

DEER BREEDER/CWD PERMIT RULES
EMERGENCY RULE EXTENSION
ADOPTION PREAMBLE

1. Introduction.

Pursuant to Parks and Wildlife Code, §12.027, and Government Code, §2001.034, the executive director of the Texas Parks and Wildlife Department (the department) adopts, on an emergency basis, a 60-day extension of the effectiveness of new §§65.90 - 65.93, concerning Disease Detection and Response, adopted on an emergency basis on August 18, 2015 and published in the September 4, 2015, issue of the *Texas Register* (40 TexReg 5566).

Pursuant to Government Code, §2001.034 (the Texas Administrative Procedure Act), emergency rules may initially be in effect for no longer than 120 days, but may be extended for an additional 60 days. In the notice of adoption of the emergency rules, the department stated its intent to also publish proposed rules pursuant to the Administrative Procedure Act's notice and comment rulemaking process. The department published interim proposed rules in the October 2, 2015, issue of the *Texas Register* (40 TexReg 6856) and those rules were approved for adoption, with changes, by the Texas Parks and Wildlife Commission (Commission) in a duly noticed meeting on November 5, 2015.

The extension of the emergency rules is necessary to enable their effectiveness to continue until the adoption of the interim rules can be filed and take effect, which will take place prior to the expiration of the 60-day extension. The interim rules will replace the emergency rules and the emergency rules will be withdrawn simultaneously upon the effectiveness of the interim rules. Therefore, the entirety of the 60-day extension will not be necessary.

As noted in the original adoption of the emergency rules, the emergency rules are constituted as new Division 2 within Chapter 65, Subchapter B, entitled Chronic Wasting Disease - Movement of 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 into the wild. To the extent that any provision of the new division conflicts with any other provision of Chapter 65, the new division prevails, except as noted.

For the reasons explained in this preamble, pursuant to Parks and Wildlife Code, §12.027 and Government Code, §2001.034, the department's executive director has determined that the presence of CWD continues to pose an immediate danger to white-tailed and mule deer, which are species authorized to be regulated by the department, and that an extension of the original emergency adoption is necessary to address this immediate danger.

On June 30, 2015, the department received confirmation that a two-year-old white-tailed deer held in a deer breeding facility in Medina County ("index facility") had tested positive for chronic wasting disease (CWD). Subsequent testing confirmed the presence of CWD in additional white-tailed deer at the index facility. The source of the CWD at the index facility is unknown at this time. Within the last five years, the index facility accepted deer from 30 other Texas deer breeders and transferred 835 deer to 147 separate sites (including 96 deer breeding facilities, 46 release sites, and two Deer Management Permit (DMP) facilities in Texas, as well as two destinations in Mexico). A DMP is a permit issued by the department under rules adopted pursuant to Parks and Wildlife Code, Chapter 43, Subchapters R and R-1, that allows the temporary possession of free-ranging white-tailed or mule deer for breeding purposes. 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, representing approximately 30% of the total number of deer breeders in the state.

The emergency rules impose CWD testing requirements and movement restrictions for white-tailed deer and mule deer held under the authority of deer breeder's permits issued by the department. The new rules are a result of cooperation between the department and the Texas Animal Health Commission (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).

CWD is a fatal neurodegenerative disorder that affects some cervid species, including white-tailed deer, mule deer, elk, red deer, sika, 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 commonly known as “Mad Cow Disease”), and variant Creutzfeldt-Jakob Disease (vCJD) 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; however, there is no scientific evidence to indicate that CWD is transmissible to humans. What is known is that CWD is invariably fatal, and is transmitted both directly (through deer-to-deer contact) and indirectly (through environmental contamination). Moreover, a high prevalence of the disease in wild populations correlates with deer population declines and there is evidence that hunters tend to avoid areas of high CWD prevalence. The implications of CWD for Texas and its multi-billion dollar ranching, hunting, and wildlife management economies are expected to be significant, unless contained and controlled.

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 the Texas Animal Health Commission (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 among other things require deer harvested in a specific geographical area to be presented at check stations to be tested for CWD.

The department has been concerned for over a decade about the possible emergence of CWD in wild and captive deer populations in Texas. Since 2002, more than 28,209 “not detected” CWD test results were obtained from free-ranging (i.e., not breeder) deer in Texas. Additionally, deer breeders have submitted 12,759 “not detected” test results to the department. The intent of the new emergency rules is to reduce the probability of CWD being spread from facilities where it might exist and to increase the probability of detecting CWD if it does exist.

The new emergency rules extended herein set forth specific testing requirements for deer breeders, which would have to be satisfied in order to move deer to other deer breeders or for purposes of release. The new emergency rules also impose similar testing requirements on sites where breeder deer are liberated (release sites). The other significant component of the rules is that they restrict the release of breeder deer solely to enclosures surrounded by a fence of at least seven feet in height and that is capable of retaining deer at all times. Because deer held under deer breeder’s permits are frequently liberated for stocking and/or hunting purposes (27,684 in 2014), the potential for disease transmission to free-ranging deer is significant, given that the source of CWD in the index facility is unknown and the large number of deer that have been moved to other breeding facilities and/or released to the wild.

The extension of the current emergency action is necessary to protect the state's white-tailed and mule deer populations, as well as the associated hunting and deer breeding industries. To minimize the severity of biological and economic impacts resulting from CWD, the rules implement a more rigorous testing protocol within certain deer breeding facilities and at certain release sites. The new emergency rules allow most breeder deer to continue to be released because the department believes that the need to protect free-ranging populations must be balanced with the interests of the more than 1,300 deer breeders in the state.

The rules are adopted and extended on an emergency basis under Parks and Wildlife Code, §12.027, which authorizes 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. In addition, Parks and Wildlife Code, Chapter 43, Subchapter L, authorizes the department to regulate the possession of white-tailed and mule deer for scientific, management, and propagation purposes.

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

(1) Accredited testing facility--A laboratory approved by the United States Department of Agriculture to test white-tailed deer or mule deer for CWD.

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

(3) CWD--chronic wasting disease.

(4) CWD-positive facility--A facility where CWD has been confirmed.

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

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

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

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

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

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

(9) Exposed deer--A white-tailed deer or mule deer that:

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

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

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

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

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

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

(14) Originating facility-- A facility that is registered in TWIMS and is authorized to transfer breeder deer.

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

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

(17) Reporting year--For a deer breeder, the period of time from April 1 of one

calendar year to March 31 of the next calendar year.

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

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

(20) Tier 1 facility--A deer breeding facility that has:

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

(B) transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility.

(21) TAHC--Texas Animal Health Commission.

(22) 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).

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

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

§65.91. General Provisions.

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

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

(c) Notwithstanding any other provision of this chapter, no person shall introduce into or remove breeder deer from or allow or authorize breeder deer to be introduced into or removed from any deer breeding facility for which a CWD test result

of 'detected' has been obtained from an accredited testing facility. The provisions of this subsection take effect immediately upon the notification of a CWD 'detected' test result for a deer breeding facility, and continue in effect until the department expressly authorizes the resumption of permitted activities at that facility.

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

(e) A breeding facility or release site that receives breeder deer from an originating facility of lower status automatically assumes the status of the originating facility and becomes subject to the testing and release requirements of this division at that status.

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

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

(h) A person who is subject to the provisions of this division shall comply with the provisions of TAHC regulations at 4 TAC Chapter 40 (relating to Chronic Wasting Disease) that are applicable to white-tailed or mule deer.

(i) The provisions of this division that affect TC 1 facilities take effect immediately; the remaining provisions of this division take effect upon notification of deer breeders by the department or at 11:59 p.m. on August 24, 2015, whichever is sooner.

§65.92. Transfer Categories and Requirements.

(a) General.

(1) A breeding facility that is a TC 1, Transfer Category 2 (TC 2), or TC 3

facility may transfer breeder deer under a valid transfer permit that has been activated and approved by the department as provided in §65.610(e) of this title (relating to Transfer of Deer) to:

(A) another breeding facility;

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

(C) a DMP facility under Chapter 65, Subchapter D of this title (relating to Deer Management Permits); or

(D) to another person for nursing purposes.

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

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

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

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

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

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

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

(b) Types of Facilities.

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

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

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

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

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

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

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

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

(3) TC 3.

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

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

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

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

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

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

§65.93. Release Sites - Qualifications and Testing Requirements.

(a) General.

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

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

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

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

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

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

(i) the name and hunting license or driver's license number of the person who harvested the deer;

(ii) the date the deer was harvested;

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

(iv) any alphanumeric identifier tattooed on the deer;

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

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

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

(E) By not later than March 15 of each year, the owner of a release

site shall submit the contents of the daily harvest log to the department via TWIMS or other format authorized by the department.

(4) Release site status cannot be altered by the sale or subdivision of a property if the purpose of the sale or subdivision is to avoid the requirements of this division.

(5) The owner of a release site agrees, by consenting to the release of breeder deer on the release site, to submit all required CWD test results to the department as soon as possible but not later than May 1, 2016. Failure to comply with this paragraph will result in the release site being declared ineligible to be a destination for future releases for a period of five years.

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

(b) Types of Release Sites

(1) Class I.

(A) A release site is a Class I release site if after July 1, 2015, it:

- (i) is not a Tier 1 facility; and
- (ii) receives breeder deer only from TC 1 facilities.

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

(2) Class II.

(A) A release site is a Class II release site if, after July 1, 2015, it:

- (i) is not a Tier 1 facility;
- (ii) receives any breeder deer from TC 2 facility; and
- (iii) receives no deer from a TC 3 facility.

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

(i) if deer are hunter-harvested, a number of deer equivalent to 50 percent of the number of breeder deer released at the site between the effective date of this division and the end of any open season for deer established for the site under

this chapter; or

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

(C) If any hunter-harvested deer were breeder deer released between the effective date of this division and the end of any open season for deer established for the site under this chapter, 50 percent of those hunter-harvested deer must be submitted for CWD testing, which may be counted to satisfy the requirements of subparagraph (B) of this paragraph.

(d) Class III.

(1) A release site is a Class III release site if, after July 1, 2015, it receives deer from an originating facility that is a TC 3 facility.

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

(A) 100% of all hunter-harvested deer; or

(B) one hunter-harvested deer per breeder deer released between the effective date of this division and the end of any open season for deer established for the site under this chapter.