

## TEXAS PARKS AND WILDLIFE DEPARTMENT

### EXECUTIVE DIRECTOR ORDER NO. 021-008

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 emergency rule was filed on June 22, 2021 and subsequently was replaced by a modified emergency rule filed on July 19, 2021 and published in the August 6, 2021, issue of the *Texas Register* (46 TexReg 4759). The modified rule was filed with a designated expiration date of October 19, 2021 in order to preserve a total of 120 days of effectiveness, which is the statutory limit for the period of effectiveness of an initial emergency rule. Under the provisions of Government Code, §2001.034, a state agency may extend the effectiveness of an emergency rule for an additional 60 days, which was effected on October 22, 2021 (46 TexReg 7113).

The Executive Director finds that the impacts of a national shortage of the chemical reagent used in disease testing required by the rule presents the possibility of unforeseen threats to white-tailed and mule deer populations as a result of the regulated community being unable to comply with the emergency rule in effect.

Therefore, finding that the immediate danger to both captive and free-ranging white-tailed and mule deer populations continues to exist, the Executive Director hereby ORDERS this replacement emergency rule be published in the *Texas Register* and has specified an expiration date of December 18, 2021 in order to preserve the maximum 180-day period of effectiveness established by statute for emergency filings.

This order is issued pursuant to §12.027 of the Texas Parks and Wildlife Code and §2001.034 of the Texas Government Code and is effective immediately.

Signed this the 30<sup>th</sup> day of November, 2021.



Carter Smith

Executive Director

Texas Parks and Wildlife Department

**DEER BREEDER RULES**  
**EMERGENCY ADOPTION PREAMBLE**

1. Introduction.

The Texas Parks and Wildlife Department adopts, on an emergency basis, new §65.100, concerning Emergency Provisions. The emergency action replaces the emergency rule filed on July 19, 2021 (46 TexReg 4759) and extended on October 22, 2021 (46 TexReg 7113). This action is necessary to alter the current emergency rule to address the impacts of a national shortage of the chemical reagent used in disease testing required by the rule.

The emergency rule was adopted in response to the threat of chronic wasting disease (CWD), 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 created an unprecedented situation because they occurred at a scale that is orders of magnitude greater than earlier instances of detection encountered by the department.

The department has determined that if the regulated community is unable to comply with the disease testing requirements of the rule there could be significant unforeseen consequences that further threaten deer populations in the state.

The department has specified an expiration date of December 18, 2021 for the expiration of this replacement emergency adoption in order to preserve the maximum 180-day period of effectiveness established by statute for emergency filings.

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 MO 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 NMO 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 MO 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 MO 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) Upon notification of the department by the Texas Veterinary Medical Diagnostic Laboratory (TVMDL) that a national shortage of the chemical reagent used in immunohistochemistry testing for CWD prevents TVMDL from performing the ante-mortem testing required by this section, the department will notify permittees that test-eligible breeder deer may be transferred to a release facility; provided, however no deer may be transferred under the provisions of this paragraph unless the permittee has submitted and TVMDL has received a valid ante-mortem test sample collected from each deer within six months immediately preceding the release.

(3) Upon notification of the department by TVMDL that sufficient chemical reagent is available to perform the ante-mortem testing required by this section, the department will notify permittees that the provisions of paragraph (2) of this section have ceased effect.

(4) A facility from which deer are transferred in violation of paragraph (1) or (2) of this subsection becomes automatically NMO 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.**