

TEXAS PARKS AND WILDLIFE DEPARTMENT

EXECUTIVE DIRECTOR ORDER NO. 021-004

Under the provisions of Parks and Wildlife Code, §12.027, if the Texas Parks and Wildlife Commission (the Commission) or the Executive Director of the Texas Parks and Wildlife Department (Executive Director) finds that there is an immediate danger to a species authorized to be regulated by the Department, the Commission or the Executive Director may adopt emergency rules as provided by Government Code, §2001.034.

White-tailed deer and mule deer are game animals subject to regulation by the Commission under the provisions of various chapters of the Parks and Wildlife Code, including Chapters 43 (Subchapters E, L, R, and R-1), 61, 62, and 63. Chronic Wasting Disease (CWD) is a fatal neurodegenerative disorder that affects some cervid species, including white-tailed deer and mule deer. On June 22, 2021, the Executive Director found that the discovery of CWD in Texas deer breeding facilities regulated under Parks and Wildlife Code, Chapter 43, Subchapter L and regulations adopted pursuant to that subchapter (31 TAC Chapter 65, Subchapters B and T) created an immediate danger to the white-tailed deer and mule deer resources of Texas and that the adoption of rules on an emergency basis with fewer than 30 days' notice was necessary to address an immediate danger.

The Executive Director has subsequently found that the original emergency rule requires additional technical adjustments to address the department's response to the disease emergency as well as to provide options to the regulated community as a consequence of continued communications with the regulated community since the filing of the original emergency rule.

Therefore, the Executive Director hereby ORDERS the adoption, on an emergency basis, of new 31 TAC §65.100 to replace the original emergency rule implementing additional disease testing requirements for deer breeding facilities. This order is effective immediately upon filing, authorizes publication of a Notice of Emergency Adoption in the *Texas Register*, and is to remain in effect until October 19, 2021, which is the expiration date of the original emergency rule as filed.

This order is issued pursuant to §12.027 of the Texas Parks and Wildlife Code and is effective immediately.

Signed this the 19th day of July, 2021.



Carter Smith
Executive Director
Texas Parks and Wildlife Department

CHRONIC WASTING DISEASE MANAGEMENT RULES
EMERGENCY ADOPTION PREAMBLE

1. Introduction.

The Texas Parks and Wildlife Commission adopts, on an emergency basis, new §65.100, concerning Emergency Provisions. The emergency action is necessary because of the recent discovery of chronic wasting disease (CWD) in six deer breeding facilities (“positive facilities”), five of which have extensive direct or indirect epidemiological connectivity with each other and/or other deer breeding facilities and locations where breeder deer have been released, introducing a significant possibility that additional free-ranging deer populations in the state have been exposed to CWD. This emergency action replaces an emergency rule filed on June 22, 2021 and is necessary to address technical imperfections in the original filing, as well as to add provisions intended to address concerns from the regulated community. The department has specified an expiration date of October 19, 2021 for the initial period of effectiveness of this replacement emergency adoption in order to preserve the 120-day period of effectiveness established by statute for initial emergency filings.

The original emergency rule filed on June 22, 2021, because of a conflict between the definition of “exposed deer” and the definition of “Tier 1 facility,” inadvertently created the unintended consequence of truncating the actual universe of deer breeding facilities epidemiologically connected to positive facilities. The new emergency rule as adopted removes subsection (b)(1)(D) and alters the definition of “Tier 1 facility” to remedy that oversight. The altered definition and removal of subsection (b)(1)(D) has the effect of automatically making any deer breeding facility that received exposed deer either a trace facility or a Tier 1 facility, depending on the status of the facility from which the deer was transferred, and therefore subject to the provisions of the emergency rule. The department has determined that the new emergency rule will affect 28 deer breeders in addition to those affected by the existing emergency rule. The department also notes that the definition of “Tier 1” in this rule is a definition with a meaning

unique to the emergency rule and should not be construed in any context other than as defined herein.

Additionally, the replacement emergency rule allows any permittee subject to the provisions of the emergency rule to request an epidemiological assessment to determine whether a custom CWD testing plan could be an efficacious alternative to the testing requirements prescribed by the emergency rule.

The replacement emergency rule will also allow the transfer of fawns from breeding facilities affected by the emergency rule to nursing facilities, provided the originating facility is otherwise Movement Qualified (MQ – authorized to receive and transfer breeder deer) and each nursing facility receives deer from only one breeding facility in the permit year. The provision is in response to a request from the regulated community.

Finally, the replacement emergency rule adds new subsection (a)(2) to clarify that the regulations governing the movement of deer within CWD zones established in Chapter 65, Subchapter B, Division 1 also apply to any facility designated by the department as a Category A, Category B, or Tier 1 breeding facility under the provisions of the emergency rule.

CWD is a fatal neurodegenerative disorder that affects cervid species such as white-tailed deer, mule deer, elk, red deer, sika, and others (susceptible species). The department, along with the Texas Animal Health Commission (TAHC), has been engaged in an ongoing battle with CWD in Texas since 2002. White-tailed deer and mule deer are species authorized to be regulated by the department under the Parks and Wildlife Code. TAHC is the state agency charged with disease management in livestock and exotic livestock, including exotic livestock known to be susceptible to CWD. The recent detections of CWD in breeding facilities create an unprecedented situation because they are at a scale that is orders of magnitude greater than earlier instances of detection encountered by the department.

When CWD is detected in a facility, that facility and any directly connected facility are by current rule immediately prohibited from receiving or transferring deer and the

department and TAHC staff immediately begin epidemiological investigations to determine the extent and significance of possible disease transmission. In this case, department records indicate that within the last five years, the positive facilities referenced earlier transferred a total of 2,355 deer to 255 locations in 90 counties and eight locations in Mexico (the destinations included 138 deer breeding facilities, 103 release sites, three Deer Management Permit sites, and three nursing facilities). These breeding facilities and release sites are therefore directly connected to at least one of the positive facilities and by current rule were designated as having not movement qualified status (NMQ - prohibited from receiving or transferring deer). As a result of the ongoing epidemiological investigation, the department will be able to restore MQ status to additional facilities as a result of this emergency action, leaving 39 directly connected deer breeding facilities of epidemiological concern and therefore designated NMQ (out of the original 138). Department records indicate that 208 deer breeding facilities received deer from at least one of those 39 directly connected breeding facilities after the originating facility had received deer from one of the CWD-positive facilities. These 208 facilities ("Tier 1" facilities) are indirectly connected to the positive facilities and are of epidemiological concern because it is possible that any of them could have received CWD-infected deer. The department has determined that an additional 28 deer breeding facilities received exposed deer but were not designated Tier 1 facilities under the original emergency rule; those facilities will now be designated Tier 1 under this emergency rule. Current rules do not address disease response with respect to indirectly connected facilities. The emergency rule will address that situation by imposing requirements for disease testing and movement of breeder deer to and from indirectly connected facilities. The department has determined that the number of affected facilities restored to MQ status will increase as a result of this emergency rule.

In addition, the rule will require ante-mortem testing of all test-eligible breeder deer prior to being transferred to a release site. The department and TAHC will continue to conduct epidemiological investigations and the department will undertake rulemaking through the normal administrative process.

CWD is classified as a TSE (transmissible spongiform encephalopathy), a family of diseases that includes scrapie (found in sheep) and bovine spongiform encephalopathy (BSE, found in cattle and commonly known as Mad Cow Disease). CWD is transmitted both directly (through deer-to-deer contact) and indirectly (through environmental contamination). 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; however, a high prevalence of the disease in free-ranging populations is correlated with significant deer population declines as well as expected negative impacts and influences on landowners, hunting, and hunters. The implications of CWD for Texas and its multi-billion-dollar ranching, hunting, and wildlife management economies are significant.

The department has engaged in several rulemakings over the years to address the threat posed by CWD. In 2013, based on recommendations from the CWD Task Force, the department adopted rules (37 TexReg 10231) to implement a CWD containment strategy in response to the first detection of CWD in Texas. In 2015, the department discovered CWD in a deer breeding facility in Medina County and adopted emergency rules (40 TexReg 5566) to respond immediately to the threat, followed by interim rules (41 TexReg 815) intended to function through the 2015-2016 hunting season. Working closely with TAHC and with the assistance of the Center for Public Policy Dispute Resolution of the University of Texas School of Law, the department developed and adopted comprehensive CWD management rules in 2016 (41 TexReg 5726). The department has since engaged in periodic rulemaking (both emergency and via the normal rulemaking process) to create containment and surveillance zones in response to CWD detections in both free-ranging and captive deer in various parts of the state.

The emergency rule sets forth specific testing requirements for certain deer breeders that would have to be satisfied in order for the department to restore MQ status and requires ante-mortem testing of all test-eligible breeder deer prior to transfer

to a release site. The emergency action is necessary because the risk to the multi-billion-dollar deer hunting and deer breeding industries represented by even one infected animal among a population is considerable.

Unfortunately, it is clear that the department's existing disease detection rules were not effective in detecting CWD earlier in the deer breeding facilities where it was eventually discovered (and obviously had been resident for some time), which introduces additional concern regarding adequate mitigation of the risk of transferring CWD-positive breeder deer to release sites where released breeder deer come into contact with free-ranging deer. The department strongly believes that vigilance is crucial to minimizing the severity of biological and economic impacts that could result from the current situation. Therefore, pending resolution of the current epidemiological uncertainty surrounding the spread of CWD from directly connected facilities, the department believes that more rigorous testing at certain deer breeder facilities, in conjunction with mandatory testing of breeder deer prior to any release, is a wise and responsible course of action.

The rule is adopted on an emergency basis under Parks and Wildlife Code, Chapter 43, Subchapter L, which authorizes the Parks and Wildlife Commission to establish regulations governing the possession of white-tailed and mule deer under a deer breeders permit; Parks and Wildlife Code, §12.027, which authorizes the Texas Parks and Wildlife Commission and the department's executive director to adopt emergency rules if there is an immediate danger to a species authorized to be regulated by the department, and under Government Code, §2001.034, which authorizes a state agency to adopt such emergency rules without prior notice or hearing.

2. Rule Text.

§65.100. Emergency Provisions.

(a) Effectiveness.

(1) To the extent that any provision of this section conflicts with any provision of this division, the provisions of this section prevail.

(2) The provisions of Division 1 of this subchapter apply to any facility designated by the department as a Category A, Category B, or Tier 1 breeding facility subject to the provisions of this section.

(b) Definitions. The following words and terms shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms used in this section shall have the meanings assigned by the Parks and Wildlife Code and §65.90 of this title (relating to Definitions).

(1) Exposed deer--A deer that meets any of the following criteria:

(A) the deer is or has been in a breeding facility where a CWD-positive deer has been kept following the date the facility was first exposed to CWD (if known);

(B) the deer is or has been in a breeding facility within the five-year period preceding the death date of any CWD-positive deer that was in the facility (or the date of a positive ante-mortem test result); or

(C) the deer is in a breeding facility on or after the date that the facility received a deer under the circumstances described in subparagraph (A) or (B) of this paragraph.

(2) Exposure--The period of time that has elapsed following the introduction of an exposed deer to a breeding facility.

(3) "Insufficient follicles"--A test result indicating that a tonsil or rectal biopsy sample contained an insufficient number of lymphoid follicles to produce a valid test result.

(4) Last known exposure--the last date a deer in a trace-out breeding facility was exposed to a trace deer prior to the death or transfer of that trace deer, or the last date an exposed deer entered a Tier 1 facility.

(5) Test-eligible deer--A deer at least nine months of age.

(6) Tier 1 facility--A breeding facility that has received an exposed deer that was in a trace-out breeding facility.

(7) Trace deer--A deer that the department has determined had been in a CWD-positive deer breeding facility on or after the date the facility was first exposed to CWD, if known; otherwise, within the previous five years from the reported mortality date of the CWD-positive deer, or the date of the ante-mortem test result.

(8) Trace-out breeding facility--A breeding facility that has received an exposed deer that was in a CWD-positive deer breeding facility.

(c) General provisions.

(1) Deer required to be reported to the department under §65.605 of this title (relating to Holding Facility Standards and Care of Deer) are considered to be mortalities for the purposes of this subchapter until lawfully recaptured. A deer that is not recaptured will be treated as a mortality that occurred within the facility from which the escape is required to be reported.

(2) Deer that according to department records should be present in a breeding facility but cannot be accounted for to the satisfaction of the department are considered to be mortalities for the purposes of this subchapter.

(3) For facilities required to test ten or more deer, the department will not accept inconclusive ante-mortem test results, including but not limited to "insufficient follicles," for more than 10 percent of the total number of deer tested. For facilities required to test less than ten deer, inconclusive ante-mortem test results, including but not limited to "insufficient follicles," will not be accepted.

(4) Fawns in any Category A, Category B, and or Tier 1 facility may be transferred to a registered nursing facility, provided:

(A) the originating facility was MO at the time the facility was designated Category A, Category B, or Tier 1 ; and

(B) no fawns from any other breeding facility are or have been present in the nursing facility during the current permit year.

(5) Nursing facilities may not possess fawns that are older than 120 days of age.

(d) Category A trace-out breeding facility.

(1) A Category A facility is a trace-out breeding facility:

(A) in which all trace deer are alive in the facility; or

(B) for which post-mortem test results of “not detected” have been returned for trace deer that have died and all other trace deer are alive and present in the facility.

(2) Except as provided in paragraph (3) of this subsection, a permittee shall, upon notification by the department of Category A status:

(A) within seven days euthanize all trace deer in the breeding facility and submit test samples for each of those deer for post-mortem testing within one business day;

(B) inspect the facility daily for mortalities;

(C) immediately report all test-eligible mortalities that occur within the facility; and

(D) immediately collect test samples from all test-eligible mortalities that occur within the facility and submit the samples for post-mortem testing within one business day of collection.

(3) In lieu of the testing requirements prescribed in paragraph (2)(A) of this subsection, a permittee may request the development of a custom testing plan as provided in subsection (g) of this section; provided however, the permittee must comply with the requirements of paragraph (2)(B) – (D) of this subsection.

(4) The department in consultation with TAHC may decline to authorize a custom testing plan under subsection (g) of this section if an epidemiological assessment determines that a custom testing plan is inappropriate.

(5) The department will not restore MQ status unless CWD “not detected” test results are obtained for all required sample submissions and the permittee has complied with all applicable requirements of this subsection and this division.

(e) Category B trace-out breeding facility.

(1) A Category B facility is a trace-out breeding facility in which less than 100% of the trace deer that department records indicate were received by the facility are for whatever reason (including but not limited to transfer, release, or escape) available for testing.

(2) Upon notification by the department of Category B status, a permittee shall:

(A) within seven days euthanize all trace deer in the breeding facility and submit test samples for each of those deer for post-mortem testing within one business day;

(B) inspect the facility daily for mortalities;

(C) immediately report all test-eligible mortalities that occur within the facility;

(D) immediately collect test samples from all test-eligible mortalities that occur within the facility and submit the samples for post-mortem testing within one business day of collection; and

(E) conduct ante-mortem testing of all test-eligible deer in the facility as specified in the following:

(i) for a facility for which the date of last known exposure is within the immediately preceding 18 months:

(I) submit rectal or tonsil biopsy samples collected on or after April 1, 2021; and

(II) submit tonsil biopsy samples collected no earlier than 24 months from the date of last known exposure;

(ii) for a facility for which the date of last known exposure is not within the immediately preceding 18 months and not at a time prior to the immediately preceding 36 months: collect and submit tonsil biopsy samples no earlier than 24 months from the date of last known exposure; and

(iii) for a facility for which the date of last known exposure occurred at a time after the immediately preceding 36 months: collect and submit

rectal or tonsil biopsy samples collected no earlier than 36 months from the date of last known exposure.

(3) In lieu of the testing requirements prescribed by paragraph (2)(A) and (2)(E) of this subsection, a permittee may request the development of a custom testing plan as provided in subsection (g) of this section; provided, however, the permittee must comply with subparagraphs (B) – (D) of this paragraph.

(4) Samples required by paragraph (2)(E) of this subsection shall be submitted no later than 45 days after the applicable last known exposure period as determined by the department.

(5) The department in consultation with TAHC may decline to authorize a custom testing plan under subsection (g) of this section if an epidemiological assessment determines that a custom testing plan is inappropriate.

(6) The department will not restore MQ status unless CWD “not detected” test results are obtained for all required sample submissions and the permittee has complied with all applicable requirements of this subsection and this division.

(f) Tier 1 facility.

(1) Upon notification by the department of Tier 1 status, a facility is automatically NMQ and the permittee shall :

(A) inspect the facility daily for mortalities;

(B) immediately report all test-eligible deer mortalities that occur within the facility; and

(C) immediately collect test samples from all test-eligible deer mortalities that occur within the facility and submit for post-mortem testing within one business day of collection.

(2) A permittee may request the development of a custom testing plan as provided in subsection (g) of this section; provided, however, the permittee must comply with the provisions of paragraph (1)(A) – (C) of this subsection.

(3) The department will not restore MQ status unless the permittee has complied with all applicable requirements of this subsection and this division, and any one of the following:

(A) post-mortem results of “not detected” have been submitted for every exposed deer received from a trace facility; or

(B) the department has restored MQ status to all trace facilities from which deer were received; or

(C) the permittee has conducted ante-mortem testing as specified in subsection (e)(2)(E) of this section; or

(D) the permittee has conducted testing as specified in compliance with the provisions of a custom testing plan under the provisions of subsection (g) of this section to the satisfaction of the department and TAHC.

(4) The department in consultation with TAHC may decline to authorize a custom testing plan under subsection (g) of this section if an epidemiological assessment determines that a custom testing plan is inappropriate.

(g) Custom Testing Plan. Within seven days of being notified by the department that a breeding facility has been designated a Category A, Category B, or Tier 1 facility, a permittee may, in lieu of meeting the applicable testing requirements of subsections (d) – (f) of this subsection, request the development of a custom testing plan by the department in consultation with TAHC based upon an epidemiological assessment conducted by the department and TAHC. A custom testing plan under this subsection is not valid unless it has been approved by the department and TAHC.

(1) The department shall temporarily suspend the applicable testing provisions of subsections (d)(2)(A) and (e)(2)(A) and (E) of this section while the epidemiological assessment and custom testing plan development under this subsection take place.

(2) Upon the development of a custom testing plan under the provisions of this subsection, the department shall provide the permittee with a copy of the custom testing plan and the permittee shall, within seven days:

(A) agree in writing to comply with the provisions of the custom testing plan; or

(B) notify the department in writing that the permittee declines to participate in the custom testing plan.

(C) If a permittee chooses to decline participation in a custom testing plan under this subsection, the provisions of subsections (d)(2)(A) and (e)(2)(A) and (E) of this section take effect as of the date of the notification required by subparagraph (B) of this paragraph and all time-dependent calculations of those subsections begin.

(D) If a permittee agrees in writing to comply with the provisions of a custom testing plan under this subsection, the custom testing plan replaces the testing provisions of subsections (d)(2)(A) and (e)(2)(A) and (E) of this section.

(3) A breeding facility designated by the department as Category A, Category B, or Tier 1 is NMQ as of the date of such notification and remains NMQ until the provisions of the custom testing plan under this subsection have been satisfied.

(4) If for any reason the permittee does not comply with the provisions of a custom testing plan under this subsection, the provisions of subsections (d)-(f) of this section resume applicability.

(5) The terms of a custom testing plan under this subsection are non-negotiable and final.

(h) Release of breeder deer.

(1) No person may transfer a test-eligible breeder deer to a release facility or cause or allow a breeder deer to be transferred to a release facility unless an ante-mortem test on rectal or tonsil tissue collected from the deer within the six

months immediately preceding the release has been returned with test results of “not detected.”

(2) A facility from which deer are transferred in violation of paragraph (1) of this subsection becomes automatically NMQ and any further transfers are prohibited until the permittee has conducted ante-mortem testing as specified in writing by the department.

(i) Violations and Penalties. In addition to any other conduct punishable as a violation of this subchapter or the Parks and Wildlife Code, it is an offense for any person to fail to abide by any provision of this section, a permit provision, a herd plan provision, or a provision of a custom testing plan developed under subsection (g) of this section.