility initiates the ante-mortem testing process; however, the breeding facility must submit the remaining ante-mortem tests results to achieve 50% testing by May 15, 2017.

(2) TC 2.

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

(i) it is not a TC 1 facility; and

(ii) it is not a TC 3 facility.

(B) The testing requirements for a TC 2 facility are the minimum testing requirements established for MQ designation in §65.94(a)(1) of this title (relating to Breeding Facility Minimum Movement Qualification).

(3) TC 3.

(A) A TC 3 facility is any breeding facility registered in TWIMS that is under a TAHC hold order, quarantine, and/or herd plan and meets any of the following criteria:

(i) received an exposed deer within the previous five years;

(ii) transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility; or

(iii) possessed a deer that was in a CWD-positive facility within the previous five years.

(B) No deer from a TC 3 facility may be transferred or liberated unless expressly authorized in a TAHC herd plan and then only in accordance with the provisions of this division and the TAHC herd plan.

(C) A TC 3 breeding facility remains a TC 3 breeding facility until the TAHC hold order or quarantine in effect at the breeding facility has been lifted.

(D) A TC 3 breeding facility may not transfer a breeder deer for any purpose unless the deer has been tagged in one ear with a NUES tag or button-type RFID tag approved by the department.

(c) Release Sites.

(1) General.

(A) An approved release site consists solely of the specific tract of land to which deer are released and the acreage designated as a release site in TWIMS. A release site owner may modify the acreage registered as the release site to recognize changes in acreage (such as the removal of cross-fencing or the purchase of adjoining land), so long as the release site owner notifies the department of such modifications prior to the acreage modification. The release site requirements set forth in this division apply to the entire acreage modified under the provisions of this subparagraph.

(B) Liberated breeder deer must have complete, unrestricted access to the entirety of the release site; provided, however, deer may be excluded from areas for safety reasons (such as airstrips) or for the purpose of protecting areas such as crops, orchards, ornamental plants, and lawns from depredation.

(C) All release sites onto which breeder deer are liberated must be surrounded by a fence of at least seven feet in height that is capable of retaining deer at all times under reasonable and ordinary circumstances. The owner of the release site is responsible for ensuring that the fence and associated infrastructure retain deer under reasonable and ordinary circumstances.

(D) The testing requirements of this subsection continue in effect until "not detected" test results have been submitted as required by this subsection. A release site that is not in compliance with the requirements of this subsection is ineligible to receive deer and must continue to submit test results until the testing requirements of this subsection are satisfied.

(E) No person may intentionally cause or allow any live deer to leave or escape from a release site onto which breeder deer have been liberated.

(F) The owner of a Class II or Class III release site shall maintain a harvest log at the release site that complies with §65.93 of this title (relating to Harvest Log).

(2) **Class I Release Site**. Except as provided in §65.98, a release site is a Class I release site and is not required to perform CWD testing if the release site

(A) is not a Class II or Class III release site; and

(B) after August 15, 2016, the release site has received deer only from TC 1 facilities

(3) **Class II Release Site.**

(A) A release site that is not a Class III release site and receives deer from a TC 2 breeding facility is a Class II release site.

(B) Beginning the first hunting year following the release of deer from any TC 2 breeding facility and continuing for each hunting year thereafter, the owner of a Class II release site must submit "not detected" post-mortem test results for the first deer harvested and each deer harvested thereafter at the release site; however, no release site owner is required to submit more than 15 "not detected" post-mortem test results in any hunting year.

(C) The requirements of subparagraph (B) cease as follows:

(i) for release sites that have submitted all test results required by this division, the requirements of subparagraph (B) cease on March 1, 2019;

(ii) for release sites that have not submitted all the test results required by this division, the requirements of subparagraph (B) shall cease upon submission of all required test results.

(4) **Class III Release Site**.

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

(i) it has:

(I) received deer from an originating facility that is a TC 3 facility; or

(II) 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

(ii) it has not been released from a TAHC hold order or quarantine related to activity described in clause (i) of this subparagraph.

(B) The landowner of a Class III release site must submit post-mortem 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 liberated deer released on the release site between the last day of lawful hunting on the release site in the previous hunting year and the last day of lawful hunting on the release site during the current hunting year; provided, however, this minimum harvest and testing provision may only be substituted as prescribed in a TAHC herd plan.

(C) No breeder deer may be transferred to a Class III release site unless the deer has been tagged in one ear with a NUES tag or button-type RFID tag approved by the department.

§65.96. Movement of DMP Deer. This section applies to the movement of deer under a DMP.

(1) Testing Requirements.

(A) There are no CWD testing requirements for a DMP facility that:

(i) does not receive breeder deer; or

(ii) receives breeder deer solely from TC 1 deer breeding facilities.

(B) Beginning the first hunting year after the release of deer from the following facilities, and continuing for each hunting year thereafter, the owner of the release site must submit "not detected" post-mortem test results for the first deer harvested and each deer harvested thereafter at the release site; however, no release site owner is required to submit more than 15 "not detected" post-mortem test results in any hunting year:

(i) deer from a DMP facility that receives breeder deer from a TC 2 deer breeding facility; or

(ii) deer from a DMP facility that receives deer trapped deer from a Class II release site.

(C) The requirements of subparagraph (B) cease as follows:

(i) for release sites that have submitted all test results required by this division, the requirements of subparagraph (B) cease on March 1, 2019;

(ii) for release sites that have not submitted all the test results required by this division, the requirements of subparagraph (B) shall cease upon submission of all required test results.

(2) The department will not authorize the transfer of deer to a DMP facility from a TC 3 breeding facility, a Class III release site, or from a release site or deer breeding facility that is not in compliance with the requirements of this division.

§65.97. Testing and Movement of Deer Pursuant to a Triple T or TTP Permit.

(a) General.

(1) Unless expressly provided otherwise in this section, the provisions of §65.102 of this title (relating to Disease Detection Requirements) cease effect upon the effective date of this section.

(2) The department may require a map of any Triple T trap site to be submitted as part of the application process.

(3) The department will not issue a Triple T permit authorizing deer to be trapped at a:

(A) release site that has received breeder deer within five years of the application for a Triple T permit;

(B) release site that has failed to fulfill testing requirements;

(C) any site where a deer has been confirmed positive for CWD;

(D) any site where a deer has tested "suspect" for CWD; or

(E) any site under a TAHC hold order or quarantine.

(4) In addition to the reasons for denying a Triple T permit listed in §65.103(c) of this title (relating to Trap, Transport, and Transplant Permit), the department will not issue a Triple T permit if the department determines, based on epidemiological assessment and consultation with TAHC that to do so would create an unacceptable risk for the spread of CWD.

(5) All deer released under the provisions of this section must be tagged prior to release in one ear with a button-type RFID tag approved by the department, in addition to the marking required by §65.102 of this title (relating to Disease Detection Requirements). RFID tag information must be submitted to the department.

(6) Nothing in this section authorizes the take of deer except as authorized by applicable laws and regulations, including but not limited to laws and regulations regarding seasons, bag limits, and means and methods as provided in Subchapter A of this chapter (relating to Statewide Hunting Proclamation).

(7) Except for a permit issued for the removal of urban deer, a test result is not valid unless the sample was collected and tested after the Saturday closest to September 30 of the year for which activities of the permit are authorized.

(8) For permits issued for the removal of urban deer, test samples may be collected between April 1 and the time of application.

(b) Testing Requirements for Triple T Permit.

(1) The department will not issue a Triple T permit unless "not detected" post-mortem test results have been submitted for 15 eligible-aged deer from the trap site.

(2) CWD testing is not required for deer trapped on any property if the deer are being moved to adjacent, contiguous tracts owned by the same person who owns the trap site property.

(c) Testing Requirements for TTP Permit.

(1) "Not detected" test results for at least 15 eligible-aged deer from the trap site must be submitted.

(2) The landowner of a Class III release site must submit CWD test results for 100% of the deer harvested pursuant to a TTP permit, which may include the samples required under paragraph (1) of this subsection.

(3) Test results related to a TTP permit must be submitted to the department by the method prescribed by the department by the May 1 immediately following the completion of permit activities.

§65.98. Transition Provisions.

(a) This division does not apply to an offense committed before the effective date of this division. An offense committed before the effective date of this division is governed by the regulations that existed on the date the offense was committed, including, but not limited to the following:

(1) Deer Breeder: published in the *Texas Register* September 4, 2015 (40 TexReg 5566); January 1, 2016 (41 TexReg 9); January 29, 2016 (41 TexReg 815);

(2) DMP: published in the *Texas Register* October 23, 2015 (40 TexReg 7305); February 12, 2016 (41 TexReg 1049); February 19, 2016 (41 TexReg 1250); and,

(3) Triple T/TTP: published in the *Texas Register* October 23, 2015 (40 TexReg 7307); January 1, 2016 (41 TexReg 9).

(b) A release site that as of August 15, 2016, is in compliance with the Interim Deer Breeder Rules shall be not subject to testing requirements of this division until deer are liberated or released onto the release site under the provisions of this division.

(c) A release site that becomes a Class II release site as a result of the receipt of deer on or after August 15, 2016 from a TC 2 breeding facility will be designated as a Class I release site if the release site is in compliance with all Class II requirements as provided in §65.95(c) of this title (relating to Movement of Breeder Deer) in that season; and

(1) all TC 2 breeding facilities that provided deer to the release site achieve TC 1 status by May 15, 2017, as provided in 65.95(b)(1) of this title (relating to Movement of Breeder

Deer); or

(2) all breeder deer liberated to the release site after August 15, 2016 and prior to October 1, 2016:

(A) are harvested and CWD-tested during the 2016-2017 hunting year; and

(B) no additional deer are received from a TC 2 or TC 3 facility during the 2016-2017 hunting year.

(d) A release site that was not in compliance with the Interim Deer Breeder Rules shall be:

(1) required to comply with the applicable provisions of this division regarding Class II or Class III sites for a period of three consecutive years beginning on the first day of lawful hunting for the 2016-2017 hunting year; and

(2) ineligible to be a release site for breeder deer or deer transferred pursuant to a Triple T permit or DMP until the release site has complied with paragraph (1) of this subsection.

(e) The department's executive director shall develop a transition plan and issue appropriate guidance documents to facilitate an effective transition to this division from previously applicable regulations. The transition plan shall include, but is not limited to, provision addressing a mechanism for classifying facilities that have obtained "not detected" ante-mortem test results at a level that meets or exceeds that required in this division prior to the effective date of this division.

§65.99. Violations and Penalties.

(a) A person who violates a provision of this division or a condition of a deer breeder's permit, DMP, Triple T permit, or TTP permit commits an offense and is subject to the penalties prescribed by the applicable provisions of the Parks and Wildlife Code.

(b) A person who possesses or receives white-tailed deer or mule deer under the provisions of this division and/or Subchapters C, D, or 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.

(c) A person who fails to comply with a provision of this division or a condition of a

deer's breeder permit, DMP, Triple T permit, or TTP permit may be prohibited by the department from future permit eligibility or issuance.