TEXAS REGISTER

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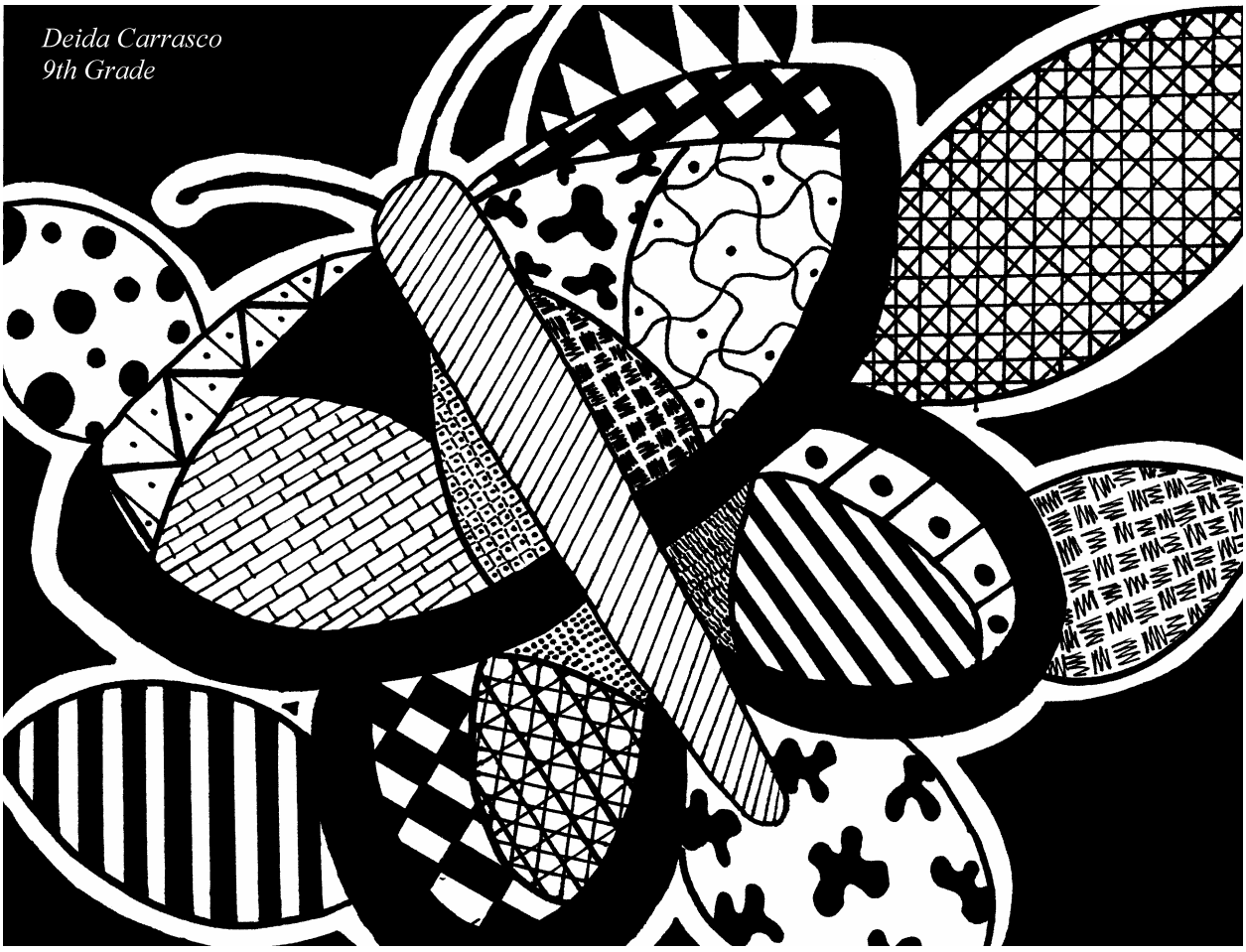

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

WITHDRAWN RULES

ADOPTED RULES

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for April 13, 2006

Appointed to the University of Houston System Board of Regents for a term to expire August 31, 2011, Jim P. Wise of Houston (replacing Morrie Abramson of Houston whose term expired).

Appointed to the University of Houston System Board of Regents for a term to expire August 31, 2011, Welcome Wade Wilson, Sr. of Houston (replacing Thad Smith of Sugar Land whose term expired).

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2011, James P. Maloney of El Paso. Mr. Maloney is being reappointed.

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2011, Samuel Loyd Neal, Jr. of Corpus Christi. Mr. Neal is being reappointed.

Appointed to the Texas Seed and Plant Board for a term to expire October 6, 2006, Kelly A. Book of Bastrop. (Reappointment).

Appointed to the Texas Seed and Plant Board for a term to expire October 6, 2007, Aubrey James Allison of Buchanan Dam (Reappointment).

Appointed to the Texas Seed and Plant Board for a term to expire October 6, 2007, Ellen B. Peffley of Lubbock (Replacing Dick Auld whose term expired).

Appointed to the Texas Seed and Plant Board for a term to expire October 6, 2007, Mark A. Hussey of Bryan (Reappointment).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2007, William A. Faulk, Jr. of Brownsville (Reappointment).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2007, Larry D. Kokel of Walburg (Reappointment).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2007, James B. Ratliff of Garland (replacing Wayne Mayo of Richardson whose term expired).

Appointed to the Texas Appraiser Licensing and Certification Board for a term to expire January 31, 2008, Shirley J. Ward of Alpine (Reappointment).

Appointed to the Texas Youth Commission for a term to expire August 31, 2011, Juan Sanchez Munoz, Ph.D. of Lubbock (replacing Stephen Fryar of Brownwood whose term expired).

Appointed to the Advisory Board of Athletic Trainers for a term to expire January 31, 2007, David R. Schmidt, M.D. of San Antonio (replacing D. Leilani Cronin who resigned).

Appointed to the Advisory Board of Athletic Trainers for a term to expire January 31, 2009, David J. Weir of College Station (replacing T. Ross Bailey whose term expired).

Appointed to the Farm and Ranch Lands Conservation Council, pursuant to SB 1273, 79th Legislature, Regular Session, for a term to expire February 1, 2007, Thomas R. Kelsey of Houston.

Appointed to the Farm and Ranch Lands Conservation Council, pursuant to SB 1273, 79th Legislature, Regular Session, for a term to expire February 1, 2009, R. Neal Wilkins, Ph.D. of College Station.

Appointed to the Farm and Ranch Lands Conservation Council, pursuant to SB 1273, 79th Legislature, Regular Session, for a term to expire February 1, 2011, Glen David Webb of Abilene.

Appointed to the Farm and Ranch Lands Conservation Council, pursuant to SB 1273, 79th Legislature, Regular Session, for a term to expire February 1, 2011, Bob McCan of Victoria.

Appointments for April 17, 2006

Appointed as Judge of the 315th Judicial District Court, for a term until the next General Election and until his successor shall be duly elected and qualified, Michael Haygood Schneider, Jr. of Houston. Mr. Schneider is replacing Judge Kent Ellis who resigned, effective April 30, 2006.

Appointed as District Attorney for the 70th Judicial District, Ector County, for a term until the next General Election and until his successor shall be duly elected and qualified, Robert Newton Bland, IV of Odessa. Mr. Bland is replacing John Smith who was appointed as Judge of the 161st Judicial District Court.

Appointed to the Texas Agricultural Finance Authority Board of Directors for a term to expire January 1, 2007, Darwin Dallas DeWees of San Angelo (Reappointment).

Appointed to the Texas Agricultural Finance Authority Board of Directors for a term to expire January 1, 2007, Ruben Bosquez of McAllen (Reappointment).

Appointed to the Texas Agricultural Finance Authority Board of Directors for a term to expire January 1, 2007, Susan Kennedy of Nacogdoches (Reappointment).

Appointed to the Texas Agricultural Finance Authority Board of Directors for a term to expire January 1, 2008, Sydney Michael Golden of Lake Jackson (Reappointment).

Designating Sydney Golden of Lake Jackson as chair of the Texas Agricultural Finance Authority Board of Directors for a term at the pleasure of the Governor. Mr. Golden is replacing Jane Anne Stinnett as chair.

Appointed to the Texas Medical Board District Three Review Committee for a term to expire January 15, 2012, Mark Maberry, M.D. of Abilene (replacing Lonnie Vickers whose term expired).

Appointed to the Texas Medical Board District Four Review Committee, pursuant to SB 419, 79th Legislature, Regular Session, for a term to expire January 15, 2008, Noe Fernandez of McAllen.

Appointed to the Finance Commission of Texas for a term to expire February 1, 2012, Johnny Lewis Snider of Center (Reappointment).

Appointed to the Finance Commission of Texas for a term to expire February 1, 2012, Mike Bradford of Midland (Reappointment).

Appointed to the Texas State Board of Examiners of Marriage and Family Therapists for a term to expire February 1, 2009, Michael R. Puhl of McKinney (replacing Simon Aguilar of Lufkin who no longer qualifies).

Designating Govind B. Nadkarni of Corpus Christi as Presiding Officer of the State Board of Professional Engineers for a term at the pleasure of the Governor. Mr. Nadkarni will replace James Nichols as presiding officer.

Appointed to the State Board of Professional Engineers for a term to expire September 26, 2009, James Greer of Roanoke (replacing James Nichols of Fort Worth whose term expired).

Appointed to the State Board of Professional Engineers for a term to expire September 26, 2011, Kem Bennett, Ph.D. of College Station (replacing Robert Sweazy of Lubbock whose term expired).

Rick Perry, Governor

TRD-200602239

THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code, Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the *Texas Register*. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. You may view copies of opinions at http://www.oag.state.tx.us. To request copies of opinions, please fax your request to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Request for Opinions

RQ-0473-GA

Requestor:

The Honorable Tamara Y.S. Keener

Gillespie County Attorney

125 West Main, Suite L41

Fredericksburg, Texas 78624

Re: Whether a county attorney may use the "hot check" fund established by article 102.007, Code of Criminal Procedure, to sponsor a children's book (Request No. 0473-GA)

Briefs requested by May 13, 2005

For further information, please access the website at www.oag.state.tx.us. or call the Opinion Committee at (512) 463-2110.

TRD-200602244
Stacey Schiff
Deputy Attorney General
Office of the Attorney General
Filed: April 19, 2006

♦ ♦ ♦

Opinions

Opinion No. GA-0422

Mr. Carl Reynolds

Administrative Director

Office of Court Administration

Post Office Box 12066

Austin, Texas 78711-2066

Re: Confidentiality of grand and petit jury lists (RQ-0380-GA)

S U M M A R Y

Neither a clerk nor a judge has a duty to keep a grand jury list confidential after the clerk, in order to summon the prospective grand jurors, has opened an envelope containing their names. Until that time, a clerk is specifically obligated to maintain sealed the list of prospective grand jurors.

Neither a clerk nor a judge has a duty to keep petit jury lists confidential from any party, counsel to a party, or third party at any point in time after the clerk, in order to summon the prospective petit jurors, has opened the envelope containing the names of prospective petit jurors.

Opinion No. GA-0423

The Honorable D. Matt Bingham

Smith County Criminal District Attorney

Smith County Courthouse

100 North Broadway, Fourth Floor

Tyler, Texas 75702

Re: Whether a physician, psychiatrist, licensed professional counselor, licensed marriage and family therapist, or social worker must be licensed by the Council on Sex Offender Treatment to provide rehabilitation services or act as a sex offender treatment provider (RQ-0405-GA)

S U M M A R Y

Chapter 110 of the Occupations Code requires a person to have one of the professional licenses listed in section 110.001(7) as well as a sex offender treatment provider license under section 110.301(a) before the person may render rehabilitation services or provide mental health or medical services for the rehabilitation of sex offenders. A person who was registered as a sex offender treatment provider as of September 1, 2005, is considered to hold a license under chapter 110. Whether the patient is a "sex offender" as defined and whether the treatment or program is for a problem that "may relate or contribute" to the offender's criminal or paraphiliac problem is a matter for the treating professional's determination within the bounds of chapter 110's express terms and the rules of the Council on Sex Offender Treatment.

For further information, please access the website at www.oag.state.tx.us. or call the Opinion Committee at (512) 463-2110.

TRD-200602240
Stacey Schiff
Deputy Attorney General
Office of the Attorney General
Filed: April 19, 2006

♦ ♦ ♦

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 1. OFFICE OF THE GOVERNOR

CHAPTER 3. CRIMINAL JUSTICE DIVISION

The Office of the Governor, Criminal Justice Division (CJD), proposes the amendment of Subchapter A §§3.1, 3.19; Subchapter B §§3.75, 3.79, 3.81, and 3.87; Subchapter C §§3.401, 3.701, 3.703, 3.705, 3.711, 3.717, 3.1103, 3.1301, 3.1303, and 3.1305; Subchapter D §3.2009; Subchapter E §§3.2511, 3.2521, and 3.2523; and Subchapter F §3.2601.

CJD proposes the addition of Subchapter A §3.25.

CJD proposes the repeal of Subchapter C §§3.615, 3.719, 3.721, 3.723, 3.725, 3.801, 3.803, 3.805, 3.809, and 3.811; and Subchapter D §3.2007.

The proposed amendment to §3.1 enables CJD to more efficiently and effectively administer grant funds by allowing CJD to apply recent changes to its administrative rules (which have been adopted in response to changes in state and federal statutes, rules, regulations and guidelines) to current grant projects, if grantees agree to do so.

The proposed amendment to §3.19 corrects the citation for the OMB Circular and the name of the Office of Justice Programs Financial Guide.

The proposed amendment to §3.75: (1) allows CJD to more effectively and efficiently administer grant funds by allowing grant funds to be used to provide overtime pay if such use is permitted by applicable state and federal law, complies with the grant requirements for the state or federal funding source, and is reasonable and cost-effective considering the amount of funds available in the state or federal funding source; and (2) clarifies that the leave requirement applies to compensation for accrued leave paid to staff members leaving employment.

The proposed amendment to §3.79 removes the provision that was applicable to projects funded under the federal Byrne Formula Grant Program, which is no longer funded by the federal government.

The proposed amendment to §3.81: (1) removes unnecessary language regarding grant adjustments; (2) replaces the provision relating to the federal Law Enforcement Block Grant program, which is no longer funded by the federal government, with a provision relating to the federal Edward Byrne Memorial Justice Assistance Grant Program; and (3) removes the language regarding the use of grant funds to purchase weapons and other military type equipment because Part III, Chapter 16 of the Office of Justice Programs Financial Guide already prohibits the use of grant funds to purchase armored vehicles, explosive devises, and other military-type equipment.

The proposed amendment to §3.87 prohibits grantees from carrying forward program income from one grant year to the next to allow CJD to more efficiently and effectively manage state and federal funds that earn program income.

The proposed amendment to §3.401 updates the language of this section to reflect the current federal requirements for this funding source.

The proposed amendment to §§3.701, 3.703, 3.705, and 3.711 replace provisions relating to the federal Byrne Formula Grant Program, which is no longer funded by the federal government, with provisions relating to the federal Edward Byrne Memorial Justice Assistance Grant Program. The new provisions adopt the federal requirements for the Edward Byrne Memorial Justice Assistance Grant Program.

The proposed amendment to §3.717 removes provisions relating to the federal Byrne Formula Grant Program, which is no longer funded by the federal government, and establishes requirements for the use of confidential funds under the Edward Byrne Memorial Justice Assistance Grant Program.

The proposed amendment to §3.1103 updates the language of this section to reflect the current federal requirements for the Residential Substance Abuse Treatment Grant Program.

The proposed amendment to §3.1301 updates the language of this section to reflect the current citation for the federal legislation applicable to the Coverdell Forensic Sciences Program.

The proposed amendment to §3.1303 and §3.1305 update the language of this section to reflect the current federal requirements for the Coverdell Forensic Sciences Program.

The proposed amendment to §3.2009 removes provisions that were applicable to projects funded under the federal Byrne Formula Grant Program, which is no longer funded by the federal government.

The proposed amendment to §3.2511 removes provisions that were applicable to projects funded under the federal Local Law Enforcement Block Grant Program, which is no longer funded by the federal government.

The proposed amendment to §3.2521 clarifies that CJD may specify the length of the liquidation period for certain grant projects so that grant funds are expended within the grant period specified in the federal grant award documentation.

The proposed amendment to §3.2523: (1) clarifies the language of this section to make it easier to understand; and (2) ensures that CJD is immediately notified if any records are seized from a grantee by a law enforcement agency, or a state or federal agency.

The proposed amendment to §3.2601 clarifies the types of actions that must be resolved by a grantee.

The proposed addition of §3.25 allows CJD to suspend any requirement in this chapter upon a showing of good cause to ensure the efficient and effective use of state and federal grant funds.

The proposed repeal of §3.615 removes the mandatory training requirement because the training is no longer necessary for grantees under the Crime Stoppers Assistance Fund.

The proposed repeal of §§3.719, 3.721, 3.723, and 3.725 remove provisions relating to the federal Byrne Formula Grant Program, which is no longer funded by the federal government.

The proposed repeal of §§3.801, 3.803, 3.805, 3.809, and 3.811 remove provisions relating to the federal Local Law Enforcement Block Grant Program, which is no longer funded by the federal government.

The proposed repeal of §3.2007 removes provisions that were applicable to projects funded under the federal Byrne Formula Grant Program, which is no longer funded by the federal government.

Scott Bingaman, Director of Operations for CJD, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Bingaman has also determined that for the first five-year period that the sections are in effect the public benefit anticipated as a result of enforcing the sections will be more efficient processes and procedures and the current rules will be more easily understood. There will be no anticipated economic cost to persons or businesses for complying with the proposed rules.

Comments on the proposed amendments, additions, and repeals may be submitted to Heather Morgan, Office of the Governor, Criminal Justice Division, at hmorgan@governor.state.tx.us; P.O. Box 12428, Austin, Texas 78711; or (512) 463-1919. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

SUBCHAPTER A. GENERAL GRANT PROGRAM PROVISIONS

1 TAC §§3.1, 3.19, 3.25

The amendment and addition of these rules is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended and added rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment and addition of these rules.

§3.1. Applicability.

Subchapters A through F of this chapter apply to all applications for funding and grants submitted to the Criminal Justice Division (CJD), Office of the Governor. A grantee must comply with the provisions of Subchapters A through F in effect on the date the grant is awarded by CJD, unless a subsequent effective date is specified by CJD in an original grant award or a grant adjustment. Subchapter A covers the general provisions for grant funding. Subchapter B addresses general eligibility and budget rules for grant funding. Subchapter C outlines specific eligibility and budget rules applicable to various funding sources available to CJD; these rules are in addition to all other general rules in this chapter. Subchapter D provides rules detailing the conditions CJD may place on grants. Subchapter E sets out the rules related to administering grants. Subchapter F specifies rules regarding program monitoring and audits. Subchapter G details the rules regarding CJD advisory boards. Subchapter H addresses Crime Stoppers program certification. Subchapter I adopts the Memorandum of Understanding between CJD and the Texas Department of Public Safety.

§3.19. Adoptions by Reference.

(a) (No change.)

(b) CJD adopts by reference the rules and documents listed below that relate to the administration of CJD grants:

(1) (No change.)

(2) Office of Justice Programs[~~, OJP~~] Financial Guide. These requirements apply to grants of federal funds in which the source of the federal funds is the U.S. Department of Justice.

(3) (No change.)

(4) Common Rule for OMB Circular No. A-102: Grants and Cooperative Agreements with State and Local Governments. See 28 C.F.R. §66. These requirements apply to grants from federal funds to state agencies, cities, counties, community supervision and corrections departments, COGs, and juvenile boards.

(5) - (10) (No change.)

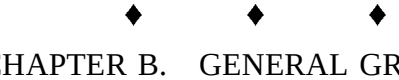
§3.25. Suspension of Rules.

Except where prohibited by state or federal statute, rule, regulation, or guideline, the executive director may suspend any requirement in this chapter upon a showing of good cause.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 17, 2006.

TRD-200602183
David Zimmerman
Assistant General Counsel
Office of the Governor
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 463-1919



SUBCHAPTER B. GENERAL GRANT PROGRAM POLICIES
DIVISION 2. GRANT BUDGET REQUIREMENTS

1 TAC §§3.75, 3.79, 3.81, 3.87

The amendment of these rules is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation

for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of these rules.

§3.75. Personnel.

(a) - (b) (No change.)

(c) Upon receipt of approval from CJD, a grantee [~~Grantees~~] may [~~not~~] use grant funds to provide overtime pay in accordance with the grantee's policy, unless such use is otherwise prohibited by law. [~~Overtime pay is remuneration for hours worked in excess of full-time on a CJD grant project. Grants under the Drug Court Program and the Local Law Enforcement Block Grant Program are exempt from this subsection. Grants under the Byrne Formula Grant Program are exempt from this subsection and instead CJD may approve requests to pay overtime in accordance with agency policy only for law enforcement officers assigned to a multi-jurisdictional task force and only from program income that is not used toward the minimum cash match requirement.~~]

(d) Grantees may [~~not carry forward accrued leave from one grant period to another. In accordance with a grantee's or subgrantee's policy, grantees may~~] use grant funds to compensate staff members leaving employment for accrued leave (which includes, but is not limited to, annual leave, compensatory time, and sick leave) in accordance with the grantee's policy. These payments may only fund leave earned during the current grant period. The proportion of grant funds paid for leave cannot exceed the proportion of grant funds used to pay the staff member's salary.

§3.79. Transportation, Travel, and Training.

(a) Grant funds used for travel expenses must be limited to the grantee agency's established mileage, per diem, and lodging policies. Federal regulations applicable to the relevant funding source may limit mileage reimbursement rates. If a grantee does not have established mileage, per diem, and lodging policies, then the grantee must use state travel guidelines. [~~Funds requested by multi-jurisdictional task forces for meals and lodging are allowable only for travel to points at least 50 miles from the location to which task force personnel are assigned.~~]

(b) - (c) (No change.)

§3.81. Equipment.

(a) Applicants must submit with their grant applications an itemized list of all proposed equipment purchases to CJD for approval. Grantees must request any additional equipment purchases through grant adjustments. Grantees are not authorized to purchase any equipment until they have received written approval to do so from CJD through an [~~the~~] original grant award or a [~~subsequent~~] grant adjustment [~~notice~~]. Decisions regarding equipment purchases are made based on whether or not the grantee has demonstrated that the requested equipment is necessary, essential to the successful operation of the grant project, and reasonable in cost.

(b) CJD will not approve grant funds to purchase vehicles or equipment for governmental agencies that are for general agency use. The Edward Byrne Justice Assistance Grant Program [~~Local Law Enforcement Block Grant program~~] and the County Essential Services Grant Program [~~program~~] are exempt from this subsection.

(c) In accordance with §3.2013 of this chapter, grantees must submit to CJD a CJD-prescribed Procurement Questionnaire when a procurement is expected to exceed $100,000 or upon CJD request [~~CJD will not approve grant funds for the purchase of weapons, ammunition, explosives, or military vehicles~~].

[~~(d) In accordance with §3.2013 of this chapter, grantees must submit to CJD a CJD-prescribed Procurement Questionnaire when a procurement is expected to exceed $100,000 or upon CJD request.~~]

§3.87. Program Income.

(a) (No change.)

(b) Program income may only be used for allowable project costs as reflected in an approved budget[~~, except as provided in subsection (c) of this section. Otherwise, grantees must refund program income to CJD~~].

(c) Grantees may not carry forward program income from one grant year to the next. Grantees must refund to CJD any program income remaining at the end of the grant period [~~CJD may require or allow a grantee receiving grant funds for a multi-jurisdictional drug task force project under the Byrne Formula Grant Program, or grant funds under the State Criminal Justice Planning (421) Fund to transfer the CJD portion of program income to another grant, grantee, agency, or to CJD~~].

(d) As provided in §3.3(12) of this chapter, all funds, accrued interest, and property awarded to a grantee under a forfeiture action represent program income [~~Grantees may not carry forward program income from one grant year to the next, except as provided by subsections (e) and (f) of this section~~].

[~~(e) A grantee receiving grant funds for a multi-jurisdictional drug task force project under the Byrne Formula Grant Program may request to carry forward program income obtained from forfeiture actions from one grant period to the next.~~]

[~~(f) A grantee receiving grant funds under the State Criminal Justice Planning (421) Fund may request to carry forward program income from one grant period to the next.~~]

[~~(g) A request to carry forward program income in accordance with subsections (e) and (f) of this section must be submitted to CJD with the grantee's final financial expenditure report. Program income may not be carried forward without written CJD approval. A grantee must report program income on its quarterly financial expenditure reports in a timely and accurate manner to be eligible to carry forward program income in accordance with subsections (e) and (f) of this section.~~]

[~~(h) Program income carried forward in accordance with subsections (e) and (f) of this section must be used to further the objectives of the grant project.~~]

[~~(i) As provided in §3.3(12) of this chapter, all funds, accrued interest, and property awarded to a grantee under a forfeiture action represent program income.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 17, 2006.

TRD-200602184
David Zimmerman
Assistant General Counsel
Office of the Governor
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 463-1919

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SUBCHAPTER C. FUND-SPECIFIC GRANT POLICIES

DIVISION 4. SAFE AND DRUG-FREE SCHOOLS AND COMMUNITIES ACT FUND

1 TAC §3.401

The amendment of this rule is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rule implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of this rule.

§3.401. Source and Purpose.

(a) - (c) (No change.)

(d) The purpose of this grant program is to support programs that [~~implement the following drug and violence prevention services~~]:

(1) prevent violence in and around schools [~~complementing and supporting local educational agency activities, including developing and implementing activities to prevent and reduce violence associated with prejudice and intolerance~~];

(2) prevent the illegal use of alcohol, tobacco and drugs [~~disseminating information about drug and violence prevention~~];

(3) involve parents and communities [~~developing and implementing community-wide drug and violence prevention planning and organizing~~]; and

(4) are coordinated with federal, state, school, and community efforts and resources to foster a safe and drug-free learning environment that supports student academic achievement. [~~fostering a safe and drug-free learning environment that supports academic achievement;~~]

[~~(5) preventing and reducing violence; the use, possession and distribution of illegal drugs; and delinquency;~~]

[~~(6) creating a well disciplined environment conducive to learning; and~~]

[~~(7) promoting the involvement of parents.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 17, 2006.

TRD-200602185
David Zimmerman
Assistant General Counsel
Office of the Governor
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 463-1919

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DIVISION 6. CRIME STOPPERS ASSISTANCE FUND

1 TAC §3.615

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the Office of the Governor or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of this rule is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The repeal of this rule implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the repeal of this rule.

§3.615. Mandatory Training.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 17, 2006.

TRD-200602186
David Zimmerman
Assistant General Counsel
Office of the Governor
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 463-1919

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DIVISION 7. EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM

1 TAC §§3.701, 3.703, 3.705, 3.711, 3.717

The amendment of these rules is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of these rules.

§3.701. Source and Purpose.

(a) All rules in this division relate to the Edward Byrne Memorial Justice Assistance [~~Formula~~] Grant Program. The funding agency for the source of these federal funds is the U.S. Department of Justice. Grantees must comply with the grant management standards adopted under §3.19 of this chapter.

(b) (No change.)

(c) The fund's purpose is to [~~reduce and~~] prevent [~~illegal drug activity, crime,~~] and control crime [~~violence and to improve the functioning of the criminal justice system~~].

§3.703. Project Requirements.

All projects must meet at least one of the following purpose areas:

(1) law enforcement programs [~~multi-jurisdictional task force projects that integrate federal, state and local drug law enforcement agencies and prosecutors for the purpose of enhancing interagency coordination, acquiring intelligence information, and facilitating multi-jurisdictional investigations. Multi-jurisdictional task forces must use the Criminal Law Enforcement Reporting Information System (CLERIS) and input task force drug intelligence information into the system. Multi-jurisdictional task force projects must be composed of law enforcement agencies located in no less than two contiguous counties within the State of Texas~~];

(2) prosecution and court programs [~~projects designed to target the domestic sources of controlled and illegal substances, such as precursor chemicals, diverted pharmaceuticals, clandestine laboratories, and cannabis cultivation~~];

(3) prevention and education programs [~~projects that will improve the operational effectiveness of law enforcement through the use of crime analysis techniques, street sales enforcement, schoolyard violator projects, and gang-related and low-income housing drug control projects~~];

(4) corrections and community corrections programs [~~law enforcement and prevention projects that address problems with gangs or youth who are at risk of becoming involved in gangs~~];

(5) drug treatment programs[~~financial investigation projects that target the identification of money-laundering operations and assets obtained through illegal drug trafficking, including the development of proposed model legislation, financial investigative training, and financial information-sharing systems~~]; or

(6) planning, evaluation, and technology improvements. [~~projects that improve the operational effectiveness of the court process by expanding prosecution, defender, and judicial resources and by implementing court delay-reduction programs;~~]

~~[(7) criminal justice information systems, including automated fingerprint identification systems, that assist law enforcement, prosecution, courts and corrections' organizations;]~~

~~[(8) innovative projects that demonstrate new and different approaches to the enforcement, prosecution, and adjudication of drug offenses and other serious crimes;]~~

~~[(9) drug control evaluation projects that state and local units of government may use to evaluate projects directed at state drug control activities;]~~

~~[(10) projects to develop and implement anti-terrorism training projects and to procure equipment for use by local law enforcement authorities;]~~

~~[(11) improving or developing forensic laboratory capabilities to analyze DNA for identification purposes;]~~

~~[(12) demand reduction education programs in which law enforcement officers participate;]~~

~~[(13) career criminal prosecution programs including the development of proposed model drug control legislation;]~~

~~[(14) programs designed to provide additional public correctional resources and improve the corrections system, including treatment in prisons and jails, intensive supervision programs, and long-range corrections and sentencing strategies;]~~

~~[(15) providing prison industry projects designed to place inmates in a realistic working and training environment which will enable them to acquire marketable skills and to make financial payments for restitution to their victims, for support of their own families, and for support of themselves in the institution;]~~

~~[(16) providing programs which identify and meet the treatment needs of adult and juvenile drug-dependent and alcohol-dependent offenders;]~~

~~[(17) developing and implementing programs which provide assistance to jurors and witnesses, and assistance (other than compensation) to victims of crimes;]~~

~~[(18) developing programs to improve drug control technology, such as pretrial drug testing programs, programs which provide for the identification, assessment, referral to treatment, case management and monitoring of drug-dependent offenders, and enhancement of state and local forensic laboratories;]~~

~~[(19) improving the criminal and juvenile justice system's response to domestic and family violence, including spouse abuse, child abuse, and abuse of the elderly;]~~

~~[(20) providing alternatives to prevent detention, jail, and prison for persons who pose no danger to the community;]~~

~~[(21) providing community and neighborhood programs that assist citizens in preventing and controlling crime, including special programs that address the problems of crimes committed against the elderly and special programs for rural jurisdictions;]~~

~~[(22) disrupting illicit commerce in stolen goods and property;]~~

~~[(23) improving the investigation and prosecution of white-collar crime (e.g., organized crime, public corruption crimes, and fraud against the government with priority attention to cases involving drug-related official corruption);]~~

~~[(24) developing and implementing anti-terrorism plans for deep draft ports, international airports, and other important facilities;]~~

~~[(25) addressing the problems of drug trafficking and the illegal manufacture of controlled substances in public housing;]~~

~~[(26) programs of which the primary goal is to strengthen urban enforcement and prosecution efforts targeted at street drug sales;]~~

~~[(27) prosecution of driving while intoxicated charges and the enforcement of other laws relating to alcohol use and the operation of motor vehicles;]~~

~~[(28) addressing the need for effective bindover systems for the prosecution of violent 16 and 17-year-old juveniles in courts with jurisdiction over adults for (certain enumerated) violent crime;]~~

~~[(29) enforcing child abuse and neglect laws, including laws protecting against child sexual abuse, and promoting programs designed to prevent child abuse and neglect;]~~

~~[(30) establishing or supporting cooperative programs between law enforcement and media organizations to collect, record, retain, and disseminate information useful in the identification and apprehension of suspected criminal offenders; or]~~

~~[(31) projects to improve the quality, timeliness, and credibility of forensic science services for criminal justice purposes.]~~

§3.705. Eligible Applicants.

State agencies, units of local government, tribal governments, and neighborhood or community-based nonprofit corporations [~~crime control and prevention districts, and Indian tribes that perform law enforcement functions (as determined by the Secretary of the Interior)~~] are eligible to apply for grants under this fund.

§3.711. Ineligible Activities and Costs [~~Years of Funding~~].

[~~(a)~~] Grantees may not use grant funds to purchase, lease, rent, or acquire any of the following: [~~Funding is available for a grant project for up to four years. CJD exempts multi-jurisdictional drug task forces from this policy.~~]

(1) armored vehicles, vessels, or aircraft;

(2) luxury items;

(3) real estate;

(4) construction projects;

(5) security enhancements for any nongovernmental entity that is not engaged in criminal justice or public safety;

(6) equipment for any nongovernmental entity that is not engaged in criminal justice or public safety; and

(7) any similar items not essential to the maintenance of public safety.

[~~(b) The purpose of the four-year limitation is to encourage innovative programming with grantees assuming the cost of programs proven to be successful following the period of federal funding support.~~]

§3.717. Confidential Funds.

(a) (No change.)

(b) The expenditure of confidential funds requires written CJD approval either through an original grant award or a [~~subsequent~~] grant adjustment. The [~~CJD will also ensure that the~~] grantee's controls over the disbursement of confidential funds must be [~~are~~] adequate to safeguard against the misuse of the funds. [~~CJD will render its determination after reviewing the grant application and the accompanying signed certification.~~]

(c) Grantees shall store confidential funds in a locked, fireproof container such as a safe or vault until needed. [~~The time limit and approval levels for the official advance of funds are as follows:~~]

[~~(1) up to two calendar days advance requires the Field Supervisor's written approval;~~]

[~~(2) three to seven calendar days advance requires the commander's written approval;~~]

[~~(3) eight to 30 calendar days requires the project director's written approval; and~~]

[~~(4) 31 to 60 calendar days requires CJD written approval.~~]

[~~(5) if the payment to a confidential informant is in excess of $2,500, the grantee must submit a written request for approval to the regional Texas Department of Public Safety commander or his designee prior to making any payment to a confidential informant.~~]

(d) A grantee shall not use confidential funds to pay confidential informants who are law enforcement officers or elected or appointed public officials [~~Approval beyond seven calendar days should be limited to special operations, special deployments and other exceptional situations~~].

(e) If CJD no longer funds a grant and the grantee does not continue project activities, then the grantee must refund all accumulated confidential funds to CJD in the proportion of CJD funding [~~In considering whether to approve these requests, CJD reviews the amount of funds involved and the security under which the funds are being held. Grantees should store funds in a locked, fireproof container such as a safe or vault until needed~~].

(f) Grantees must comply with all applicable state and federal statutes, rules, regulations and guidelines regarding confidential funds, including the applicable requirements set forth in the Office of Justice Programs Financial Guide [~~Under no circumstances may a grantee use confidential funds to pay confidential informants who are law enforcement officers or elected or appointed public officials~~].

[~~(g) If CJD no longer funds a grant and the grantee does not continue project activities, then the grantee must refund all accumulated confidential funds to CJD in the proportion of CJD funding.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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David Zimmerman
Assistant General Counsel
Office of the Governor
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DIVISION 7. BYRNE FORMULA GRANT PROGRAM

1 TAC §§3.719, 3.721, 3.723, 3.725

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the Office of the Governor or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of these rules is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The repeal of these rules implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the repeal of these rules.

§3.719. District Attorney Agreement.

§3.721. Certification of Drug Testing.

§3.723. Multi-jurisdictional Drug Task Force Advisory Boards.

§3.725. Task Force Personnel.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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David Zimmerman
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DIVISION 8. LOCAL LAW ENFORCEMENT BLOCK GRANT PROGRAM

1 TAC §§3.801, 3.803, 3.805, 3.809, 3.811

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the Office of the Governor or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of these rules is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The repeal of these rules implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the repeal of these rules.

§3.801. Source and Purpose.

§3.803. Project Requirements.

§3.805. Eligible Applicants.

§3.809. Indirect Costs.

§3.811. Ineligible Activities and Costs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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DIVISION 11. RESIDENTIAL SUBSTANCE ABUSE TREATMENT GRANT PROGRAM

1 TAC §3.1103

The amendment of this rule is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rule implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of this rule.

§3.1103. Project Requirements.

(a) (No change.)

(b) Grantees must give priority to inmates who have six to 12 months remaining in their confinement so they can be released from prison instead of returning to the general prison population after completing the program. [~~Residential substance abuse projects must:~~]

[~~(1) be designed to last for not less than six nor more than 12 months;~~]

[~~(2) provide treatment in residential treatment facilities that are set apart from the general correctional population in a completely separate facility or a dedicated housing unit within a facility for the exclusive use of project participants;~~]

[~~(3) focus on the substance abuse problems of the inmate;~~]

[~~(4) develop the inmate's cognitive, behavioral, social, vocational, and other skills to resolve the substance abuse and related problems; and~~]

[~~(5) require urinalysis or other reliable methods of drug and alcohol testing for those enrolled in the residential substance abuse project and post program while they remain in the custody of the state or local government.~~]

(c) Residential substance [~~Jail-based substance~~] abuse projects must:

(1) be designed to last [~~for~~] not less than six nor more than 12 [~~three~~] months;

(2) provide treatment in residential treatment facilities that are set apart from the general correctional population in a completely separate facility or a dedicated housing unit within a facility for the exclusive use of project participants [~~make every effort to set apart the treatment population from the general correctional population~~];

(3) - (4) (No change.)

(5) require urinalysis or other reliable methods of drug and alcohol testing for those enrolled in the residential substance abuse project and post program while they remain in the custody of the state or local government [~~be science-based and effective~~].

(d) Jail-based substance abuse projects must: [~~CJD gives preference to applicants who provide aftercare services to project participants. Aftercare services should coordinate service provisions between the correctional treatment program and other human service and rehabilitation programs such as education and job training, parole supervision, halfway houses, and self-help and peer group projects that may aid in rehabilitation.~~]

(1) be designed to last not less than three months;

(2) make every effort to set apart the treatment population from the general correctional population;

(3) focus on the substance abuse problems of the inmate;

(4) develop the inmate's cognitive, behavioral, social, vocational, and other skills to solve the substance abuse and related problems; and

(5) be science-based and effective.

(e) CJD gives preference to applicants whose projects include aftercare services to project participants. Aftercare services should coordinate service provisions between the correctional treatment program and other human service and rehabilitation programs such as education and job training, parole supervision, halfway houses, and self-help and peer group projects that may aid in rehabilitation. [~~Grantees shall develop an individualized plan for each offender when the offender enters a residential treatment project. Corrections treatment projects and state or local substance abuse treatment projects must work together to place~~

project participants in appropriate aftercare placement when these individuals complete the program.]

(f) Grantees shall develop an individualized plan for each offender when the offender enters a residential treatment project. Corrections treatment projects and state or local substance abuse treatment projects must work together to place project participants in appropriate aftercare placement when these individuals complete the program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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David Zimmerman
Assistant General Counsel
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DIVISION 13. COVERDELL FORENSIC SCIENCES PROGRAM

1 TAC §§3.1301, 3.1303, 3.1305

The amendment of these rules is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of these rules.

§3.1301. Source and Purpose.

(a) (No change.)

(b) These federal funds are authorized under Title I of the Omnibus Crime Control and Safe Streets Act of 1968, codified as amended at 42 U.S.C. §3797j et seq [the Consolidated Appropriations Act of 2004, Public Law 108-99].

(c) This program provides funds to improve the quality, timeliness, and credibility of forensic science and medical examiner services for criminal justice purposes.

§3.1303. Project Requirements.

(a) All projects funded through this program must meet one or more of the following purposes areas:

(1) To carry out all or a substantial part of a program intended to improve the quality and timeliness of forensic science or medical examiner services in the State, including such services provided by the laboratories operated by the State and those operated by units of government within the State [Employ one or more full-time scientists whose principal duties are the examination of physical evidence for law enforcement agencies in criminal justice matters and who provide testimony with respect to such physical evidence to the criminal justice system].

(2) To eliminate a backlog in the analysis of forensic science evidence, including firearms examination, latent prints, toxicology, controlled substances, forensic pathology, questionable documents, and trace evidence. A backlog exists if forensic evidence has been stored in a laboratory, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility, and has not been subjected to all appropriate forensic testing because of a lack of resources or personnel [Demonstrate improvement over current operations in the average number of days between submission of a sample to a forensic science laboratory and the delivery of test results to the requesting office or agency].

(3) To train, assist, and employ forensic laboratory personnel to eliminate a backlog as defined in paragraph (a)(2) [Assure that all project personnel comply with 28 C.F.R. Part 22 regarding protection of personally identifiable information that may be collected for research or statistical purposes].

(b) Laboratories must also comply with [Allowable expenditures are limited to] the following operational requirements:

(1) Employ one or more full-time scientists whose principal duties are the examination of physical evidence for law enforcement agencies in criminal justice matters and who provide testimony with respect to such physical evidence to the criminal justice system [Laboratory and computer equipment including upgrading, replacing, and purchasing laboratory equipment, instrumentation, and computer hardware or software for forensic analyses and data management].

(2) Demonstrate improvement over current operations in the average number of days between submission of a sample to a forensic science laboratory and the delivery of test results to the requesting office or agency [Supplies including laboratory items needed to perform analyses and to conduct validation studies, and other expenses directly attributable to conducting various types of forensic analyses].

(3) Assure that all project personnel comply with 28 C.F.R. Part 22 regarding protection of personally identifiable information that may be collected for research or statistical purposes [Costs associated with personnel, such as overtime, fellowships, visiting scientists, interns, consultants or contracted staff].

(4) Certify that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct by employees or contractors substantially affecting the integrity of forensic results [Facility improvements including benches, cabinets, interior dividing walls, evidence storage rooms, or extraction rooms when it can be demonstrated that these items will improve the effectiveness and credibility of the laboratory].

[(5) Education and training, including internal and external training and continuing education, that is directly applicable to the job position and duties of the individuals receiving the training.]

(c) Allowable expenditures are limited to the following:

(1) Laboratory and computer equipment including upgrading, replacing, and purchasing laboratory equipment, instrumentation, and computer hardware or software for forensic analyses and data management;

(2) Supplies including laboratory items needed to perform analyses and to conduct validation studies, and other expenses directly attributable to conducting various types of forensic analyses;

(3) Costs associated with personnel, such as overtime, fellowships, visiting scientists, interns, consultants or contracted staff;

(4) Facility improvements including benches, cabinets, interior dividing walls, evidence storage rooms, or extraction rooms when it can be demonstrated that these items will improve the effectiveness and credibility of the laboratory;

(5) Education and training, including internal and external training and continuing education, that is directly applicable to the job position and duties of the individuals receiving the training; and

(6) Preparation for accreditation, application for accreditation, and maintenance fees charged by appropriate accrediting bodies including the American Society of Crime Laboratory Directors/Laboratory Accreditation Board, and the National Association of Medical Examiners.

§3.1305. Eligible Applicants.

State agencies and units of local government that operate the following:

(1) (No change.)

(2) unaccredited laboratories that have applied for [~~are in the process of obtaining~~] accreditation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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David Zimmerman
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SUBCHAPTER D. CONDITIONS OF GRANT FUNDING

1 TAC §3.2007

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the Office of the Governor or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of this rule is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The repeal of this rule implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the repeal of this rule.

§3.2007. Confidential Funds Certification.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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1 TAC §3.2009

The amendment of this rule is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rule implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of this rule.

§3.2009. Cooperative Working Agreement.

(a) When a grantee intends to carry out a grant project through cooperating or participating with one or more outside organizations, the grantee must ensure that [~~obtain authorized approval signatures on~~] the cooperative working agreement is signed by [~~from~~] each participating organization. Grantees must maintain on file a signed copy of all cooperative working agreements.

(b) (No change.)

(c) Each grantee must submit to CJD a list of each participating organization that has entered into a cooperative working agreement with the grantee and a written description of the purpose of each cooperative working agreement [~~For multi-jurisdictional task force grants under the Byrne Formula Grant Program, a cooperative working agreement must include the signature of each sheriff in a multi-jurisdictional task force's impact area. Counties must be contiguous and the sheriff may not execute a cooperative working agreement with more than one task force project~~].

[~~(d) Each grantee must submit to CJD a list of each participating organization that has entered into a cooperative working agreement with the grantee and a written description of the purpose of each cooperative working agreement.~~]

[~~(e) Grantees that have statewide jurisdiction to make arrests and execute process in criminal cases are exempt from subsection (c) of this section.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. ADMINISTERING GRANTS

1 TAC §§3.2511, 3.2521, 3.2523

The amendment of these rules is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rules implement the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of these rules.

§3.2511. Requests for Funds.

(a) - (b) (No change.)

(c) Crime Stoppers Assistance Fund projects are exempt from subsection (a) of this section and instead may request funds once each quarter on a cost reimbursement basis only. Crime Stoppers Assistance Fund grantees must attach a completed Request for Funds form to their quarterly financial expenditure report [~~Local Law Enforcement Block Grant Program projects are exempt from subsection (a) of this section~~].

[~~(d) Crime Stoppers Assistance Fund projects are exempt from subsection (a) of this section and instead may request funds once each quarter on a cost reimbursement basis only. Crime Stoppers Assistance Fund grantees must attach a completed Request for Funds form to their quarterly financial expenditure report.~~]

§3.2521. Payment of Outstanding Liabilities.

Grantees must expend all outstanding liabilities no later than 90 calendar days after the end of the grant period, unless otherwise specified in an original grant award or a grant adjustment. All payments made after the completion of the grant period must relate to obligations incurred during the grant period.

§3.2523. Violations of Laws.

(a) A grantee [~~CJD~~] must [~~be~~] immediately notify CJD [~~notified~~] in writing of any legal violations, including the misappropriation of funds, fraud, theft, embezzlement, forgery, or any other serious irregularities indicating noncompliance with grant requirements. The grantee shall also notify the local prosecutor's office [~~shall also be notified~~] of any possible criminal violations.

(b) A grantee [~~CJD~~] must [~~be~~] immediately notify CJD [~~notified~~] in writing if a project or project personnel become involved in any litigation, whether civil or criminal, and the grantee must immediately forward a copy of any demand notices, subpoenas, lawsuits, or indictments to CJD.

(c) If a federal or state court or administrative agency renders a judgment or order finding discrimination by a [~~the~~] grantee based on race, color, national origin, sex, age, or handicap, the grantee must immediately forward a copy of the judgment or order [~~must be immediately forwarded~~] to CJD.

(d) If any records are seized from a grantee by a law enforcement agency, or a state or federal agency, the grantee must immediately notify CJD in writing of the seizure and must retain copies of the seized records.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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David Zimmerman
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SUBCHAPTER F. PROGRAM MONITORING AND AUDITS

1 TAC §3.2601

The amendment of this rule is proposed under the Texas Government Code, Title 7, §772.006(a)(10), which authorizes CJD to adopt rules and procedures as necessary.

The amended rule implements the Texas Government Code, Title 7, §772.006(a), which requires CJD to award and administer state and federal grant programs, and to assist the Governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system.

No other statutes, articles, or codes are affected by the amendment of this rule.

§3.2601. Monitoring.

(a) - (h) (No change.)

(i) The grantee shall resolve all issues, findings, or [~~required~~] actions identified by CJD [~~in the final report~~] within the time frame specified by CJD.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 22. PROCEDURAL RULES
SUBCHAPTER M. PROCEDURES AND FILING REQUIREMENTS IN PARTICULAR COMMISSION PROCEEDINGS

16 TAC §22.246

The Public Utility Commission of Texas (commission) proposes an amendment to §22.246, relating to Administrative Penalties. The proposed amendment will increase the maximum penalty per violation from $5,000 to $25,000 and limit penalties in excess of $5,000 per violation to only those violations included in the

highest class of violations. Project Number 31937 is assigned to this proceeding.

Jeffrey Pender, Attorney, Legal Division, has determined that for each year of the first five- year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Pender has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be increased compliance with the laws, rules and orders of the commission affecting the electric power and telecommunications industries. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Pender has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Tuesday, June 6, 2006, at 9:30 a.m. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed amendment may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711- 3326, within 30 days after publication. Sixteen copies of comments to the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule(s). The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 31937.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2005) (PURA), which provide the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, PURA §15.023 which grants the commission the authority to assess an administrative penalty in an amount not to exceed $25,000 per violation, provided that a penalty in an amount that exceeds $5,000 may be assessed only if the violation is included in the highest class of violations in the classification system.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, and 15.023.

§22.246. Administrative Penalties.

(a) - (b) (No change.)

(c) Amount of penalty.

(1) (No change.)

(2) The penalty for each separate violation may be in an amount not to exceed $25,000[~~$5,000.00~~] per day, provided that a penalty in an amount that exceeds $5,000 may be assessed only if the violation is included in the highest class of violations in the classification system.

(3) (No change.)

(d) - (h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 13, 2006.

TRD-200602149
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 936-7223

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CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §25.8

The Public Utility Commission of Texas (commission) proposes new §25.8, relating to Classification System for Violations of Statutes, Rules and Orders Applicable to Electric Service Providers. The proposed new rule will establish a classification system for violations of the Public Utility Regulatory Act (PURA) and related commission rules and orders, and establish a range of penalties that may be assessed for each class of violations. Project Number 31937 is assigned to this proceeding.

Jeffrey Pender, Attorney, Legal Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Pender has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be increased compliance with the laws, rules and orders of the commission affecting the electric power industry. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Pender has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Tuesday, June 6, 2006, at 9:30 a.m. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed new section may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Sixteen copies of comments to the proposed section are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 31937.

The new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §15.023 which requires the commission to establish by rule a classification system for violations.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §15.023.

§25.8. Classification System for Violations of Statutes, Rules and Orders Applicable to Electric Service Providers.

(a) Purpose. The purpose of this rule is to establish a classification system for violations of the Public Utility Regulatory Act (PURA) and related commission rules and orders, and to establish a range of penalties that may be assessed for each class of violations.

(b) Classification system.

(1) Class C violations.

(A) Penalty range. Penalties for Class C violations may not exceed $1,000 per violation per day.

(B) Types of violations.

(i) Failure to file a report or provide information required to be submitted to the commission under this chapter within the timeline required;

(ii) Failure by an electric utility, retail electric provider, or aggregator to investigate a customer complaint and appropriately report the results within the timeline required;

(iii) Failure to update information relating to a registration or certificate by the commission within the timeline required; and

(iv) A violation of the Electric no-call list.

(2) Class B violations.

(A) Penalty range. Penalties for Class B violations may not exceed $5,000 per violation per day.

(B) Types of violations. All violations not listed as a Class C or Class A violation.

(3) Class A violations.

(A) Penalty range. Penalties for Class A violations may not exceed $25,000 per violation per day.

(B) Types of violations.

(i) A violation related to the wholesale electric market, including but not limited to a violation of Subchapter S of this chapter (relating to Wholesale Markets) or failure to comply with the ERCOT protocols;

(ii) A violation related to electric service quality standards or reliability standards established by the commission or the independent organization;

(iii) A violation related to the code of conduct between electric utilities and their competitive affiliates;

(iv) A violation related to prohibited discrimination in the provision of electric service;

(v) A violation related to improper disconnection of electric service;

(vi) A violation related to fraudulent, unfair, misleading, deceptive, or anticompetitive business practices;

(vii) Conducting business subject to the jurisdiction of the commission without proper commission authorization, registration, licensing or certification;

(viii) Failure by ERCOT to perform its duties adequately;

(ix) A violation not otherwise enumerated in this subsection that creates an imminent hazard or potential hazard to the health or safety of the public;

(x) A violation not otherwise enumerated in this subsection that creates economic harm to a person or persons, property, or the environment in excess of $5,000 per violation per day;

(xi) A Class B violation where the commission finds that the person has previously committed the same type of violation; and

(xii) A Class B violation that is committed willfully and knowingly.

(c) Application of enforcement provisions of other rules. To the extent that PURA or other rules in this chapter establish a range of administrative penalties that are inconsistent with the penalty ranges provided for in subsection (b) of this section, the other provisions control with respect to violations of those rules.

(d) Assessment of administrative penalties. In addition to the requirements of §22.246 of this title (relating to Administrative Penalties), a notice of violation recommending administrative penalties shall indicate the class of violation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 13, 2006.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 936-7223

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CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §26.9

The Public Utility Commission of Texas (commission) proposes new §26.9, relating to Classification System for Violations of Statutes, Rules and Orders Applicable to Telecommunications Service Providers. The proposed new rule will establish a classification system for violations of certain provisions of the Business and Commerce Code, the Public Utility Regulatory Act (PURA) and related commission rules and orders, and establish a range of penalties that may be assessed for each class of violations. Project Number 31937 is assigned to this proceeding.

Jeffrey Pender, Attorney, Legal Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Pender has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be increased compliance with the laws, rules and orders of the commission affecting telecommunications service providers. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Pender has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Tuesday, June 6, 2006, at 9:30 a.m. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed new section may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Sixteen copies of comments to the proposed section are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 31937.

The new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §15.023 which requires the commission to establish by rule a classification system for violations.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §15.023.

§26.9. Classification System for Violations of Statutes, Rules and Orders Applicable to Telecommunications Service Providers.

(a) Purpose. The purpose of this rule is to establish a classification system for violations of certain provisions of the Business and Commerce Code, the Public Utility Regulatory Act (PURA), and related commission rules and orders, and to establish a range of penalties that may be assessed for each class of violations.

(b) Classification system.

(1) Class C violations.

(A) Penalty range. Penalties for Class C violations may not exceed $1,000 per violation per day.

(B) Types of violations.

(i) Failure to file a report or provide information required to be submitted to the commission under this chapter within the timeline required;

(ii) Failure by a certified telecommunications utility to investigate a complaint by a customer and appropriately report the results within the timeline required;

(iii) Failure to update information relating to a registration or certificate by the commission within the timeline required;

(iv) Failure to comply with the requirements for the use and permitting of an automatic dial announcing device (ADAD); and

(v) A violation of the Texas no-call list.

(2) Class B violations.

(A) Penalty range. Penalties for Class B violations may not exceed $5,000 per violation per day.

(B) Types of violations. All violations not listed as a Class C or Class A violation.

(3) Class A violations.

(A) Penalty range. Penalties for Class A violations may not exceed $25,000 per violation per day.

(B) Types of violations.

(i) A violation related to service quality, service objectives, or performance benchmarks;

(ii) A violation related to prohibited discrimination in the provision of telecommunications service;

(iii) A violation related to prohibited discrimination by a cable service provider or video service provider that has been granted a state-issued certificate of franchise authority;

(iv) Engaging in acts that adversely affect the integrity of the state's 9-1-1 system relating to network interoperability, service quality standards and database integrity standards;

(v) A violation relating to improper suspension or disconnection of a customer;

(vi) A violation related to fraudulent, unfair, misleading, deceptive, or anticompetitive business practices;

(vii) Conducting business subject to the jurisdiction of the commission without proper commission authorization, registration, licensing or certification;

(viii) A violation not otherwise enumerated in this subsection that creates an imminent hazard or potential hazard to the health or safety of the public;

(ix) A violation not otherwise enumerated in this subsection that creates economic harm to a person or persons, property, or the environment in excess of $5,000 per violation per day;

(x) A Class B violation where the commission finds that the person has previously committed the same type of violation; and

(xi) A Class B violation that is committed willfully and knowingly.

(c) Application of enforcement provisions of other rules. To the extent that the Business and Commerce Code, PURA, or other rules in this chapter establish a range of administrative penalties that are inconsistent with the penalty ranges provided for in subsection (b) of this section, the other provisions control with respect to violations of those rules.

(d) Assessment of administrative penalties. In addition to the requirements of §22.246 of this title (relating to Administrative Penalties), a notice of violation recommending administrative penalties shall indicate the class of violation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 163. LICENSURE

The Texas Medical Board proposes amendments to §§163.1, 163.2, 163.4, 163.6 and the repeal of 163.12, concerning Licensure.

The amendment to §163.1 allows payment of fees on-line and makes minor clean-up changes. The amendment to §163.2 creates an alternative opportunity for licensure for applicants who have graduated from a foreign medical school that has not been approved as substantially equivalent to a U.S. or Canadian medical school or that has been disapproved by another state licensing board and reorganizes provisions for fifth pathway to licensure. The amendment to §163.4 authorizes the Executive Director to issue licenses to applicants who clearly qualify for licensure as authorized by provisions of SB 419. The amendment to §163.6 is necessary for minor clean-up of language. Section 163.12 is repealed in order to reorganize the chapter and include all provisions for licensure of foreign medical school graduates in the same section.

Michele Shackelford, General Counsel, Texas Medical Board, has determined that for the first five-year period the amendments and repeal are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the sections as proposed.

Ms. Shackelford also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be updating rule to allow for on-line payment of fees, allowing for licensure of more qualified graduates of foreign medical schools to increase the number of physicians in Texas, expediting licensure of physicians who clearly meet all licensure requirement and makes the process more efficient and making the rules more understandable. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

22 TAC §§163.1, 163.2, 163.4, 163.6

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The following statutes, articles or codes are affected by this proposal: §155.004, §155.002(b), Texas Occupations Code.

§163.1. Definitions.

The following words and terms, (concerning General Definitions) when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (4) (No change.)

(5) Application--An application is all documents and information necessary to complete an applicant's request for licensure including the following:

(A) forms furnished by the board, completed by the applicant:

(i) all forms and addenda requiring a written response must be typed, [~~or~~] printed in ink, or completed online;

(ii) (No change.)

(B) (No change.)

(C) the required fee[~~, payable by check through a United States bank~~].

(6) - (8) (No change.)

(9) Good professional character--An applicant for licensure must not be in violation of or have committed any act described in the Medical Practice Act, TEX. OCC. CODE ANN. §§164.051-.053.

(10) - (12) (No change.)

(13) Texas Medical Jurisprudence Examination (JP exam): the ethics examination developed by the board [~~for licensure that must be passed by an applicant for licensure within three attempts with a score 75 or better~~].

(14) (No change.)

§163.2. Full Texas Medical License.

(a) [~~United States/Canadian Medical School~~] Graduates of medical schools in the United States or Canada. To be eligible for full licensure, an applicant who is a graduate from a school in the United States or Canada must:

(1) - (6) (No change.)

(7) pass the Texas Medical Jurisprudence Examination [~~with a score of 75 or better within three attempts~~].

(b) Graduates of medical schools outside the United States or Canada [~~Acceptable Unapproved Medical Schools~~]. To be eligible for full licensure, an applicant who is a graduate from a school outside the United States or Canada must:

(1) - (3) (No change.)

(4) be a graduate of:

(A) an acceptable unapproved medical school as defined under §163.1(2) of this title; or

(B) any medical school and:

(i) have passed the basic sciences portion of an acceptable examination listed in §163.6(a) of this title within two attempts;

(ii) have not been the subject of disciplinary action by any other state, the uniformed services of the United States, or the applicant's peers in a local, regional, state, or national professional medical association or staff of a hospital;

(iii) have, on a full-time basis, actively diagnosed or treated persons or have been on the active teaching faculty of an acceptable approved medical school for three of the last four years preceding receipt of an Application for licensure, which may include post-graduate training (The term "full-time basis" shall have the same meaning provided in §163.11(b) of this title); and

(iv) hold a certificate from a specialty board that is a member of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists or have passed a monitored examination leading to such certification by the specialty board.

(5) - (6) (No change.)

(7) pass the Texas Medical Jurisprudence Examination [~~with a score of 75 or better within three attempts~~];

(8) - (11) (No change.)

(c) Fifth Pathway Program. To be eligible for licensure, an applicant who has completed a Fifth Pathway Program must:

(1) be at least 21 years of age;

(2) be of good professional character as defined under §163.1(9) of this title;

(3) have completed 60 semester hours of college courses as defined under §163.1(12) of this title;

(4) have completed all of the didactic work, but not graduated from a foreign medical school and meet the requirements subparagraph A or B of this subsection.

(A) The medical school's curriculum meets the requirements for an acceptable unapproved medical school as determined by a committee of experts selected by the Texas Higher Education Coordinating Board; or

(B) Either:

(i) the medical school's curriculum is substantially equivalent to a Texas medical school as defined under §163.1(13) of this title and has not been disapproved by another state physician licensing agency unless the applicant can provide evidence that the disapproval was unfounded, or:

(ii) the applicant must:

(I) have passed the basic sciences portion of an acceptable examination listed in §163.6(a) of this title within two attempts;

(II) have not been the subject of disciplinary action by any other state, the uniformed services of the United States, or the applicant's peers in a local, regional, state, or national professional medical association or staff of a hospital;

(III) have, on a full-time basis, actively diagnosed or treated persons or have been on the active teaching faculty of an acceptable approved medical school for three of the last fours years preceding receipt of an Application for licensure, which may include post-graduate training (The term "full-time basis" shall have the same meaning provided in §163.11(b) of this title); and

(IV) hold a certificate from a specialty board that is a member of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists or have passed a monitored examination leading to such certification by the specialty board.

(5) have successfully completed a three-year training program of graduate medical education in the United States or Canada that was approved by the board on the date the training was completed;

(6) submit evidence of passing an examination, that is acceptable to the board for licensure;

(7) pass the Texas Medical Jurisprudence Examination;

(8) submit a sworn affidavit that no proceedings, past or current, have been instituted against the applicant before any state medical board, provincial medical board, in any military jurisdiction or federal facility;

(9) have attained a passing score on the ECFMG examination;

(10) have the ability to communicate in the English language;

(11) have attained a satisfactory score on a qualifying examination and have completed one academic year of supervised clinical training for foreign medical students as defined by the American Medical Association Council on Medical Education (Fifth Pathway Program) in a United States medical school; and

(12) have supplied all additional information that the board may require, concerning the applicant's medical school, before approving the applicant.

§163.4. Procedural Rules for Licensure Applicants.

(a) - (c) (No change.)

(d) If the Executive Director determines that the applicant clearly meets all licensing requirements, the Executive Director or a person designated by the Executive Director, may issue a license to the applicant, to be effective on the date issued without formal board approval, as authorized by §155.002(b) of the Act.

(e) If the Executive Director determines that the applicant does not clearly meet all licensing requirements, a license may be issued only upon action by the board following a recommendation by the Licensure Committee, in accordance with §155.007 of the Act and §187.13 of this title.

§163.6. Examinations Accepted for Licensure.

(a) - (e) (No change.)

(f) Texas Medical Jurisprudence Examination (JP Exam) [~~JP Exam~~].

(1) In this chapter, when applicants are required to pass the JP exam, [~~In addition to the licensing examinations required for licensure under subsection (a) of this section,~~] applicants must pass the JP exam with a score of 75 or better within three attempts.

(2) An examinee shall not be permitted to bring medical books, compendia [~~compends~~], notes, medical journals, calculators or other help into the examination room, nor be allowed to communicate by word or sign with another examinee while the examination is in progress without permission of the presiding examiner, nor be allowed to leave the examination room except when so permitted by the presiding examiner.

(3) - (4) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 17, 2006.

TRD-200602197
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 305-7016

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22 TAC §163.12

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Medical Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§163.12. Licensure for the Fifth Pathway.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 17, 2006.

TRD-200602198
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 305-7016

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CHAPTER 165. MEDICAL RECORDS

22 TAC §165.1, §165.6

The Texas Medical Board proposes an amendment to §165.1 and new §165.6 concerning Medical Records.

The amendment to §165.1 adds requirements that written consents for treatment or surgery be included in a patient's medical records. New §165.6 provides a form for parental consent for an abortion to be performed on an unemancipated minor, as required by SB 419.

Michele Shackelford, General Counsel, Texas Medical Board, has determined that for the first five-year period the amendment and new section are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the sections as proposed.

Ms. Shackelford also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to assure the public that their consent to medical treatment and surgery will be included in their medical records and to provide a standard form for parental consent for an abortion. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment and new section are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The following statutes, articles or codes are affected by this proposal: §164.052(c), Texas Occupations Code.

§165.1. Medical Records.

(a) Contents of Medical Record. Each licensed physician of the board shall maintain an adequate medical record for each patient that is complete, contemporaneous and legible. For purposes of this section, an "adequate medical record" should meet the following standards:

(1) - (6) (No change.)

(7) any written consents for treatment or surgery requested from the patient/family by the physician.

(8) [~~(7)~~] Billing codes, including CPT and ICD-9-CM codes, reported on health insurance claim forms or billing statements should be supported by the documentation in the medical record.

(9) [~~(8)~~] Any amendment, supplementation, change, or correction in a medical record not made contemporaneously with the act or observation shall be noted by indicating the time and date of the amendment, supplementation, change, or correction, and clearly indicating that there has been an amendment, supplementation, change, or correction.

(10) [~~(9)~~] Records received from another physician or health care provider involved in the care or treatment of the patient shall be maintained as part of the patient's medical records.

(11) [~~(10)~~] The board acknowledges that the nature and amount of physician work and documentation varies by type of services, place of service and the patient's status. Paragraphs (1) - (11) [~~(10)~~] of this subsection may be modified to account for these variable circumstances in providing medical care.

(b) (No change.)

§165.6. Medical Records Regarding an Abortion on an Unemancipated Minor.

(a) As used in this section:

(1) "Abortion" means the use of any means to terminate the pregnancy of a female known by the attending physician to be pregnant with the intention that the termination of the pregnancy by those means will, with reasonable likelihood, cause the death of the fetus (as defined at §33.001, Texas Family Code).

(2) "Unemancipated minor" means a minor who is not 18 years, unmarried and has not had the disabilities of minority removed under Chapter 31, Texas Family Code (as defined at §33.001, Texas Family Code).

(b) In the case of an unemancipated minor patient on whom a physician plans to perform an abortion, the physician shall obtain and maintain in the medical records one of the following:

(1) the written consent of one of the patient's parents, managing conservator, or legal guardian, in accordance with §164.052(a)(19), Medical Practice Act;

(2) a court order authorizing the minor to consent to the abortion, in accordance with §33.003 or §33.004, Texas Family Code;

(3) an affidavit of the physician authorizing the physician to perform the abortion as if the court had issued an order granting the application or appeal, in accordance with §33.005, Texas Family Code; or

(4) indications supporting the physician's judgment, if the physician concludes, on the basis of good faith clinical judgment, that a condition exists that complicates the medical condition of the pregnant minor and necessitates the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial impairment of a major bodily function and that there is insufficient time to obtain the consent of the patient's parent, managing conservator, or legal guardian, in accordance with §164.052(a)(19), Medical Practice Act. The physician shall also maintain in the medical records a copy of the certification to the Department of State Health Services, as required by §33.002, Texas Family Code.

(c) Except in the case of a medical emergency, the physician shall obtain and maintain in the medical records a written consent signed by the patient that includes the requirements set forth in §171.011 and §171.012, Texas Health and Safety Code.

(d) The physician must use due diligence in determining that any person signing a written consent for an abortion on an unemancipated minor is, in fact, who the person purports to be. In any disciplinary action before the board, based on allegations that a consent was not signed by the person purporting to sign it, the physician must show that the written consent is either

(1) witnessed in the office or clinic of the physician; or

(2) is notarized.

(e) The physician shall maintain the medical records required by this section until the later of the fifth anniversary of the date of the patient's majority or the seventh anniversary of the date the physician received or created the documentation for the record.

(f) Pursuant to §164.052(c), Medical Practice Act, the board adopts the following form for physicians to obtain the consent required for an abortion to be performed on an unemancipated minor:
Figure: 22 TAC §165.6(f)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 17, 2006.

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Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 305-7016

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CHAPTER 166. PHYSICIAN REGISTRATION

22 TAC §§166.1, 166.2, 166.6

The Texas Medical Board proposes an amendment to §§166.1, 166.2 and 166.6, concerning Physician Registration.

The amendment to §166.1 eliminates reference to "written" application in order to allow for on-line registration and removes obsolete provisions that were adopted to transition from annual to biennial registration of physicians. The amendment to §166.2 adds a provision allowing emergency room physician to receive Continuing Medical Education in forensic evidence, as required by the Legislature in 2005. The amendment to §166.6 expands the rule regarding voluntary charity care by retired physicians to include care to medically underserved areas and for a disaster relief organization, as required by the Legislature in 2005.

Michele Shackelford, General Counsel, Texas Medical Board, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the sections as proposed.

Ms. Shackelford also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be making the Board more efficient by allowing for on-line registration of physicians, to encourage continuing medical education in forensic evidence to assist in prosecution of sexual assault cases and allows the experience and expertise of retired physicians to be applied to a broader range of voluntary charity care. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§166.1. Physician Registration.

(a) Each physician licensed to practice medicine in Texas shall register with the board, submit a current physician profile, and pay a fee. A physician may obtain a registration permit ("permit") by submitting the required form and by paying the required registration fee to the board on or before the expiration date of the permit. The fee shall accompany an [~~a written~~] application prescribed by the board which sets forth the licensee's name, mailing address, primary practice site, and address for receipt of electronic mail if available.

(b) - (d) (No change.)

(e) [~~Approximately half of all permits issued to license holders that expire between January 1, 2005 and December 31, 2005 shall remain in effect for a one-year period; the other half shall remain in effect for a two-year period.~~] All permits issued to license holders that expire on or after January 1, 2006 shall remain in effect for two-year periods.

§166.2. Continuing Medical Education.

(a) As a prerequisite to the registration of a physician's permit a physician must complete 24 hours of continuing medical education (CME) every 12 months. CME hours must be completed in the following categories:

(1) - (3) (No change.)

(4) A physician whose practice includes treating patients in an emergency room setting may complete two hours of formal continuing medical education, as required by paragraph (1) of this subsection, relating to forensic evidence. To obtain credit for such courses, a course must include information regarding indicators of sexual assault and interviewing a person who may have been the victim of a sexual assault.

(b) - (p) (No change.)

§166.6. Exemption From Registration Fee for Retired Physician Providing Voluntary Charity Care.

(a) A retired physician licensed by the board whose only practice is the provision of voluntary charity care [~~to indigent populations~~] shall be exempt from the registration fee.

(b) As used in this section:

(1) "voluntary charity care" means medical care provided for no compensation to indigent populations, in medically underserved areas, or for a disaster relief organization.

(2) "compensation" means direct or indirect payment of anything of monetary value, except payment or reimbursement of reasonable, necessary, and actual travel and related expenses.

(c) To qualify for and obtain such an exemption, a physician must truthfully certify under oath, on a form approved by the board, and received by the board at least 30 days prior to the expiration date of the permit, that the following information is correct:

(1) the physician's practice of medicine does not include the provision of medical services for either direct or indirect compensation which has monetary value of any kind;

(2) the physician's practice of medicine is limited to voluntary charity care for which the physician receives no direct or indirect compensation of any kind for medical services rendered;

(3) the physician's practice of medicine does not include the provision of medical services to members of the physician's family; and

(4) the physician's practice of medicine does not include the self-prescribing of controlled substances or dangerous drugs.

(d) [~~(b)~~] A physician who qualifies for and obtains an exemption from the registration fee authorized under this section shall obtain and report continuing medical education as required under the Act, §§156.051-.055 and §166.2 of this title (relating to Continuing Medical Education), except that the number of hours of informal CME, as required by §166.2(a)(3) shall be reduced from 12 hours to 10 hours.

(e) [~~(c)~~] A retired physician who has obtained an exemption from the registration fee as provided for under this section, may be subject to disciplinary action under the Act, §§164.051-.053, based on unprofessional or dishonorable conduct likely to deceive, defraud, or injure the public if the physician engages in the compensated practice of medicine, the provision of medical services to members of the physician's family, or the self-prescribing of controlled substances or dangerous drugs.

(f) [~~(d)~~] A physician who attempts to obtain an exemption from the registration fee under this section by submitting false or misleading statements to the board shall be subject to disciplinary action pursuant to the Act, §164.052(a)(1), in addition to any civil or criminal actions provided for by state or federal law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 170. AUTHORITY OF PHYSICIAN TO PRESCRIBE FOR THE TREATMENT OF PAIN

The Texas Medical Board proposes the repeal and replacement of §§170.1 - 170.3. The current Chapter is titled "Authority of Physician to Prescribe for the Treatment of Pain". The new title will be "Pain Management".

The repeal and replacement revises rules regarding guidelines for physicians in the treatment of pain.

Michele Shackelford, General Counsel, Texas Medical Board, has determined that for the first five-year period the repeal and replacement are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the sections as proposed.

Ms. Shackelford also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to provide better guidelines for physicians regarding the treatment of pain to address issues of adequate pain management as well as concern for the possible addiction to and diversion of pain medications. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

22 TAC §§170.1 - 170.3

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Medical Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice

of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§170.1. Purpose.

§170.2. Definitions.

§170.3. Guidelines.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Donald W. Patrick, MD, JD
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CHAPTER 170. PAIN MANAGEMENT

22 TAC §§170.1 - 170.3

The new sections are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§170.1. Purpose.

The treatment of pain is a vital part of the practice of medicine. Optimal pain management, however, is difficult. The physician must temper the desire to relieve pain with concern for the addictive potential and possible abuse and diversion of drugs. This Rule sets forth the board's policy for the proper treatment of pain. The board's intent is to protect the public and give guidance to physicians. The principles underlying this policy include:

(1) Pain is a medical condition that every physician sees regularly. It is an integral part of the practice of medicine.

(2) The goal of pain management is to treat the patient's pain in relation to overall health. Physical function, psychological, social, and work-related factors affect the patient's need for pain treatment.

(3) Drugs may be essential for the treatment of pain.

(4) A license to practice medicine gives a physician legal authority to prescribe drugs for pain. The physician has a duty to use that authority to help, and not to harm patients and the public.

(5) Improper pain treatment may involve over-treatment, under-treatment, or no treatment. It may also involve prescribing drugs for purposes other than the treatment of a medical condition.

(6) Over-treatment of pain is a threat to patients and the public, because it may lead to abuse, addiction, and diversion of drugs. Thus, physicians must minimize this potential.

(7) Physicians should not fear board action if they provide proper pain treatment. Sound clinical judgment is the most important consideration.

(8) Sound clinical judgment results from evidence-based medicine or the use of generally accepted standards. The board will not look solely at the quantity or duration of drug therapy.

(9) Adequate medical records are crucial when a physician uses dangerous or scheduled drugs. The physician must keep current, legible, complete, and accurate records for each patient. The physician must record the rationale for the treatment plan in a way that shows that these guidelines have been followed.

(10) The extent of medical records must be reasonable for the case. For example, a treatment plan for acute, episodic pain may note only the dosage and frequency of drugs prescribed and that no further treatment is planned. Treatment of chronic pain, on the other hand, would require a more extensive plan, to assure that the success of the treatment is monitored. An explanation of the thought process is important when the physician continues scheduled drug therapy or escalates the prescription of scheduled drugs. A thorough explanation is especially required for cases in which treatment with scheduled drugs is difficult to relate to the patients objective physical, radiographic, or laboratory findings.

(11) The board does not require a physician to comply strictly with these guidelines, provided medical records show a sound basis for the treatment plan. A physician cannot always relieve all of a patient's pain. Proper pain treatment may require the escalation of drug use. The board will consider all factors, including:

(A) how a diagnosis supports the drug therapy;

(B) the efforts to monitor the efficacy of drug therapy; and

(C) whether the medical records show a rationale and plan to improve function.

§170.2. Definitions.

In this Chapter:

(1) "Abuse" or "substance abuse"--a patient's use of a drug for purposes other than the treatment of a medical condition, including pain, as prescribed by a physician.

(2) "Acute pain"--the normal, predicted, physiological response to a stimulus such as trauma and disease. Acute pain is time limited.

(3) "Addiction"--a primary, chronic, neurobiological disease characterized by craving and compulsive use of drugs. Addiction is often characterized by impaired control over drug use, including taking more drugs more often than prescribed by a physician. It may also be characterized by continued use despite harm to oneself or others. Genetic, psychosocial, and environmental factors may influence the development and manifestations of addiction. Physical dependence and tolerance are normal physiological consequences of extended drug therapy for pain and, alone, do not indicate addiction.

(4) "Chronic pain"-- a state in which pain persists beyond the usual course of an acute disease or healing of an injury. Chronic pain may be associated with a chronic pathologic process that causes continuous or intermittent pain over months or years.

(5) "Proper treatment of pain"--treatment of pain by a physician using sound clinical judgment documented by adequate medical records.

(6) "Scheduled drugs" (sometimes referred to as "Controlled Substances")--medications defined by the Texas Controlled Substances Act, Chapter 481, Texas Health and Safety Code. This Act establishes five categories, or schedules of drugs, based on risk of abuse and addiction. (Schedule I includes drugs that carry an extremely

high risk of abuse and addiction and have no legitimate medical use. Schedule V includes drugs that have the lowest abuse/addiction risk).

(7) "Dangerous drugs"--medications defined by the Texas Dangerous Drug Act, Chapter 483, Texas Health and Safety Code. Dangerous drugs require a prescription, but are not included in the list of scheduled drugs. A dangerous drug bears the legend "Caution: federal law prohibits dispensing without a prescription" or "Prescription Only."

(8) "Diversion"--the use of drugs by anyone other than the person for whom the drug was prescribed by a physician.

(9) "Escalation"--increasing the dosage or frequency of the use of drugs.

(10) "Improper pain treatment"--includes over treatment, under treatment, no treatment, and the prescription of drugs for purposes other than the proper treatment of pain. Improper pain treatment results from the failure to follow the guidelines set forth in this Chapter.

(11) "Non-therapeutic"--has the same definition as improper pain treatment.

(12) "Pain"--An unpleasant sensory and emotional experience associated with actual or potential tissue damage or described in terms of tissue damage.

(13) "Physical dependence"--A state of adaptation that is a normal physiological consequence of extended drug therapy for pain. Symptoms of dependence can be produced by abruptly discontinuing drug therapy, rapidly reducing dosage, decreasing blood level of the drug, and administering an antagonist. Physical dependence, alone, does not indicate addiction.

(14) "Tolerance" (tachyphylaxis)--the progressive decrease in the relief of pain following extended drug therapy. Tolerance does not necessarily occur during drug treatment and does not, alone, indicate addiction.

(15) "Withdrawal"--the physiological and mental readjustment that accompanies discontinuation of a drug for which a person has established a physical dependence.

§170.3. Guidelines.

(a) The Texas Medical Board will use these guidelines to assess a physician's treatment of pain. Failure to follow these guidelines will be grounds for disciplinary action under the Medical Practice Act. The board interprets the word "Nontherapeutic," as used in §164.053(a)(5), Texas Occupations Code, to include improper pain treatment. "Must," as used in these guidelines means that failure to follow the guideline violates the Medical Practice Act, unless a sound basis for deviation is noted in the medical records. "Should" means that the guideline must be followed unless there is a sound basis for deviation.

(1) Evaluation of the patient.

(A) A physician must obtain a medical history either orally or in writing from the patient.

(B) The physician must perform a proper physical examination.

(C) The medical record should document the medical history and physical examination, including:

(i) the nature and intensity of the pain,

(ii) current and past treatments for pain,

(iii) underlying or coexisting diseases and conditions,

(iv) the effect of the pain on physical and psychological function,

(v) any history and potential for substance abuse, and

(vi) the presence of one or more recognized medical indications for the use of a dangerous or scheduled drug.

(2) Treatment plan. A written treatment plan must be included in the medical records. In preparing the treatment plan, the physician shall consider and the treatment plan should mention:

(A) dosage and frequency of any drugs prescribed,

(B) further testing and diagnostic evaluations to be ordered,

(C) other treatments that are planned or considered,

(D) periodic reviews planned, and

(E) objectives that will be used to determine treatment success, such as pain relief and improved physical and psychosocial function.

(3) Informed consent. The physician should discuss the risks and benefits of the use of dangerous and scheduled drugs with the patient. If the patient does not have medical decision-making capacity, the discussion should be with another appropriate person. Discussion of risks and benefits should include an explanation of the:

(A) diagnosis;

(B) treatment plan;

(C) anticipated therapeutic results, including the realistic expectations for sustained pain relief and improved functioning and it should be mentioned that it might not be possible to relieve all of the patient's pain;

(D) alternatives or complementary therapies to drug therapy, including physical therapy or psychological techniques;

(E) potential side effects and how to manage them, including the potential for dependence, addiction, escalation, tolerance, and withdrawal; and

(F) potential for impairment of judgment and motor skills.

(4) Agreement for treatment. The patient should agree to obtain prescriptions from only one physician and only one pharmacy. If the treatment plan includes extended drug therapy, the physician should consider the use of a written pain management agreement between the physician and the patient outlining patient responsibilities, including the following provisions:

(A) the physician may require laboratory tests for drug levels upon request;

(B) the physician may limit the number and frequency of prescription refills;

(C) only one physician will prescribe dangerous and scheduled drugs;

(D) only one pharmacy will be used for prescriptions, and

(E) reasons for which drug therapy may be discontinued (e.g. violation of agreement).

(5) Periodic review.

(A) The physician should see the patient for periodic review at reasonable intervals in view of the individual circumstances of the patient.

(B) Periodic review should assess progress toward reaching treatment objectives, taking into consideration the course of medications, as well as any new information about the etiology of the pain.

(C) Each periodic visit should be documented in the medical records.

(D) Contemporaneous to the periodic reviews, the physician should note in the medical records any adjustment in the treatment plan based on the individual medical needs of the patient.

(E) A physician should continue or modify the use of dangerous and scheduled drugs for pain management based on an evaluation of progress toward treatment objectives.

(i) Progress or the lack of progress in relieving pain must be documented in the patient's record.

(ii) Satisfactory response to treatment may be indicated by the patient's decreased pain, increased level of function, or improved quality of life.

(iii) Objective evidence of improved or diminished function should be monitored. Information from family members or other caregivers should be considered in determining the patient's response to treatment. If the patient's progress is unsatisfactory, the physician should assess the appropriateness of continued use of the current treatment plan and consider the use of other therapeutic modalities.

(6) Consultation and Referral. The physician should refer a patient for further evaluation and treatment as necessary. Patients who are at-risk for abuse, addiction, or diversion require special attention. Patients with a history of substance abuse or with a co-morbid psychiatric disorder require even more care. A consult with or referral to a pain management specialist should be considered in the treatment of such patients.

(7) Medical records. The medical records must document the physician's rationale for the treatment plan and the prescription of drugs and show that the physician has followed these guidelines. Specifically the records should include:

(A) the medical history and the physical examination;

(B) diagnostic, therapeutic and laboratory results;

(C) evaluations and consultations;

(D) treatment objectives;

(E) discussion of risks and benefits;

(F) informed consent;

(G) treatments;

(H) medications (including date, type, dosage and quantity prescribed);

(I) instructions and agreements; and

(J) periodic reviews.

(b) It is not the board's policy to take disciplinary action against a physician solely for not adhering strictly to these guidelines if the reason for deviation is documented in the medical records. Each case of prescribing for pain will be evaluated on an individual basis. The physician's conduct will be evaluated by considering:

(1) the treatment outcome, including any improvement in functioning;

(2) whether the drugs and amounts used are medically and pharmacologically recognized to be appropriate for the diagnosis;

(3) the patient's individual needs; and

(4) that some types of pain cannot be completely relieved.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Medical Board
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CHAPTER 171. POSTGRADUATE TRAINING PERMITS

22 TAC §§171.2 - 171.4, 171.6, 171.7

The Texas Medical Board proposes amendments to §§171.2-171.4, 171.6 and 171.7, concerning Postgraduate Training Permits.

The amendment to §171.2 reinforces the Board's authority to discipline a licensee who supervises a training program. The amendment to §171.3 requires that training programs for which physician in training permits are issued be supervised by a physician over which the Board has jurisdiction; makes more specific the requirements for certification of training program by supervisors; deletes obsolete provisions; and reorganizes the chapter to put annual reporting with other similar provisions. The amendment to §171.4 substantially revises the rule regarding postgraduate fellowship training programs that seek Board approval and assures that the program has been reviewed and approved by the graduate medical education committee of the institution. The amendment to §171.6 specifies a disciplinary action against the supervisor of a training program as an administrative violation and moves provisions for annual reporting from another section to include in the duties of a supervisor. The amendment to §171.7 changes the provision regarding a return to active status of a physician in training permit from mandatory to permissive upon a training program lifting a suspension.

Michele Shackelford, General Counsel, Texas Medical Board, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the sections as proposed.

Ms. Shackelford also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to assure that the Board can discipline a physician regarding the physician's duties in supervising a medical training program, assures that the Board has jurisdiction to oversee postgraduate training and reorganizes the chapter, assures that physician in training permits are issued on for fellowship programs that

are based on needed training and quality education, assures that postgraduate training programs are properly supervised and gives the Board discretion to refuse to re-activate a physician in training permit after a training program has suspended a student and then lifted the suspension. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The following statutes, articles or codes are affected by this proposal: §155.105, Texas Occupations Code.

§171.2. Construction.

(a) Unless otherwise indicated, permit holders under this chapter shall be subject to the duties, limitations, disciplinary actions, rehabilitation order provisions, and procedures applicable to licensees in the Medical Practice Act and board rules. Permit holders under this chapter shall also be subject to the limitations and restrictions elaborated in this chapter.

(b) Permit holders under this chapter shall cooperate with the board and board staff involved in investigation, review, or monitoring associated with the permit holder's practice of medicine. Such cooperation shall include, but not be limited to, permit holder's written response to the board or board staff written inquiry within 14 days of receipt of such inquiry.

(c) A physician-in-training permit holder's failure to comply with required annual reporting is grounds for disciplinary action by the Board.

(d) [~~(c)~~] In accordance with §155.105 of the Medical Practice Act, the board shall retain jurisdiction to discipline a permit holder whose permit has been terminated, canceled, and/or expired if the permit holder violated the Medical Practice Act or board rules during the time the permit was valid.

(e) [~~(d)~~] The issuance of a permit to a physician shall not be construed to obligate the board to issue the physician subsequent permits or licenses. The board reserves the right to investigate, deny a permit or full licensure, and/or discipline a physician regardless of when the information was received by the board.

§171.3. Physician-in-Training Permits.

(a) Definitions.

(1) Approved Postgraduate Training Program: a clearly defined and delineated postgraduate medical education training program, including postgraduate subspecialty training programs, approved by the Accreditation Council for Graduate Medical Education (ACGME), the American Osteopathic Association (AOA), the Committee on Accreditation of Preregistration Physician Training Programs, the Federation of Provincial Medical Licensing Authorities of Canada (internships prior to 1994), the Royal College of Physicians and Surgeons of Canada, or the College of Family Physicians of Canada.

(2) Board-approved [~~Postgraduate~~] Fellowship [~~Training Program~~]: a clearly defined and delineated postgraduate subspecialty-training program approved by the Texas [~~State Board of~~] Medical Board [~~Examiners~~] under §171.4 of this title.

(3) Designated Institutional Official (DIO): The individual in a sponsoring graduate medical education institution who has the authority and responsibility for the graduate medical education programs.

(4) Fellowship: A subspecialty training program of graduate medical education for postgraduate residents who have completed the requirements for eligibility for first board certification in the specialty and that is approved by the Accreditation Council for Graduate Medical Education (ACGME), the American Osteopathic Association (AOA), a member board of the American Board of Medical Specialties (ABMS), or a member board of the Bureau of Osteopathic Specialists (BOS).

(5) [~~(3)~~] Postgraduate Resident: a physician who is in postgraduate training as an intern, resident, or fellow in an approved postgraduate training program or a board-approved [~~postgraduate~~] fellowship [~~training program~~].

(6) [~~(4)~~] Physician-in-Training Permit:

(A) A physician-in-training permit is a permit issued by the board in its discretion to a physician who does not hold a license to practice medicine in Texas and is enrolled in a training program as defined in paragraphs (1) and (2) of this subsection in Texas, regardless of his/her postgraduate year (PGY) status within the program.

(B) The permit shall be effective for the length of the postgraduate training program as reported by the training program.

(C) A physician-in-training permit is valid only for the practice of medicine within the training program for which it was approved. If a permit holder enters into a new program that is not covered by the issued permit, the permit shall be terminated and the permit holder must apply for a new permit for the new program.

(D) A physician-in-training permit holder is restricted to the supervised practice of medicine that is part of and approved by the training program. The permit does not allow for the practice of medicine that is outside of the approved program.

(b) Qualifications of Physician-in-Training Permit Holders.

(1) To be eligible for a physician-in-training permit, an applicant must present satisfactory proof to the board that the applicant:

(A) is at least 18 years of age;

(B) is of good professional character and has not violated §§164.051-164.053 of the Medical Practice Act;

(C) is a graduate of a medical school or has completed a Fifth Pathway Program;

(D) has been accepted into an approved postgraduate training program or board-approved postgraduate fellowship training program; and

(E) has been credentialed by the postgraduate training program to include verification by the program of:

(i) the applicant's identity; and

(ii) the applicant's character and academic qualifications including verification of medical school graduation.

(2) To be eligible for a physician-in-training permit, an applicant must not have:

(A) a medical license, permit, or other authority to practice medicine that is currently restricted for cause, canceled for cause, suspended for cause, revoked or subject to another form of discipline in a state or territory of the United States, a province of Canada, or a uniformed service of the United States;

(B) an investigation or proceeding pending against the applicant for the restriction, cancellation, suspension, revocation, or other discipline of the applicant's medical license, permit, or authority to practice medicine in a state or territory of the United States, a province of Canada, or a uniformed service of the United States;

(C) a prosecution pending against the applicant in any state, federal, or Canadian court for any offense that under the laws of this state is a felony, a misdemeanor that involves the practice of medicine, or a misdemeanor that involves a crime of moral turpitude.

(c) Application for Physician-in-Training Permit.

(1) Application Procedures.

(A) Applications for a physician-in-training permit shall be submitted to the board no earlier than the ninetieth (90th) day prior to the date the applicant intends to begin postgraduate training in Texas to ensure the application information is not outdated. To assist in the expedited processing of the application, the application should be submitted as early as possible within the sixty-day window prior to the date the applicant intends to begin postgraduate training in Texas.

(B) The board may, in unusual circumstances, allow substitute documents where exhaustive efforts on the applicant's part to secure the required documents is presented. These exceptions shall be reviewed by the board's executive director on a case-by-case basis.

(C) For each document presented to the board, which is in a foreign language, an official word-for-word translation must be furnished. The board's definition of an official translation is one prepared by a government official, official translation agency, or a college or university official, on official letterhead. The translator must certify that it is a "true translation to the best of his/her knowledge, that he/she is fluent in the language, and is qualified to translate." He/she must sign the translation with his/her signature notarized by a Notary Public. The translator's name and title must be typed/printed under the signature.

(D) The board's executive director shall review each application for training permit and shall approve the issuance of physician-in-training permits for all applicants eligible to receive a permit. The executive director shall also report to the board the names of all applicants determined to be ineligible to receive a permit, together with the reasons for each recommendation. The executive director may refer any application to a committee or panel of the board for review of the application for a determination of eligibility.

(E) An applicant deemed ineligible to receive a permit by the executive director may request review of such recommendation by a committee or panel of the board within 20 days of written receipt of such notice from the executive director.

(F) If the committee or panel finds the applicant ineligible to receive a permit, such recommendation together with the reasons for the recommendation, shall be submitted to the board unless the applicant makes a written request for a hearing within 20 days of receipt of notice of the committee's or panel's determination. The hearing shall be before an administrative law judge of the State Office of Administrative Hearings and shall comply with the Administrative Procedure Act, the rules of the State Office of Administrative Hearings and the board. The board shall, after receiving the administrative law judge's proposed findings of fact and conclusions of law, determine the eligibility of the applicant to receive a permit. A physician whose application to receive a permit is denied by the board shall receive a written statement containing the reasons for the board's action.

(G) All reports and investigative information received or gathered by the board on each applicant are confidential and are not subject to disclosure under the Public Information Act, Gov't Code Chapter 552 and the Medical Practice Act, Tex. Occ. Code §§155.007(g), 155.058, and 164.007(c). The board may disclose such reports and investigative information to appropriate licensing authorities in other states.

(2) Physician-in-Training Permit Application. An application for a physician-in-training permit must be on forms furnished by the board and include the following:

(A) the required fee as mandated in the Medical Practice Act, §153.051 and as construed in board rules[~~, payable by personal check, money order or cashier's check through a United States bank~~];

(B) certification by the postgraduate training program:

(i) for a Texas postgraduate training program, a certification must be completed by the director of medical education, the chair of graduate medical education, the program director, or, if none of the previously named positions is held by a Texas licensed physician, the Texas Licensed physician supervising [~~physician, of~~] the postgraduate training program on a form provided by the board that certifies that:

(I) [~~(i)~~] the program meets the definition of an approved postgraduate training program in subsection (a)(2) and (3) of this section;

(II) [~~(ii)~~] the applicant has met all educational and character requirements established by the program and has been accepted into the program; and

(III) [~~(iii)~~] the program has received a letter from the dean of the applicant's medical school that [~~which~~] states that the applicant is scheduled to graduate from medical school before the date the applicant plans to begin postgraduate training, if the applicant has not yet graduated from medical school. [~~; and~~]

(ii) [~~(iv)~~] if the applicant is completing rotations in Texas as part of the applicant's residency out-of-state training program or with the military: [~~, the facility at which the rotations are being completed, and the dates the rotations will be completed in Texas;~~]

(I) a certification must be completed by the director of medical education, the chair of graduate medical education, the program director, or, if none of the previously named positions is held by a physician licensed in any state, the supervising physician, licensed in any state, of the postgraduate training program on a form provided by the board that certifies that:

(-a-) the program meets the definition of an approved postgraduate training program in subsection (a)(2) and (3) of this section;

(-b-) the applicant has met all educational and character requirements established by the program and has been accepted into the program;

(-c-) the program has received a letter from the dean of the applicant's medical school which states that the applicant is scheduled to graduate from medical school before the date the applicant plans to begin postgraduate training, if the applicant has not yet graduated from medical school; and

(II) a certification by the Texas Licensed physician supervising the Texas rotations of the postgraduate training program on a form provided by the board that certifies:[~~,~~]

(-a-) the facility at which the rotations are being completed,

(-b-) the dates the rotations will be completed in Texas, and

(-c-) that the Texas postgraduate training program will supervise and be responsible for the applicant during the rotation in Texas;

(C) arrest records. If an applicant has ever been arrested, a copy of the arrest and arrest disposition must be requested from the arresting authority by the applicant and said authority must submit copies directly to the board;

(D) medical records for inpatient treatment for alcohol/substance abuse, mental illness, and physical illness. Each applicant who has been admitted to an inpatient facility within the last five years for the treatment of alcohol/substance abuse, mental illness (recurrent or severe major depressive disorder, bipolar disorder, schizophrenia, schizoaffective disorder, or any severe personality disorder), or physical illness shall submit documentation to include, but not limited to:

(i) an applicant's statement explaining the circumstances of the hospitalization;

(ii) all records, submitted directly from the inpatient facility;

(iii) a statement from the applicant's treating physician/psychotherapist as to diagnosis, prognosis, medications prescribed, and follow-up treatment recommended; and

(iv) a copy of any contracts signed with any licensing authority or medical society or impaired physician's committee;

(E) medical records for outpatient treatment for alcohol/substance abuse, mental illness, or physical illness. Each applicant that has been treated on an outpatient basis within the last five years for alcohol/substance abuse, mental illness (recurrent or severe major depressive disorder, bipolar disorder, schizophrenia, schizoaffective disorder, or any severe personality disorder), or physical illness shall submit documentation to include, but not limited to:

(i) an applicant's statement explaining the circumstances of the outpatient treatment;

(ii) a statement from the applicant's treating physician/psychotherapist as to diagnosis, prognosis, medications prescribed, and follow-up treatment recommended; and

(iii) a copy of any contracts signed with any licensing authority or medical society or impaired physician's committee;

(F) an oath on a form provided by the board attesting to the truthfulness of statements provided by the applicant;

(G) such other information or documentation the board and/or the executive director deem necessary to ensure compliance with this chapter, the Medical Practice Act and board rules.

(d) Expiration of Physician-in-Training Permit.

(1) Physician-in-Training permits shall be issued with effective dates corresponding with the beginning and ending dates of the postgraduate resident's training program as reported to the board by the program director.

(2) Physician-in-training permits shall expire on any of the following, whichever occurs first:

(A) on the reported ending date of the postgraduate training program;

(B) on the date a postgraduate training program terminates or otherwise releases a permit holder from its training program; or

(C) on the date the permit holder obtains full licensure or temporary licensure pending full licensure pursuant to §155.002 of the Act.

(3) Physician-in-training permit holders who are issued permits on or after April 1, 2005, and who require extensions to remain in a training program after a program's reported ending date must submit a written request to the board and fee, if required, along with a statement by the program director authorizing the request for the extension. Such extensions shall be granted at the discretion of the board's executive director and may not be for longer than 90 days unless good cause is shown.

[(4) If a postgraduate resident was issued a permit for a program with an initial start date prior to April 1, 2005, and the permit is set to expire before the ending date of the permit holder's training program, and the expiration date is on or after July 2, 2005, the program director and/or permit holder must submit an application and fee requesting that the permit be extended to the ending date of the training program. The fee shall be in accordance with §175.1(2)(B) of this title (relating to Fees, Penalties, and Applications).]

[(e) Annual reports. Program directors for postgraduate training programs must ensure that the board receives certain information annually in order to keep the board informed on a permit holder's progress while in the approved training program. The required information shall be sent to the board on forms provided by the board and shall include:]

[(1) information regarding the permit holder's criminal and disciplinary history, professional character, mailing address, and place where engaged in training since the program director's last report;]

[(2) certification by the permit holder's program director, on a form provided by the board, regarding the permit holder's training; and]

[(3) such other information or documentation the board and/or the executive director deem necessary to ensure compliance with this chapter, the Medical Practice Act and board rules.]

(e) [(f)] The executive director of the board may, in his/her discretion, issue a temporary physician-in-in-training permit to an applicant if the applicant and the postgraduate training program have submitted written requests. The executive director, in his/her discretion, will determine the length of the permit and may issue additional temporary physician-in-training permits to an applicant.

§171.4. Board-Approved Fellowships [Postgraduate Fellowship Training Programs].

(a) The executive director may in his/her discretion, upon written request, approve fellowships [training programs] as referenced in §171.3(a)(2) [(3)] of this chapter [for up to three years]. Fellowships meeting the criteria set forth in §171.3(a)(4) of this chapter do not require board approval for physician-in-training permits to be issued to subspecialty postgraduate residents in the fellowship. [The initial request should be submitted to the executive director 180 days prior to the beginning date of the program to assist in the expedited processing of an application. Said training programs shall be limited to postgraduate subspecialty programs.] If the executive director does not recommend approval, the institution's designated institutional official (DIO) and chair of the Graduate Medical Education Committee (GMEC) [program's director] may appeal to the board for its discretionary consideration of the request.

(b) The initial request for approval should be submitted to the executive director, on a form prescribed by the board, 90 days prior to the beginning date of the program to assist in the expedited processing of an application. The request must include the length of the fellow-

ship; the length of time for which the institution is requesting approval of the fellowship itself, not to exceed five years; and other information as required by the board. [~~Approval of training programs shall include but not be limited to the following considerations:~~]

(c) Approval of fellowships requires certification by the DIO and the chair of the GMEC of the institution in which the fellowship will be conducted that the fellowship program has been evaluated and approved by the institution's graduate medical education committee. The evaluation shall include but not be limited to satisfactory demonstration to the committee of the fellowship's:

(1) [~~the~~] goals and objectives [~~of the program~~]; documented curriculum; and, qualifications of the program director and program faculty, including, but not limited to, certification by the appropriate specialty board and/or appropriate educational qualifications;

(2) [~~the~~] process by which [~~the program selects~~] subspecialty postgraduate residents are selected;

(3) prerequisite requirements of the postgraduate residents, including whether prior residency training in a related specialty is required [~~of subspecialty postgraduate residents in the program~~];

(4) delineated [~~the~~] duties and responsibilities required of subspecialty postgraduate residents in the program [~~including the number of subspecialty postgraduate residents to be enrolled each year and when subspecialty postgraduate residents are required to be permanently licensed~~];

(5) number of subspecialty postgraduate residents to be enrolled each year [~~the formal educational experiences required of subspecialty postgraduate residents in the program, including grand rounds, seminars and journal club~~];

(6) [~~the~~] scholarly activity to be [~~research~~] required of subspecialty postgraduate residents [~~in the program, including participation in peer reviewed and funded research which may result in publications or presentations at regional and national scientific meetings~~];

(7) [~~the~~] type of supervision to be provided for subspecialty postgraduate residents [~~by the program~~];

[~~(8) the curriculum vitae, including academic appointments, of all supervising staff;~~]

(8) [~~(9)~~] requirements for [~~that~~] the program director or supervising physician to hold [~~holds~~] a Texas license or faculty temporary license issued by the board;

[~~(10) the academic affiliation of the program;~~]

(9) [~~(11)~~] [~~the~~] methods for evaluation of subspecialty postgraduate residents by the program; and

[~~(12) whether a specialty board that is a member of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists gives credit for the program; and~~]

(10) [~~(13)~~] [~~the~~] progressive nature, including, but not limited to, the progressively greater responsibility of the subspecialty postgraduate residents throughout the course of the fellowship if the fellowship [~~training program~~] is over one year in length.

(d) Institutions with board-approved fellowships must determine whether to conduct internal reviews of the program at the midpoint of the program's most recent approval period.

(e) Institutions with board-approved fellowships that are eligible for accreditation as described in §171.3(a)(4) of this chapter must determine whether the fellowship should seek such accreditation rather than board approval of the fellowship.

(f) [~~(c)~~] The DIO and the chair of the GMEC of the institution for which a [~~All program directors for~~] fellowship program has [~~training programs that have~~] been previously approved by the board must apply to have the program [~~be re-evaluated~~] approved again, if the program is to continue after the expiration date [~~to assure compliance with the above considerations and consideration of continuation of the fellowship training program~~]. Applications for subsequent approval must comply with all requirements in this section for initial approval and must be submitted [~~The program director must apply for re-evaluation~~] at least three [~~six~~] months prior to the expiration of the approved program in order to prevent a lapse in time of the fellowship [~~training program~~]. Permit holders shall be allowed to complete their fellowship [~~training program~~] regardless of continuing program approval [~~re-evaluation~~].

(g) [~~(d)~~] All board-approved fellowships that subsequently become approved by the ACGME, AOA, a member board of the ABMS, or a member board of the BOS, [~~or AOA~~] must notify the board within 30 days of their approval. Fellowships may not be dually approved by the board and ACGME, AOA, a member board of the ABMS, or a member board of the BOS [~~or AOA~~]. A board-approved fellowship that becomes approved by the ACGME, AOA, a member board of the ABMS, or a member board of the BOS [~~or AOA approved~~] immediately loses its board-approved status when its new approval becomes effective through the ACGME , AOA, a member board of the ABMS, or a member board of the BOS [~~or AOA~~].

(h) All fellowships that have been approved before September 1, 2006 shall terminate no later than August 31, 2007, but shall expire on such earlier date provided in the approval. A new application for approval must be submitted at least three months prior to the expiration date or on June 1, 2007, whichever date is earlier. All requests for board approval of fellowships submitted on or after September 1, 2006 must comply with the requirements of this chapter.

§171.6. Duties of Program Directors to Report [~~Certain Types of Conduct~~].

(a) Failure of any postgraduate training program director to comply with the provisions of this chapter or the Medical Practice Act §160.002 and §160.003 may be grounds for disciplinary action as an administrative violation against the program director.

(b) The director of each approved postgraduate training program shall report in writing to the executive director of the board the following circumstances within seven days of the director's knowledge for any physician-in-training permit holder completing postgraduate training:

(1) if a physician did not begin the training program due to failure to graduate from medical school as scheduled or for any other reason(s);

(2) if a physician has been or will be absent from the program for more than 21 consecutive days (excluding vacation, family, or military leave) and the reason(s) why;

(3) if a physician has been arrested after the permit holder begins training in the program;

(4) if a physician poses a continuing threat to the public welfare as defined under Tex. Occ. Code §151.002(a)(2), as amended;

(5) if the program has taken final action that adversely affects the physician's status or privileges in a program for a period longer than 30 days;

(6) if the program has suspended the physician from the program;

(7) if the program has requested termination or terminated the physician from the program, requested or accepted withdrawal of the physician from the program, or requested or accepted resignation of the permit holder from the program and the action is final.

(c) Annual reports. Program directors for postgraduate training programs must ensure that the board receives certain information annually in order to keep the board informed on a permit holder's progress while in the approved training program. The required information shall be sent to the board on forms provided by the board and shall include:

(1) information regarding the permit holder's criminal and disciplinary history, professional character, mailing address, and place where engaged in training since the program director's last report;

(2) certification by the permit holder's program director, on a form provided by the board, regarding the permit holder's training; and

(3) such other information or documentation the board and/or the executive director deem necessary to ensure compliance with this chapter, the Medical Practice Act and board rules.

(d) [~~(c)~~] A violation of §§164.051-164.053 or any other provision of the Medical Practice Act is grounds for disciplinary action by the Board.

§171.7. Inactive Status.

(a) A physician-in-training permit holder who is placed on suspension, dismissed, or terminated by a training program shall have his permit placed on inactive status.

(b) The board retains jurisdiction to investigate any physician-in-training permit holder placed on inactive status for possible violation(s) of the Medical Practice Act and/or board rules.

(c) If a postgraduate training program lifts the suspension of a physician-in-training permit holder, the program must notify the board of the lifted suspension and board may [~~shall~~] return the physician's permit to active status effective the date the board is notified that the suspension is lifted.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
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CHAPTER 172. TEMPORARY AND LIMITED LICENSES

SUBCHAPTER C. LIMITED LICENSES

22 TAC §172.13

The Texas Medical Board proposes new §172.13, concerning Conceded Eminence.

New §172.13 creates a new limited license for physicians with conceded eminence in their specialty, as required by SB 419.

Michele Shackelford, General Counsel, Texas Medical Board, has determined that for the first five-year period the new section is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the section as proposed.

Ms. Shackelford also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to increase the effectiveness of recruiting professors for Texas medical schools. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The new section is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The following statutes, articles or codes are affected by this proposal: §155.006, Texas Occupations Code.

§172.13. Conceded Eminence.

(a) The board may issue a license to an applicant pursuant to the authority of §155.006, Tex. Occ. Code, by virtue of the applicant's conceded eminence and authority in the applicant's specialty.

(b) "Conceded eminence and authority in the applicant's specialty," as used in this section, shall mean that the physician has achieved a high level of academic or professional recognition for excellence in research, teaching, or the practice of medicine, as evidenced by objective factors, including academic appointments, length of time in a profession, scholarly publications and presentations, professional accomplishments, and awards.

(c) An applicant for a license based on conceded eminence must complete an application showing that the applicant:

(1) is recommended to the board by the dean, president, or chief academic officer of:

(A) a school of medicine in this state;

(B) The University of Texas Health Center at Tyler;

(C) The University of Texas M.D. Anderson Cancer Center, or

(D) a program of graduate medical education, accredited by the Accreditation Council for Graduate Medical Education, that exceeds the requirements for eligibility for first board certification in the discipline;

(2) is expected to receive an appointment at the institution or program making the recommendation under paragraph (1) of this subsection;

(3) has not failed a licensing examination within the three-attempt limit provided by §163.6(b) and §163.6(f)(1) of this title;

(4) has passed the Texas Medical Jurisprudence Examination;

(5) has successfully completed at least one year of approved subspecialty training accredited by the Accreditation Council for Graduate Medical Education or the American Osteopathic Association;

(6) is of good professional character, as defined by §163.1(a)(9) of this title;

(7) has conceded eminence and authority in a medical specialty identified in the application;

(8) has not been the subject of disciplinary action by any other state, the uniformed services of the United States, or the applicant's peers in a local, regional, state, or national professional medical association or staff of a hospital;

(9) has not been convicted of, or placed on deferred adjudication, community supervision, or deferred disposition for a felony, a misdemeanor connected with the practice of medicine, or a misdemeanor involving moral turpitude. And

(10) has read and will abide by board rules and the Medical Practice Act.

(d) Applicants with complete applications may qualify for a Temporary License prior to being considered by the board for licensure, as required by §172.11 of this title (relating to Temporary Licensure--Regular).

(e) The holder of a conceded eminence license shall be limited to the practice of only a specialty of medicine for which the license holder has conceded eminence and authority, as identified in the application. The license holder may only practice medicine within the setting of the institution or program that recommended the license holder under subsection (c)(1) of this section, including a setting that is part of the institution or program by contractual arrangement.

(f) If the holder of a conceded eminence license terminates the relationship with the institution or program that recommended the license holder under subsection (c)(1) of this section, the conceded eminence license shall be considered automatically canceled. To practice medicine in Texas, the license holder must:

(1) file a new application with the recommendation of a new institution or program, as required by subsection (c)(1) of this section, or

(2) file an application for another Texas medical license or permit.

(g) The holder of a conceded eminence license shall be required to pay the same fees and meet all other procedural requirements for issuance and renewal of the license as a person holding a full Texas medical license.

(h) The holder of a conceded eminence license shall be subject to disciplinary action under the Medical Practice Act and board rules.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Medical Board
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CHAPTER 174. TELEMEDICINE

22 TAC §174.2, §174.6

The Texas Medical Board proposes an amendment to §174.2 and new §174.6, concerning Telemedicine.

The amendment to §174.2 adds the definition for "telepresenter." New §174.6 creates standards for delegation by a physician to a non-physician in the practice of telemedicine.

Michele Shackelford, General Counsel, Texas Medical Board, has determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the sections as proposed.

Ms. Shackelford also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to define the use of non-physicians in the practice of telemedicine and to assures that physicians delegate duties only to properly trained and qualified personnel in the practice of telemedicine. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment and new section are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§174.2. Definitions.
The following words and terms, when used in this chapter shall have the following meanings unless the context indicates otherwise.

(1) Medical practice site--A patient-specific Internet site, access to which is limited to licensed physicians, associated medical personnel and patients. It is an interactive site and thus qualifies as a practice location. It requires a defined physician-patient relationship.

(2) Medium--Any mechanism of information transfer including electronic means.

(3) Person--An individual unless otherwise expressly made applicable to a partnership, association, or corporation.

(4) Physician-patient e-mail--A computer-based communication between physician (or their medical personnel) and patients within a professional relationship in which the physician has taken on an explicit measure of responsibility for the patient's care.

(5) Telemedicine medical service--A health care service initiated by a physician or provided by a health professional acting under physician delegation and supervision, for purposes of assessment by a health professional, diagnosis or consultation by a physician, treatment, or the transfer of medical data, that requires the use of advanced telecommunications other than by telephone or facsimile as described in §57.042 of the Utilities Code.

(6) Telepresenter--a remote site provider, as defined in 1 TAC §354.1430, who is not a physician, registered nurse, advanced practice nurse or physician assistant, unless such physician, registered nurse, advanced practice nurse or physician assistant is a qualified mental health professional as defined in §531.02175(a) of the Government Code.

§174.6. Delegation to and Supervision of Telepresenters.

(a) A physician may delegate tasks and activities to a telepresenter who is qualified by licensing, training or experience for the performance of the task or activity as long as the task or activity does not require the exercise of independent medical judgment for its performance;

(b) A physician delegating tasks or activities to a telepresenter shall ensure that the telepresenter to whom delegation is made is qualified by licensure, training, or experience to perform the task or activity delegated;

(c) A physician delegating tasks or activities to a telepresenter shall ensure that the telepresenter to whom delegation is made is adequately supervised.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Medical Board
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CHAPTER 175. FEES, PENALTIES AND FORMS

22 TAC §175.5

The Texas Medical Board proposes new §175.5, concerning Payment of Fees or Penalties.

New §175.5 specifies the procedure for payment of fees and penalties, including payment on-line.

Michele Shackelford, General Counsel, Texas Medical Board, has determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the section as proposed.

Ms. Shackelford also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to provide guidance in the procedures for payment of fees and penalties to the Board. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The new section is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§175.5. Payment of Fees or Penalties.

Fees paid online must be submitted by credit card, electronic check, or debit card, as required by the online application. All other licensure fees or penalties must be submitted in the form of a money order, personal check, or cashier's check payable on or through a United States bank. Fees and penalties cannot be refunded. If a single payment is made for more than one individual permit, it must be made for the same class of permit and a detailed listing, on a form prescribed by the board, must be included with each payment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 178. COMPLAINTS

22 TAC §178.8

The Texas Medical Board proposes an amendment to §178.8, concerning Appeals.

The amendment to §178.8 deletes the time limit for a complainant to appeal the dismissal of a complaint.

Michele Shackelford, General Counsel, Texas Medical Board, has determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the section as proposed.

Ms. Shackelford also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be removing time limits for a member of the public who has complained against a physician to appeal a Board decision to dismiss the complaint. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§178.8. Appeals.

(a) Initiation. Following the receipt of the notice of dismissal of a complaint, the complainant may appeal the dismissal to the board. To be considered by the board, the appeal must:

(1) be in writing; and

~~[(2) be received within 60 days of the mailing of the notice of dismissal of the complaint; and]~~

(2) [~~(3)~~] list the reason(s) for the appeal. The appeal should provide sufficient information to indicate that additional review is warranted.

(b) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 185. PHYSICIAN ASSISTANTS

22 TAC §§185.1 - 185.4, 185.6 - 185.8, 185.13, 185.15 - 185.19, 185.22, 185.23, 185.26

The Texas Medical Board proposes amendments to §§185.1 - 185.4, 185.6 - 185.8, 185.13, 185.15 - 185.19, 185.22, 185.23 and new §185.26, concerning Physician Assistants.

The amendment to §185.1 expands the expressed purpose of the Physician Assistant Board to more fully state the functions of the Board. The amendment to §185.2 conforms the name of the Physician Assistant Board and the Medical Board as required by SB 419 and adds definitions for clarity. The amendment to §185.3 conforms the rule to SB 419 changes regarding the appointment of the presiding officer of the Physician Assistant Board; changes the name of the Long Range Planning Committee to the Executive Committee; and revises duties of the committees. The amendment to §185.4 updates the name of the Accreditation Review Commission for the Education of Physician Assistants and adds the Jurisprudence Exam as a required exam for Physician Assistant licensure. The amendment to §185.6 sets out procedure and fees for reinstatement of Physician Assistant license after expiration. The amendment to §185.7 updates the name of the Accreditation Review Commission for the Education of Physician Assistants and allows a temporary license to be issued to a Physician Assistant who cannot demonstrate the required active practice. The amendment to §185.8 places additional limits of Physician Assistants to place their license on inactive status. The amendment to §185.13 adds requirements for a Physician Assistant to notify the Board of the termination of a supervising physician. The amendment to §185.15 eliminates unnecessary words. The amendment to §185.16 updates the name of the Medical Board to conform to changes made by SB 419. The amendment to §185.17 eliminates unnecessary words and adds to grounds for discipline the writing of a false prescription for a controlled substance. The amendment to §185.18 corrects a reference to another section and adds criminal convictions to the list of subjects in the Medical Boards rules that are adopted by reference. The amendment to §185.19 abbreviates Administrative Procedure Act, as defined. The amendment to §185.22 changes "this" to "the" in reference to the Physician Assistant Act. The amendment to §185.23 conforms the name of the Physician Assistant Board with changes made by SB 419. New §185.26 authorizes the Physician Assistant Board to accept the voluntary surrender of a license and adopts Medical Board procedures for voluntary surrender.

Michele Shackelford, General Counsel, Texas Medical Board, has determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the sections as proposed.

Ms. Shackelford also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to provide a better description of the functions of the Physician Assistant Board, update the rules and provide additional definitions, update the rule to conform to the statute and provides more effective committee structure for the Physician Assistant Board, assures that licensed Physician Assistants have knowledge of the legal requirement for practice as a Physician Assistant, makes clear the procedures and fees required for a Physician Assistant after expiration of a license, allows Physician Assistants to be temporarily licensed, pending the demonstration of clinical competency through the active practice as a Physician Assistant, assures that a Physician Assistant who returns to practice after being on inactive status is clinically competent to practice, assures that the Board is notified upon the termination of a supervising physician, economizes on the language used to describe the Physician Assistant Act, makes the rule clear regarding the name of the Medical Board, economizes on language and conforms the rule to the statutory provision making it a violation of the Physician Assistant Act to write a false prescription for a controlled substance, corrects references in the rule and conforms the rule to disciplinary guidelines used by the Medical Board, economizes on language used in the rule, corrects language of the rule, updates name of the Physician Assistant Board and provides a more efficient way to resolve some disciplinary cases. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments and new section are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§185.1. Purpose.

(a) These rules are promulgated under the authority of the Medical Practice Act, Title 3, Subtitle B, Texas Occupations Code and the Physician Assistant Licensing Act, Chapter 204, Texas Occupations Code, to establish procedures and standards for the training, education, licensing, and discipline of persons performing as a physician assistant in this State so as to establish an orderly system of regulating the practice of a physician assistant in a manner that protects the health, safety, and welfare of the public. [~~The purpose of these rules is to create a system of licensing and regulating physician assistants as a means to ensure the competency of physician assistants without a financial burden to the people of Texas. Furthermore, the purpose of these rules and regulations is to also encourage the more effective utilization of the skills of physicians by enabling them to delegate health care tasks to qualified physician assistants. These~~

~~sections are not intended to, and shall not be construed to, restrict the physician from delegating technical and clinical tasks to technicians, other assistants, or employees who perform delegated tasks in the office of a physician and who are not rendering services as a physician assistant or identifying themselves as a physician assistant. Nothing in these rules and regulations shall be construed to relieve the supervising physician of the professional or legal responsibility for the care and treatment of his or her patients.~~]

(b) The functions of the physician assistant board include but are not limited to the following:

(1) Establish standards for the practice of a physician assistant.

(2) Regulate the practice of a physician assistant through the licensure and discipline of physician assistants.

(3) Interpret the Physician Assistant Licensing Act and the physician assistant board Rules to ensure that physician assistants, other allied health professionals, and consumers are properly informed.

(4) Receive complaints and investigate possible violations of the Physician Assistant Licensing Act and the physician assistant board Rules.

(5) Discipline violators through appropriate legal action to enforce the Physician Assistant Licensing Act and the physician assistant board Rules.

(6) Provide a mechanism for public comment with regard to the Physician Assistant Licensing Act and the physician assistant board Rules.

(7) Review and modify the physician assistant board Rules when necessary and appropriate.

(8) Examine and license qualified applicants to practice as a physician assistant in Texas in a manner that ensures that applicable standards are maintained.

(9) Provide recommendations to the legislature concerning appropriate changes to the Physician Assistant Licensing Act to ensure that the acts are current and applicable to changing needs and practices.

(10) Provide public information on licensees.

(11) Maintain data concerning the practice of a physician assistant.

§185.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) Agency--The divisions, departments, and employees of the Texas [~~State Board of~~] Medical Board [~~Examiners~~], the Texas [~~State Board of~~] Physician Assistant Board [~~Examiners~~], and the Texas State Board of Acupuncture Examiners.

(3) - (4) (No change.)

(5) Applicant--A party seeking a license from the Texas [~~State Board of~~] Physician Assistant Board [~~Examiners~~].

(6) Board or the "physician assistant board"--The Texas [~~State Board of~~] Physician Assistant Board [~~Examiners~~].

(7) Executive Director--the Executive Director of the Agency or the authorized designee of the Executive Director.

(8) Good professional character--an applicant for licensure must not be in violation of or committed any act described in the Physician Assistant Licensing Act, §§204.302-204.304, Texas Occupations Code Annotated.

(9) [~~(7)~~] Medical Board--The Texas [~~State Board of~~] Medical Board [~~Examiners~~].

(10) [~~(8)~~] Medical Practice Act--Texas Occupations Code Annotated, Title 3, Subtitle B, as amended.

(11) [~~(9)~~] Open Meetings Act--Texas Government Code Annotated, Chapter 551 as amended.

(12) [~~(10)~~] Party--The physician assistant board and each person named or admitted as a party in a [~~SOAH~~] hearing before the State Office of Administrative Hearings or contested case before the physician assistant board.

(13) [~~(11)~~] Physician assistant--A person licensed as a physician assistant by the Texas [~~State Board of~~] Physician Assistant Board [~~Examiners~~].

(14) Presiding Officer--The person appointed by the Governor to serve as the presiding officer of the board.

(15) [~~(12)~~] State--Any state, territory, or insular possession of the United States and the District of Columbia.

(16) [~~(13)~~] Submit--The term used to indicate that a completed item has been actually received and date-stamped by the board along with all required documentation and fees, if any.

(17) [~~(14)~~] Supervising physician--A physician licensed by the medical board [~~either as a doctor of medicine or doctor of osteopathic medicine~~] who assumes responsibility and legal liability for the services rendered by the physician assistant, and who has notified the Medical Board of the intent [~~received approval from the medical board~~] to supervise a specific physician assistant and of the termination of such supervision.

(18) [~~(15)~~] Supervision--Overseeing the activities of, and accepting responsibility for, the medical services rendered by a physician assistant. Supervision does not require the constant physical presence of the supervising physician but includes a situation where a supervising physician and the person being supervised are, or can easily be, in contact with one another by radio, telephone, or another telecommunication device.

§185.3. Meetings and Committees.

(a) - (d) (No change.)

(e) The governor shall designate a member of the physician assistant board as the presiding officer of the board to serve in that capacity at the will of the governor. The board, at a regular meeting or special meeting, shall [~~may~~] elect from its membership a [~~presiding officer and a~~] secretary for one year.

(f) The board, at a regular meeting or special meeting, upon majority vote of the members present, may remove the [~~presiding officer or~~] the secretary from office.

(g) The following are standing and permanent committees of the board. Each committee, with the exception of the Executive Committee, shall consist of at least one board member who is a licensed physician, one board member who is a licensed physician assistant, and one public board member. In the event that a committee does not have a representative of one or more of these groups, the presiding officer shall appoint additional members as necessary to maintain this composition. The Executive Committee shall include the presiding officer, secretary, and other members as named by the presiding officer. The presiding officer shall name the chair and assign the members of the other committees. The responsibilities and authority of these commit-

tees shall include those duties and powers as defined in paragraphs (1) - (3) of this subsection and such other responsibilities and authority which the board may from time to time delegate to these committees.

(1) Licensure Committee.

(A) - (E) (No change.)

(F) Oversee and make recommendations to the physician assistant board regarding any aspect of the examination process including the approval of an appropriate licensure examination and the administration of such an examination and documentation and verification of records from all applicants for licensure;

(2) Disciplinary [~~and Ethics~~] Committee.

(A) Draft and review proposed rules regarding the discipline of physician assistants and enforcement of the [~~Physician Assistant Licensing~~] Act.

(B) Oversee the disciplinary process and give guidance to the board and staff regarding methods to improve the disciplinary process and more effectively enforce the [~~Physician Assistant Licensing~~] Act.

(C) - (D) (No change.)

[~~(E) Draft and review proposed ethics guidelines and rules for the practice of physician assistants, and make recommendations to the board regarding the adoption of such ethics guidelines and rules.~~]

(E) [~~(F)~~] Make recommendations to the board and staff regarding policies, priorities, budget, and any other matters related to the disciplinary process and enforcement of the [~~Physician Assistant Licensing~~] Act.

(F) [~~(G)~~] Make recommendations to the board regarding matters brought to the attention of the Disciplinary [~~and Ethics~~] Committee.

(3) Executive [~~Long Range Planning~~] Committee.

(A) Ensure records are maintained of all committee actions; [~~Formulate and make recommendations to the board concerning future board goals and objectives and the establishment of priorities and methods for their accomplishment.~~]

(B) Review requests from the public to appear before the board and provide opportunities for the public to speak regarding issues related to the regulations of practice of Physician Assistants; [~~Study and make recommendations to the board regarding the role and responsibility of the board officers and committees.~~]

(C) Review inquiries regarding policy or administrative procedure; [~~Study and make recommendations to the board regarding ways to improve the efficiency and effectiveness of the administration of the board.~~]

(D) Delegate tasks to other committees; [~~Study and make recommendations to the board regarding board rules or any area of a board function that, in the judgment of the committee needs consideration.~~]

(E) Take action on matter of urgency that may arise between board meetings; such matters shall be presented to the board at the next board meeting; [~~Study and make recommendations to the board regarding legislative changes pertinent to the practice of Physician Assistants.~~]

(F) Assist the Medical Board in the organization, preparation, and delivery of information and testimony to the Legislators and committees of the Legislature; [~~Study and make recommendations to the board regarding financial issues.~~]

(G) Formulate and make recommendations to the board regarding future board goals and objectives and the establishment of priorities and methods for their accomplishment;

(H) Study and make recommendations to the board regarding the role and responsibility of the board officers and committees;

(I) Review staff reports regarding finances and the budget; and

(J) Make recommendations to the board regarding matters brought to the attention of the Executive Committee.

(h) Meetings of the board and of its committees are open to the public unless such meetings are conducted in executive session pursuant to the Open Meetings Act, the [~~Physician Assistant Licensing~~] Act, or the Medical Practice Act. In order that board meetings may be conducted safely, efficiently, and with decorum, attendees [~~members of the public shall refrain at all times from smoking or using tobacco products, eating, or reading newspapers and magazines. Members of the public~~] may not engage in disruptive activity that interferes with board proceedings[~~, including excessive movement within the meeting room, noise or loud talking, and resting of feet on tables and chairs~~]. The public shall remain within those areas of the board offices and board meeting room designated as open to the public. Members of the public shall not address or question board members during meetings unless recognized by the board's presiding officer pursuant to a published agenda item.

(i) Journalists have the same right of access as other members of the public to board meetings conducted in open session, and are also subject to the same rules [~~of conduct described in subsection (h) of this section~~]. Observers of any board meeting may not disrupt the meeting or disturb participants. Observers may make audio or visual recordings of such proceedings conducted in open session as long as these activities do not disrupt the meeting and subject to the following limitations: the board's presiding officer may request periodically that camera operators extinguish their artificial lights to allow excessive heat to dissipate; camera operators may not assemble or disassemble their equipment while the board is in session and conducting business; persons seeking to position microphones for recording board proceedings may not disrupt the meeting or disturb participants. Journalists [~~; journalists~~] may conduct interviews in the reception area of the agency's [~~medical board's~~] offices or, at the discretion of the board's presiding officer, in the meeting room after recess or adjournment; no interview may be conducted in the hallways of the agency's [~~medical board's~~] offices; and the board's presiding officer may exclude from a meeting any person who, after being duly warned, persists in conduct described in this subsection and subsection (h) of this section.

(j) (No change.)

(k) In the event of the absence or temporary incapacity of the presiding officer, and the secretary, the members of the board may elect another member to act as the presiding officer of a board meeting or may elect an interim acting presiding officer for the duration of the absences or incapacity or until another presiding officer is appointed by the governor.

(l) Upon the death, resignation, removal or permanent incapacity of the presiding officer or the secretary, the board shall elect a secretary from its membership an officer to fill the vacant position. The board may elect an interim acting presiding officer until another presiding officer is appointed by the governor. Such an election shall be

conducted as soon as practicable at a regular or special meeting of the board.

§185.4. Procedural Rules for Licensure Applicants.

(a) Except as otherwise provided in this section, an individual shall be licensed by the board before the individual may function as a physician assistant. A license shall be granted to an applicant who:

(1) - (2) (No change.)

(3) has successfully completed an educational program for physician assistants or surgeon assistants accredited by the Accreditation Review Commission for the Education of Physician Assistants (ARC-PA) [~~Commission on Accreditation of Allied Health Education Programs~~], or by that committee's predecessor or successor entities, and holds a valid and current certificate issued by the National Commission on Certification of Physician Assistants ("NCCPA");

(4) - (6) (No change.)

(7) is of good professional character as defined under §185.1(7) of this title.

(8) [~~(7)~~] submits to the board any other information the board considers necessary to evaluate the applicant's qualifications; [~~and~~]

(9) [~~(8)~~] meets any other requirement established by rules adopted by the board; and [~~.~~]

(10) for applicants who apply for a license on or after January 1, 2007, passes the national licensing examination required for NCCPA certification within no more than three attempts.

(11) for applicants who apply for a license on or after September 1, 2007, passes a jurisprudence examination ("JP exam"), which shall be conducted on the licensing requirements and other laws, rules, or regulations applicable to the physician assistant profession in this state. The jurisprudence examination shall be developed and administered as follows:

(A) The staff of the Medical Board shall prepare questions for the JP exam and provide a facility by which applicants can take the examination.

(B) Applicants must pass the JP exam with a score of 75 or better within three attempts.

(C) An examinee shall not be permitted to bring medical books, compends, notes, medical journals, calculators or other help into the examination room, nor be allowed to communicate by word or sign with another examinee while the examination is in progress without permission of the presiding examiner, nor be allowed to leave the examination room except when so permitted by the presiding examiner.

(D) Irregularities during an examination such as giving or obtaining unauthorized information or aid as evidenced by observation or subsequent statistical analysis of answer sheets, shall be sufficient cause to terminate an applicant's participation in an examination, invalidate the applicant's examination results, or take other appropriate action.

(E) An applicant who is unable to pass the JP exam within three attempts must appear before a committee of the board to address the applicant's inability to pass the examination and to re-evaluate the applicant's eligibility for licensure. It is at the discretion of the committee to allow an applicant additional attempts to take the JP exam.

(b) The following documentation shall be submitted as a part of the licensure process:

(1) - (2) (No change.)

(3) Examination Scores. Each applicant for licensure must have a certified transcript of grades submitted directly from the appropriate testing service to the board for all examinations accepted by the board for licensure.

(4) [~~(3)~~] Verification from other states. Each applicant for licensure who is licensed, registered, or certified in another state must have that state submit directly to the board, on a form provided by the board, that the physician assistant's license, registration, or certification is current and in full force and that the license, registration, or certification has not been restricted, canceled, suspended, or revoked. The other state shall also include a description of any sanctions imposed by or disciplinary matters pending in the state.

(5) [~~(4)~~] State License Registration. Each applicant, if licensed, registered, or certified in another state as a physician assistant, must submit a copy of the license registration certificate to the board. The license, registration, or certificate number and the date of expiration must be visible on the copy.

(6) [~~(5)~~] Arrest Records. If an applicant has ever been arrested, a copy of the arrest and arrest disposition needs to be requested from the arresting authority and that authority must submit copies directly to the board.

(7) [~~(6)~~] Malpractice. If an applicant has ever been named in a malpractice claim filed with any liability carrier or if an applicant has ever been named in a malpractice suit, the applicant must:

(A) have each liability carrier complete a form furnished by this board regarding each claim filed against the applicant's insurance;

(B) for each claim that becomes a malpractice suit, have the attorney representing the applicant in each suit submit a letter directly to the board explaining the allegation, dates of the allegation, and current status of the suit. If the suit has been closed, the attorney must state the disposition of the suit, and if any money was paid, the amount of the settlement. The letter shall be accompanied by supporting documentation including court records if applicable. If such letter is not available, the applicant will be required to furnish a notarized affidavit explaining why this letter cannot be provided; and

(C) provide a statement, composed by the applicant, explaining the circumstances pertaining to patient care in defense of the allegations.

(8) [~~(7)~~] Additional Documentation. Additional documentation as is deemed necessary to facilitate the investigation of any application for licensure must be submitted.

(c) - (d) (No change.)

(e) Applicants for licensure:

(1) whose application for licensure which has been filed with the board office and which is in excess of one year [~~two years~~] old from the date of receipt, shall be considered inactive. Any fee previously submitted with the application shall be forfeited. Any further application procedure for licensure will require submission of a new application and inclusion of the current licensure fee;

(2) - (6) (No change.)

(7) who previously held a Texas health care provider license, certificate, permit, or registration may be required to complete additional forms as required.

§185.6. Annual Renewal of License.

(a) - (b) (No change.)

(c) Falsification of an affidavit or submission of false information to obtain renewal of a license shall subject a physician assistant to denial of the renewal and/or to discipline pursuant to the [~~Physician Assistant Licensing~~] Act, §§204.301-.303.

(d) - (f) (No change.)

(g) Practicing as a physician assistant as defined in the [~~Physician Assistant Licensing~~] Act without an annual registration permit for the current year as provided for in the board rules has the same force and effect as and is subject to all penalties of practicing as a physician assistant without a license.

(h) (No change.)

(i) Expired Annual Registration Permits.

(1) If a physician assistant's registration permit has expired, the physician assistant may register for a new permit without monetary penalty during the first 30 days following expiration. If a physician assistant's permit has been expired for longer than 30 days, but less than 91, the physician may obtain a new permit by submitting to the board a completed permit application, the registration fee, and the penalty fee, as defined in §175.3(2) of this title.

(2) If a physician assistant's registration permit has been expired for longer than 90 days but less than one year, the physician assistant may obtain a new permit by submitting a completed permit application, the registration fee, and a penalty fee as defined in §175.3(2) of this title.

(3) If a physician assistant's registration permit has been expired for one year or longer, the physician assistant's license is automatically canceled, unless an investigation is pending, and the physician assistant may not obtain a new permit.

(4) Practicing as a physician assistant after the expiration of the 30-day grace period under subsection (a) of this section without obtaining a new registration permit for the current registration period has the same effect as, and is subject to all penalties of, practicing as a physician assistant without a license.

§185.7. Temporary License.

(a) The board, or its designee may issue a temporary license to an applicant who:

(1) meets all the qualifications for a license under the [~~Physician Assistant Licensing~~] Act but is waiting for the next scheduled meeting of the board for the license to be issued;

(2) seeks to temporarily substitute for a licensed physician assistant during the licensee's absence, if the applicant:

(A) - (B) (No change.)

(C) pays the appropriate fee prescribed by the board; [~~or~~]

(3) has graduated from an educational program for physician assistants or surgeon assistants accredited by the Accreditation Review Commission for the Education of Physician Assistants (ARC-PA) [~~Commission on Accreditation of Allied Health Education Programs~~] or by the committee's predecessor or successor entities no later than six months previous to the application for temporary licensure and is waiting for examination results from the National Commission on Certification of Physician Assistants; or [~~.~~]

(4) has not, on a full-time basis, actively practiced as a physician assistant , as defined under §185.4(d) of this title, but meets guidelines set by the physician assistant board including, but not limited to, length of time out of active practice as a physician assistant and duration of temporary licenses.

(b) (No change.)

§185.8. Inactive License.

(a) - (b) (No change.)

(c) A license holder who practices as a physician assistant in Texas while on inactive status is considered to be practicing without a license.

(d) A physician assistant may return to active status by applying to the board, paying an application fee equal to an application fee for a physician assistant license, [~~the license renewal fee,~~] complying with the requirements for license renewal under the [~~Physician Assistant Licensing~~] Act, providing current verifications from each state in which the physician assistant holds a license, demonstrating current certification by NCCPA, and submitting professional evaluations from each employment held after the license was placed on inactive status, and complying with subsection (e) of this section.

(e) A physician assistant applicant applying to return to active status shall provide sufficient documentation to the board that the applicant has, on a full-time basis as defined in §185.4(d) of this title (relating to Procedural Rules for Licensure Applicants) [~~chapter~~], actively practiced as a physician assistant or has been on the active teaching faculty of an acceptable approved physician assistant program, within either of the two years preceding receipt of an application for reactivation. Applicants who do not meet this requirement may, in the discretion of the board, be eligible for the reactivation of a license subject to one or more of the following conditions or restrictions as set forth in paragraphs (1) - (5) of this subsection:

(1) - (3) (No change.)

(4) remedial education; and/or

(5) (No change.)

(f) After five years on inactive status, the license shall be canceled as if by request. The physician assistant may obtain a new license by complying with the requirements and procedures for obtaining an original license.

§185.13. Notification of Intent to Practice and Supervise.

(a) A physician assistant licensed under the [~~Physician Assistant Licensing~~] Act must, before beginning practice or upon changing practice, submit notification of the license holder's intent to begin practice. Notification under this section must include:

(1) - (2) (No change.)

(b) (No change.)

(c) For the purposes of this section, a single form prescribed by the board shall be used to provide notification of the license holder's intent to begin practice or termination of, and any changes in, or additions to, the person acting as a supervising physician.

(d) (No change.)

§185.15. Supervising Physician.

(a) (No change.)

(b) A physician assistant may be supervised by an alternate supervising physician in the absence of the supervising physician consistent with this chapter, the Texas Medical Practice Act, the [~~Physician Assistant Licensing~~] Act, board rules, medical board rules, and any standing orders or protocols established in accordance with these statutes and rules.

§185.16. Employment Guidelines.

(a) - (c) (No change.)

(d) A physician who provides medical services in preventive medicine, disease management, health and wellness education, or similar services in an accredited academic/teaching institution listed in paragraphs (1) - (10) of this subsection, or its affiliates, may be denoted as the supervising physician for more than five physician assistants in that institution or its affiliates, provided the supervising physician determines that the physician assistants are properly trained to deliver the services, that the services are of such a nature that they may be safely and competently delivered by the supervised physician assistants, and the proper paperwork has been filed with the [~~Texas State Board of~~] Medical Board [~~Examiners~~]. The supervision of physician assistants must comply with all institutional rules and there must be accurate and timely internal institutional records, which are available upon request within 24 hours to the [~~Texas State Board of~~] Medical Board [~~Examiners~~], which list the name and license number of the physician who is specifically assigned to actively supervise each physician assistant at one of the following institutions:

(1) - (10) (No change.)

(e) A physician who holds the position of Medical Director, Chief of Staff, or Emergency Room Department Chair at a licensed hospital may be denoted as the supervising physician for more than five physician assistants for the purpose of staffing a hospital emergency room. This physician may then delegate the direct supervision of the physician assistant to staff physicians providing medical services within the emergency room, provided that the supervising physician determines that the physician assistants are properly trained to deliver services, that the services are of such a nature that they may be safely and competently delivered by the supervised physician assistants, and that the proper paperwork has been filed with the [~~Texas State Board of~~] Medical Board [~~Examiners~~]. The supervision of physician assistants must comply with all institutional rules and there must be accurate and timely internal institutional records, which are available upon request within 24 hours to the Texas [~~State Board of~~] Medical Board [~~Examiners~~], which list the name and license number of the physician who is specifically assigned to actively supervise each physician assistant.

(f) (No change.)

§185.17. Grounds for Denial of Licensure and for Disciplinary Action.

The board may refuse to issue a license to any person and may, following notice of hearing and a hearing as provided for in the APA [~~Administrative Procedure Act~~], take disciplinary action against any physician assistant who:

(1) - (2) (No change.)

(3) violates the [~~Physician Assistant Licensing~~] Act, or any rules relating to the practice of a physician assistant;

(4) - (13) (No change.)

(14) writes a false or fictitious prescription for a scheduled or a dangerous drug as defined by Chapters 481 and [~~Chapter~~] 483, Health and Safety Code;

(15) - (22) (No change.)

§185.18. Discipline of Physician Assistants.

(a) The board, upon finding a physician assistant has committed any of the acts set forth in §185.17 [~~§185.18~~] of this title (relating to Grounds for Denial of Licensure and for Disciplinary Action), shall enter an order imposing one or more of the allowable actions set forth under §204.301 of the Act.

(b) Disciplinary Guidelines.

(1) Chapter 190 of this title (relating to Disciplinary Guidelines) shall apply to physician assistants regulated under this chapter to be used as guidelines for the following areas as they relate to the denial of licensure or disciplinary action of a licensee:

(A) - (C) (No change.)

(D) repeated and recurring meritorious health care liability claims; [~~and~~]

(E) aggravating and mitigating factors; and [~~.~~]

(F) criminal convictions.

(2) If the provisions of Chapter 190 of this title conflict with the Act or rules under this chapter, the Act and provisions of this chapter shall control.

§185.19. Administrative Penalties.

(a) The board by order may impose an administrative penalty, subject to the provisions of the APA [~~Administrative Procedure Act~~], against a person licensed or regulated under the [~~Physician Assistant Licensing~~] Act who violates the Act or a rule or order adopted under the Act.

(b) - (c) (No change.)

§185.22. Impaired Physician Assistants.

(a) (No change.)

(b) Rehabilitation Orders.

(1) - (2) (No change.)

(3) Violation of a rehabilitation order entered pursuant to this section may result in disciplinary action under the provisions of the [~~this~~] Act for contested matters or pursuant to the terms of the agreed order. A violation of a rehabilitation order may be grounds for disciplinary action based on unprofessional or dishonorable conduct or on any of the provisions of this Act which may apply to the misconduct which resulted in violation of the rehabilitation order.

(4) (No change.)

§185.23. Third Party Reports to the Board.

(a) - (c) (No change.)

(d) Reporting Professional Liability Claims.

(1) - (4) (No change.)

(5) Penalty. Failure by a licensed insurer to report under this section shall be referred to the Texas Department [~~State Board~~] of Insurance.

(6) - (8) (No change.)

(9) Reporting Form. The reporting form shall be as follows:

Figure: 22 TAC §185.23(d)(9)

(10) (No change.)

(e) (No change.)

§185.26. Voluntary Surrender of Physician Assistant License.

Pursuant to §204.315 of the Act, the Board may accept the voluntary surrender of a physician assistant license. Chapter 196 of this title (relating to Voluntary Surrender of a Medical License) shall govern the voluntary surrender of a physician assistant license in a similar manner as that chapter applies to a medical license. Section 185.4 of this title

(relating to Procedural Rules for Licensure Applicants) shall govern reapplication after a voluntary surrender.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 17, 2006.

TRD-200602208
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 305-7016

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CHAPTER 192. OFFICE-BASED ANESTHESIA SERVICES

22 TAC §§192.1 - 192.5

The Texas Medical Board proposes amendments to §§192.1 - 192.5, concerning Office Based Anesthesia Services.

The amendment to §192.1 adds definitions necessary to provide regulation for the administration of analgesics and anxiolytics, as required by SB 419. The amendment to §192.2 expands the rule to include regulation of the use of analgesics and anxiolytics, as required by SB 419. The amendment to §192.3 broadens the reference to anesthesia services to include use of analgesics and anxiolytics. The amendment to §192.4 expands the reference to anesthesia and conforms payment of fees for registration of office based anesthesia services so that fees are paid by each physician and not by the site location. The amendment to §192.5 broadens the reference to anesthesia services to include use of analgesics and anxiolytics.

Michele Shackelford, General Counsel, Texas Medical Board, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the sections as proposed.

Ms. Shackelford also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to provide assurance that properly trained personnel and equipment will be present for any medical procedure in which analgesics and anxiolytics are administered and to assure that each physician that provides office based anesthesia services registers with the Board. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§192.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the contents indicate otherwise.

(1) ACLS--Advanced Cardiac Life Support, as defined by the AHA.

(2) AED--Automatic External Defibrillator.

(3) AHA--American Heart Association.

(4) Analgesics--Dangerous or scheduled drugs that alleviate pain.

(5) Anesthesia--The loss of feeling or sensation resulting from the use of dangerous or scheduled drugs to depress nerve function. Anesthetics are scheduled or dangerous drugs used to induce anesthesia.

(6) Anesthesia Services--The use of dangerous and scheduled drugs, including anesthetics, analgesics, and anxiolytics, to permit the performance of surgery or other painful medical procedures.

(7) Anxiolytics--Dangerous or scheduled drugs used to treat episodes of anxiety.

(8) [~~(1)~~] Anesthesiologist [~~Anesthesiologist's~~] assistant--A graduate of an approved anesthesiologist [~~anesthesiologist's~~] assistant training program.

(9) [~~(2)~~] Anesthesiology resident--A physician who is presently in an approved Texas anesthesiology residency program who is either licensed as a physician in Texas or holds a postgraduate resident permit issued by the Texas [~~State Board of~~] Medical Board [~~Examiners~~].

(10) BCLS--Basic Cardiac Life Support, as defined by the AHA.

(11) [~~(3)~~] Certified registered nurse anesthetist--A person licensed by the Board of Nurse Examiners for the State of Texas (BNE) as a registered professional nurse, authorized by the BNE as an advanced practice nurse in the role of nurse anesthetist, and certified by a national certifying body recognized by the BNE.

(12) Dangerous drugs--medications defined by the Texas Dangerous Drug Act, Chapter 483, Texas Health and Safety Code. Dangerous drugs require a prescription, but are not included in the list of scheduled drugs. A dangerous drug bears the legend "Caution: federal law prohibits dispensing without a prescription" or "Prescription Only."

(13) Level I services--delivery of analgesics or anxiolytics by mouth, as prescribed for the patient on order of a physician, at a dose level low enough to allow the patient to remain ambulatory.

(14) Level II services--delivery of analgesics or anxiolytics by mouth in dosages greater than allowed at Level I and tunescent anesthesia, as prescribed for the patient on order of a physician.

(15) Level III services--delivery of analgesics or anxiolytics other than by mouth, including intravenously, intramuscularly, or rectally.

(16) Level IV services--delivery of general anesthetics, including regional anesthetics and monitored anesthesia care.

(17) [~~(4)~~] Monitored anesthesia care--Situations where a patient undergoing a diagnostic or therapeutic procedure receives doses of medication that create a risk of loss of normal protective reflexes or loss of consciousness and the patient remains able to protect the airway during [~~for the majority of~~] the procedure. If[~~, for an extended period of time,~~] the patient is rendered unconscious and [~~and/or~~] loses normal

protective reflexes, then anesthesia care shall be considered a general anesthetic.

(18) [~~(5)~~] Outpatient setting--Any facility, clinic, center, office, or other setting that is not a part of a licensed hospital or a licensed ambulatory surgical center with the exception of all of the following listed in subparagraphs (A) - (D) of this paragraph:

(A) a clinic located on land recognized as tribal land by the federal government and maintained or operated by a federally recognized Indian tribe or tribal organization as listed by the United States secretary of the interior under 25 U.S.C. (479-1 or as listed under a successor federal statute or regulation;

(B) a facility maintained or operated by a state or governmental entity;

(C) a clinic directly maintained or operated by the United States or by any of its departments, officers, or agencies; and

(D) an outpatient setting accredited by either the Joint Commission on Accreditation of Healthcare Organizations relating to ambulatory surgical centers, the American Association for the Accreditation of Ambulatory Surgery Facilities, or the Accreditation Association for Ambulatory Health Care.

(19) [~~(6)~~] Board--The Texas [~~State Board of~~] Medical Board [~~Examiners~~].

(20) PALS--Pediatric Advanced Life Support, as defined by the AHA.

(21) [~~(7)~~] Physician--A person licensed by the Texas [~~State Board of~~] Medical Board [~~Examiners~~] as a medical doctor or doctor of osteopathic medicine who diagnoses, treats, or offers to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or effects cures thereof and charges therefor, directly or indirectly, money or other compensation. "Physician" and "surgeon" shall be construed as synonymous.

(22) Scheduled Drugs--medications defined by the Texas Controlled Substances Act, Chapter 481, Texas Health and Safety Code. This Act establishes five categories, or schedules of drugs, based on risk of abuse and addiction. (Schedule I includes drugs that carry an extremely high risk of abuse and addiction and have no legitimate medical use. Schedule V includes drugs that have the lowest abuse/addiction risk).

§192.2. Provision of Anesthesia Services in Outpatient Settings.

(a) The purpose of these rules is to identify the roles and responsibilities of physicians providing, or overseeing by proper delegation, anesthesia services in outpatient settings and to provide the minimum acceptable standards for the provision of anesthesia services in outpatient settings.

(b) The rules promulgated under this title do not apply to physicians who practice in the following settings listed in paragraphs (1) - (8) of this subsection:

(1) an outpatient setting in which only local anesthesia, peripheral nerve blocks, or both are used;

(2) any setting physically located outside the State of Texas [~~an outpatient setting in which only anxiolytics and analgesics are used and only in doses that do not have the significant probability of placing the patient at risk for loss of the patient's life-preserving protective reflexes~~];

(3) a licensed hospital, including an outpatient facility of the hospital that is separately located apart from the hospital;

(4) a licensed ambulatory surgical center;

(5) a clinic located on land recognized as tribal land by the federal government and maintained or operated by a federally recognized Indian tribe or tribal organization as listed by the United States secretary of the interior under 25 U.S.C. (479-1 or as listed under a successor federal statute or regulation;

(6) a facility maintained or operated by a state or governmental entity;

(7) a clinic directly maintained or operated by the United States or by any of its departments, officers, or agencies; and

(8) an outpatient setting accredited by:

(A) the Joint Commission on Accreditation of Healthcare Organizations relating to ambulatory surgical centers;

(B) the American Association for the Accreditation of Ambulatory Surgery Facilities; or

(C) the Accreditation Association for Ambulatory Health Care.

(c) Standards for Anesthesia Services. The following standards are required for outpatient settings providing anesthesia services that are administered within two hours before an out patient procedure. If personnel and equipment meet the requirements of a higher level, lower level anesthesia services may also be provided.

(1) Level I services:

(A) at least two personnel must be present, including the physician who must be currently certified at least in AHA approved BCLS; and

(B) the following age-appropriate equipment must be present:

(i) bag mask valve;

(ii) oxygen;

(iii) AED or other defibrillator; and

(iv) pre-measured doses of epinephrine, atropine, adreno-corticoids, and antihistamines.

(2) Level II services:

(A) at least two personnel must be present, including the physician who must be currently certified at least in AHA approved ACLS or PALS, as appropriate;

(i) another person must be currently certified at least in AHA approved BCLS; and

(ii) a licensed health care provider, who may be one of the two required personnel, must attend the patient, until the patient is ready for discharge; and

(B) a crash cart must be present containing drugs and equipment necessary to carry out ACLS protocols, including, but not limited to, the following age-appropriate equipment:

(i) bag mask valve and appropriate airway maintenance devices;

(ii) oxygen;

(iii) AED or other defibrillator;

(iv) pre-measured doses of first line cardiac medications, including epinephrine, atropine, adreno-corticoids, and antihistamines;

(v) IV equipment;

(vi) pulse oximeter; and

(vii) EKG Monitor.

(3) Level III services:

(A) at least two personnel must be present, including the physician who must be currently certified at least in AHA approved ACLS or PALS, as appropriate;

(i) another person must be currently certified at least in AHA approved BCLS;

(ii) a licensed health care provider, which may be either of the two required personnel, must attend the patient, until the patient is ready for discharge; and

(iii) a person, who may be either of the two required personnel, must be responsible for monitoring the patient during the procedure; and

(B) the same equipment required for Level II;

(4) [~~(c)~~] Physicians who practice medicine in this state and who administer anesthesia or perform a [~~surgical~~] procedure for which anesthesia services are provided in [~~an~~] outpatient settings at Level IV shall follow current, applicable standards and guidelines as put forth by the American Society of Anesthesiologists (ASA) including, but not limited to, the following listed in paragraphs (1) - (8) of this subsection:

(A) [~~(1)~~] Basic Standards for Preanesthesia Care;

(B) [~~(2)~~] Standards for Basic Anesthetic Monitoring;

(C) [~~(3)~~] Standards for Postanesthesia Care;

(D) [~~(4)~~] Position on Monitored Anesthesia Care;

(E) [~~(5)~~] The ASA Physical Status Classification System;

(F) [~~(6)~~] Guidelines for Nonoperating Room Anesthetizing Locations;

(G) [~~(7)~~] Guidelines for Ambulatory Anesthesia and Surgery; and

(H) [~~(8)~~] Guidelines for Office-Based Anesthesia.

(d) A physician delegating the provision of anesthesia or anesthesia-related services to a certified registered nurse anesthetist shall be in compliance with ASA standards and guidelines when the certified registered nurse anesthetist provides a service specified in the ASA standards and guidelines to be provided by an anesthesiologist.

(e) In an outpatient setting, where a physician has delegated to a certified registered nurse anesthetist the ordering of drugs and devices necessary for the nurse anesthetist to administer an anesthetic or an anesthesia-related service ordered by a physician, a certified registered nurse anesthetist may select, obtain and administer drugs, including determination of appropriate dosages, techniques and medical devices for their administration and in maintaining the patient in sound physiologic status. This order need not be drug-specific, dosage specific, or administration-technique specific. Pursuant to a physician's order for anesthesia or an anesthesia-related service, the certified registered nurse anesthetist may order anesthesia-related medications during perianesthesia periods in the preparation for or recovery from anesthesia. In providing anesthesia or an anesthesia-related service, the certified registered nurse anesthetist shall select, order, obtain and administer drugs which fall within categories of drugs generally utilized for anesthesia or anesthesia-related services and provide the concomitant care required to maintain the patient in sound physiologic status during those experiences.

(f) The anesthesiologist or physician providing anesthesia or anesthesia-related services in an outpatient setting shall perform a pre-anesthetic evaluation, counsel the patient, and prepare the patient for anesthesia per current ASA standards. If the physician has delegated the provision of anesthesia or anesthesia-related services to a CRNA, the CRNA may perform those services within the scope of practice of the CRNA. Informed consent for the planned anesthetic intervention shall be obtained from the patient/legal guardian and maintained as part of the medical record. The consent must include explanation of the technique, expected results, and potential risks/complications. Appropriate pre-anesthesia diagnostic testing and consults shall be obtained per indications and assessment findings. Pre-anesthetic diagnostic testing and specialist consultation should be obtained as indicated by the pre-anesthetic evaluation by the anesthesiologist or suggested by the nurse anesthetist's pre-anesthetic assessment as reviewed by the surgeon. If responsibility for a patient's care is to be shared with other physicians or non-physician anesthesia providers, this arrangement should be explained to the patient.

(g) Physiologic monitoring of the patient shall be determined by the type of anesthesia and individual patient needs. Minimum monitoring shall include continuous monitoring of ventilation, oxygenation, and cardiovascular status. Monitors shall include, but not be limited to, pulse oximetry and EKG continuously and non-invasive blood pressure to be measured at least every five minutes. If general anesthesia is utilized, then an O2 analyzer and end-tidal CO2 analyzer must also be used. A means to measure temperature shall be readily available and utilized for continuous monitoring when indicated per current ASA standards. An audible signal alarm device capable of detecting disconnection of any component of the breathing system shall be utilized. The patient shall be monitored continuously throughout the duration of the procedure. Postoperatively, the patient shall be evaluated by continuous monitoring and clinical observation until stable by a licensed health care provider. Monitoring and observations shall be documented per current ASA standards. In the event of an electrical outage which disrupts the capability to continuously monitor all specified patient parameters, at a minimum, heart rate and breath sounds will be monitored on a continuous basis using a precordial stethoscope or similar device, and blood pressure measurements will be reestablished using a non-electrical blood pressure measuring device until electricity is restored. There should be in each location, sufficient electrical outlets to satisfy anesthesia machine and monitoring equipment requirements, including clearly labeled outlets connected to an emergency power supply. A two-way communication source not dependent on electrical current shall be available. Sites shall also have a secondary power source as appropriate for equipment in use in case of power failure.

(h) All anesthesia-related equipment and monitors shall be maintained to current operating room standards. All devices shall have regular service/maintenance checks at least annually or per manufacturer recommendations. Service/maintenance checks shall be performed by appropriately qualified biomedical personnel. Prior to the administration of anesthesia, all equipment/monitors shall be checked using the current FDA recommendations as a guideline. Records of equipment checks shall be maintained in a separate, dedicated log which must be made available upon request. Documentation of any criteria deemed to be substandard shall include a clear description of the problem and the intervention. If equipment is utilized despite the problem, documentation must clearly indicate that patient safety is not in jeopardy. All documentation relating to equipment shall be maintained for seven years or for a period of time as determined by the board.

(i) Each location must have emergency supplies immediately available. Supplies should include emergency drugs and equipment appropriate for the purpose of cardiopulmonary resuscitation. This must

include a defibrillator, difficult airway equipment, and drugs and equipment necessary for the treatment of malignant hyperthermia if "triggering agents" associated with malignant hyperthermia are used or if the patient is at risk for malignant hyperthermia. Equipment shall be appropriately sized for the patient population being served. Resources for determining appropriate drug dosages shall be readily available. The emergency supplies shall be maintained and inspected by qualified personnel for presence and function of all appropriate equipment and drugs at intervals established by protocol to ensure that equipment is functional and present, drugs are not expired, and office personnel are familiar with equipment and supplies. Records of emergency supply checks shall be maintained in a separate, dedicated log and made available upon request. Records of emergency supply checks shall be maintained for seven years or for a period of time as determined by the board.

(j) The operating surgeon shall verify that the appropriate policies or procedures are in place. Policies, procedure, or protocols shall be evaluated and reviewed at least annually. Agreements with local emergency medical service (EMS) shall be in place for purposes of transfer of patients to the hospital in case of an emergency. EMS agreements shall be evaluated and re-signed at least annually. Policies, procedure, and transfer agreements shall be kept on file in the setting where procedures are performed and shall be made available upon request. Policies or procedures must include, but are not limited to the following listed in paragraphs (1) - (2) of this subsection:

(1) Management of outpatient anesthesia. At a minimum, these must address:

(A) patient selection criteria;

(B) patients/providers with latex allergy;

(C) pediatric drug dosage calculations, where applicable;

(D) ACLS (advanced cardiac life support) or PALS (pediatric advanced life support) algorithms;

(E) infection control;

(F) documentation and tracking use of pharmaceuticals, including controlled substances, expired drugs and wasting of drugs; and

(G) discharge criteria.

(2) Management of emergencies. At a minimum, these must include, but not be limited to:

(A) cardiopulmonary emergencies;

(B) fire;

(C) bomb threat;

(D) chemical spill; and

(E) natural disasters.

(k) Physicians, certified registered nurse anesthetists, and [~~Operating surgeons or~~] anesthesiologists shall maintain current competency in ACLS, PALS, or a course approved by the board. In all settings under these rules, at a minimum, at least two persons, including the surgeon or anesthesiologist, shall maintain current competency in basic life support.

(l) Physicians or surgeons must notify the board in writing within 15 days if a procedure performed in any of the settings under these rules resulted in an unanticipated and unplanned transport of the patient to a hospital for observation or treatment for a period in excess of 24 hours, or a patient's death intraoperatively or within the immediate postoperative period. Immediate postoperative period is defined as 72 hours.

§192.3. Compliance with Office-Based Anesthesia Rules.

(a) A physician who provides anesthesia services [~~practices medicine in this state and who administers anesthesia~~] or performs a [~~surgical~~] procedure for which anesthesia services are provided in an outpatient setting shall comply with the rules adopted under this title. Nothing in this chapter shall be construed to relieve a physician who delegates anesthesia services to a non-physician, including a Certified Registered Nurse Anesthetist, of professional or legal responsibility for such delegation.

(b) The board may require a physician to submit and comply with a corrective action plan to remedy or address any current or potential deficiencies with the physician's provision of anesthesia services in an outpatient setting in accordance with the Medical Practice Act, Title 3 Subtitle C §§162.101-.107 of the Texas Occupations Code, or rules of the board.

(c) Any physician who violates these rules shall be subject to disciplinary action and/or termination of the registration issued by the board as authorized by the Medical Practice Act or rules of the board.

§192.4. Registration.

(a) Each physician who provides [~~administers~~] anesthesia services or performs a [~~surgical~~] procedure for which anesthesia services are provided in an outpatient setting shall register with the board on a form prescribed by the board and pay a fee to the board in an amount established by the board.

[~~(b) The physician who owns, maintains, controls, or is otherwise deemed to be responsible for the office-based anesthesia site shall pay a biennial office-based anesthesia site registration fee to the board in an amount established by the board. In the event that a non-physician or any other entity owns, maintains, controls, or is otherwise deemed to be responsible for the office-based anesthesia site, that non-physician or entity shall designate a duly licensed Texas physician to be responsible for that office-based anesthesia site. The designated physician shall be responsible for the registration of the office-based anesthesia site.~~]

(b) [~~(c)~~] The board shall coordinate the registration required under this section with the registration required under the Medical Practice Act, Texas Occupations Code Chapter 156, so that the times of registration, payment, notice, and imposition of penalties for late payment are similar and provide a minimum of administrative burden to the board and to physicians.

§192.5. Inspections.

(a) The board may conduct inspections to enforce these rules, including inspections of an office site and of documents of a physician's practice that relate to the provision of anesthesia services in an outpatient setting. The board may contract with another state agency or qualified person to conduct these inspections.

(b) Unless it would jeopardize an ongoing investigation, the board shall provide at least five business days' notice before conducting an on-site inspection under this section.

(c) This section does not require the board to make an on-site inspection of a physician's office.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 17, 2006.

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Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 305-7016

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CHAPTER 199. PUBLIC INFORMATION

22 TAC §199.5

The Texas Medical Board proposes new §199.5, concerning Notice of Ownership Interest in a Niche Hospital.

New §199.5 requires physicians to notify the Department of State Health Services of an ownership interest in niche hospitals and provides a form for such notification as required by the Legislature in 2005.

Michele Shackelford, General Counsel, Texas Medical Board, has determined that for the first five-year period the new section is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the section as proposed.

Ms. Shackelford also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to provide public information regarding physician's ownership interests in niche hospitals. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The new section is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§199.5. Notice of Ownership Interest in a Niche Hospital.

(a) A physician shall notify the Department of State Health Services of an ownership interest held by the physician in a niche hospital as required by §162.052 of the Act.

(b) In this section, "niche hospital," as defined by §105.002, Tex. Occ. Code, means a hospital that:

(1) classifies at least two-thirds of the hospital's Medicare patients or, if data is available, all patients:

(A) in not more than two major diagnosis-related groups; or

(B) in surgical diagnosis-related groups;

(2) specializes in one or more of the following areas:

(A) cardiac;

(B) orthopedics;

(C) surgery; or

(D) women's health; and

(3) is not:

(A) a public hospital;

(B) a hospital for which the majority of inpatient claims are for major diagnosis-related groups relating to rehabilitation, psychiatry, alcohol and drug treatment, or children or newborns; or

(C) a hospital with fewer than 10 claims per bed per year.

(c) The board hereby adopts by reference the Disclosure and Consent Form, which shall be published on the board's web site and may be examined and copies obtained at the offices of the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 17, 2006.

TRD-200602210
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 305-7016

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PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

CHAPTER 365. LICENSING AND REGISTRATION

22 TAC §365.14

The Texas State Board of Plumbing Examiners (Board) proposes amendments to §365.14, which provides for the criteria adopted by the Board for Continuing Professional Education Programs. Currently, §365.14(a)(7) requires providers of Course Materials to include perforated forms, used by those who do business with the Board, within the binding of the Course materials that may be removed. The amendments proposed to this section would change the requirement from the forms to be perforated for removal to the forms being included in a format to be seen as an example, not to be removed from the Course Materials.

The Board periodically reviews and updates its forms to provide new or improved information. The proposed amendments to §365.14(a)(7) will help eliminate the use of outdated perforated forms found within the Course Materials.

Robert L. Maxwell, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the amendments are in effect there will be no fiscal impact on state and local government or small businesses and persons required to comply with the amended rule.

Mr. Maxwell has also determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amended rule will be improved efficiency for those who do business with the Board, as well as improved efficiency for the Board.

Comments on the proposed amendments may be submitted within 30 days of publication of the proposal in the *Texas Register*, to Robert L. Maxwell, Executive Director, Texas State Board

of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The amendments to §365.14 are proposed under and affect Title 8, Chapter 1301, Occupations Code ("Plumbing License Law"), §1301.251, §1301.404 and the rule it amends. Section 1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. Section 1301.404 provides the Board with authority to recognize, approve and administer continuing professional education programs for persons who hold licenses or endorsements under the Plumbing License Law.

No other statute, article or code is affected by these proposed amendments.

§365.14. Continuing Professional Education Programs.

(a) Course Materials--Beginning in preparation for the 2000 - 2001 Continuing Professional Education year (begins on July 1, 2000), the Board will annually approve Course Materials to be used for the Continuing Professional Education (CPE) required for renewal of Journeyman Plumber, Master Plumber, Tradesman Plumber-Limited Licensee and Plumbing Inspector Licenses. The Course Materials are the printed materials that are the basis for a substantial portion of a CPE course and which are provided to the Licensees. Board approval of Course Materials will be subject to all of the terms and conditions of this Section. The following minimum criteria will be used by the Board in considering approval of Course Materials:

(1) - (6) (No change.)

(7) The Course Materials will include CPE evaluation forms, along with Board forms used for doing business with licensees, registrants and the public. The Board forms shall be marked as being provided for example purposes only. Course Materials will provide information stating that the most current Board forms are available on the Board's website or by mail upon request [~~perforated Board forms within the binding of the Course Materials that may be removed for use by the Licensees. The forms will include CPE evaluation forms, License and Endorsement examination forms, registration forms and General Complaint forms~~].

(8) - (18) (No change.)

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 12, 2006.

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Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 936-5224

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER H. EMISSIONS BANKING AND TRADING

The Texas Commission on Environmental Quality (commission) proposes amendments to §§101.302, 101.306, 101.372, 101.373, 101.376, and 101.378; and the repeal of §101.338. The commission proposes new §§101.305, 101.338, 101.339, and 101.375. The repealed, new, and amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the Texas State Implementation Plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Emissions Banking and Trading Program (EBTP) has been designed to offer flexibility and provide a market-based method of meeting required emission reductions. The program makes use of several types of emission credits including emission reduction credits (ERCs), mobile emission reduction credits (MERCs), discrete emission reduction credits (DERCs), and mobile discrete emission reduction credits (MDERCs). Flexibility has been built into the rules to create incentives for the early or permanent retirement of volatile organic compounds (VOC) and nitrogen oxides (NO_x) emissions credits.

In the October 5, 2005, edition of the *Federal Register* (70 FR 58154), the EPA published the proposed conditional approval of the DERC program as part of the SIP. The conditional approval was based on the commission submitting corrected program deficiencies to the EPA by December 1, 2006. Unless the commission adopts and submits these corrections, the EPA will have to issue a finding of disapproval. These proposed revisions address the deficiencies, which the commission committed to correct in a letter to the EPA dated September 8, 2005.

The proposed corrections include the prohibition of the future generation of DERCs from permanent shutdowns and allow only DERCs generated from permanent shutdowns before September 30, 2002, to remain available for use for no more than five years from the date of the commission's commitment letter. Any DERCs generated after September 30, 2002, would be removed from the DERC registry and not be available for use. The conditions also required revisions to §101.302(f) and §101.372(f)(7) and (8) to clarify that the EPA must approve individual transactions involving emission reductions generated in another state or nation as well as those transactions from one nonattainment area to another or from attainment counties into nonattainment areas. The proposed revisions would revise Subchapter H, Emissions Banking and Trading, to include program audit and reporting requirements to satisfy the EPA's requirements for open market trading programs. The requirements concerning program audits were not included in the EPA publication of conditional approval but were the subject of discussion between the commission and the EPA.

The conditions also required the change to Form DEC-1, Notice of Generation and Generator Certification of Discrete Emission Credits; Form MDEC-1, Notice of Generation and Generator of Mobile Discrete Emission Credits; and Form DEC-2, Notice of Intent to Use Discrete Emission Credits, to include a waiver to federal statute of limitations defense for generators and users of discrete emission credits. With the revision of these forms and adoption of the proposed rule changes, the commission will have corrected all identified deficiencies in the DERC program.

The proposed rules also reflect changes to the Texas Health and Safety Code (THSC), §382.0172(c). Senate Bill (SB) 784 was adopted by the 79th Legislature, 2005, and allows additional options for credit from emission reductions achieved outside of the United States. The revisions would allow the commission more discretion in its authorization to approve the substitution and crediting of emission reductions outside the United States that may be used to satisfy reduction or trading requirements.

SECTION BY SECTION DISCUSSION

§101.302. General Provisions.

The commission proposes administrative changes throughout the rules to conform with Texas Register requirements and agency guidelines.

In order to better organize similar rule requirements, the commission proposes to delete §101.302(a)(2) and relocate this language concerning emission creditable reductions occurring outside the United States to a new §101.305, Emission Reductions Achieved Outside the United States.

The commission proposes to amend §101.302(d)(1)(C)(vi) to allow the rejection of an emission credit quantification protocol if the EPA objects to the protocol during a 45-day adequacy review period or if the EPA publishes in the *Federal Register* a disapproval of the protocol. This does not impact the procedures to approve the quantification protocol. The commission has in practice always worked with the EPA to approve new quantification protocols. This revision clarifies in the rule that the quatification protocols would not be approved if the EPA objects.

§101.305. Emission Reductions Achieved Outside the United States.

The proposed new §101.305 would combine the existing language on using emission reductions from outside the United States that would be moved from §101.302(f)(3) and (a)(2) for better organization. The proposed revisions would also reflect the change to THSC, §382.0172(c), enacted under SB 784, which allows facilities to substitute emission reductions in criteria pollutants outside the United States if it is a reduction in an air contaminant for which the area, where the facility is located, has been designated as nonattainment, or if the reduction will result in a greater overall health benefit for the area. This will allow the continuance of beneficial emission credit programs for reductions in Ciudad Juárez in the event of El Paso being reclassified as an attainment area.

The commission is moving the rules governing optional credit to their own sections (§§101.305, 101.338, and 101.375) so that they may be considered separately by EPA for approval into the SIP and will not delay approval of other portions of the EBTP.

§101.306. Emission Credit Use.

The proposed amendment to §101.306(a)(5) would modify the section to be consistent with the allowed use of ERCs under §101.399, Allowance Banking and Trading. This revision is necessary because of a previous adoption of Chapter 101, Subchapter H, Division 6, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program, and allows facilities to use ERCs as allowances under the highly-reactive volatile organic compound cap and trade program.

§101.338. Emission Reductions Achieved Outside the United States.

The existing §101.338 would be repealed. The proposed new §101.338 would reflect the revisions to THSC, §382.0172(c) and provide the commission more discretion in approving the substitution of emission reductions achieved outside the United States for emissions from electric generating or grandfathered facilities. The commission would also modify the arrangement of the existing section to parallel the arrangement of language in §101.305 and §101.375.

§101.339. Program Audits and Reports.

The proposed new §101.339 includes program audits and report requirements for emission credit programs applicable to electric generating and grandfathered facilities. The proposed section contains similar audit and report requirements as are applicable to the commission's other open market trading programs. These requirements are used by the commission and the EPA to evaluate the effectiveness of the program and include reportable items such as effect on ozone attainment, number of allowances or credits traded, cost of allowances or credits, and number of allowances in each compliance account.

§101.372. General Provisions.

In order to better organize similar rule requirements, the commission proposes to delete §101.372(a)(2) and relocate this language concerning emission creditable reductions occurring outside the United States to a new §101.375, Emission Reductions Achieved Outside the United States. The commission proposes to amend §101.372(d)(1)(C)(vi) to require the rejection of a quantification protocol if the EPA objects to the quantification protocol during the 45-day adequacy review period or if the EPA publishes in the *Federal Register* a disapproval of the quantification protocol. This does not impact the procedures to approve the quantification protocol. The commission has in practice always worked with the EPA to approve new quantification protocols. This revision clarifies in the rule that the quantification protocols would not be approved if the EPA objects. The commission also proposes to remove language from this section concerning credits for emission reductions outside the United States and the options for applying them. This language, modified to be consistent with the changes to THSC, §382.0172(c), enacted under SB 784, would be moved to the new §101.375 in order to be considered separately by the EPA for approval into the SIP and not delay approval of other portions of the EBTP.

§101.373. Discrete Emission Reduction Credit Generation and Certification.

The proposed amendments to §101.373(a)(1) and (2) would remove the ability to generate DERCs from facility shutdowns. The commission proposes this action to respond to the *Federal Register* notice requiring the correction of program deficiencies prior to the approval of the EBTP into the SIP. The EPA has stated that open market trading programs are intended to encourage innovative and creative emission reductions and shutdowns generally do not fall into this category. Shutdowns are also problematic for these programs because of the possibility that a facility may shut down in one area, generate and sell credits, but then relocate operations to other areas or states. Additionally, when activity level increases cause emission increases, mitigating reductions are typically not required. Thus, allowing the generation of tradable credits as a result of activity level decreases (including shutdowns) may tend to promote emissions increases. Such patterns of activity related to shutdowns have the potential to interfere with attainment.

§101.375. Emission Reductions Achieved Outside the United States.

The proposed new §101.375 would relocate the existing language on using emission reductions from outside the United States in §101.372(f)(8) and (a)(2). The proposed revisions would also reflect the SB 784 change to THSC, §382.0172(c), which allows facilities to substitute emission reductions in criteria pollutants outside the United States if it is a reduction in an air contaminant for which the area, where the facility is located, has been designated as nonattainment, or if the reduction will result in a greater overall health benefit for the area. This will allow the continuance of beneficial emission credit programs for reductions in Ciudad Juárez in the event of El Paso being reclassified as an attainment area.

The commission is moving the rules governing optional credit to their own sections (§§101.305, 101.338, and 101.375) so that they may be considered separately by EPA for approval into the SIP and will not delay approval of other portions of the EBTP.

§101.376. Discrete Emission Credit Use.

The proposed amendment to §101.376 would correct the rule references to reflect the pending reorganization of 30 TAC §106.261 and repeal of 30 TAC §106.262 under Rule Project Number 2005-016-106-PR concerning maintenance, startup, and shutdown emissions.

§101.378. Discrete Emission Credit Banking and Trading.

The proposed amendment to §101.378 would change the lifetime of DERCs generated from shutdowns strategy. Companies that have previously certified DERCs from shutdown strategies will have no more than five years from the September 8, 2005, commitment letter to the EPA to use the DERCs. As a result, DERCs that were generated from shutdowns prior to September 30, 2002, would be available for use until September 8, 2010. After that date, the DERCs that were generated from shutdowns before September 30, 2002, will be removed from the DERC registry and will no longer be available for use. DERCs generated from shutdowns after September 30, 2002, may not be used. The reason for this action is included in the discussion of changes to §101.373 in this preamble.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules affect the EBTP and DERCs. Typically, governmental organizations do not participate in the DERC program.

The proposed rules implement EPA requirements concerning the EBTP, implement changes made by SB 784, 79th Legislature, and make other organizational and administrative changes to allow for more clarity in the administration of the EBTP.

The EPA is requiring the removal from the commission's DERC registry of credits generated after September 30, 2002, from permanent shutdowns so that the EBTP can be approved as a revision to the SIP. Only those DERCs generated from shutdowns prior to September 30, 2002, can be used in the EBTP, and they must be used by September 8, 2010.

The proposed rules also clarify that the EPA has to approve inclusions in the EBTP of emission reductions generated in another state or nation. The rules further clarify that the EPA must approve the inclusion of emission reductions in the EBTP if they are generated in and traded between nonattainment areas as well as those generated in an attainment area and traded to a nonattainment area. The proposed rules also implement THSC, §382.0172(c), as amended by SB 784, 79th Legislature, to give the agency more discretion in approving the use, by a Texas facility, of emission reduction credits generated outside the United States to satisfy emission reduction requirements.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be the reduction of air contaminants and improved health and safety of Texas citizens. By disallowing DERCs for shutdown activities, staff estimates that approximately 19,774 tons of NO_x emissions, 576 tons of VOC emissions, and 80 tons of other hazardous air pollutant emissions will be reduced.

The loss of post-September 30, 2002, DERCs generated from permanent shutdowns will have a fiscal effect. The value of a DERC varies by nonattainment area and by contaminant. In the Houston-Galveston-Brazoria nonattainment area (HGB), the value of NO_x DERCs range from $145 per ton to $2,100 per ton. In the Beaumont-Port Arthur nonattainment area (BPA), the value of NO_x DERCs are estimated to be $750 per ton, and a carbon monoxide credit is estimated to be worth $700 per ton. The DERCs generated prior to September 30, 2002, represent the majority of the shutdown DERCs the commission currently has on its registry with an approximate total value of $40 million in HGB and $600,000 in BPA. These credits remain available for compliance or trading by the 11 sites holding them until September 8, 2010, and will retain their full value until then. The loss of DERCs generated from permanent shutdowns after September 30, 2002, is estimated to cost, area wide, from $183,470 in HGB to $604,870 in BPA. These DERCs will expire on the effective date of this rule.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules because they do not generally participate in the EBTP.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action does meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 101 and revisions to the SIP would phase out DERCs generated from shutdowns prior to September 30, 2002, require removal of DERCs generated from shut-

downs after September 30, 2002, from the DERC registry, implement the provisions of SB 784, reorganize various rules, correct one citation, specify the time the EPA has to object to quantification protocols, eliminate future generation of shutdown DERCs, and add a reference to the highly-reactive volatile organic compound cap and trade program. With the exception of the portions of the rulemaking regarding shutdown DERCs, the proposed amendments to Chapter 101 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants; although, the underlying emissions banking and trading programs are intended to achieve these goals. The rulemaking provides flexibility regarding credits near the Texas-Mexico border by implementing SB 784 and makes various administrative changes. The changes to shutdown DERCs generation and use are proposed to bring the DERC program into compliance with EPA program requirements, allowing the DERC program to be approved as part of the SIP and to ensure air quality standards will be met. This rulemaking does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225 applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. Specifically, the banking and trading program amendments in this proposal were developed to implement the provisions of SB 784, limit the use of DERCs generated from shutdowns to bring the banking and trading program into compliance with federal requirements, and make several administrative changes. This rulemaking does not exceed an express requirement of federal or state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed under federal law and authorized under the THSC.

The rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the national ambient air quality standard (NAAQS) in each air quality control region of the state. While 42 USC, §7410 does not require specific programs, methods, or reductions to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the Federal Clean Air Act (FCAA) does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods to attain the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of adopted regulations in the Texas Government Code was amended by SB 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC, §7410 does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission contends that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC, §7410. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2) requires attainment as expeditiously as practicable, and 42 USC, §7511(a), requires states to submit ozone attainment demonstration SIPs for ozone nonattainment areas such as the HGB area. The adopted rules, which will reduce ambient concentrations of ozone precursors in nonattainment areas, will be submitted to the EPA as one of several measures in the federally approved SIP. As discussed earlier in this preamble, the banking and trading scheme in the adopted rules are necessary to address some of the elevated criteria pollutant levels observed in various nonattainment areas in Texas; this scheme will result in reductions in criteria pollutants in nonattainment areas and help bring areas into compliance with the air quality standards established under federal law as NAAQS.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the

legislature has revised the Texas Government Code but left this provision substantially unamended. The commission presumes that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485. 489 (Tex. App.-Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App.-Austin 1990), *no writ*; *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App.-Austin 2000), *pet. denied*; and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

As discussed, this rulemaking action implements requirements of 42 USC, §7410. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is it adopted solely under the general powers of the agency. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act), and Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.011, 382.012, 382.014, 382.016, 382.017, 382.021, and 382.034. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rulemaking does not meet any of the four applicability requirements.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043. The proposed amendments to Chapter 101 and revisions to the SIP would phase out DERCs generated from shutdowns prior to September 30, 2002, require removal of DERCs generated from shutdowns after September 30, 2002, from the DERC registry, implement the provisions of SB 784, reorganize various rules, correct one citation, specify the time the EPA has to object to quantification protocols, eliminate future generation of shutdown DERCs, and add a reference to the highly-reactive volatile organic compound cap and trade program. Specifically, the banking and trading program amendments in this proposal were developed to implement the provisions of SB 784, limit the use of DERCs generated from shutdowns to comply with federal requirements, and make several administrative changes. Promulgation and enforcement of the proposed amendments will not burden private real property. The proposed rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits created under these rules are not property rights (§101.372(j)). Because DERCs are not property, phasing out shutdown DERCs does not constitute a taking. Consequently, this rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

Additionally, Texas Government Code, §2007.003(b)(4) provides that Chapter 2007 does not apply to this rulemaking action because it is reasonably taken to fulfill an obligation mandated by federal law. The changes regarding shutdown DERCs within this proposal were developed to meet the EPA conditional program approval so that these requirements can be approved into the SIP and used to meet NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS. However, this rulemaking is only one step among many necessary for attaining the ozone NAAQS.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, the commission's rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and the proposed revisions will maintain the same level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is the policy that the commission's rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The new and amended sections are applicable requirements under the Federal Operating Permits Program, but no revisions to operating permits will be required.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on May 22, 2006, at 2:00 p.m. in Building B, Room 201A, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open dis-

cussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Lola Brown, Office of Legal Services, at (512) 239-0348. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Texas Register Team, Office of Legal Services, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., May 30, 2006, and should reference Rule Project Number 2005-054-101- PR. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Beecher Cameron, Air Permits Division, at (512) 239-1495 or Steve Sun, Air Permits Division, at (512) 239-3554.

DIVISION 1. EMISSION CREDIT BANKING AND TRADING

30 TAC §§101.302, 101.305, 101.306

STATUTORY AUTHORITY

The amended and new sections are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended and new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The amended and new sections are also proposed under THSC, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits. The amended and new sections are also proposed under 42 USC, §7410(a)(2)(A), that requires state implementation plans to include enforceable measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed amended and new sections implement THSC, §§382.002, 382.011, 382.012, and 382.017; and Senate Bill 784, 79th Legislature, 2005.

§101.302. General Provisions.

(a) Applicable pollutants. Reductions of criteria pollutants, excluding lead, or precursors of criteria pollutants for which an area is designated nonattainment, may qualify as emission credits. Reductions of one pollutant may not be used to meet the requirements for another pollutant, unless [~~:~~]

[~~(1)~~] urban airshed modeling demonstrates that one ozone precursor may be substituted for another, subject to executive director and United States Environmental Protection Agency (EPA) approval. [~~; or~~]

[~~(2) the facility generating the emission reductions is located outside the United States; and~~]

[~~(A) the substitution:~~]

[~~(i)~~ ~~results in a greater health benefit and is of equal or greater benefit to the overall air quality of the area, as determined by the executive director;~~]

[~~(ii)~~ ~~is from the reduction of an air contaminant for which the area has been designated as nonattainment or which leads to the formation of a criteria pollutant for which an area has been designated as nonattainment; and~~]

[~~(iii)~~ ~~is for any air contaminant for which the area has been designated as nonattainment or leads to the formation of a criteria pollutant for which the area has been designated as nonattainment; and~~]

[~~(B) the user:~~]

[~~(i)~~ ~~demonstrates that the use of the reduction does not cause localized health impacts, as determined by the executive director;~~]

[~~(ii)~~ ~~submits all supporting information for calculations and modeling, and any additional information requested by the executive director; and~~]

[~~(iii)~~ ~~is located within 100 kilometers of the Texas - Mexico border.~~]

(b) - (c) (No change.)

(d) Protocol.

(1) All generators or users of emission credits shall use a protocol that has been submitted by the executive director to the EPA for approval, if existing for the applicable facility or mobile source, to measure and calculate baseline emissions. If the generator or user wishes to deviate from a protocol submitted by the executive director, EPA approval is required before the protocol can be used. Protocols must be used as follows.

(A) - (B) (No change.)

(C) If the executive director has not submitted a protocol for the applicable facility or mobile source to the EPA for approval, the following requirements apply:

(i) - (v) (No change.)

(vi) quantification protocols shall not be accepted for use with this division if the executive director receives a letter objecting to the use of the protocol from the EPA during the 45-day adequacy review or the EPA proposes disapproval of the protocol in the *Federal Register* [~~after a proposed disapproval of the protocol by the EPA in the *Federal Register*~~].

(2) - (3) (No change.)

(e) (No change.)

(f) Geographic scope. Except as provided in §101.305 of this title (relating to Emission Reductions Achieved Outside the United States) [~~paragraph (3) of this subsection~~], only emission reductions generated in nonattainment areas can be certified. An emission credit must be used in the nonattainment area in which it is generated unless the user has obtained prior written approval of the executive director and the EPA; and[~~:~~]

(1) (No change.)

(2) the emission credit was generated in a nonattainment area that has an equal or higher nonattainment classification than the nonattainment area of use, and a demonstration has been made and approved by the executive director and the EPA to show that the emissions from the nonattainment area where the emission credit is generated contribute to a violation of the national ambient air quality standard in the nonattainment area of use. [~~; or~~]

[~~(3) a facility is using emission reductions generated outside the United States that have been determined by the executive director to be real, permanent, enforceable, quantifiable, and surplus to any applicable international, federal, state, or local law and the result would provide a greater health benefit to the area as determined by the executive director; and the facility:~~]

[~~(A) demonstrates that the use of the reduction does not cause localized health impacts, as determined by the executive director;~~]

[~~(B) submits all supporting information for calculations and modeling, and any additional information requested by the executive director; and~~]

[~~(C) is located within 100 kilometers of the Texas - Mexico border.~~]

(g) - (l) (No change.)

§101.305. Emission Reductions Achieved Outside the United States.

(a) A facility may use reductions achieved outside the United States of criteria pollutants or precursors of criteria pollutants if the facility meets the requirements of subsection (c) of this section.

(b) A facility may use reductions achieved outside the United States of criteria pollutants or precursors of criteria pollutants and substitute these reductions for reductions in other criteria pollutants if the facility meets the requirements of subsection (c) of this section; and

(1) the reduction is substituted for the reduction of another criteria pollutant if the substitution results in a greater health benefit and is of equal or greater benefit to the overall air quality of the area; or

(2) a reduction of an air contaminant for which the area in which the facility is located has been designated as nonattainment or which leads to the formation of a criteria pollutant for which an area has been designated as nonattainment is substituted for any air contaminant for which the area has been designated as nonattainment or leads to the formation of any criteria pollutant for which the area has been designated as nonattainment.

(c) The use of reductions outside the United States must be approved by the executive director and the United States Environmental Protection Agency, and the user of the emission reduction must:

(1) demonstrate to the executive director that the reduction is real, permanent, enforceable, quantifiable, and surplus to any applicable international, federal, state, or local law;

(2) demonstrate that the use of the reduction does not cause localized health impacts, as determined by the executive director;

(3) submit all supporting information for calculations and modeling, and any additional information requested by the executive director; and

(4) be located within 100 kilometers of the Texas - Mexico border.

(d) This section does not apply to reductions in emissions of lead.

§101.306. Emission Credit Use.

(a) Uses for emission credits. Unless precluded by a commission order or a condition or conditions within an authorization under the same commission account number, emission credits may be used as the following:

(1) - (4) (No change.)

(5) an annual allocation of allowances as provided in §101.356 and §101.399 of this title (relating to Allowance Banking and Trading);

(6) - (7) (No change.)

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron Perdue
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For further information, please call: (512) 239-0348

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DIVISION 2. EMISSIONS BANKING AND TRADING ALLOWANCES

30 TAC §101.338

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The repeal is also proposed un-

der THSC, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits. The repeal is also proposed under 42 USC, §7410(a)(2)(A), that requires state implementation plans to include enforceable measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed repeal implements THSC, §§382.002, 382.011, 382.012, and 382.017; and Senate Bill 784, 79th Legislature, 2005.

§101.338. Emission Reductions Achieved Outside the United States.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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30 TAC §101.338, §101.339

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The new sections are also proposed under THSC, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits. The new sections are also proposed under 42 USC, §7410(a)(2)(A), that requires state implementation plans to include enforceable measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new sections implement THSC, §§382.002, 382.011, 382.012, and 382.017; and Senate Bill 784, 79th Legislature, 2005.

§101.338. Emission Reductions Achieved Outside the United States.

(a) A grandfathered or electing electric generating facility (EGF) may use reductions achieved outside the United States of criteria pollutants or precursors of criteria pollutants if the facility meets the requirements of subsection (c) of this section.

(b) A grandfathered or electing EGF may use reductions achieved outside the United States of criteria pollutants or precursors of criteria pollutants and substitute these reductions for reductions in other criteria pollutants if the facility meets the requirements of subsection (c) of this section; and

(1) the reduction is substituted for the reduction of another criteria pollutant if the substitution results in a greater health benefit and is of equal or greater benefit to the overall air quality of the area; or

(2) a reduction of an air contaminant for which the area in which the facility is located has been designated as nonattainment or which leads to the formation of a criteria pollutant for which an area has been designated as nonattainment is substituted for any air contaminant for which the area has been designated as nonattainment or leads to the formation of any criteria pollutant for which the area has been designated as nonattainment.

(c) The use of reductions outside the United States must be approved by the executive director and the United States Environmental Protection Agency, and the user of the emission reduction must:

(1) demonstrate to the executive director that the reduction is real, permanent, enforceable, quantifiable, and surplus to any applicable international, federal, state, or local law;

(2) demonstrate that the use of the reduction does not cause localized health impacts, as determined by the executive director;

(3) submit all supporting information for calculations and modeling, and any additional information requested by the executive director; and

(4) be located within 100 kilometers of the Texas - Mexico border.

(d) This section does not apply to reductions in emissions of lead.

§101.339. Program Audits and Reports.

(a) No later than three years after the effective date of this division, and every three years thereafter, the executive director will audit this program.

(1) The audit will evaluate the impact of the program on the state's ozone attainment demonstration, the availability and cost of allowances, compliance by the participants, and any other elements the executive director may choose to include.

(2) The executive director will recommend measures to remedy any problems identified in the audit. The trading of allowances may be discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(3) The audit data and results will be completed and submitted to the United States Environmental Protection Agency (EPA)

and made available for public inspection within six months after the audit begins.

(b) No later than September 30 following the end of each control period, the executive director shall develop and make available to the general public and EPA, a report that includes:

(1) number of allowances allocated to each compliance account;

(2) total number of allowances allocated under this division;

(3) number of actual nitrogen oxides (NO_x) allowances subtracted from each compliance account based on the actual NO_x emissions from the site; and

(4) a summary of all trades completed under this division.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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DIVISION 4. DISCRETE EMISSION CREDIT BANKING AND TRADING

30 TAC §§101.372, 101.373, 101.375, 101.376, 101.378

STATUTORY AUTHORITY

The amended and new sections are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended and new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The amended and new sections are also proposed under THSC, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits. The amended and new sections are also proposed under 42 USC, §7410(a)(2)(A), that requires state implementation plans to include enforceable measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed amended and new sections implement THSC, §§382.002, 382.011, 382.012, and 382.017; and Senate Bill 784, 79th Legislature, 2005.

§101.372. General Provisions.

(a) Applicable pollutants. Reductions of volatile organic compounds (VOC), nitrogen oxides (NO_x), carbon monoxide (CO), sulfur dioxide (SO_2), and particulate matter with an aerodynamic diameter of less than or equal to a nominal ten microns (PM_{10}) may qualify as discrete emission credits as appropriate. Reductions of other criteria pollutants are not creditable. Reductions of one pollutant may not be used to meet the reduction requirements for another pollutant, unless[~~:~~]

[~~(1)~~] urban airshed modeling demonstrates that one may be substituted for another subject to approval by the executive director and the United States Environmental Protection Agency (EPA). [~~EPA; or~~]

[~~(2) the facility generating the emission reductions is located outside the United States and:~~]

[~~(A) the substitution:~~]

[~~(i)~~ ~~results in a greater health benefit and is of equal or greater benefit to the overall air quality of the area, as determined by the executive director;~~]

[~~(ii)~~ ~~is from the reduction of a criteria pollutant for which the area has been designated as nonattainment or which leads to the formation of a criteria pollutant for which an area has been designated as nonattainment; and~~]

[~~(iii)~~ ~~is for any criteria pollutant for which the area has been designated as nonattainment or leads to the formation of a criteria pollutant for which the area has been designated as nonattainment; and~~]

[~~(B) the user:~~]

[~~(i)~~ ~~demonstrates that the use of the reduction does not cause localized health impacts, as determined by the executive director;~~]

[~~(ii)~~ ~~submits all supporting information for calculations and modeling, and any additional information requested by the executive director; and~~]

[~~(iii)~~ ~~is located within 100 kilometers of the Texas - Mexico border.~~]

(b) - (c) (No change.)

(d) Protocol.

(1) All generators or users of discrete emission credits must use a protocol which has been submitted by the executive director to the EPA for approval, if existing for the applicable facility or mobile source, to measure and calculate baseline emissions. If the generator or user wishes to deviate from a protocol submitted by the executive director, EPA approval is required before the protocol can be used. Protocols shall be used as follows.

(A) - (B) (No change.)

(C) If the executive director has not submitted a protocol for the applicable facility or mobile source to the EPA for approval, the following applies:

(i) - (iii) (No change.)

(iv) the chosen quantification protocol shall be made available for public comment for a period of 30 days and shall be viewable on the commission's Web [~~web~~] site;

(v) (No change.)

(vi) quantification protocols shall not be accepted for use with this division (relating to Discrete Emission Credit Banking and Trading) if the executive director receives a letter objecting to the use of the protocol from the EPA during the 45-day adequacy review or the EPA proposes disapproval of the protocol in the *Federal Register*[~~after a proposed disapproval of the protocol by the EPA in the *Federal Register*~~].

(2) - (3) (No change.)

(e) (No change.)

(f) Geographic scope. Except as provided in paragraph (7) of this subsection and §101.375 of this title (relating to Emission Reductions Achieved Outside the United States) [~~paragraphs (7) and (8) of this subsection~~], only emission reductions generated in the State of Texas may be creditable and used in the state with the following limitations.

(1) - (7) (No change.)

[~~(8) A facility may use discrete emission reductions generated outside the United States provided that the emission reductions are quantifiable, real, and surplus to any applicable international, federal, state, or local law and the result would provide a greater health benefit to the area as determined by the executive director. The applicant must:~~]

[~~(A) demonstrate that the use of the reduction does not cause localized health impacts, as determined by the executive director;~~]

[~~(B) submit all supporting information for calculations and modeling, and any additional information requested by the executive director; and~~]

[~~(C) be located within 100 kilometers of the Texas - Mexico border.~~]

(g) - (i) (No change.)

(j) Authorization to emit. A discrete emission credit created under this division is a limited authorization to emit the specified pollutants in accordance with the provisions of this section, the Federal Clean Air Act [~~FCAA~~], and the Texas Clean Air Act [~~TCAA~~], as well as regulations promulgated thereunder. A discrete emission credit does not constitute a property right. Nothing in this division should be construed to limit the authority of the commission or the EPA to terminate or limit such authorization.

(k) - (m) (No change.)

§101.373. Discrete Emission Reduction Credit Generation and Certification.

(a) Methods of generation.

(1) Discrete emission reduction credits (DERC) may be generated using one of the following methods or any other method that is approved by the executive director:

[~~(A) the permanent shutdown of a facility that causes a loss of capability to produce emissions;~~]

(A) [~~(B)~~] the installation and operation of pollution control equipment that reduces emissions below the level required of the facility; or

(B) [~~(C)~~] a change in the manufacturing process that reduces emissions below the level required of the facility.

(2) DERCs may not be generated by the following strategies:

(A) permanent or temporary shutdowns [~~temporary shutdown~~] or permanent curtailment of an activity at a facility;

(B) - (K) (No change.)

(b) - (d) (No change.)

§101.375. Emission Reductions Achieved Outside the United States.

(a) A facility may use discrete emission credits for reductions achieved outside the United States of criteria pollutants or precursors of criteria pollutants if the facility meets the requirements of subsection (c) of this section.

(b) A facility may use reductions achieved outside the United States of criteria pollutants or precursors of criteria pollutants and substitute these reductions for reductions in other criteria pollutants if the facility meets the requirements of subsection (c) of this section; and

(1) the reduction is substituted for the reduction of another criteria pollutant if the substitution results in a greater health benefit and is of equal or greater benefit to the overall air quality of the area; or

(2) a reduction of an air contaminant for which the area in which the facility is located has been designated as nonattainment or which leads to the formation of a criteria pollutant for which an area has been designated as nonattainment is substituted for any air contaminant for which the area has been designated as nonattainment or leads to the formation of any criteria pollutant for which the area has been designated as nonattainment.

(c) The use of reductions outside the United States must be approved by the executive director and the United States Environmental Protection Agency, and the user of the emission reduction must:

(1) demonstrate to the executive director that the reduction is real, permanent, enforceable, quantifiable, and surplus to any applicable international, federal, state, or local law;

(2) demonstrate that the use of the reduction does not cause localized health impacts, as determined by the executive director;

(3) submit all supporting information for calculations and modeling, and any additional information requested by the executive director; and

(4) be located within 100 kilometers of the Texas - Mexico border.

(d) This section does not apply to reductions in emissions of lead.

§101.376. Discrete Emission Credit Use.

(a) - (b) (No change.)

(c) Discrete emission credit use prohibitions. A discrete emission credit may not be used under this division:

(1) - (3) (No change.)

(4) to allow an emissions increase of an air contaminant above a level authorized in a permit or other authorization that exceeds the limitations of §106.261 [~~§106.261(3) or (4) or §106.262(3)~~]

of this title (relating to Facilities (Emission Limitations)[~~; and Facilities (Emission and Distance Limitations)~~]) except as approved by the executive director. This paragraph does not apply to limit the use of discrete emission reduction credits (DERC) or mobile discrete emission reduction credits in lieu of allowances under §101.356(h) of this title;

(5) - (6) (No change.)

(d) - (e) (No change.)

§101.378. Discrete Emission Credit Banking and Trading.

(a) (No change.)

(b) Life of a discrete emission credit. A discrete emission credit is available for use after the DEC-1 Form, Notice of Generation and Generator Certification of Discrete Emission Credits, has been received, deemed creditable by the executive director, and deposited in the commission credit registry in accordance with subsection (a) of this section, and may be used anytime thereafter except as stated in this subsection. All credits are deposited in the credit registry and reported as available credits until they are used or withdrawn.

(1) Discrete emission credits generated from shutdown strategies prior to September 30, 2002, will be available for use until September 8, 2010.

(2) Discrete emission credits certified from facility shutdowns after September 30, 2002, may not be used.

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 295. WATER RIGHTS, PROCEDURAL

SUBCHAPTER A. REQUIREMENTS OF WATER RIGHTS APPLICATIONS GENERAL PROVISIONS

DIVISION 1. GENERAL REQUIREMENTS

30 TAC §295.17

The Texas Commission on Environmental Quality (commission) proposes new §295.17.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The Rio Grande below Fort Quitman is regulated by the Rio Grande Watermaster under Texas Water Code, §11.326 and §11.327. 30 TAC Chapter 303, Operation of the Rio Grande contains the Rio Grande Watermaster's rules. These rules recognize that the water rights in this area were adjudicated by a court, *State v. Hidalgo County Water Control & Improv. Dist. No. 18*, 443 S.W.2d 728 (Tex. App. - Corpus Christi 1969), *writ ref'd n.r.e.*, and that below Amistad Reservoir, water rights are not based on the priority system (first in time is first in right) as in the rest of the state.

Senate Bill (SB) 1902, and House Bill (HB) 2250, 78th Legislature, 2003, amended Texas Water Code (TWC), §11.3271, Powers and Duties of Rio Grande Watermaster, by amending Subsection (e), and adding Subsections (f) - (k). The provisions of the two bills are identical except for Subsection (j), relating to central repositories for documents.

Subsection (e) of the bills was amended to provide that the Rio Grande Watermaster's duties shall include activities relating to situations of imminent threat to public health and safety or the environment and required that the commission adopt rules which define situations of imminent threat and address the watermaster's duties in response to terrorism.

Subsections (f) - (i) provide that the commission may issue a permit which allows a person to place groundwater in the river and store it in a reservoir for release at a later time. The commission is to write rules which will account for any discharge, delivery, conveyance, storage, diversion, or associated loss of water conveyed down the Rio Grande. The rules must also protect other water right holders which store water in the reservoir and be consistent with the 1944 Treaty between the United States and Mexico. The commission may not issue this permit if it determines that the water to be conveyed will degrade the water quality of the Rio Grande. These permits will be called water-in-transit permits.

Subsection (j) of the two bills requires the watermaster to maintain a place available to the public that will contain copies of documents which the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande. SB 1902 provides that the watermaster is the "official recorder" of "all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens" filed in connection with water rights. HB 2250 provides that the watermaster shall "maintain a central repository" that includes "certified copies of all instruments, including deeds, deeds of trust, and liens" filed in connection with water rights.

SB 1902 also provides that an instrument should be filed "in the same manner as required by other law for the same type of instrument," and that "the filing of an instrument under this subsection results in the same legal and administrative status and consequences as a filing under other law for the same type of instrument." Further, an instrument filed under this law "shall be construed by a court, financial institution, or other affected person in the same manner as an instrument of the same type that is filed under other law." HB 2250 does not include any of this quoted language, but instead provides that "a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster," but that the law "does not affect the validity of a lien as between the holder of the water right and the holder of the lien or the requirements or validity of any other law governing the perfection and recordation of these instruments."

Both bills allow a fee to be collected for filing these instruments. SB 1902 further states that the commission shall adopt rules which "prescribe the procedures necessary for the proper implementation of this subsection, including reasonable transition provisions, if appropriate."

To implement this legislation, the commission proposes to concurrently amend this chapter; 30 TAC Chapter 297, Water Rights, Substantive; and 30 TAC Chapter 303; Operation of the Rio Grande.

The proposed rule implements the provisions of the two bills. Concerning rules for terror threats, the proposed commission rules require the Watermaster to communicate with the agency Homeland Security Coordinator if activities are noted which may be suspicious. Concerning the bed and banks provisions of these two bills, the commission proposes procedures that will protect existing surface water right holders in the Rio Grande and will allow the commission and State of Texas to comply with the Rio Grande Treaty between the United States and Mexico.

Concerning the provisions of the bills relating to filing documents with the Rio Grande Watermaster, the two bills are in conflict relating to the effect of filing and failure to file. The commission has determined that it should not adopt rules relating to the legal effect of filing or failing to file documents with the Rio Grande Watermaster because the commission does not regulate these matters. Therefore, the commission leaves the questions of the ramifications and effect of filing or failing to file documents with the commission to interpretation of the statutes by the courts. These rules would provide procedures for filing documents with the Rio Grande Watermaster.

The new rule in this chapter would provide that water-in-transit permits are not governed by this chapter but that Chapter 303 contains the requirements for these water-in-transit permits.

SECTION DISCUSSION

Proposed new §295.17 would provide that this chapter does not apply to water-in-transit permits. These permits are governed by Chapter 303.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, has determined that, for the first five-year period the proposed rules are in effect, fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. The proposed amendments address additional duties and responsibilities of the Rio Grande Watermaster as well as procedures to allow for the storage of water-in-transit in the Rio Grande system. No fiscal implications are anticipated for local governments since typically they do not transport water to sell to customers outside their constituency base. A local government will be subject to the same costs as other entities holding this type of water right if it decides to apply for a water-in-transit permit.

The proposed rulemaking seeks to implement provisions of SB 1902 and HB 2250, 78th Legislature, that amended the Texas Water Code and affected the duties and functions of the Rio Grande Watermaster. The rulemaking proposes changes to TAC Chapters 295, 297, and 303. The proposed amendments to Chapters 295 and 297 provide that water-in-transit permits for the Rio Grande are governed by provisions in Chapter 303 instead of Chapters 295 and 297.

The proposed rulemaking would implement provisions to: give the Rio Grande Watermaster the authority to take actions when there are imminent threats to public health, public safety, and the environment; provide for the permitting of privately owned groundwater that an owner may wish to sell and transport (water-in-transit) to a buyer using the Rio Grande River and its reservoirs as a means of delivery; and maintain, for public use, a central repository that includes certified copies of instruments the commission requires to be filed in connection with water rights in the lower, middle, and upper Rio Grande basins.

The proposed rulemaking would require the Rio Grande Watermaster to modify the water accounting methods currently in use. New procedures to issue a permit for this type of water right will have to be developed. It will be necessary to investigate and verify the increased volume and diversions of water flowing through the Rio Grande system because of these new permits. Daily monitoring and evaluation will be needed to compute the direct and indirect losses of privately owned water put into, and diverted from, the Rio Grande system so that current existing water rights will not be impacted by this new water right.

The proposed rulemaking may generate additional fee revenue for the agency. Revenue generated by application fees under this proposed rulemaking may range from $100 to $53,000 per application depending on the size and type of the groundwater source. Revenue from recording fees will also be generated at $1.25 per page of the application. Revenue from annual assessment fees for water-in-transit would be determined by the water holder's apportioned share of fees needed to cover Rio Grande Watermaster operations. This fee, which varies on an annual basis, could be as much as $45,000 per 100,000 acre-feet of water-in-transit.

Fees assessed to administer the Watermaster programs are deposited into the Watermaster Administration Account 158. The amount of fee revenue available for use by the agency to administer the Watermaster programs is determined through the legislative appropriations process. Projected revenue collected in this account is approximately $2.2 million over the 2006/2007 biennium. Of this amount, the agency is authorized to use $1.7 million in the 2006/2007 biennium. Currently, additional revenue generated by water-in-transit permits could not be used to cover the cost of implementing the proposed rulemaking. The agency submitted an exceptional item request in its Legislative Appropriation Request for Fiscal Years 2006 and 2007 to allow it to use the total amount of revenue collected in Account 158 to administer the Watermaster programs, however, this exceptional item request was not approved. The agency will again submit an exceptional item request in its Legislative Appropriation Request for Fiscal Years 2008 and 2009 to allow usage of the total amount of revenue collected.

The proposed rulemaking would have a number of operational impacts for the Rio Grande Watermaster. The costs of developing and implementing the procedures needed to account for additions and diversions of water-in-transit, monitor and investigate water activities on a daily basis, and establish and maintain a central repository for required documentation of water rights within the Rio Grande Watermaster division is estimated to be $90,000 per year, roughly the equivalent of three full-time employees at the level of a Watermaster Specialist I.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be the possible availability of more water in a region where water is scarce, greater accessibility to public records pertaining to water rights in the Rio Grande basins, and increased protection of public health, public safety, and the environment if situations of imminent threat arise.

Fiscal implications are anticipated for businesses and individuals who apply for a water-in-transit permit under this proposed rulemaking. Costs for obtaining this type of permit would vary depending on the characteristics of the site and the number of acre-feet of water placed in the system.

Applicants will be required to conduct a hydrological assessment of the water source, which staff experience indicates could cost between $15,000 to $30,000, depending on the location and geological formation of the groundwater aquifer. Geological engineering models may be required to complete the evaluation regarding any groundwater surface water connection. Applicants will also be required to publish notices in the newspapers of 16 counties of the Rio Grande Water division for which they intend to obtain this type of permit. This cost is estimated to be between $300 to $500 per newspaper publication. Applicants will also have to mail a notice to the 1,600 water right account holders in the Rio Grande Watermaster division costing approximately $600 total. Applicants will also have to pay an application fee and a user fee for the permit. These costs could range from $100 to $52,000, depending upon the amount of water discharged for transit. These fees are based on the amount of water that is being transported and therefore increases if more water is used. There is a $50,000 maximum on use fees. Recording fees will be $1.25 per page of the permit application. Fees for filing copies of liens will be assessed at $16 for the first page and $2.00 for each additional page of the document. If a water-in-transit right had to be amended, the applicant would have to pay $100 per amendment. A water-in-transit holder will have to pay an annual assessment fee that all water right holders in the Rio Grande division pay. This fee varies from year to year, but a water-in-transit permit holder could pay as much as $45,000 per each 100,000 acre-feet of water-in-transit, depending on the annual assessment rate calculated by the watermaster and approved by the commission to provide for compensation of all watermaster activities multiplied by the authorized amount of water both discharged into the Rio Grande and maximum authorized diverted and the intended and authorized use of that water. Entities with this type of water right will be required to install pumping and metering equipment. Pumping equipment ranges from an estimated $800 - $5,000 per unit, and metering equipment will cost about $500 per site.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to the administration and implementation of the proposed rule. Small and micro-businesses are not expected to apply for a water-in-transit permit. If a small or micro-business elected to obtain a water-in-transit permit, it would be subject to the same costs that other entities pay to obtain that permit.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. The intent is to indicate that Chapter 295 does not apply to water-in-transit permits and to refer the reader to Chapter 303 for the requirements for those permits. The purpose of the rule is not to protect the environment or reduce risks to human health due to environmental exposure.

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. The intent of the rulemaking concerning terror threats is not to reduce risks to human health from environmental exposure, but to provide new duties for the Rio Grande Watermaster relating to actions during terror threats. The rules relating to terror threats could be considered to protect the environment. However, these rules do not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government, and these rules are not adopted under the general powers of the agency instead of a specific state law. The rules relating to bed and banks permits are not for the purpose of protecting the environment or protection from environmental exposure, but are to allow the conveyance and storage of groundwater in the river and to protect existing water rights. The recordkeeping rules are not for the purpose of protecting the environment or reducing risks from environmental exposure but are to provide a local public place for documents to be filed.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules in Chapter 295 and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. These rules are simply a procedural statement which refers the reader to another chapter for water-in-transit permit requirements. The rules do not affect private real property. Thus, these new rules do not constitute a taking under the Texas Government Code.

The commission evaluated the proposed rules and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. Concerning actions to be taken by the Rio Grande Watermaster due to terror threats, the rules are written in response to a real and substantial threat to public health and safety, are designed to significantly advance the health and safety purpose, and do not impose a greater burden than is necessary to achieve the health and safety purpose.

For the bed and banks permits and the recordkeeping requirements of the rules, none of the exceptions in §2007.003(b) apply to this rulemaking. The specific purpose of these proposed rules is to allow the commission to issue bed and banks permits for conveyance of groundwater to be stored in a reservoir, and to provide new duties for the Rio Grande Watermaster relating to bed and banks permits for conveyance of groundwater to be stored in a reservoir, recordkeeping, and monitoring water right activities in the Rio Grande basin. The proposed rules would substantially advance this stated purpose by providing procedures for each of these duties.

There are no burdens imposed on private real property due to these rules requiring the Rio Grande Watermaster to issue bed and banks permits and keep records. The rules on recordkeeping do not impact real property. The new rules relating to these bed and banks permits in the Rio Grande are specifically written to prevent any impact on their property because under the "Rule of Capture" persons may pump water from their land if they are not wasting the water or causing subsidence or other damage to other land. These rules do not affect that law. Additionally, a

permittee will not be allowed to remove all of the water put into the river under the permit. This limit on how much water can be taken from the river is necessary to protect water right holders and to comply with the 1944 Treaty, both of which are required in Texas Water Code, §11.3271. Thus, these new rules do not constitute a taking under the Texas Government Code.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). The purpose of the rulemaking is to provide notice that this chapter does not apply to applications for water-in-transit in the Rio Grande and to provide a cross-reference to rules that are applicable to water-in-transit in the Rio Grande. Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2004-014-295-CE. Comments must be received by 5:00 p.m., May 30, 2006. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Tracy Callen, Field Operations Division, at (512) 239-4127.

STATUTORY AUTHORITY

The new section is proposed under amendments to Texas Water Code, TWC, §11.3271, which provides that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new section is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposed new section implements TWC, §11.3271, and TWC, §5.103.

§295.17. Water-in-Transit in the Rio Grande.

This chapter only applies to applications for water-in-transit in the Rio Grande to the extent that the rules for water-in-transit applications in the Rio Grande in Chapter 303 of this title (relating to Operation of the Rio Grande) do not govern or do not expressly conflict with this chapter. The applicable rules for water-in-transit in the Rio Grande are in Chapter 303 of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 14, 2006.

TRD-200602169
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 239-5017

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CHAPTER 297. WATER RIGHTS, SUBSTANTIVE

SUBCHAPTER A. DEFINITIONS AND APPLICABILITY

30 TAC §297.2

The Texas Commission on Environmental Quality (commission) proposes new §297.2.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The Rio Grande below Fort Quitman is regulated by the Rio Grande Watermaster under Texas Water Code, §11.326 and §11.327. 30 TAC Chapter 303, Operation of the Rio Grande, contains the Rio Grande Watermaster's rules. These rules recognize that the water rights in this area were adjudicated by a court, *State v. Hidalgo County Water Control & Improv. Dist. No. 18*, 443 S.W.2d 728 (Tex. App. - Corpus Christi 1969), *writ ref'd n.r.e.*, and that below Amistad Reservoir, water rights are not based on the priority system (first in time is first in right) as in the rest of the state.

Senate Bill (SB) 1902, and House Bill (HB) 2250, 78th Legislature, 2003, amended Texas Water Code (TWC), §11.3271, Powers and Duties of Rio Grande Watermaster, by amending Subsection (e), and adding Subsections (f) - (k). The provisions of the two bills are identical except for Subsection (j), relating to central repositories for documents.

Subsection (e) of the bills was amended to provide that the Rio Grande Watermaster's duties shall include activities relating to situations of imminent threat to public health and safety or the environment and required that the commission shall adopt rules which define situations of imminent threat and address the watermaster's duties in response to terrorism.

Subsections (f) - (i) provide that the commission may issue a permit which allows a person to place groundwater in the river and store it in a reservoir for release at a later time. The commission is to write rules which will account for any discharge, delivery, conveyance, storage, diversion, or associated loss of water conveyed down the Rio Grande. The rules must also protect other water right holders which store water in the reservoir and be consistent with the 1944 Treaty between the United States and Mexico. The commission may not issue this permit if it determines that the water to be conveyed would degrade the water quality of the Rio Grande. These permits will be called water-in-transit permits.

Subsection (j) of the two bills requires the watermaster to maintain a place available to the public that will contain copies of documents which the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande. SB 1902 provides that the watermaster is the "official recorder" of "all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens" filed in connection with water rights. HB 2250 provides that the watermaster shall "maintain a central repository" that includes "certified copies of all instruments, including deeds, deeds of trust, and liens" filed in connection with water rights.

SB 1902 also provides that an instrument should be filed "in the same manner as required by other law for the same type of instrument," and that "the filing of an instrument under this subsection results in the same legal and administrative status and consequences as a filing under other law for the same type of instrument." Further, an instrument filed under this law "shall be construed by a court, financial institution, or other affected person in the same manner as an instrument of the same type that is filed under other law." HB 2250 does not include any of this quoted language, but instead provides that "a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster," but that the law "does not affect the validity of a lien as between the holder of the water right and the holder of the lien or the requirements or validity of any other law governing the perfection and recordation of these instruments."

Both bills allow a fee to be collected for filing these instruments. SB 1902 further states that the commission shall adopt rules which "prescribe the procedures necessary for the proper implementation of this subsection, including reasonable transition provisions, if appropriate."

To implement this legislation, the commission proposes to concurrently amend this chapter; 30 TAC Chapter 295, Water Rights, Procedural; and 30 TAC Chapter 303; Operation of the Rio Grande.

The proposed rule implements the provisions of the two bills. Concerning rules for terror threats, the proposed commission rules require the Watermaster to communicate with the agency Homeland Security Coordinator if activities are noted which may be suspicious. Concerning the bed and banks provisions of these two bills, the commission proposes procedures that will protect existing surface water right holders in the Rio Grande and will allow the commission and State of Texas to comply with the Rio Grande Treaty between the United States and Mexico.

Concerning the provisions of the bills relating to filing documents with the Rio Grande Watermaster, the two bills are in conflict relating to the effect of filing and failure to file. The commission has determined that it should not adopt rules relating to the legal effect of filing or failing to file documents with the Rio Grande Watermaster because the commission does not regulate these matters. Therefore, the commission leaves the questions of the ramifications and effect of filing or failing to file documents with the commission to interpretation of the statutes by the courts. These rules would provide procedures for filing documents with the Rio Grande Watermaster.

The new rule in this chapter would provide that water-in-transit permits are not governed by this chapter but that Chapter 303 contains the requirements for these water-in-transit permits.

SECTION DISCUSSION

Proposed §297.2 provides that this chapter does not apply to water-in-transit permits. These permits are governed by Chapter 303.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, has determined that, for the first five-year period the proposed new rule is in effect, fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. The proposed amendments address additional duties and responsibilities of the Rio Grande Watermaster as well as procedures to allow for the storage of water-in-transit in the Rio Grande system. No fiscal implications are anticipated for local governments since typically they do not transport water to sell to customers outside their constituency base. A local government would be subject to the same costs as other entities holding this type of water right if it decides to apply for a water-in-transit permit.

The proposed rulemaking seeks to implement provisions of SB 1902 and HB 2250, 78th Legislature, that amended the Texas Water Code and affected the duties and functions of the Rio Grande Watermaster. The rulemaking proposes changes to Chapters 295, 297, and 303 of the Texas Administrative Code. The proposed amendments to Chapters 295 and 297 provide that water-in-transit permits for the Rio Grande are governed by provisions in Chapter 303 instead of Chapters 295 and 297.

The proposed rulemaking would implement provisions to: give the Rio Grande Watermaster the authority to take actions when there are imminent threats to public health, public safety, and the environment; provide for the permitting of privately owned groundwater that an owner may wish to sell and transport (water-in-transit) to a buyer using the Rio Grande River and its reservoirs as a means of delivery; and maintain, for public use, a central repository that includes certified copies of instruments the commission requires to be filed in connection with water rights in the lower, middle, and upper Rio Grande basins.

The proposed rulemaking will require the Rio Grande Watermaster to modify the water accounting methods currently in use. New procedures to issue a permit for this type of water right will have to be developed. It will be necessary to investigate and verify the increased volume and diversions of water flowing through the Rio Grande system because of these new permits. Daily monitoring and evaluation will be needed to compute the direct and indirect losses of privately owned water put into, and diverted from, the Rio Grande system so that current existing water rights will not be impacted by this new water right.

This proposed rulemaking may generate additional fee revenue for the agency. Revenue generated by application fees under this proposed rulemaking may range from $100 to $53,000 per application depending on the size and type of the groundwater source. Revenue from recording fees would also be generated at $1.25 per page of the application. Revenue from annual assessment fees for water-in-transit will be determined by the water holder’s apportioned share of fees needed to cover Rio Grande Watermaster operations. This fee, which varies on an annual basis, could be as much as $45,000 per 100,000 acre-feet of water-in-transit.

Fees assessed to administer the Watermaster programs are deposited into the Watermaster Administration Account 158. The amount of fee revenue available for use by the agency to administer the Watermaster programs is determined through the

legislative appropriations process. Projected revenue collected in this account is approximately $2.2 million over the 2006/2007 biennium. Of this amount, the agency is authorized to use $1.7 million in the 2006/2007 biennium. Currently, additional revenue generated by water-in-transit permits could not be used to cover the cost of implementing the proposed rulemaking. The agency submitted an exceptional item request in its Legislative Appropriation Request for Fiscal Years 2006 and 2007 to allow it to use the total amount of revenue collected in Account 158 to administer the Watermaster programs, however, this exceptional item request was not approved. The agency will again submit an exceptional item request in its Legislative Appropriation Request for Fiscal Years 2008 and 2009 to allow usage of the total amount of revenue collected.

This proposed rulemaking would have a number of operational impacts for the Rio Grande Watermaster. The costs of developing and implementing the procedures needed to account for additions and diversions of water-in-transit, monitor and investigate water activities on a daily basis, and establish and maintain a central repository for required documentation of water rights within the Rio Grande Watermaster division is estimated to be $90,000 per year, roughly the equivalent of three full-time employees at the level of a Watermaster Specialist I.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be the possible availability of more water in a region where water is scarce, greater accessibility to public records pertaining to water rights in the Rio Grande basins, and increased protection of public health, public safety, and the environment when situations of imminent threat arise.

Fiscal implications are anticipated for businesses and individuals who apply for a water-in-transit permit under this proposed rulemaking. Costs for obtaining this type of permit would vary depending on the characteristics of the site and the number of acre-feet of water placed in the system.

Applicants will be required to conduct a hydrological assessment of the water source, which staff experience indicates could cost between $15,000 to $30,000, depending on the location and geological formation of the groundwater aquifer. Geological engineering models may be required to complete the evaluation regarding any groundwater surface water connection. Applicants will also be required to publish notices in the newspapers of 16 counties of the Rio Grande Water division for which they intend to obtain this type of permit. This cost is estimated to be between $300 to $500 per newspaper publication. Applicants will also have to mail a notice to the 1,600 water right account holders in the Rio Grande Watermaster division costing approximately $600 total. Applicants will also have to pay an application fee and a user fee for the permit. These costs could range from $100 to $52,000, depending upon the amount of water discharged for transit. These fees are based on the amount of water that is being transported and therefore increases if more water is used. There is a $50,000 maximum on use fees. Recording fees will be $1.25 per page of the permit application. Fees for filing copies of liens will be assessed at $16 for the first page and $2.00 for each additional page of the document. If a water-in-transit right had to be amended, the applicant would have to pay $100 per amendment. A water-in-transit holder would have to pay an annual assessment fee that all water right holders in the Rio Grande division pay. This fee varies from year to year, but a water-in-transit permit holder could pay as much as $45,000 per each 100,000 acre-feet of water-in-transit, depending on the annual assessment rate calculated by the watermaster and approved by the commission to provide for compensation of all watermaster activities multiplied by the authorized amount of water both discharged into the Rio Grande and maximum authorized diverted and the intended and authorized use of that water. Entities with this type of water right will be required to install pumping and metering equipment. Pumping equipment ranges from an estimated $800 - $5,000 per unit, and metering equipment will cost about $500 per site.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to the administration and implementation of the proposed rule. Small and micro-businesses are not expected to apply for a water-in-transit permit. If a small or micro-business elected to obtain a water-in-transit permit, it would be subject to the same costs that other entities pay to obtain that permit.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking for Chapter 297 in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. The intent of the rulemaking is to indicate that this chapter does not apply to water-in-transit permits and to refer the reader to Chapter 303 for the requirements for those permits. The purpose of the rule is not to protect the environment or reduce risk to human health due to environmental exposure.

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. The intent of the rulemaking concerning terror threats is not to reduce risks to human health from environmental exposure, but to provide new duties for the Rio Grande Watermaster relating to actions during terror threats. The rules relating to terror threats could be considered to protect the environment. However, these rules do not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government, and these rules are not adopted under the general powers of the agency instead of a specific state law. The rules relating to bed and banks permits are not for the purpose of protecting the environment or protection from environmental exposure, but are to allow the conveyance and storage of groundwater in the river and to protect existing water rights. The recordkeeping rules are not for the purpose of protecting the environment or reducing risks from environmental exposure but are to provide a local public place for documents to be filed.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. These rules are simply a procedural statement which refers the reader to another chapter for water-in-transit permit requirements. Thus, these new rules do not constitute a taking under the Texas Government Code.

The commission evaluated the proposed rule and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. Concerning actions to be taken by the Rio Grande Watermaster due to terror threats, the rules are written in response to a real and substantial threat to public health and safety, are designed to significantly advance the health and safety purpose, and do not impose a greater burden than is necessary to achieve the health and safety purpose.

For the bed and banks permits and the recordkeeping requirements of the rules, none of the exceptions in §2007.003(b) apply to this rulemaking. The specific purpose of these proposed rules is to allow the commission to issue bed and banks permits for conveyance of groundwater to be stored in a reservoir, and to provide new duties for the Rio Grande Watermaster relating to bed and banks permits for conveyance of groundwater to be stored in a reservoir, recordkeeping, and monitoring water right activities in the Rio Grande basin. The proposed rules would substantially advance this stated purpose by providing procedures for each of these duties.

There are no burdens imposed on private real property due to these rules requiring the Rio Grande Watermaster to issue bed and banks permits and keep records. The rules on recordkeeping do not impact real property. The rules relating to these bed and banks permits in the Rio Grande are specifically written to prevent any impact on their property because under the "Rule of Capture" persons may pump water from their land if they are not wasting the water or causing subsidence or other damage to other land. These rules do not affect that law. Additionally, a permittee will not be allowed to remove all of the water put into the river under the permit. This limit on how much water can be taken from the river is necessary to protect water right holders and to comply with the 1944 Treaty, both of which are required in Texas Water Code, §11.3271. Thus, these new rules do not constitute a taking under the Texas Government Code.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). The purpose of the rulemaking is to provide notice that this chapter does not apply to applications for water-in-transit in the Rio Grande and to provide a cross-reference to rules that are applicable to water-in-transit in the Rio Grande. Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2004-014-295-CE. Comments must be received by 5:00 p.m., May 30, 2006. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Tracy Callen, Field Operations Division, at (512) 239-4127.

STATUTORY AUTHORITY

The new section is proposed under amendments to Texas Water Code, TWC, §11.3271, which provides that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new section is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposed new section implements TWC, §11.3271, and TWC, §5.103.

§297.2. Water-in-Transit in the Rio Grande.

This chapter only applies to applications for water-in-transit in the Rio Grande to the extent that the rules for water-in-transit applications in the Rio Grande in Chapter 303 of this title (relating to Operation of the Rio Grande) do not govern or do not expressly conflict with this chapter. The applicable rules for water-in-transit in the Rio Grande are in Chapter 303 of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 14, 2006.

TRD-200602170
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 239-5017

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CHAPTER 303. OPERATION OF THE RIO GRANDE

The Texas Commission on Environmental Quality (commission) proposes amendments to §§303.1, 303.2, 303.21 - 303.23, 303.53, 303.55, and 303.72. The commission also proposes new §§303.18, 303.40, and 303.74 - 303.93.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Rio Grande below Fort Quitman is regulated by the Rio Grande Watermaster under Texas Water Code, §11.326 and §11.327. Chapter 303, Operation of the Rio Grande, of 30

Texas Administrative Code (TAC) contains the Rio Grande Watermaster's rules. These rules recognize that the water rights in this area were adjudicated by a court, *State v. Hidalgo County Water Control & Improv. Dist. No. 18*, 443 S.W.2d 728 (Tex. App. - Corpus Christi 1969), *writ ref'd n.r.e.*, and that below Amistad Reservoir, water rights are not based on the priority system (first in time is first in right) as in the rest of the state.

Senate Bill (SB) 1902, and House Bill (HB) 2250, 78th Legislature, 2003, amended Texas Water Code (TWC), §11.3271, Powers and Duties of Rio Grande Watermaster, by amending Subsection (e), and adding Subsections (f) - (k). The provisions of the two bills are identical except for Subsection (j), relating to central repositories for documents.

Subsection (e) of the bills was amended to provide that the Rio Grande Watermaster's duties shall include activities relating to situations of imminent threat to public health and safety or the environment and required that the commission adopt rules which define situations of imminent threat and address the watermaster's duties in response to terrorism.

Subsections (f) - (i) provide that the commission may issue a permit which allows a person to convey groundwater in the river, which may include, but does not require, storage in a reservoir for release at a later time. The commission is to write rules which will account for any discharge, delivery, conveyance, storage, diversion, or associated loss of water conveyed down the Rio Grande. The rules must also protect other water right holders which store water in the reservoir and be consistent with the 1944 Treaty between the United States and Mexico. Because groundwater will be introduced into the Rio Grande and will be conveyed in the river under this permit, this water must be shared with Mexico under the 1944 Treaty. The commission may not issue this permit if it determines that the water to be conveyed would degrade the water quality of the Rio Grande. These permits will be called water-in-transit permits.

Subsection (j) of the two bills requires the watermaster to maintain a place available to the public that will contain copies of documents which the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande. SB 1902 provides that the watermaster is the "official recorder" of "all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens" filed in connection with water rights. HB 2250 provides that the watermaster shall "maintain a central repository" that includes "certified copies of all instruments, including deeds, deeds of trust, and liens" filed in connection with water rights.

SB 1902 also provides that an instrument should be filed "in the same manner as required by other law for the same type of instrument," and that "the filing of an instrument under this subsection results in the same legal and administrative status and consequences as a filing under other law for the same type of instrument." Further, an instrument filed under this law "shall be construed by a court, financial institution, or other affected person in the same manner as an instrument of the same type that is filed under other law." HB 2250 does not include any of this quoted language, but instead provides that "a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster," but that the law "does not affect the validity of a lien as between the holder of the water right and the holder of the lien or the requirements or validity of any other law governing the perfection and recordation of these instruments."

Both bills allow a fee to be collected for filing these instruments. SB 1902 further states that the commission shall adopt rules which "prescribe the procedures necessary for the proper implementation of this subsection, including reasonable transition provisions, if appropriate."

The proposed rules implement the provisions of the two bills. Concerning rules for terror threats, the proposed commission rules require the Watermaster to communicate with the agency Homeland Security Coordinator if activities are noted which may be suspicious. Concerning the bed and banks provisions of these two bills, the commission proposes procedures that will protect existing surface water right holders in the Rio Grande and will allow the commission and State of Texas to comply with the Rio Grande Treaty between the United States and Mexico.

Concerning the provisions of the bills relating to filing documents with the Rio Grande Watermaster, the two bills are in conflict relating to the effect of filing and failure to file. The commission has determined that it should not adopt rules relating to the legal effect of filing or failing to file documents with the Rio Grande Watermaster because the commission does not regulate these matters. Therefore, the commission leaves the questions of the ramifications and effect of filing or failing to file documents with the commission to interpretation of the statutes by the courts. These rules will provide procedures for filing documents with the Rio Grande Watermaster.

SECTION BY SECTION DISCUSSION

The proposed amendment to §303.1, General, would clarify which water rights will be regulated under Chapter 303, Operation of the Rio Grande. Also, the proposed amendment states that any other rules, regulations, and orders relating to water rights will apply to water rights regulated under Chapter 303 unless Chapter 303 expressly provides otherwise. These amendments are needed to describe what rules will apply to water rights in the Rio Grande below Fort Quitman.

The proposed addition of new §303.2(19) is necessary to define the Treaty between the United States and Mexico because reference to the Treaty is made in the new rules for water-in-transit permits. Proposed new §303.2(23) is necessary to define "Water-in-transit" permits, which are required by HB 2250 and SB 1902. This definition of "Water-in-transit" tracks the language in the statutes. Section 303.2(19) - (21) is renumbered §303.2(20) - (22), and §303.2(22) and (23) is renumbered §303.2(24) and (25) because of these added definitions. Water-in-transit is groundwater that may or may not be stored in a reservoir for later use.

Proposed new §303.18 concerns threats to public health and safety and the environment and would provide that the Rio Grande Watermaster will implement the agency's Homeland Security Coordination Plan. Additionally, under §303.18, the Watermaster shall require water right holders to cease diversions if the Watermaster determines that continued diversion would pose a hazard to public health and safety and the environment. These provisions are necessary to implement the requirements of SB 1902 and HB 2250 that require that the Rio Grande Watermaster determine situations of threat and the duties he will perform.

The proposed amendment to §303.21 adds subsection (b)(4), which provides that water-in-transit accounts are not eligible for allocation under §303.22, Allocations to Accounts, and that these accounts are regulated in Subchapters I and J of Chapter 303. These accounts are not subject to allocation to other ac-

counts because the water is under contractual sale to a buyer. These additions to the rules are necessary for the allocation process for water right holders to work after water-in-transit permits have been issued.

Proposed amendments to §303.22(a) provide that this subsection allowing allocation does not apply to water-in-transit accounts. Also, the amendments to subsection (a), relating to allocations of water, provide that allocations to accounts shall be based on water in the usable storage of Falcon and Amistad Reservoirs minus the water-in-transit held in storage in these reservoirs. Water in water-in-transit accounts are deducted from usable storage after the municipal, domestic, and industrial reserve water is deducted. The amount of water in the water-in-transit accounts must be deducted from the water that will be allocated to other accounts because the water in the water-in-transit accounts is not available for allocation. This water is going to the buyer of this groundwater. These rules are needed to provide how allocation will be done with the addition of this new type of permit.

Proposed amendments to §303.22(f)(3) add water-in-transit accounts to accounts that will have water deducted when the operating reserve is less than zero acre-feet. Accounts will be deducted by the amount necessary to provide 48,000 acre-feet for the operating reserve. Once the operating reserve is back to 75,000 acre-feet, other accounts will be restored to the amount in the account before the negative allocation, but water-in-transit accounts will not be restored. This requirement is necessary because the water in water-in-transit accounts is specific water that has been purchased and that has been added to the river outside of the normal allocation process. Thus, using water that is normally in the Rio Grande to replace this additional water could injure water right holders who are allocated water that is normally in the Rio Grande.

Section 303.23 is proposed to be amended to delete water-in-transit from the water that can be distributed to water rights accounts in subsection (a). This subsection is necessary because requiring water for existing water right holders to be given to water-in-transit accounts would impair the rights of the existing water right holders. Proposed new subsection (d) provides that water available to water right holders above Amistad and all Rio Grande tributaries shall not be distributed to water-in-transit accounts. This section is necessary because water above Amistad is available to the water right holders in a priority system.

Proposed new §303.40 provides that Subchapter E, Amendments to and Sales of Water Rights, does not apply to water-in-transit permits. Amendments to and sales of water-in-transit permits are governed by Subchapters I and J of Chapter 303, therefore, this exclusion from §303.40 is necessary.

The proposed amendment to §303.53(b) provides that contracts of sale relating to water-in-transit contractual sales which are filed with the commission shall include an aerial photograph or United States Geological Survey topographic map with the location of the discharge point or points. This language needs to be added to the section because contracts of sale regarding water-in-transit permits will need to include photographs or maps of the discharge points, as well as diversion points, which are required in maps and photographs in the existing rule. This requirement for water-in-transit permits is necessary because the Rio Grande Watermaster needs to know where this water is coming into the river in order to properly administer all the water rights in the river.

The proposed amendments to §303.55(e) would prohibit buyer's or seller's water in storage accounts from exceeding their annual authorized amount while a buyer's or seller's Class A or Class B storage may not exceed 1.41 times the water right holder's recognized amount in acre-feet. This change is included in this rule package to clarify to what type of storage the requirement relates.

The proposed amendments to §303.72(a) add "water-in-transit diversion" and "water-in-transit discharge" to the formula for calculating assessment rates for water right holders in the Rio Grande Watermaster's Division. Also, these two terms are defined in this subsection. These changes are necessary in order to assess water-in-transit permit holders for the watermaster's services.

Proposed new Subchapter I, §§303.74 - 303.90, sets out the requirements for obtaining a bed and banks permit for water-in-transit. These rules are necessary to provide the procedural requirements for preparing and filing an application for water-in-transit with the commission.

Proposed new §303.74, General, provides that Subchapter I is applicable to water rights permits for water-in-transit. Other rules and orders of the commission related to water rights are also applicable unless in conflict with the provisions of Subchapter I.

Proposed new §303.75 sets out the requirements for an application for a water-in-transit permit. The section specifies specific application contents, including a description of the water quality of the water to be discharged, the date of the proposed discharge, an analysis of the losses that must be calculated, and the maximum amount of water which may be stored in the reservoirs. The loss calculations will become part of the water-in-transit permit. The water source, including a hydrological determination regarding any interaction between surface water and groundwater, is also required because any pumping of groundwater that is connected to surface water would impact treaty obligations to Mexico. This rule is necessary to provide what an applicant must put in an application to obtain a water-in-transit permit.

Proposed new §303.76 relates to forms which will be provided to applicants. While the forms are not mandatory, the information required by the forms is mandatory. Requirements for supplemental information are set out.

Proposed new §303.77 describes how to prepare an application and when the application may be changed, and by whom.

Proposed new §303.78 would provide that the applicant must provide a name and address, as well as other information, even if acting as an agent for another. A partnership must designate that it is a partnership and a trustee must designate that it is a trustee.

Proposed new §303.79 would provide that the applicant must clearly state the name and location of the underground reservoir which will serve as the source of the groundwater. This information is necessary for the executive director to determine the water quality and location of the discharge.

Proposed new §303.80 would provide that the applicant must give the executive director the total specific amount of water to be discharged and diverted. This information is necessary for the watermaster to account for this water in the river and in the reservoir.

Proposed new §303.81 would provide that the application must include the method and rate of diversion for each diversion point,

and would provide that the applicant provide the location of each discharge and diversion point. This information is necessary for the watermaster to administer water-in-transit permits and requires that the applicant provide the location of each discharge and diversion point.

Proposed new §303.82 contains requirements for who should sign the application. Requirements for who signs an application for individuals, joint applications, partnerships, estates, corporations, political subdivisions, and trustees, are given. These requirements are necessary for the commission to ensure that signatories to these applications actually represent the applicant.

Proposed new §303.83 requires that the application be sworn. This requirement is necessary to ensure that the commission bases its permits on accurate information.

Proposed new §303.84 provides that the applicant provide information describing how the application addresses a water supply need in a manner that is consistent with the state water plan or the approved regional plan of the area. The applicant may also request a waiver. This requirement is necessary for the commission to comply with TWC, §11.134, which requires the commission to grant a water right permit only if the application addresses a water supply need in a manner consistent with the state or regional plan.

Proposed new §303.85 addresses filing fees for these applications. Subsection (a) would provide that fees are to be submitted with the application and staff cannot further process an application without the fees. Subsection (b) sets out the filing, recording, and notices fees. The application fee is based on the total amount of water to be discharged. Amendments are $100 per right requested to be amended, and recording fees are $1.25 per page of application. Subsections (b)(3) and (c) set out that the applicant must pay the cost of any required mailed and published notice. These fees are necessary to reimburse the state for the expenses of processing an application for a water-in-transit permit. Subsection (d) sets out a one-time transit fee of $1.00 per acre-foot of water discharged. This fee is necessary to reimburse the state for use of the bed and banks of the river.

Under subsection (e), if the fee is over $1,000, the applicant must pay at least half, and then pay the rest within 180 days of receiving notice that the application is granted. The permit will be annulled if the fee is not paid. Subsection (f) provides that the total one-time transit fee shall not exceed $50,000. Subsection (g) provides that inquiries as to fees should be made in advance to the executive director. In case of a disagreement between the applicant and the executive director over the amount of the fee, the application will be filed "under protest" and the amount will be placed in suspense until the issue is resolved. Under subsection (h), all fees other than filing and recording fees will be returned to the applicant if they have not been expended or if the permit is not granted. The applicant must notify the executive director of his social security or federal identification number to receive these fees. These rules are necessary to administer the fee requirements for these permits.

Proposed new §303.86 provides notice requirements for water-in-transit applications. Subsection (a) requires notice by mail to the persons set out in subsection (d) and published notice as set out in subsection (c). Subsection (b) describes the required content of a notice. Subsection (c) requires published notice in each county in the Rio Grande water division at least 30 days before the commission or executive director considers the application. Subsection (d)(1) provides mailed notice must be received by water right holders within the Rio Grande division 30 days before the commission or the executive director considers the application. Subsection (d)(2) provides who received mailed notice. These rules are required to provide notice of an application in compliance with Texas Water Code, Chapter 11.

Proposed new §303.87 provides notice requirements for hearings. No further notice, other than the notice of the commission's agenda to consider the hearing request, of the time and place of the hearing is necessary other than advising the applicant, executive director, public interest council, and persons who have notified the commission of their interest in the application. This rule is required for providing notice of hearings to interested persons.

Proposed new §303.88 would provide requirements for requesting a hearing on a water rights application. Subsection (b) would provide that Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment) would govern hearing requests and commission consideration of hearing requests.

Proposed new §303.89 requires the commission to conduct public hearings under the provisions of Chapter 80 of this title (relating to Contested Case Hearings). Proposed new §303.90 provides that the executive director may issue a permit if the provisions of Chapter 50 of this title (relating to Actions on Applications and Other Authorizations) are met. These rules are necessary to ensure that procedural rules for hearings for water-in-transit permits are consistent with the procedural rules for hearings for other permits.

Proposed new Subchapter J, §303.91 and §303.92 pertains to the administration of Rio Grande bed and banks permits for water-in-transit.

Proposed new §303.91(a) provides that the purpose of the subchapter is to describe the administrative responsibilities of the watermaster regarding water-in-transit permits. Subsection (b) sets out how the accounts in Amistad and Falcon Reservoirs are established, and how water-in-transit will be accounted for in those accounts. Water-in-transit accounts are the first accounts to be eliminated if there is not storage space left in the reservoir. Water lost due to storage space limitations will not be restored. These provisions are necessary to provide how accounting for water-in-transit accounts will be done to ensure existing water rights are protected.

Proposed new §303.91(c) requires that the watermaster keep records of all authorized discharges and diversions and advise the operator of those facts. All discharges and diversions must be metered. Notice to the watermaster is required for replacements of a permanent facility or any changes in rating and a change in location of a discharge or diversion point. Subsection (d) requires that the accounting be consistent with the 1944 Treaty with Mexico. No water can be credited to water-in-transit accounts unless it has been discharged to the Rio Grande under a water-in-transit permit and has been credited to the United States' share of water by the International Boundary and Water Commission (IBWC). Any accounting must be consistent with any accounting done by the IBWC. These rules are necessary to ensure that accounting for these permits will protect existing water rights and comply with the 1944 Treaty.

Proposed new subsection (e) provides that each diverter must obtain a certification from the watermaster prior to diversion and provides requirements for certifications. Subsection (f) provides that diverters shall be charged for their diversions and sets out

provisions for this. Subsection (g) requires ownership records for diversions. Subsection (h) requires certification to be posted and provides requirements for that posting. Subsection (i) requires diverters to install and maintain measuring devices. The watermaster must approve the installation and operation, and the diverter shall bear the costs of these devices. Proposed new subsection (j) states that each diverter shall divert water only in accordance with the approved certification. These rules are necessary for the watermaster to be able to accurately enforce water rights in the Rio Grande.

Proposed new subsection (k) establishes requirements for reports to be made to the commission. Water right holders are responsible for reporting use based on their records. Proposed new subsection (l) provides that the watermaster shall maintain an accurate inventory of the water in Falcon and Amistad Reservoirs, including water-in-transit and maintain accurate records and institute necessary procedures to perform this function. Proposed new subsection (m) provides that the watermaster shall submit monthly reports to each water right holder showing the status of the account. Water right holders must tell the watermaster of any errors in the report within 20 days of distribution of the report. Proposed new subsection (n) requires certification requests to be submitted in advance to allow for travel time. The watermaster may waive travel time in cases of excess flow in the river. These rules are necessary for the water right holders to have accurate information on which to base their decisions to request water.

Proposed new subsection (o) provides that the watermaster may not authorize "no charge water" to water-in-transit accounts. This rule is necessary because water-in-transit permits only apply to private groundwater discharged into the Rio Grande and by allowing such rights to divert "no charge water" existing water rights could be affected.

Proposed new §303.92 provides that any action of a watermaster may be appealed to the executive director by any person. This rule is necessary to provide a mechanism for a water right holder to obtain review of the watermaster's action.

Proposed new Subchapter K provides procedures for filing certified copies of instruments with the watermaster. Proposed new §303.93 sets out what copies should be filed, when they should be filed, and the fee to be charged. These rules are proposed to provide procedures to comply with SB 1902 and HB 2250, new §11.3271(j) of the Water Code.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, has determined that, for the first five-year period the proposed rules are in effect, fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed amendments address additional duties and responsibilities of the Rio Grande Watermaster as well as procedures to allow for the storage of water-in-transit in the Rio Grande system. No fiscal implications are anticipated for local governments since typically they do not transport water to sell to customers outside their constituency base. A local government would be subject to the same costs as other entities holding this type of water right if it decides to apply for a water-in-transit permit.

The proposed rulemaking seeks to implement provisions of SB 1902 and HB 2250, 78th Legislature, that amended the Texas Water Code and affected the duties and functions of the Rio Grande Watermaster. The rulemaking proposes changes to Chapters 295, 297, and 303 of the Texas Administrative Code. The proposed amendments to Chapters 295 and 297 provide that water-in-transit permits for the Rio Grande are governed by provisions in Chapter 303 instead of Chapters 295 and 297.

The proposed rulemaking would implement provisions to: give the Rio Grande Watermaster the authority to take actions when there are imminent threats to public health, public safety, and the environment; provide for the permitting of privately owned groundwater that an owner may wish to sell and transport (water-in-transit) to a buyer using the Rio Grande River and its reservoirs as a means of delivery; and maintain, for public use, a central repository that includes certified copies of instruments the commission requires to be filed in connection with water rights in the lower, middle, and upper Rio Grande basins.

The proposed rulemaking would require the Rio Grande Watermaster to modify the water accounting methods currently in use. New procedures to issue a permit for this type of water right will have to be developed. It will be necessary to investigate and verify the increased volume and diversions of water flowing through the Rio Grande system because of these new permits. Daily monitoring and evaluation will be needed to compute the direct and indirect losses of privately owned water put into, and diverted from, the Rio Grande system so that current existing water rights will not be impacted by this new water right.

This proposed rulemaking may generate additional fee revenue for the agency. Revenue generated by application fees under this proposed rulemaking may range from $100 to $53,000 per application depending on the size and type of the groundwater source. Revenue from recording fees will also be generated at $1.25 per page of the application. Revenue from annual assessment fees for water-in-transit will be determined by the water holder's apportioned share of fees needed to cover Rio Grande Watermaster operations. This fee, which varies on an annual basis, could be as much as $45,000 per 100,000 acre-feet of water-in-transit.

Fees assessed to administer the Watermaster programs are deposited into the Watermaster Administration Account 158. The amount of fee revenue available for use by the agency to administer the Watermaster programs is determined through the legislative appropriations process. Projected revenue collected in this account is approximately $2.2 million over the 2006/2007 biennium. Of this amount, the agency is authorized to use $1.7 million in the 2006/2007 biennium. Currently, additional revenue generated by water-in-transit permits could not be used to cover the cost of implementing the proposed rulemaking. The agency submitted an exceptional item request in its Legislative Appropriation Request for Fiscal Years 2006 and 2007 to allow it to use the total amount of revenue collected in Account 158 to administer the Watermaster programs, however, this exceptional item request was not approved. The agency will again submit an exceptional item request in its Legislative Appropriation Request for Fiscal Years 2008 and 2009 to allow usage of the total amount of revenue collected.

This proposed rulemaking will have a number of operational impacts for the Rio Grande Watermaster. The costs of developing and implementing the procedures needed to account for additions and diversions of water-in-transit, monitor and investigate water activities on a daily basis, and establish and maintain a central repository for required documentation of water rights within the Rio Grande Watermaster division is estimated to be

$90,000 per year, roughly the equivalent of three full-time employees at the level of a Watermaster Specialist I.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be the possible availability of more water in a region where water is scarce, greater accessibility to public records pertaining to water rights in the Rio Grande basins, and increased protection of public health, public safety, and the environment when situations of imminent threat arise.

Fiscal implications are anticipated for businesses and individuals who apply for a water-in-transit permit under this proposed rulemaking. Costs for obtaining this type of permit will vary depending on the characteristics of the site and the number of acre-feet of water placed in the system.

Applicants will be required to conduct a hydrological assessment of the water source, which staff experience indicates could cost between $15,000 to $30,000, depending on the location and geological formation of the groundwater aquifer. Geological engineering models may be required to complete the evaluation regarding any groundwater surface water connection. Applicants will also be required to publish notices in the newspapers of 16 counties of the Rio Grande Water division that they intend to obtain this type of permit. This cost is estimated to be between $300 to $500 per newspaper publication. Applicants will also have to mail a notice to the 1,600 water right account holders in the Rio Grande Watermaster division costing approximately $600 total. Applicants will also have to pay an application fee and a user fee for the permit. These costs could range from $100 to $52,000, depending upon the amount of water discharged for transit. These fees are based on the amount of water that is being transported and therefore increases if more water is used. There is a $50,000 maximum on use fees. Recording fees will be $1.25 per page of the permit application. Fees for filing copies of liens will be assessed at $16 for the first page and $2.00 for each additional page of the document. If a water-in-transit right had to be amended, the applicant would have to pay $100 per amendment. A water-in-transit holder will have to pay an annual assessment fee that all water right holders in the Rio Grande division pay. This fee varies from year to year, but a water-in-transit permit holder could pay as much as $45,000 per each 100,000 acre-feet of water-in-transit, depending on the annual assessment rate calculated by the watermaster and approved by the commission to provide for compensation of all watermaster activities multiplied by the authorized amount of water both discharged into the Rio Grande and maximum authorized diverted and the intended and authorized use of that water. Entities with this type of water right will be required to install pumping and metering equipment. Pumping equipment ranges from an estimated $800 - $5,000 per unit, and metering equipment will cost about $500 per site.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to the administration and implementation of the proposed rules. Small and micro-businesses are not expected to apply for a water-in-transit permit. If a small or micro-business elected to obtain a water-in-transit permit, it would be subject to the same costs that other entities pay to obtain that permit.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. The intent of the rulemaking concerning terror threats is not to reduce risks to human health from environmental exposure, but to provide new duties for the Rio Grande Watermaster relating to actions during terror threats. The rules relating to terror threats could be considered to protect the environment. However, these rules do not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government, and these rules are not adopted under the general powers of the agency instead of a specific state law. The rules relating to bed and banks permits are not for the purpose of protecting the environment or protecting from environmental exposure, but are to allow the conveyance and storage of groundwater in the river and to protect existing water rights. The recordkeeping rules are not for the purpose of protecting the environment or reducing risks from environmental exposure but are to provide a local public place for documents to be filed.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. Concerning actions to be taken by the Rio Grande Watermaster due to terror threats, the rules are written in response to a real and substantial threat to public health and safety, are designed to significantly advance the health and safety purpose, and do not impose a greater burden than is necessary to achieve the health and safety purpose.

For the bed and banks permits and the recordkeeping requirements of the rules, none of the exceptions in §2007.003(b) apply to this rulemaking.

The commission further evaluated these proposed rules and performed a preliminary assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to allow the commission to issue bed and banks permits for conveyance of groundwater to be stored in a reservoir, and to provide new duties for the Rio Grande Watermaster relating to bed and banks permits for conveyance of groundwater to be stored in a reservoir, recordkeeping, and monitoring water right activities in the Rio Grande basin. The proposed rules would substantially advance this stated purpose by providing procedures for each of these duties.

There are no burdens imposed on private real property due to these rules requiring the Rio Grande Watermaster to issue bed and banks permits and keep records. The rules on recordkeeping do not impact real property. The new rules relating to these bed and banks permits in the Rio Grande are specifically written to prevent any impact on existing water rights in the Rio

Grande. Any impact on landowners' groundwater is not a burden on their property because under the "Rule of Capture" persons may pump water from their land if they are not wasting the water or causing subsidence or other damage to other land. These rules do not affect that law. Additionally, a permittee will not be allowed to remove all of the water put into the river under the permit. This limit on how much water can be taken from the river is necessary to protect water right holders and to comply with the 1944 Treaty, both of which are required in Texas Water Code, §11.3271. Thus, these new rules do not constitute a taking under the Texas Government Code.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). The purpose of the rulemaking is to define situations of imminent threat to public health and safety and the environment, including terrorism response; provide for the method and procedures by which water-in-transit permits will be issued; and provide for the methods that the Rio Grande Watermaster will account for any discharge, delivery, conveyance, storage, diversion, or associated loss of water conveyed down the bed and banks of the Rio Grande. Additionally, this rulemaking establishes procedures and fees for the Watermaster to maintain a central repository for all instruments that the commission requires to be filed in connection with water rights relating to the water division of the Rio Grande. None of these activities are identified in the rules. Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2004-014-295-CE. Comments must be received by 5:00 p.m., May 30, 2006. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Tracy Callen, Field Operations Division, at (512) 239-4127.

SUBCHAPTER A. INTRODUCTORY PROVISIONS

30 TAC §303.1, §303.2

STATUTORY AUTHORITY

The amendments are proposed under amendments to Texas Water Code (TWC), §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed amendments are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.1. General.

This chapter is [~~These sections are~~] applicable to water rights in the Rio Grande Basin below Fort Quitman, and water rights in that portion of the Nueces-Rio Grande Coastal Basin in Starr, Hidalgo, Willacy, and Cameron Counties whose source of water is the Rio Grande, excluding the Pecos and Devils watersheds. All other rules, regulations, or orders promulgated or issued by the commission relating to water rights are also applicable to these water rights unless expressly stated otherwise or in conflict with the provisions of this chapter, in which event this chapter shall govern.

§303.2. Definitions.

The following words and terms when used in this chapter shall have the following meanings.

(1) - (18) (No change.)

(19) Treaty--The 1944 water sharing treaty between the United States and Mexico, and all related amendments and minute orders adopted by the International Boundary Water Commission.

(20) [~~(19)~~] Tributary diverter--A water right holder, an agent, or an exempt domestic and livestock user on the Rio Grande below Fort Quitman and above Amistad Reservoir or on a tributary of the Rio Grande with no right to call for releases from Amistad or Falcon Reservoirs.

(21) [~~(20)~~] Upper Rio Grande--That portion of the Rio Grande Basin, including tributaries, in Texas from Amistad dam upstream to Fort Quitman, excluding the Pecos and Devils watersheds.

(22) [~~(21)~~] Usable balance--The quantity of water in acre-feet an allottee has available for use, and is based upon whichever is less:

(A) the sum of allottee's annual authorized amount of water minus actual use for the year to date, plus the allottee's contract water balance; or

(B) the amount in the allottee's storage account.

(23) Water-in-transit--Privately owned water, not including state water, that a person has pumped from an underground reservoir and that is in transit between the point of discharge into the Rio Grande and the place or the point of diversion by a person who has contracted with the owner of the water to purchase the water, and that may be stored in a reservoir for later use.

(24) [~~(22)~~] Water right--A right acquired under the laws of the state to impound, divert, and/or use water.

(A) Class A water right--A water right in the Lower or Middle Rio Grande Basin designated as a Class A right and held under a certificate of adjudication, granted in the Adjudication of the Lower and Middle Rio Grande River in *State v. Hidalgo County Water Control & Improv. Dist. No. 18* [~~*State v. Hidalgo Co. Water Con. & Irr. Dist. No. Eighteen*~~], 443 S.W.2d 728 (Tex. App. - Corpus Christi 1969), *writ ref'd n.r.e.* [~~writ ref'd n.r.e.~~], or issued by the commission. If converted to a domestic, municipal, and industrial (DMI) water right, a Class A water right is converted to 50% of the existing water right.

(B) Class B water right--A water right in the Lower or Middle Rio Grande Basin designated as a Class B right and held under a certificate of adjudication, granted in the Adjudication of the Lower and Middle Rio Grande River in *State v. Hidalgo County Water Control & Improv. Dist. No. 18* [~~*State v. Hidalgo Co. Water Con. & Irr. Dist. No. Eighteen*~~], 443 S.W.2d 728 (Tex. App. - Corpus Christi 1969), *writ ref'd n.r.e.* [~~writ ref'd n.r.e.~~], or issued by the commission. If converted to a DMI water right, a Class B water right is converted to 40% of the existing water right.

(25) [~~(23)~~] Water right holder--One who owns a water right.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 14, 2006.

TRD-200602171
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 239-5017

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SUBCHAPTER B. WATERMASTER--REGULATORY FUNCTIONS

30 TAC §303.18

STATUTORY AUTHORITY

The new section is proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new section is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.18. Threats to Public Health and Safety and the Environment.

(a) The watermaster shall implement the procedures adopted by the agency during times of threats to public health and safety and the environment related to the waters of the Rio Grande below Fort Quitman, Texas.

(b) The watermaster shall report activities that pose a threat to public health, safety, and the environment regarding waters of the Rio Grande under the watermaster's jurisdiction as required by the agency's procedures regarding homeland security.

(c) The watermaster shall gather and distribute information from and to the Rio Grande water users, and assist water users in efforts to recover from an emergency.

(d) The watermaster shall require water users to immediately cease any and all diversions of water during emergency periods when the watermaster declares that continued diversion and use of water would pose a hazard to public health and safety and the environment.

(e) The watermaster shall maintain records of water users to enable the watermaster to provide notification of a threat to the water users in the watermaster's division.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
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SUBCHAPTER C. ALLOCATION AND DISTRIBUTION OF WATERS

30 TAC §§303.21 - 303.23

STATUTORY AUTHORITY

The amendments are proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed amendments are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.21. Amistad/Falcon Reservoirs Accounts [~~Accounts--Amistad/Falcon Reservoirs~~].

(a) (No change.)

(b) When there is adequate water to do so, the watermaster shall maintain the following accounts:

(1) (No change.)

(2) an operating reserve of 75,000 acre-feet; [~~and~~]

(3) (No change.)

(c) (No change.)

(d) Water-in-transit accounts are not eligible for an allocation under §303.22 of this title (relating to Allocations to Accounts) and are regulated under Subchapter I of this chapter (relating to Rio Grande Bed and Banks Permits for Water-in-Transit) and Subchapter J of this chapter (relating to Administration of Rio Grande Bed and Banks Permits for Water-in-Transit).

§303.22. Allocations to Accounts.

(a) Allocations to Middle and Lower Rio Grande accounts, which do not include water-in-transit accounts, shall be based on water in the usable storage of Falcon and Amistad Reservoirs minus the water-in-transit held in storage at Falcon and Amistad Reservoirs. Such storage shall be computed as the total storage in Amistad and Falcon Reservoirs as reported by the International Boundary and Water Commission on the last Saturday of each month, less the water-in-transit and the amount of water in dead storage, which is water behind the dams that cannot be released due to hydrologic restrictions. To determine the amount of water to be allocated to the various accounts, computations shall be made in the following sequence:

(1) - (3) (No change.)

(4) from the remaining storage, deduct the total amount of water held in storage from water-in-transit.

[~~(4) after the deduction of the operating reserve, the remaining water will be allocated to the Class A and Class B accounts.~~]

(b) - (e) (No change.)

(f) If the amount of usable water is insufficient to carry out all the steps specified in subsections (a) and (b) of this section, the computations will be made in the specified sequence, with the following adjustments.

(1) - (2) (No change.)

(3) If the balance available for the operating reserve is less than 75,000 acre-feet, but greater than zero acre-feet, then that amount will be the amount allocated to the operating reserve. If the operating reserve is less than zero acre-feet, the watermaster will deduct from the Class A, [~~and~~] Class B, and water-in-transit accounts, via negative allocations, the amount necessary to provide 48,000 acre-feet for the operating reserve account. A negative allocation will be made on a pro rata basis, from all Class A, [~~and~~] Class B, and water-in-transit accounts containing water at the time, based on the amount of water in such accounts. The watermaster will keep accurate records of the negative allocations affecting each Class A, [~~and~~] Class B, and water-in-transit account. When the operating reserve has been restored to 48,000 acre-feet, negative allocations will cease. When the operating reserve has been restored to 75,000 acre-feet, and sufficient water is available, all accounts (excluding water-in-transit accounts) from which water has been deducted will be restored to the amount of water in each account prior to the negative allocation period and any new allotments will be made in accordance with subsections (a) and (b) of this section.

(g) - (h) (No change.)

§303.23. Distribution of Available Waters--Upper Rio Grande and All Rio Grande Tributaries.

(a) Distribution of waters in the Upper Rio Grande and all Rio Grande tributaries shall be based upon the amount of water authorized per annum and the priority date of the water right. Water rights holders in the Upper Rio Grande and all Rio Grande tributaries are entitled to waters flowing in these watercourses excluding water-in-transit, which can be beneficially used and which are used in accordance with §303.11 of this title (relating to Records of Diversions--General) and §303.13 of this title (relating to Records--Upper Rio Grande and All Rio Grande Tributaries). All waters excluding water-in-transit which cannot be so used shall be available to the Lower and Middle Rio Grande system.

(b) - (c) (No change.)

(d) Distribution of available waters from the Rio Grande above Amistad and all Rio Grande tributaries shall not be eligible for distribution or use to water-in-transit accounts.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron Perdue
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For further information, please call: (512) 239-5017

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SUBCHAPTER E. AMENDMENTS TO AND SALES OF WATER RIGHTS

30 TAC §303.40

STATUTORY AUTHORITY

The new section is proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new section is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.40. Applicability.

This subchapter does not apply to water-in-transit permits. These permits are regulated under Subchapter I of this chapter (relating to Rio Grande Bed and Banks Permits for Water-in-Transit) and Subchapter J of this chapter (relating to Administration of Rio Grande Bed and Banks Permits for Water-in-Transit).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. CONTRACTUAL SALES

30 TAC §303.53, §303.55

STATUTORY AUTHORITY

The amendments are proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed amendments are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.53. Documents Needed To File.

(a) (No change.)

(b) The contract will be accompanied by an aerial photograph or United States Geological Survey topographic map with the location of diversion points and areas to be irrigated described thereon. In water-in-transit contractual sales, the contract must also include an aerial photograph or United States Geological Survey topographic map with the location of the discharge point(s).

(c) (No change.)

§303.55. Accounting for Contract Sale Water.

(a) - (d) (No change.)

(e) At no time will buyer's or seller's Class A or Class B [~~irrigation~~] storage [~~account~~] exceed 1.41 times the water right holder's recognized amount in acre-feet.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER H. FINANCING RIO GRANDE WATERMASTER OPERATION

30 TAC §303.72

STATUTORY AUTHORITY

The amendment is proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed, and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed amendments are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.72. Determination of Assessment Rates.

(a) After a commission order is issued approving the assessment income needed for the next fiscal year, the executive director shall calculate assessment rates for water use and storage based on the following formula:
Figure: 30 TAC §303.72(a)
[~~Figure: 30 TAC §303.72(a)~~]

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER I. RIO GRANDE BED AND BANKS PERMITS FOR WATER-IN-TRANSIT

30 TAC §§303.74 - 303.90

STATUTORY AUTHORITY

The new sections are proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in con-

nection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new sections are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.74. General.

This subchapter is applicable to water rights permits for water-in-transit in the Rio Grande below Fort Quitman, Texas. All other rules, regulations, or orders promulgated or issued by the commission regarding water rights are also applicable to water-in-transit water rights unless in conflict with the provisions of this subchapter, in which event this subchapter shall govern.

§303.75. Requirements for an Application to Convey Water-in-Transit in the Bed and Banks of the Rio Grande.

(a) The purpose of this section is to provide the application content requirements for a bed and banks permit authorization for water-in-transit in the Rio Grande under Texas Water Code, §11.3271.

(b) A person who intends to discharge private water that originates from an underground reservoir into the Rio Grande and wishes to divert and use the discharged water must submit an application to the commission containing the following information:

(1) the name, mailing address, and telephone number of the applicant;

(2) the location(s) of the proposed groundwater reservoir from which the water will originate identified on a United States Geological Survey (USGS) 7.5 minute topographical map(s);

(3) the location(s) of the point of the proposed discharge(s) into the Rio Grande and diversion(s) as identified on a USGS 7.5 minute topographical map(s);

(4) the appropriate ownership or lease documents evidencing applicant's authority to develop the proposed project;

(5) the source, including a hydrological determination regarding any interaction between the groundwater source and state waters, amount, and rates of the proposed discharge and diversion;

(6) a description of the quality of the water proposed to be discharged and a description of the Rio Grande water quality at the proposed discharge point with documentation that the discharge will not degrade the Rio Grande;

(7) the date of the proposed discharge of the groundwater into the Rio Grande;

(8) an analysis of the amount of water that will be lost under differing flow regimes to transportation, evaporation, seepage, channel, treaty accounting, or other associated losses for each reach of the Rio Grande from the point of discharge to Amistad or Falcon Reservoir, including losses associated with storage in these reservoirs, and carriage losses from these reservoirs to the point of diversion. The losses shall be quantified for each reach of the Rio Grande below Amistad Reservoir as listed in §303.2 of this title (relating to Definitions) and for the appropriate reaches above Amistad Reservoir.

(9) the maximum amount of water which may be stored in Amistad and/or Falcon Reservoir;

(10) any other information the executive director may need to complete an analysis of the application.

(c) The method and calculation of any losses including, but not limited to, carriage, treaty accounting completed by the International Boundary and Water Commission (IBWC), storage, and that are associated with any permit issued under this section shall be quantified and made a provision of the permit and shall be subject to the review and approval of the executive director. The method of loss calculation shall be consistent with procedures used by the IBWC.

§303.76. Use of Forms.

The executive director will furnish, without charge, forms and instructions for preparing an application. The use of such forms is not mandatory, but the information required by such forms must be provided. Supplements may be attached if there is not sufficient space on the printed form. If supplements are used, the data and information entered on the form must be separated into paragraphs numbered to correspond with those on the printed form. A supplement explaining the project and planned operation may be attached to an application.

§303.77. Preparation of Application.

(a) All applications must be typewritten or printed legibly in ink. Illegible applications will be returned to the applicant.

(b) Applicants will be notified if additional information is needed to process an application.

(c) Upon express written or verbal approval of the applicant or the applicant's agent, any employee of the commission may make non-substantive changes in any documents submitted by the applicant.

(d) Substantive changes in an application may be made only by the applicant or the applicant's agent who submitted the application and only in the form of a written, notarized amendment to the application signed by the proper person; provided, however, that no substantive changes may be made after an application has been filed with the chief clerk by the executive director.

(e) The executive director shall file the application with the chief clerk once the application has been determined to be administratively complete.

§303.78. Name and Address.

(a) Each applicant must provide its full name, post-office address, telephone number, and social security or federal identification number.

(b) If the applicant is a partnership, it must be designated by the firm name followed by the words "a partnership."

(c) If the applicant is acting as trustee for another, it must be designated by the trustee's name followed by the word "trustee."

(d) If one other than the named applicant executes the application, the name, position, post-office address, and telephone number of the person executing the application must be given.

§303.79. Source of Supply.

The applicant must clearly state the name and location of the underground reservoir from which the water will originate. If the source has no name, it may be designated as "an unnamed reservoir."

§303.80. Amount of Discharge and Diversion.

The total amount of water to be discharged and diverted must be stated in cubic feet per second and acre-feet annually.

§303.81. Rate and Method of Diversion.

The application must:

(1) include the maximum rate of diversion for each diversion point in gallons per minute or cubic feet per second;

(2) describe the method to be used as portable pump, stationary pump, or gravity flow;

(3) include the location of point(s) of discharge and diversion. These locations must also be shown on the application maps with reference to a corner of an original land survey and/or other survey point of record, giving both course and distance; and

(4) include the distance and direction from the nearest county seat or town.

§303.82. Signature of Applicant.

The application must be signed as follows.

(1) If the applicant is an individual, the application must be signed by the applicant or the applicant's duly appointed agent. An agent must provide written evidence with the application of his or her authority to represent the applicant. If the applicant is an individual doing business under an assumed name, the applicant must attach to the application an assumed name certificate from the county clerk of the county in which the principal place of business is located.

(2) A joint application must be signed by each applicant or each applicant's duly authorized agent, with written evidence of such agency to be submitted with the application. If land is owned by both husband and wife, each must sign the application. Joint applicants must select one among them to act for and represent the others in pursuing the application with the commission, with written evidence of such representation to be submitted with the application.

(3) If the application is by a partnership, the application must be signed by one of the general partners. If the applicant is a partnership doing business under an assumed name, it must attach to the application an assumed name certificate from the county clerk of the county in which the principal place of business is located.

(4) If the applicant is an estate or guardianship, the application must be signed by the duly appointed guardian or representative of the estate, and a current copy of the letters issued by the court must be attached to the application.

(5) If the applicant is a corporation, public district, county, municipality, or other corporate entity, the application must be signed by a duly authorized official. Written evidence in the form of by-laws, charters, or resolutions which specify the authority of the official to take such action must be submitted. A corporation may file a corporate affidavit as evidence of the official's authority to sign.

(6) If the applicant is acting as trustee for another, the applicant must sign as trustee, and in the application must disclose the nature of the trust agreement and give the name and current address of each trust beneficiary.

§303.83. Sworn Application Required.

Each applicant must subscribe and swear to the application before any person entitled to administer oaths, who must also sign his or her name and affix his or her seal of office to the application.

§303.84. Consistency With State And Regional Water Plans.

An application must contain information describing how it addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan for any area in which the proposed appropriation is located or, in the alternative, describe conditions that warrant a waiver of this requirement.

§303.85. Fees for Filing an Application.

(a) Fees. Statutory fees must accompany an application in order for it to be considered by the commission. The executive director's staff are expressly prohibited from processing any application unless the proper fees are tendered. The executive director shall charge and collect for the benefit of the state the applicable fees, and it shall be his duty to make a record at the time same becomes due and to render an account to the party charged. Each fee is a separate charge and is in addition to other fees, unless provided otherwise.

(b) Filing, recording, and notice fees. The following fees must be submitted with any application for a water-in-transit permit or any application for an amendment to a water-in-transit permit.

(1) Application filing fees are established as follows.

(A) Fees for a water-in-transit permit application must be based upon the total amount of water requested to be discharged for transit as follows:

(i) less than 100 acre-feet - $100;

(ii) 100 - 5,000 acre-feet - $250;

(iii) 5,001 - 10,000 acre-feet - $500;

(iv) 10,001 - 250,000 acre-feet - $1,000; and

(v) greater than 250,000 acre-feet - $2,000.

(B) Fees to amend a water-in-transit right are $100 per right requested to be amended.

(2) Recording fees are $1.25 per page of the application.

(3) The applicant must pay the total cost of mailing notice to persons in the Rio Grande water division. The executive director will advise the applicant of the number of persons to whom notice is mailed and the total mailing cost. A water-in-transit permit or amendment will require notice to all owners of water rights within the Rio Grande water division of any such application.

(c) Publication. The cost of any required publication must be paid by the applicant directly to the newspaper involved. Publication is required in newspapers of general circulation throughout the basin.

(d) One-time transit fees. A use fee of $1.00 per acre-foot of water discharged for transit shall be charged.

(e) Payment of fees exceeding $1,000. If the total fee for a permit exceeds $1,000, the applicant must pay at least one-half of the use fee when the application is filed, and one-half within 180 days after notice is mailed to the applicant that the permit is granted. If the applicant does not pay all of the amount owed before beginning to use state water under the permit, the permit is annulled and reverts to the status of a pending, filed application requiring notice, the payment of notice fees, and the balance of the use fees.

(f) Maximum fees. The one-time transit use fee shall not exceed $50,000.

(g) Inquiries as to fees. Any inquiries as to fees must be made in advance to the executive director. The applicant is charged with the duty of tendering correct fees according to law. In case of disagreement between the applicant and the executive director over the proper amount of the fees required, the application will be filed "under protest" and the fees paid by the applicant will be placed in suspense until the issue is resolved.

(h) Return of fees.

(1) Other than the filing and recording fees required by statute, all fees paid pertaining to an application for a water-in-transit

permit which have not been expended in the processing of the application will be placed in suspense until action is taken by the commission upon the application.

(2) If the permit is not granted, unexpended fees will be returned to the applicant.

(3) If the application is granted in part, excess use fees will be returned to the applicant.

(4) No fees will be returned to any applicant who has failed to notify the executive director of the applicant's social security or federal identification number.

§303.86. Notice Requirements for Water-in-Transit Applications.

(a) At the time an application for a water-in-transit permit has been filed by the executive director with the chief clerk, the commission shall give notice by mail to those persons specified in subsection (d) of this section. At such time, the chief clerk shall furnish a copy of the notice to the applicant, and the applicant must publish notice, pursuant to subsection (c) of this section.

(b) A notice of application and commission action must:

(1) include the name and address of the applicant;

(2) include the date on which the application was received by the commission;

(3) include the date the application was filed by the executive director with the chief clerk;

(4) include that the executive director has determined that the application is administratively complete;

(5) include the application number;

(6) include the type of permit the applicant is seeking;

(7) include the purpose and extent of the proposed transfer of water;

(8) identify the source of supply, place of discharge, and the place where the water is to be diverted;

(9) specify the time and location where the commission will consider the application;

(10) identify all potentially affected groundwater districts;

(11) give any additional information the executive director considers necessary.

(c) The applicant must publish the notice in newspapers of general circulation in each county within the Rio Grande water division. The date of publication must be on or before the date of publication directed by the chief clerk.

(d) Notice by mail.

(1) The commission shall mail the notice by first-class mail, postage prepaid, to persons listed in this section after the executive director has declared the application administratively complete.

(2) For an application for a water-in-transit permit pursuant to Texas Water Code, §11.3271 or for an amendment to a Texas Water Code, §11.3271 permit, notice must be mailed to:

(A) each claimant or appropriator of water within the Rio Grande water division below Fort Quitman, Texas, the record of whose claim or appropriation has been filed with the commission or its predecessor agencies;

(B) all groundwater districts potentially impacted by the application; and

(C) other persons who in the judgment of the commission might be affected.

§303.87. Notice of Hearing.

A hearing on an application may be held without the necessity of issuing further notice other than advising the applicant, executive director, public interest counsel, and all persons who have in writing notified the commission of their interest in the application of the time and place where the hearing is to convene. The chief clerk will mail such notice to these persons not less than 30 days before the date of the hearing.

§303.88. Request for Public Hearing.

A request for public hearing on an application for a water-in-transit permit or amendment is governed by Chapter 55, Subchapter G of this title (relating to Requests for Contested Case Hearing and Public Comment on Certain Applications).

§303.89. Public Hearing.

The commission may conduct a public hearing as provided by in Chapter 80 of this title (relating to Contested Case Hearings).

§303.90. Action on Application Without Public Hearing.

If no hearing requests are filed as provided for in §303.87 of this title (relating to Notice of Hearing) and §303.88 of this title (relating to Request for Public Hearing) the executive director may issue the permit if the requirements of Chapter 50 of this title (relating to Action on Applications and Other Authorizations) are met.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER J. ADMINISTRATION OF RIO GRANDE BED AND BANKS PERMITS FOR WATER-IN-TRANSIT

30 TAC §303.91, §303.92

STATUTORY AUTHORITY

The new sections are proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new sections are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of

water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.91. Water-in-Transit Permit Accounts.

(a) Purpose. The purpose of this section is to provide the administrative responsibilities of the watermaster regarding any water-in-transit permits.

(b) Storage and losses. For the purpose of establishing accounts in Amistad and Falcon Reservoirs, the two reservoirs are considered to constitute a single storage system.

(1) The watermaster shall establish an account of water stored in the Amistad - Falcon system for these water-in-transit permits only if there is storage space available in the reservoirs.

(2) The water stored shall be based upon the amount of water discharged into the Rio Grande minus appropriate losses to either Falcon or Amistad Reservoir.

(3) All associated losses will be calculated by the method specified in the permit. The water-in-transit storage accounts shall be subject to reductions as determined by the watermaster to cover losses while water is in storage. Any water diverted downstream from water released from these accounts will be reduced by the appropriate losses, including conveyance losses, from either Falcon or Amistad Reservoir. These losses will also be calculated by the method specified in the permit and by the 1944 Treaty.

(4) If and when Rio Grande treaty inflows to the reservoirs reach the point where the storage space occupied by the transit water authorized by these permits is required to store these inflows, the transit water accounts will be reduced or eliminated on a priority date basis to enable these inflows to be stored. Water lost due to storage space limitations will not be restored by the watermaster.

(c) Records of inflows/diversions.

(1) The watermaster shall locate, number by river mile or other method, and rate as to capacity all authorized discharges and diversions associated with a permit for water transit, and the owner or operator of the water-in-transit shall be advised in writing of these facts.

(2) All discharges into the Rio Grande and all diversions from the Rio Grande pursuant to these permits shall be metered or measured by a method approved by the watermaster.

(3) When a permanent facility is replaced at the same location or when any changes in rating are made, the water-in-transit permittee must immediately inform the watermaster prior to diversion.

(4) Any change in the location of the discharges or diversion facilities and place of use on the Middle or Lower Rio Grande must be made pursuant to §295.71 of this title (relating to Applications to Amend a Permit) and §295.158(c) of this title (relating to Notice of Amendments to Water Rights), not requiring mailed and published notice.

(5) Any change in the location of the discharge or diversion facilities and place of use on the Upper Rio Grande and tributaries to the Rio Grande must be made pursuant to §295.71 and §295.158(b) of this title, requiring mailed and published notice.

(d) Consistency with the Treaty. The watermaster will request releases from Amistad and Falcon Reservoirs in such a manner that promotes the efficient use and optimum yield of the United States' share of water in the Amistad/Falcon System, consistent with the 1944 Treaty between the United States and Mexico. Any water inflows, conveyance losses, and water stored in these water-in-transit accounts must be consistent with any accounting of waters by the International Boundary and Water Commission (IBWC) relating to the 1944 Treaty with Mexico. No water can be credited to such accounts unless it has first discharged to the Rio Grande under a water-in-transit permit. Water-in-transit will be subject to allocation under the Treaty. The watermaster will only credit water-in-transit accounts with the amount of water-in-transit included in the United States' share of water by the IBWC.

(e) Certification.

(1) Each diverter must request written certification from the watermaster prior to diverting water-in-transit by identifying the specific permit to be used and the pump number of the pump to be used.

(2) Certifications will be granted only for diversion from authorized diversion points associated with that permit.

(3) Any diversion of water released from an account for water-in-transit in Falcon or Amistad Reservoir will be subject to transportation losses to the point of diversion as specified by the permit.

(4) Each reach of the river shall constitute one day of travel time from Amistad Dam downstream.

(5) Certifications are limited to a maximum diversion period of one calendar week.

(f) Diversions. Diversions shall be charged against the appropriate accounts as follows.

(1) A diverter shall be charged with the actual amount diverted, without being penalized, if the total diversion is within plus or minus 10% of the amount requested, minus conveyance losses, pursuant to certification.

(2) A diverter shall be charged with 90% of the certification amount if the total diversion is less than 90% of the amount requested, minus conveyance losses.

(3) If the quantity of water diverted is more than 110% of the amount requested according to the certification, then the diverter will be charged with the actual amount of water diverted and the provisions of §303.31 of this title (relating to General) will apply.

(4) The watermaster shall have the discretion to waive the penalties for excessive or inadequate diversions due to circumstances beyond the control of the diverter.

(5) No certification will be issued that exceeds the maximum annual authorization of the permit. The watermaster is authorized to cancel a certification or to refuse or modify a request for the diversion of water.

(g) Ownership records. Except as provided in §303.44 of this title (relating to the Administration by Watermaster), the watermaster will refuse a request of a diverter if the water rights holder whose water is to be diverted does not have complete ownership records on file with the commission. The watermaster will maintain a list of all water rights holders with incomplete ownership records and will remove names from that list after the executive director notifies the watermaster that the ownership record has been completed.

(h) Certification to be posted.

(1) Each diverter must post at or near his diversion facility the watermaster certification authorizing the diversion of water.

(2) In the event the certification has been granted but is not received by the diverter by the time diversion is authorized, the diverter must post a written note at or near the diversion facility in lieu of the watermaster certification, stating the pump number and the dates and

hours of the request and that verbal authority was given by the watermaster.

(3) The diverter must ensure that the written note conforms to the time and conditions shown on the watermaster certification.

(4) The diverter must replace the written note with the watermaster certification, upon receipt.

(i) Measuring devices.

(1) Each diverter must install and maintain meters or other measuring devices at the authorized point of discharge and diversion which will provide for accurate measurement and accounting of the quantities of water diverted.

(2) The installation, maintenance, and operation of measuring devices by the diverter must be subject to approval of the watermaster.

(3) The diverter must ensure the accessibility of the measuring device, so it can be conveniently and safely located and checked by the watermaster.

(4) The diverter must be liable for all expenses incurred in the acquisition, installation, maintenance, and operation of measuring devices.

(j) Diversion. Each diverter must divert water in accordance with the watermaster certification.

(k) Report by water-in-transit permitee.

(1) Each water right holder or his designated agent must submit to the watermaster a written report of the amount of water actually discharged, diverted, and used during the reporting period. All pumps used during the reporting period, including borrowed and rented pumps, must be shown by number on the pump operation report with metered readings or with the number of hours operated for each reporting period. The watermaster will accept as timely all pump operation reports for each diversion pump received within seven days or postmarked within five days from the termination of the certification period. If the pump operation report is incomplete or not timely filed, the watermaster will refuse to issue a new certification until the complete report is filed. Pump operation reports, other than International Boundary and Water Commission diversion reports, received in the watermaster's office are unacceptable:

(A) if unsigned; or

(B) if the measuring device reading is not shown.

(2) The water right holder is responsible for reporting actual use based on the records kept by the water right holder or diverter.

(3) The watermaster shall not prepare annual surface water use reports.

(l) Inventory of water in Falcon and Amistad Reservoirs. The watermaster shall maintain an accurate inventory of water in Falcon and Amistad Reservoirs including water-in-transit accounts and shall maintain records and institute necessary procedures with the International Boundary and Water Commission as may be appropriate to perform this function.

(m) Report by watermaster.

(1) The watermaster shall submit a monthly report to each water-in-transit permittee, or his designated agent, showing the current status of each water-in-transit permittee's account.

(2) The period of time covered by each report shall be from the last Saturday of a month at midnight to the last Saturday of the following month at midnight. The watermaster shall provide the date for the end of the watermaster's next reporting period.

(3) Each water-in-transit permittee must apply in writing to the watermaster for correction of any alleged errors in the report within 20 consecutive days following distribution of the monthly report.

(n) Request for travel time.

(1) A diverter must request written certification in advance to allow travel time for the released water to reach the river diversion point as scheduled.

(2) Each reach of the river shall constitute one day of travel time from Amistad Dam downstream.

(3) Whenever there is a flow of water in the Rio Grande in excess of downstream requirements, the watermaster may waive travel time requirements to allow immediate diversions, provided that the diverter shall post the certification at or near his diversion facility.

(o) No charge water. The watermaster shall not authorize no charge water as described in the August 4, 1981, Texas Water Commission order and any subsequent orders relating to the intermittent temporary diversion and use of Rio Grande waters, to water-in-transit accounts.

§303.92. Appeal of Watermaster Actions.

Any person dissatisfied with any action of a watermaster may apply to the executive director for relief under Texas Water Code, §11.326.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 14, 2006.

TRD-200602178
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 239-5017

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SUBCHAPTER K. FILING CERTIFIED COPIES OF INSTRUMENTS WITH THE WATERMASTER

30 TAC §303.93

STATUTORY AUTHORITY

The new section is proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new section is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of

water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.93. Filing Certified Copies of Instruments with the Watermaster.

(a) Certified copies of all instruments required to be filed under §295.31 and §295.32 of this title (relating to General and Enforcement Actions) for permits, certified filings, or certificates of adjudication in the watermaster's jurisdiction must be filed with the watermaster. Certified copies of other instruments relating to any permit, certified filing, or certificate of adjudication in the watermaster's jurisdiction, including deeds, deeds of trust, liens, financing statements, and security agreements, must be filed with the watermaster.

(b) Persons must file two certified copies of each instrument with the watermaster.

(c) If an applicant is required to file an instrument listed in subsection (a) of this section in connection with an application, the applicant must also file two certified copies of the document with the watermaster at the same time that the applicant files the application with the executive director. For water rights which have already been issued, the water right holder must file these documents as soon as possible with the watermaster.

(d) For filing certified copies of the instruments described in subsections (a) - (c) of this section, the watermaster shall charge a fee which is identical to the fee charged by the county clerk of Cameron County for recordation of similar instruments.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 14, 2006.

TRD-200602179
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Earliest possible date of adoption: May 28, 2006
For further information, please call: (512) 239-5017

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1035

The Texas Education Agency (TEA) withdraws the amendment to §61.1035, concerning assistance with payment of existing debt that was published as proposed in the October 21, 2005, issue of the *Texas Register* (30 TexReg 6898). The section includes provisions relating to the establishment of eligibility; definition of qualifying debt service; and explanations of limits on assistance, data and payment cycles, deposits and uses of funds, and refinancing of eligible debt. The proposed amendment would have modified eligibility for the Existing Debt Allotment (EDA) based on changes to statutory language, in accordance with Senate Bill 1863, 79th Texas Legislature, 2005. The proposed changes also would have added requirements for districts to disclose transactions that affect EDA eligible bonds, including related debt derivative agreements and refunding transactions. Another proposed change would have established requirements for maintaining eligibility for bonds that are refunded. A new proposal addressing statutory changes and updates to the program will be brought forward at a future date. The EDA program will continue to operate under existing provisions until such time that future rule action amends the program.

Public comments on the proposed amendment were received subsequent to publication in the *Texas Register*. In addition, in response to public hearing requests submitted by the Texas Association of School Administrators, Texas Association of School Boards, Northside Independent School District, and Fast Growth School Coalition, a public hearing to solicit testimony and input on the proposed amendment to 19 TAC §61.1035 was held on Thursday, December 8, 2005. Comments received on the proposed amendment will be considered during the development of a revised proposal.

Filed with the Office of the Secretary of State on April 13, 2006.

TRD-200602152
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: April 13, 2006
For further information, please call: (512) 475-1497

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 15. TEXAS VETERANS COMMISSION

CHAPTER 454. ACCEPTANCE OF GIFTS, GRANTS AND DONATIONS

40 TAC §§454.1 - 454.7

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), proposed new §§454.1 - 454.7, submitted by the Texas Veterans Commission have been automatically withdrawn. The proposed new sections were published in the October 7, 2005, issue of the *Texas Register* (30 TexReg 6409).

Filed with the Office of the Secretary of State on April 13, 2006.

TRD-200602130

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CHAPTER 455. GRANTS

40 TAC §§455.1 - 455.6

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), proposed new §§455.1 - 455.6, submitted by the Texas Veterans Commission have been automatically withdrawn. The proposed new sections were published in the October 7, 2005, issue of the *Texas Register* (30 TexReg 6410).

Filed with the Office of the Secretary of State on April 13, 2006.

TRD-200602131

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CHAPTER 456. USE OF FUNDS FROM THE SALE OF SERVICE ORGANIZATION LICENSE PLATES

40 TAC §456.1

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.38(d), proposed new §456.1, submitted by the Texas Veterans Commission has been automatically withdrawn. The proposed new section was published in the October 7, 2005, issue of the *Texas Register* (30 TexReg 6412).

Filed with the Office of the Secretary of State on April 13, 2006.

TRD-200602132

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 55. CHILD SUPPORT ENFORCEMENT

SUBCHAPTER D. FORMS FOR CHILD SUPPORT ENFORCEMENT

1 TAC §55.120

The Office of the Attorney General, Child Support Division adopts an amendment to §55.120(a), regarding the replacement of the form National Medical Support Notice. The amendment is adopted without changes to the proposed text as published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1541) and will not be republished.

The National Medical Support Notice was revised to conform to the National Medical Support Notice issued by the federal Office of Child Support Enforcement. The adopted amendment is necessary to reflect revisions made to the form.

The section replaces the current form and provides the public with the National Medical Support Notice recently issued by the federal Office of Child Support Enforcement.

No comments were received regarding the adoption of the amendment.

The amendment to §55.120(a) is adopted under the Texas Family Code §154.186(c), which authorizes the State's Title IV-D agency to prescribe forms for the efficient use of the notice.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 13, 2006.

TRD-200602148
Stacey Schiff
Deputy Attorney General
Office of the Attorney General
Effective date: May 3, 2006
Proposal publication date: March 10, 2006
For information regarding this publication, you may contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 370. STATE CHILDREN'S HEALTH INSURANCE PROGRAM

SUBCHAPTER D. ELIGIBILITY FOR UNBORN CHILDREN

1 TAC §370.401

The Health and Human Services Commission (HHSC) adopts new Subchapter D, Eligibility for Unborn Children, and §370.401, Perinates, without changes to the proposed text as published in the October 14, 2005, issue of the *Texas Register* (30 TexReg 6540) and will not be republished.

The new rule establishes Children's Health Insurance Program (CHIP) eligibility and enrollment criteria for an unborn child, referred to as a "perinate". The criteria include a 12-month continuous eligibility period, expedited eligibility and enrollment, and exemptions from the CHIP assets test, waiting period, and cost sharing requirements. It also indicates when the child may apply for and enroll in Medicaid.

HHSC did not receive any written comments regarding the proposed rule during the 30-day comment period. However, HHSC did receive one comment during the public hearing held on November 1, 2005, from the Texas Association of Public and Nonprofit Hospitals (TAPNH). The testimony from TAPNH was in support of the proposed rule.

The new rule is adopted under the authority granted to HHSC by Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 10, 2006.

TRD-200602072
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: April 30, 2006
Proposal publication date: October 14, 2005
For further information, please call: (512) 424-6900

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 1. GENERAL PROCEDURES

SUBCHAPTER E. ADVISORY COMMITTEES

4 TAC §1.209

The Texas Department of Agriculture (the department) adopts new Chapter 1, Subchapter E, §1.209, concerning the Wine Industry Development Advisory Committee, without changes to the proposal published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1543). New §1.209 adds the Wine Industry Development Advisory Committee to the list of the department's advisory committees, in accordance with the Texas Government Code, §2110.005.

No comments were received on the proposal.

New §1.209 is adopted under the Texas Government Code, §2110.005, which requires that an agency that establishes an advisory committee adopt rules to state the purpose and tasks of the committee and manner in which the committee shall report to the agency; §2110.008, which authorizes an agency establishing an advisory committee to designate the duration of a committee; and the Texas Agriculture Code, §50B.002 which authorizes the Commissioner of Agriculture to appoint a Wine Industry Development Advisory Committee.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 13, 2006.

TRD-200602140
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: May 3, 2006
Proposal publication date: March 10, 2006
For further information, please call: (512) 463-4075

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CHAPTER 3. BOLL WEEVIL ERADICATION PROGRAM

SUBCHAPTER F. GENERAL PROCEDURES

4 TAC §3.205

The Texas Department of Agriculture (the department) adopts new Chapter 3, Subchapter F, §3.205, concerning procedures for requests for administrative review under Texas Agriculture Code (Code), §74.1095, with changes to the proposal published in the February 24, 2006, issue of the *Texas Register* (31 TexReg 1130).

The new section is adopted to establish procedures and remedies for the processing of request for review submitted to the department under the Code regarding actions of the Texas Boll Weevil Eradication Foundation (Foundation). The new section provides filing requirements, a review and appeal process, actions covered by the section and available remedies.

Comments were received on the proposal from the Foundation. The Foundation submitted comments generally in favor of the proposal, and also requested that the Foundation be given a similar right of appeal of a General Counsel determination to the Commissioner of Agriculture as is given to the party requesting review. The department believes that the right of appeal given in §74.1095 is not limited to the party requesting review, and therefore, accepts the Foundation's comment. Subsection (d) Appeal to Commissioner is accordingly adopted with changes to reflect the Foundation's request.

The new section is adopted under the Texas Agriculture Code (the Code), §74.1095, which provides the department with the authority to establish by rule procedures necessary for the administration of the administrative review process.

§3.205. Administrative Review.

(a) Filing of request.

(1) Any person who believes they have been aggrieved in connection with an action of the Texas Boll Weevil Eradication Foundation (the foundation) may file a request for administrative review by the Texas Department of Agriculture (the department) under the Texas Agriculture Code, §74.1095 (§74.1095).

(2) A request must be in writing and received by the department within 90 days after the action of which the person is complaining occurred. Formal requests must comply with the following requirements, and shall be resolved in accordance with the procedure set forth below. Copies of the request and any supporting documentation must be mailed or delivered by the requesting party to the department and the foundation.

(b) Contents of request. A request filed under this section must be sworn and contain:

(1) a specific identification of the statutory or regulatory provision(s) that the action complained of is alleged to have violated;

(2) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in paragraph (1) of this subsection, including an identification of the issue or issues to be resolved;

(3) a precise statement of the relevant facts;

(4) argument and authorities in support of the allegations made;

(5) any supporting documentation available; and

(6) a statement that a copy of the request has been mailed or delivered to the foundation.

(c) Informal Review.

(1) Once a request is received by the department, it shall be forwarded to the Office of General Counsel for review.

(2) The General Counsel, or his or her designee, shall have the authority, prior to appeal to the commissioner or her designee, to settle and resolve the complaint that is the subject of the request, and may solicit additional information regarding the matters alleged in the request for review from the requester, the foundation, or any other relevant party. Copies of any additional information received shall be provided to both the requester and the foundation.

(3) If the issues raised in the request are not resolved by mutual agreement, the General Counsel will issue a written determination on the request for review as follows.

(A) If the General Counsel determines that no violation of rules or statutes has occurred, he or she shall so inform the request-

ing party and the foundation by letter, setting forth the reasons for the determination.

(B) If the General Counsel determines that a violation of the rules or statutes has occurred, he or she shall so inform the requesting party and the foundation by letter, setting forth the reasons for the determination and the appropriate remedial action.

(4) If the General Counsel's determination is not appealed, that determination shall serve as the final agency determination on the complaint.

(d) Appeal to Commissioner.

(1) The General Counsel's determination on a complaint may be appealed to the Commissioner by the requester, or his or her designee, or the Foundation. An appeal of the General Counsel's determination must be in writing and must be received by the department no later than 15 days after the date of the General Counsel's determination. The appeal shall include specific reasons why the requester or the Foundation disagrees with the General Counsel's determination. Copies of the appeal must be mailed or delivered by the party appealing to the other party.

(2) The Commissioner, or his or her designee, shall review the request, any supporting documentation, the General Counsel's determination, and the appeal and issue a determination on the request. The appeal shall be limited to review of the General Counsel's determination and documentation presented by parties in support of their positions.

(3) The Commissioner's determination of the appeal shall be the final administrative action of the agency and is subject to judicial review under Chapter 2001, Government Code.

(e) Actions Subject to Review.

(1) Request for Review filed under §74.1095 shall be based on actions taken by the foundation under the Texas Agriculture Code, Chapter 74, Subchapter D.

(2) Actions subject to review under §74.1095 do not include:

(A) alleged violations that may be prosecuted administratively by the department under the Texas Agriculture Code, §12.020 and/or §76.1555;

(B) bid protests and other disputes arising from a bid made or a contract entered into with the foundation under its procurement manual, and covered by the foundation's procurement dispute resolution procedure; or

(C) disputes that have been resolved through a civil or criminal action brought in a court of law.

(f) Appropriate remedial actions. If the department, or the Commissioner on appeal, determines that the foundation acted in a manner that warrants action by the department, the department may prescribe corrective action to be carried out by the foundation, or refer its determination to the appropriate entity in accordance with the Texas Agriculture Code, §74.126. The department is not authorized to award monetary damages to a person filing a request under this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602090

Dolores Alvarado Hibbs

Deputy General Counsel

Texas Department of Agriculture

Effective date: May 1, 2006

Proposal publication date: February 24, 2006

For further information, please call: (512) 463-4075

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CHAPTER 21. CITRUS
SUBCHAPTER A. CITRUS QUARANTINES

4 TAC §21.5, §21.6

The Texas Department of Agriculture (the department) adopts amendments to §21.5 and §21.6, concerning citrus quarantines, without changes to the proposal published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1543). The amendments are adopted to clarify requirements related to citrus quarantines and citrus budwood and to provide procedures whereby properly tested budwood from any state may be imported into Texas.

The amendment to §21.5 specifies plant genera that are considered quarantined articles. Amendments to §21.6 increases clarity and provides procedures for the importation of properly tested budwood from any state into Texas. Previously such procedures were available only for budwood from California or Florida. These amendments provide the citrus industry and other citrus growers in Texas a means for obtaining access to a larger citrus budwood selection that is free from pests and diseases.

No comments were received on the proposal.

The amendments to §21.5 and §21.6 are adopted under the Texas Agriculture Code (the Code), §71.007 and 71.0091, which provides the department with the authority to adopt rules as necessary for the seizure, treatment, and destruction of citrus plants, plant products, and other substances for the effective enforcement and administration of Chapter 71; and the Code, §73.002 which provides for the state to use all constitutional measures to protect the citrus industry from destruction by pests and diseases.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 13, 2006.

TRD-200602133

Dolores Alvarado Hibbs

Deputy General Counsel

Texas Department of Agriculture

Effective date: May 3, 2006

Proposal publication date: March 10, 2006

For further information, please call: (512) 463-4075

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CHAPTER 29. ECONOMIC DEVELOPMENT
SUBCHAPTER C. TEXAS CERTIFIED RETIREMENT COMMUNITY PROGRAM

4 TAC §§29.50 - 29.56

The Texas Department of Agriculture (the department) adopts new Chapter 29, Subchapter C, §§29.50 - 29.56, concerning the

department's Texas Certified Retirement Community Program rules. Section 29.50 is adopted with changes to delete duplicate language and §§29.51 - 29.53 are adopted with changes based on comments received from the Office of Community Rural Affairs to the proposal published in the February 24, 2006, issue of the *Texas Register* (31 TexReg 1132). Sections 29.54 - 29.56 are adopted without changes and will not be republished. The new sections are adopted to establish the Texas Certified Retirement Community Program, a program designed to encourage retirees and potential retirees to make their homes in Texas communities that have met the criteria for certification by the department as a Texas certified retirement community. The program will provide an increase in economic activity in Texas communities by providing communities with another tool to market and promote themselves as a desirable retirement destination to retirees and potential retirees both in and outside Texas.

New §29.50 provides definitions to be used in the new subchapter. Proposed new §29.51 provides an overview of the program. New §29.52 provides for the contents of an application and fees for the program. New §29.53 provides the application and selection process for the program. New §29.54 provides for assistance for certified communities in the program. New §29.55 provides requirements for the use of the words Texas Certified Retirement Community or other department registered trademarks that are used in the program. New §29.56 provides for the expiration of certification and renewal of certification in the program.

Comments on the proposal were received from the Nacogdoches County Chamber of Commerce, the East Texas Council of Governments, the Office of Rural Community Affairs (ORCA), and the Texas Governor's Committee on People with Disabilities.

Mr. Bruce Partain submitted comments on behalf of the Nacogdoches County Chamber of Commerce, as its President/CEO. Mr. Partain suggested that the rules include a reference to economic development, defined by Mr. Partain as financial services and retail business. After careful consideration of Mr. Partain's recommendation, department staff has determined that his recommended references are more appropriate for inclusion in the program guidelines as information that may be useful for a community to provide for consideration as part of its application. It is the department's hope that a community applying for certification will include any information that supports its position as a good location for retirement. This information may include details about the economic opportunities the community has available for personal finance and retail business.

Mr. Glynn Knight, Executive Director of the East Texas Council of Governments, submitted comments on its behalf. Mr. Knight commented that while, overall, the program procedures appear workable, the application fee for the certification is excessive. The department has no authority to adjust the program application fee. The fee was created by law and cannot be changed by department rule. Mr. Knight next suggested that the application process take into consideration the size of the community applying. The department agrees with this comment and is already taking community population into consideration in the application/scoring process. Mr. Knight also suggested that a community that has already received a retirement certification designation from another source be "grandfathered" into the state program at the department. Grandfathering was not addressed nor, we believe contemplated, in the law establishing the program and was, therefore, not included in the proposed rules. Mr. Knight stated he thought it was appropriate for local Councils Of Government (COGS) to be included in the program process. The department agrees that including the COGs in the process is important to the department and the local communities and intends to include contact information on each of the COGs in the program guidelines. The final comment made by Mr. Knight had to do with the fiscal note. Mr. Knight suggested that the fiscal note did not adequately address the financial implications the application process has on a community applying for certification. Department staff feels this concern was adequately addressed in the fiscal note which states "the cost to applicants to the Program will be an application fee which is the greater of $5,000.00 or $0.25 multiplied by the population of the community as determined by the most recent United States census". Any additional cost incidental to preparing and gathering information for the application will in most cases be minor when compared to the application fee. Also, unlike a mandatory regulatory fee which may be imposed by an agency on a local government, the preparation of an application and payment of an application fee for this program is voluntary.

Mr. Eric Beverly submitted comments on behalf of the Office of Rural Community Affairs (ORCA). Mr. Beverly suggested adding the Rural Viability Index in the language in §29.52(a)(4) of the rules. The department agrees that the index is an excellent resource tool and will consider adding the Rural Viability Index to the program guidelines. Mr. Beverly also suggested that a time period for refund of the application fee in §29.52(c) may or may not be needed. The department has determined that a refund timeline would not add to the efficient operation of the program and therefore, none will be added to the adopted rule. Mr. Beverly, in his third and final comment, recommended changing the wording in §29.53(7) from "within 75 days of the date of the initial application" to "within 75 days of the date of receipt of the completed application". The department agrees that changing the wording better describes how the process will work and will include the change in the adopted rule.

The department received several comments from the Texas Governor's Committee on People with Disabilities (Committee). Comments were submitted by Pat Pound, Executive Director of the Committee. In §29.51(3) of the proposed rules, the Committee recommended that the reference to "life-care communities" be changed to "long term living communities". The change was recommended due to a change in the terminology used by community and service providers for retirees. The department agrees with the recommended change and has changed the adopted rule accordingly. In §29.52 of the proposed rules, the Committee proposed the addition of 17 items to include: information about the elderly and disabled homestead exemption; designate availability of accessible housing and accessible housing features, if known; designate costs of electricity and water; indicate the availability of high-speed internet services; designate any local ordinances for the protection of people with disabilities; designate pedestrian friendly elements such as, sidewalks, curb cuts, audible pedestrian signals, etc.; describe telework opportunities; describe local business efforts to make reasonable accommodations for people with disabilities; include information on availability of long-term services and supports (both community and residential services and supports); availability of emergency medical services and the name and location of any (all) hospitals within a 75 mile radius of the community; denote whether emergency services such as fire departments and EMS are voluntary or paid staff; designate the number of physicians that accept Medicaid and Medicare; indicate efforts of local pharmacy's to work with Medicare Drug

plan and prescription bottles readable by persons with low vision; recommend public transportation and highways; indicate availability of cable/dish television; specify accessible parks and trails and accessible golf courses and swimming pools; designate any community elements that are "liveable" for people with disabilities. The department agrees that these items are things that could be important to a retiree seeking a community in which to retire. The department believes that the items are more specific than the rules are intended to be, but would be a good addition for the guidelines. The department also recognizes that many retirees researching for a long term living community may want the assistance of the knowledgeable staff from the Texas Governor's Committee on People with Disabilities and will include the Committee in the guidelines as a resource.

The final two suggestions by the Committee include the addition to the application a field that denotes the number of facilities certified as accessible by the Texas Department of Licensing and Regulations and that the community inform anyone considering a move to Texas that the State does not supplement Social Security Income (SSI). The department agrees that this information may be useful to some retirees and will consider addressing these two recommendations in the guidelines.

New §§29.50 - 29.56 are adopted under the Texas Agriculture Code (the Code), §12.016, which authorizes the department to adopt rules to administer its duties under the Code; and §12.039, as added by House Bill, 1982, 79th Regular Session, 2005, which authorizes the department to establish and maintain a Texas Certified Retirement Community Program.

§29.50. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Applicant--A unit of general local government which is preparing to submit or has submitted an application for Texas Certified Retirement Community Program to the Texas Department of Agriculture (TDA).

(2) Application--Written request for certification under the Texas Certified Retirement Community Program in the format required by the department.

(3) Commissioner--The commissioner of agriculture of the State of Texas or the commissioner's designee.

(4) Department--The Texas Department of Agriculture.

(5) Guidelines--Guidelines promulgated by the department for completing the application for the Program and administration of the program.

(6) Local government--An entity defined as a unit of general local government in 42 United States Code, §5302(a)(1).

(7) Program--The Texas Certified Retirement Community Program.

(8) Sponsor--A board, organization or panel designated in the application by the applicant to serve as the community's primary contact regarding all aspects of the Program.

(9) Staff--Staff of the department.

§29.51. Overview of Program.

(a) The Texas Certified Retirement Community Program is established to:

(1) promote Texas as a retirement destination to retirees and potential retirees both in and outside Texas;

(2) assist Texas communities in their efforts to market themselves as desirable retirement locations and to develop communities that retirees would find attractive for a retirement lifestyle;

(3) assist in the development of retirement communities and long term living communities for economic development purposes and as a means of providing a potential workforce and enriching Texas communities; and

(4) encourage tourism to Texas in reference to an evaluation of this state as a desirable retirement location and for the visitation of those who have chosen to retire in this state.

(b) An applicant community must be a unit of general local government.

(c) The applicant must designate a sponsor that will be responsible for working with the department during the application process and will serve as the primary contact for disseminating information to potential retirees through the Program if the certification is approved. The sponsor should be a recognizable entity within the community, have a physical location with regular office hours, and should have the capacity and resources to manage the community's retirement recruitment efforts.

(d) After approval, a Texas Certified Retirement Community may change the sponsor by notifying the department in writing.

§29.52. Contents of Application; Fees.

(a) Applications must include:

(1) A completed score sheet as provided in the Program Guidelines;

(2) A completed retiree desirability assessment to include the following information regarding the applicant community:

(A) information on the applicant's demographics, geography and climate;

(B) Texas state and local tax structure;

(C) local housing availability, opportunities and cost;

(D) climate;

(E) personal safety or security;

(F) employment opportunities;

(G) availability of health care services and other services along the continuum of care, including home-based and community-based services, housing for the elderly, assisted living, personal care, and nursing care facilities;

(H) availability of emergency medical services and the name and location of any hospital within a 75-mile radius of the community

(I) public transportation and major highways;

(J) continuing education;

(K) leisure living;

(L) recreation areas and facilities;

(M) the performing arts;

(N) festivals and events;

(O) sports at all levels;

(P) crime statistics;

(Q) any other information that the department may reasonably request.

(3) evidence of support from area churches, clubs, businesses, media, and other entities, as necessary for the success of the program in the community;

(4) a marketing plan detailing the Program's mission as applied to the community, the target market, the competition, an analysis of the community's strengths, weaknesses, opportunities and dangers, and the strategies the community will employ to attain the goals of the Program;

(5) a long-term plan outlining the steps the community will undertake to maintain its desirability as a destination for retirees, including an outline of plans to correct any facility and service deficiencies identified in the retiree desirability assessment; and

(6) any other information as required by the Program Guidelines.

(b) An application fee must be submitted with the application in an amount equal to the greater of:

(1) $5,000; or

(2) $0.25 multiplied by the population of the community, as determined by the most recent census.

(c) If the application is not approved, the department shall refund the application fee.

(d) Program guidelines and applications are available on the agency website: www.agr.state.tx.us or from: Texas Department of Agriculture, Rural Economic Development Division, P.O. Box 12847, Austin, Texas 78711.

§29.53. Application/Selection Process.

The application and selection procedures consist of the following steps:

(1) Each applicant community must submit a complete application to the department's Rural Economic Development Division. No changes to the application will be allowed after the application is submitted, unless they are a result of Staff recommendations. Applications are available from the department. Completed applications must be submitted to: Texas Department of Agriculture, Rural Economic Development Division, P.O. Box 12847, Austin, Texas 78711.

(2) Each application must be accompanied by the application fee, as described in Sec. 29.52(b) of this title (relating to Contents of Application; Fee).

(3) Staff will score the applications and review the applications for eligibility and completeness.

(4) The applicant will be notified of any deficiencies and given 20 days to rectify deficiencies. Staff may work with the applicant to improve or modify the application, with the intent of helping the applicant achieve certification. An application containing an excessive number of deficiencies, or deficiencies of a material nature will be determined incomplete and may not be considered for certification.

(5) An application that has been withdrawn either by the applicant or by the department, or has been declined may be resubmitted, however, a full application fee must be remitted with each application.

(6) After the scoring and application process is complete, Staff will make a recommendation for approval or denial of the request for certification to the commissioner or his/her designee. The commissioner will make the final decision regarding certification.

(7) The department will notify the applicant of approval or denial of the application within 75 days of the date of receipt of the completed application.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 13, 2006.

TRD-200602129
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: May 3, 2006
Proposal publication date: February 24, 2006
For further information, please call: (512) 463-4075

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 9. LP-GAS SAFETY RULES

SUBCHAPTER A. GENERAL REQUIREMENTS

16 TAC §9.2, §9.52

The Railroad Commission of Texas adopts amendments to §9.2 and §9.52, relating to Definitions, and Training and Continuing Education Courses, without changes from the versions published in the February 24, 2006, issue of the *Texas Register* (31 TexReg 1151). The Commission adopts these amendments to clarify some wording and procedures for the training and continuing education requirements, and to add a procedure by which certificate holders may receive continuing education credit for completing certain Certified Employee Training Program (CETP) courses.

In §9.2, the Commission amends the definition of "CETP" to add a reference to the National Propane Gas Association (NPGA), or the authorized agents or successors to NPGA or to the Propane Education and Research Council (PERC). The amendment is necessary because PERC has authorized NPGA to provide CETP training, and because such training may be offered by these organizations' authorized agents rather than by the organizations themselves.

In §9.52, the Commission adopts most of the amendments to clarify the rule requirements. In subsection (a), and in paragraph (1) of subsection (a), the Commission deletes some repetitive wording and adds a reference to the tables in subsection (h) of the rule. The Commission deleted the repetitive wording so that the tables, which list all the training and continuing education courses offered or approved by the Commission and the categories to which they apply, will be the definitive list of the courses that may be presented for Commission credit by certified individuals in each covered category. The Commission deletes former subsections (a)(1) and (2), and redesignates existing paragraphs (3) and (4) as paragraphs (1) and (2).

In subsection (b), the Commission adds wording to refer to the tables in subsection (h) and to delete the repetitive list of categories

in paragraph (1)(A). The Commission redesignates subsection (b)(1)(B) and (C) as (A) and (B). In newly-designated subsection (b)(1)(A), the Commission has added a May 31, 2007, deadline by which public employees who are certified as of June 1, 2006, shall complete their continuing education requirement. This is consistent with amendments the Commission made to §9.51, relating to General Requirements for Training and Continuing Education, adopted on January 24, 2006, published in the February 10, 2006, issue of the *Texas Register* (31 TexReg 843), and effective March 1, 2006.

In subsection (b)(3), the Commission deletes the sentence referring to any employee of a state agency, county, municipality, school district, or other government subdivision not being required to pay the annual certificate renewal fee, to make this rule consistent with the Commission's recent amendments to §9.51 of this title, referenced in the previous paragraph.

The Commission adopts new subsection (c) to address a situation in which a current certificate holder passes a Commission examination for an additional certification that requires completion of a training course. In this situation, the Commission will assign the certificate holder a training deadline pursuant to the requirements of §9.52(a)(1) regarding the new certification. Upon completion of that training, the Commission will then assign the certificate holder a new continuing-education deadline pursuant to §9.52(b).

The Commission redesignates current subsections (c) - (g) as subsections (d) - (h). The Commission did not propose any changes to the four tables listing the training and continuing education requirements; however, they are included in this rulemaking because the Commission changed the subsection designation from subsection (g) to subsection (h).

The Commission adopts new subsection (i) to specify the procedure by which current certificate holders may obtain continuing-education credit for completion of an approved CETP course. Tables 3 and 4 of subsection (h) specify the CETP courses approved by the Commission and the categories to which they apply. Under the procedure, a certificate holder who has successfully completed a CETP class, including any applicable knowledge and skills assessments, as determined by the issuance of a National Propane Gas Association class certificate, must submit to the Commission, either through regular mail or electronic mail, the individual's name, address, telephone number, and Social Security number; the LP-gas certification currently held; the CETP class date; and a readable copy of the CETP class certificate. AFRED must review the material submitted within 30 business days of receipt and must notify the certificate holder if the request to award Railroad Commission continuing-education credit is approved, denied, or incomplete. The certificate holder will have 30 calendar days from the date of a notice of deficiency to supply the additional required information. Certificate holders requesting credit for CETP class attendance must submit such requests to allow processing time so that a request is finally approved by May 31 in order for the certificate holder to receive credit toward that deadline.

The Commission received one comment from an individual in favor of adopting the proposed amendments. The individual stated that the amendments would enhance safety by allowing continuing education credit for attendance at CETP courses.

The Commission adopts the amendments pursuant to Texas Natural Resources Code, §113.051, which authorizes the Commission to adopt rules relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public, and §113.052, which authorizes the Commission to adopt by reference, in whole or in part the published codes of the National Fire Protection Association as standards to be met in the design, construction, fabrication, assembly, installation, use, and maintenance of containers, tanks, appliances, systems, and equipment for the transportation, storage, delivery, use, and consumption of LP-gas or any one or more of these purposes.

Statutory authority: Texas Natural Resources Code, §113.051 and §113.052.

Cross-reference to statute: Texas Natural Resources Code, Chapter 113.

Issued in Austin, Texas, on April 11, 2006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602094
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Effective date: May 1, 2006
Proposal publication date: February 24, 2006
For further information, please call: (512) 475-1295

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 157. HEARINGS AND APPEALS
SUBCHAPTER DD. HEARINGS CONDUCTED BY INDEPENDENT HEARING EXAMINERS

19 TAC §157.1101

The Texas Education Agency (TEA) adopts an amendment to §157.1101, concerning rates of independent hearing examiners. The amendment is adopted without changes to the proposed text as published in the February 24, 2006, issue of the *Texas Register* (31 TexReg 1160) and will not be republished. The adopted amendment increases the hourly compensation rate of independent hearing examiners who conduct employment hearings at the local school district level from $100 an hour to $125 an hour and raises the maximum compensation from $6,400 to $8,000.

Texas Education Code, §21.252(c), requires the commissioner of education to set hourly rates of compensation for a hearing examiner and to set a maximum amount of compensation a hearing examiner may receive for a hearing. 19 TAC §157.1101, adopted to be effective May 8, 1996, is the commissioner rule that implements this statute. Currently, the rule establishes compensation at $100 per hour for billable professional services with a maximum of $6,400 for each case.

Independent hearing examiners are attorneys who are certified by the commissioner and are assigned to preside over and to issue recommendations in local school district employment hearings. Since the inception of the program in 1995, the hourly rate of compensation has not changed from $100 an hour with a max-

imum of $6,400 per case. In 2005, a consultant issued a recommendation that the rate be increased to $125 an hour and the maximum compensation be raised accordingly to $8,000 in order to attract more highly qualified attorneys. This amendment to 19 TAC §157.1101 implements that recommendation.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Education Code, §21.252(c), which authorizes the commissioner of education to set hourly rates of compensation for a hearing examiner and to set a maximum amount of compensation a hearing examiner may receive for a hearing.

The amendment implements the Texas Education Code, §21.252(c).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 17, 2006.

TRD-200602196
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: May 7, 2006
Proposal publication date: February 24, 2006
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 175. FEES, PENALTIES AND FORMS

22 TAC §175.2

The Texas Medical Board adopts an amendment to §175.2, concerning Registration and Renewal Fees, without changes to the proposed text as published in the February 24, 2006, issue of the *Texas Register* (31 TexReg 1161) and will not be republished.

The amendment to §175.2 increases PA Registration Fees.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §204.103, which provides the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602095
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Effective date: May 1, 2006
Proposal publication date: February 24, 2006
For further information, please call: (512) 305-7016

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CHAPTER 183. ACUPUNCTURE

22 TAC §§183.1 - 183.4, 183.6, 183.12, 183.14, 183.16, 183.23

The Texas State Board of Acupuncture Examiners (Acupuncture board), with the approval of the Texas Medical Board, adopts amendments to §§183.1 - 183.4, 183.6, 183.12, 183.14 and 183.16 and new §183.23, concerning Acupuncture, without changes to the proposed text as published in the February 24, 2006, issue of the *Texas Register* (31 TexReg 1162) and will not be republished.

The amendment to §183.1 adds a more extensive list of functions of the Acupuncture board. The amendment to §183.2 updates the citation to the board rule regarding licensure; deletes references to provision of §183.4(g) that is being deleted; updates names of agencies; and provides the requirement to take the Biomedicine Module of the NCCAM, in accordance with statutory changes. The amendment to §183.3 revises functions of the licensure committee in accordance with statutory changes authorizing the acupuncture board to issue licenses. The amendment to §183.4 provides requirements for applicants to pass jurisprudence examination, in accordance with statutory changes; and revises the time period for expiration of an application from two years to one year. The amendment to §183.6 provides that Chapter 187 and Chapter 190 apply to acupuncturists; and adds "criminal convictions" to list of subjects relating to Chapter 190. Section 183.12 is amended to provide for adoption of rules by the acupuncture board with approval of the medical board. The amendment to §183.14 provides for advice by the acupuncture board to the medical board for Acudetox Specialist training programs. The amendment to §183.16 updates the name of the Texas Medical Board. New §183.23 is adopted in order to reference Chapter 196, regarding voluntary surrender of a license, to Acupuncturists.

No comments were received regarding adoption of the rules.

The amendments and new section are adopted under the authority of the Texas Occupations Code Annotated, §205.101 which provides the Texas State Board of Acupuncture Examiners, with the approval of the Texas Medical Board, to adopt rules and bylaws as necessary to administer and enforce Chapter 205, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602096

Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Effective date: May 1, 2006
Proposal publication date: February 24, 2006
For further information, please call: (512) 305-7016

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PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

CHAPTER 367. ENFORCEMENT

22 TAC §367.14

The Texas State Board of Plumbing Examiners adopts amendments to §367.14, without changes to the proposed text as published in the February 3, 2006, issue of the *Texas Register* (31 TexReg 634).

Contested cases referred to hearings before the State Office of Administrative Hearings (SOAH) must follow the requirements of SOAH Rules, the Administrative Procedure Act, the Plumbing License Law and Board Rules. The amendments to §367.14 are necessary to avoid any inconsistencies and unnecessary duplication that could exist between the requirements of §367.14, SOAH Rules and the Administrative Procedure Act. The amendments delete unnecessary language and add simplified new language to clearly specify that contested cases shall be conducted in accordance with SOAH Rules, the Administrative Procedure Act, the Plumbing License Law and Board Rules.

No comments were received regarding the proposed rule amendments.

The amendments to §367.14 are adopted under and affect Title 8, Chapter 1301, Occupations Code, as amended by the 78th Legislature ("Plumbing License Law" or "Law"), §1301.251, and the rule it amends. Section 1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. The amendments are also adopted under Texas Government Code Annotated, Chapter 2001 (the Administrative Procedure Act) and Texas Administrative Code, Title 1, Part 7 (SOAH Rules). No other statute, article or code is affected by these amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 12, 2006.

TRD-200602124
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Effective date: May 2, 2006
Proposal publication date: February 3, 2006
For further information, please call: (512) 936-5224

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PART 30. TEXAS STATE BOARD OF EXAMINERS OF PROFESSIONAL COUNSELORS

CHAPTER 681. PROFESSIONAL COUNSELORS

The Texas State Board of Examiners of Professional Counselors (board) adopts amendments to §§681.9, 681.91, 681.112, 681.162, and 681.166, concerning the licensing and regulation of professional counselors. Specifically, the amendments cover committees, temporary licenses, provisional licensing, and complaint processes. Section 681.166 is adopted with changes to the proposed text as published in the December 23, 2005, issue of the *Texas Register* (30 TexReg 8593). Sections 681.9, 681.91, 681.112, and 681.162 are adopted without changes, and the sections will not be republished.

BACKGROUND AND PURPOSE

The amendments are required by statutory changes to the Texas Occupations Code, Chapter 503, by House Bill 1283, passed during the 79th Legislature, Regular Session, 2005. The proposed amendments ensure that the rules reflect current and accurate legal, policy, and operational considerations; improve draftsmanship; and make the rules more accessible, understandable, and usable, to the extent possible.

SECTION-BY-SECTION SUMMARY

The amendment to §681.9 documents who may serve on a board committee.

New §681.91(i) clarifies that an intern may not provide counseling services unless under supervision.

The amendment to §681.112 clarifies examination requirements for license by reciprocity.

New §681.162(e) allows the board to issue a cease and desist order for persons violating the Act. A violation of an order constitutes grounds for the imposition of an administrative penalty by the board.

The amendment to §681.166 allows the board to order a license holder to issue a refund to a consumer resulting from an informal conference instead of, or in addition to, an administrative penalty.

COMMENTS

The board did not receive any comments regarding the proposed rules during the comment period. However, the board due to staff comments made the following changes.

Change: Concerning §681.166(w)(1) and (2) the word "consumer" was changed to the phrase "client or other payer" for consistency in terminology.

SUBCHAPTER A. THE BOARD

22 TAC §681.9

STATUTORY AUTHORITY

The amendment is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 14, 2006.

TRD-200602163

Judy Powell
Chairperson
Texas State Board of Examiners of Professional Counselors
Effective date: May 4, 2006
Proposal publication date: December 23, 2005
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER F. EXPERIENCE REQUIREMENTS FOR LICENSURE

22 TAC §681.91

STATUTORY AUTHORITY

The amendment is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 14, 2006.

TRD-200602164
Judy Powell
Chairperson
Texas State Board of Examiners of Professional Counselors
Effective date: May 4, 2006
Proposal publication date: December 23, 2005
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER H. LICENSING

22 TAC §681.112

STATUTORY AUTHORITY

The amendment is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 14, 2006.

TRD-200602165
Judy Powell
Chairperson
Texas State Board of Examiners of Professional Counselors
Effective date: May 4, 2006
Proposal publication date: December 23, 2005
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER K. COMPLAINTS AND VIOLATIONS

22 TAC §681.162, §681.166

STATUTORY AUTHORITY

The amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties.

§681.166. Informal Disposition.

(a) Informal disposition of any complaint or contested case involving a licensee or an applicant for licensure may be made through an informal conference held to determine whether the matters in controversy can be resolved without further proceedings.

(b) The decision to hold a conference shall be within the discretion of the executive director or a member of the complaints committee.

(c) An informal conference shall be voluntary and shall not be a prerequisite to a formal hearing.

(d) The executive director shall establish the time, date and place of the informal conference, and provide written notice to the licensee or applicant. Notice shall be provided no less than 10 working days prior to the date of the informal conference by certified mail, return receipt requested to the last known address of the licensee or applicant. The licensee or applicant may waive the 10-day notice requirement.

(e) The notice shall inform the licensee or applicant of the nature of the alleged violation or the reason for application denial; that the licensee may be represented by legal counsel; that the licensee or applicant may offer the testimony of witnesses and present other evidence as may be appropriate; that a complaints committee member shall be present; that the board's legal counsel shall be present; that the licensee's or applicant's attendance and participation is voluntary; that the complainant and any client involved in the alleged violations may be present; and that the informal conference shall be canceled if the licensee or applicant notifies the executive director that he or she or his or her legal counsel will not attend. A copy of the board's rules concerning informal disposition shall be enclosed with the notice of the informal conference.

(f) The complainant may be informed that he or she may appear and testify or may submit a written statement for consideration at the informal conference.

(g) A member of the complaints committee shall be present at an informal conference.

(h) The conference shall be informal and shall not follow the procedures established in this chapter for contested cases and formal hearings.

(i) The licensee, the licensee's attorney, the board's attorney, the executive director and the complaints committee member may question witnesses, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.

(j) The board's legal counsel may attend each informal conference. The complaints committee member or executive director may call upon the attorney at any time for assistance in the informal conference.

(k) The licensee shall be afforded the opportunity to make statements that are material and relevant.

(l) The complaints committee member or the executive director may exclude from the informal conference all persons except witnesses during their testimony, the licensee, the licensee's attorney, and board staff.

(m) Any written statement submitted by the complainant shall be reviewed at the conference.

(n) At the conclusion of the informal conference, the complaints committee member or the executive director may make recommendations for informal disposition of the complaint or contested case. The recommendations may include any disciplinary action authorized by the Act or this chapter. The complaints committee member may also conclude that the board lacks jurisdiction; conclude that a violation of the Act or this chapter has not been established; order that the investigation be closed; or refer the matter for further investigation.

(o) The licensee or applicant may either accept or reject the recommendations at the informal conference. If the recommendations are accepted, an agreed order shall be prepared by the board office or the board's legal counsel and forwarded to the licensee or applicant. The order may contain agreed findings of fact and conclusions of law. The licensee or applicant shall execute the order and return the signed order to the board office within 10 working days of his or her receipt of the order. If the licensee or applicant fails to return the signed order within the stated time period, the inaction shall constitute rejection of the recommendations.

(p) If the licensee or applicant signs and accepts the proposed recommendations, the agreed order shall be submitted to the complaints committee and the board for approval. Placement of the agreed order on the committee and board agendas shall constitute only a recommendation for approval by the board.

(q) The identity of the licensee or applicant shall not be made available to the board until after the board has reviewed and accepted the agreed order unless the licensee or applicant chooses to attend the board meeting. The licensee or applicant shall be notified of the date, time, and place of the board meeting at which the proposed agreed order will be considered. Attendance by the licensee or applicant is voluntary.

(r) Upon an affirmative majority vote, the board shall enter an agreed order approving the accepted recommendations. The board may not change the terms of a proposed order but may only approve or disapprove an agreed order unless the licensee or applicant is present at the board meeting and agrees to other terms proposed by the board.

(s) If the board does not approve a proposed agreed order, the licensee or applicant shall be so informed. The matter shall be referred to the executive director for other appropriate action.

(t) A proposed agreed order is not effective until the board has approved the agreed order and the order is signed by the board chair.

(u) A licensee's opportunity for an informal conference under this section shall satisfy the requirement of the Administrative Procedure Act, Texas Government Code, §2001.054(c).

(v) If a licensee who has requested an informal conference fails to appear at the conference and fails to provide notice of the licensee's inability to attend the conference at least 24 hours in advance of the time the conference is scheduled, such action may constitute a withdrawal of the request for a formal hearing.

(w) Refund Order.

(1) The board may order a license holder to pay a refund to a client or other payer as provided in an agreement resulting from an informal settlement conference instead of, or in addition, to imposing an administrative penalty under this chapter.

(2) The amount of a refund ordered as provided in an agreement resulting from an informal settlement conference may not exceed the amount the client or other payer paid to the license holder for a service regulated by this chapter. The board may not require payment of other damages or estimate harm in a refund order.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Judy Powell
Chairperson
Texas State Board of Examiners of Professional Counselors
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Proposal publication date: December 23, 2005
For further information, please call: (512) 458-7111 x6972

PART 34. TEXAS STATE BOARD OF SOCIAL WORKER EXAMINERS

CHAPTER 781. SOCIAL WORKER LICENSURE

The Texas State Board of Social Worker Examiners (board) adopts amendments to §§781.102, 781.203, 781.209, 781.210, 781.217, 781.301, 781.302, 781.305, 781.306, 781.310, 781.311, 781.503, 781.508, 781.509, 781.514, 781.602, 781.607, 781.608, 781.701, 781.803, the repeal of §§781.702 - 781.707, new §781.318 and §§781.702 - 781.704, concerning the licensure and regulation of social workers. Amendments to §§781.503, 781.508, 781.509, and 781.514 are adopted with changes to the proposed text as published in the October 28, 2005, issue of the *Texas Register* (30 TexReg 6989). Amendments to §§781.102, 781.203, 781.209, 781.210, 781.217, 781.301, 781.302, 781.305, 781.306, 781.310, 781.311, 781.602, 781.607, 781.608, 781.701, 781.803, the repeal of §§781.702 - 781.707, new §781.318 and §§781.702 - 781.704 are adopted without changes, and the sections will not be republished.

BACKGROUND AND PURPOSE

The adopted amendments, repeals, and new sections are necessary to comply with Senate Bill 415, 79th Texas Legislature, 2005 (Sunset legislation), which amended Occupations Code, Chapter 505, the board's enabling statute, as part of the review of the board by the Sunset Advisory Commission. The bill modified requirements relating to the board's licensing and enforcement authority and applied certain across-the-board standards and requirements for regulatory boards. The rule adoption implements the requirements of the bill.

Additionally, the Texas Legislature passed the General Appropriations Act, House Bill 1, 79th Regular Session (2005). Article 2 of the General Appropriations Act, Rider 85 Contingent Appropriation of Additional Fee Revenues authorized the collection of additional revenue in the form of fees, which would then be appropriated to pay for expenses of Health Care Professional programs, including licensed social workers.

Additionally, the board adopts the amendments and repeals to correct minor errors, improve the rules, and ensure that the rules reflect current legal, policy, and operational considerations.

SECTION-BY-SECTION SUMMARY

The amendment to §781.102 is adopted to add a new definition of AMEC; to eliminate obsolete definitions of LMSW-ACP, LSW, and SWA; and to renumber the definitions accordingly.

The amendment to §781.203 is adopted to clarify that the board's training program must meet the requirements of Occupations Code, Chapter 505. The amendment to §781.209 is adopted to reflect requirements of the Sunset legislation. The amendment to §781.210 is adopted to eliminate the obsolete reference to the executive director as an appointee of the Commissioner of Health. The amendment to §781.217(a) is adopted based on the provisions for contingent appropriation of additional fee revenue authorized by the General Appropriations Act, 79th Regular Session (2005), by increasing the amount of the fee for renewal of a license. The amendment to §781.217(b) is adopted to correct a minor error.

The amendment to §781.301 is adopted to reflect the jurisprudence examination requirement of the Sunset legislation. The amendment to §781.302 is adopted to clarify that only one supervisory plan may be in place at any time. Amendments to §781.305 and §781.306 are adopted to clarify that accredited institutions must be accredited by CSWE, to update license level terminology, and to reflect the jurisprudence examination requirement of the Sunset legislation. Amendments to §781.310 and §781.311 are adopted to update license level terminology and delete obsolete license terms. New §781.318 is adopted to reflect new language regarding issuance of licenses to certain out-of-state applicants. This language reflects the requirements of the Sunset legislation.

The amendment to §781.503 is adopted to reflect the requirements of the Sunset legislation relating to the refusal to renew a license for failure to pay an administrative penalty; and to require that licensed social workers who renew during calendar years 2007 and 2008 must complete the board's jurisprudence examination in order to renew the license. This requirement is intended to increase knowledge of, and compliance with, Texas social work law and rules among the board's license holders. Amendments to §781.508 and §781.509 are adopted to clarify the number of continuing education hours required as a result of the move to two-year license terms; to improve draftsmanship and understanding; and to reflect the requirement for license holders to take the jurisprudence examination during calendar years 2007 and 2008. The amendment to §781.514 is adopted to reflect the requirement for license holders to take the jurisprudence examination during calendar years 2007 and 2008.

The amendment to §781.602 is adopted to reflect the board's authority to issue a cease and desist order, as added by the Sunset legislation. The amendment to §781.607 is adopted to reflect the board's authority to refuse to renew a license for failure to pay an administrative penalty, as added by the Sunset legislation. The amendment to §781.608 is adopted to reflect the board's authority to order a license holder to pay a refund to a consumer as provided in an agreement resulting from an informal settlement conference, as added by the Sunset legislation.

The amendment to §781.701 is adopted to update and clarify the subchapter's purpose. New §781.702 is adopted to reflect current operational and legal considerations relating to notice of formal hearings and informal conferences, and to eliminate obsolete or unnecessary language. New §781.703 is adopted to reflect current operational and legal considerations relating to default and to eliminate obsolete or unnecessary language. New §781.704 is adopted to reflect current operational and legal considerations relating to action after a hearing and to eliminate obsolete or unnecessary language.

The repeal of §§781.702 - 781.707 is adopted as those sections are deemed obsolete or unnecessary, and they no longer reflect current legal and operational considerations.

The amendment to §781.803 is adopted to implement the requirement of the Sunset legislation to establish an administrative penalty schedule.

COMMENTS

The following comments were received concerning the proposed amendments, repeals and new sections. Following each comment is the board's response and any resulting change(s).

Comment: Two commenters expressed opposition to the proposed rule amendments that would require social workers to complete the board's jurisprudence examination as part of the biennial license renewal process. The commenters stated that this proposal is inconsistent with Sunset Advisory Commission recommendations, is not required by the social worker licensing statute, and would be unnecessary and overly burdensome to license holders. Concerns were also expressed about the use of the term "examination" as opposed to "training course."

Response: The board both agrees and disagrees with the commenters. The commenters were present and participated fully in the Rules Committee meeting and the board meeting at which their comments were considered and the proposal was finally adopted. The board and the commenters engaged in significant dialogue about the proposed requirement and its perceived advantages and disadvantages. The commenters and the board agreed that there is value in requiring all social workers to complete the jurisprudence examination once, during calendar years 2007 and 2008 at the time of renewal. After that two-year period, the board and its stakeholders will discuss whether an ongoing requirement is necessary. The board agrees that, in the context of requirements and options for currently licensed social workers, the term "training course" is preferable to "examination."

As a result of these discussions, the following changes were made. Section 781.503(l) is modified to read "For all licenses renewed between January 1, 2007, and December 31, 2008, the jurisprudence training course must be completed in order to renew the license. Completion of the jurisprudence training course shall count as 3 hours of the continuing education requirement for professional ethics and social work values, as referenced in §781.508(b) of this title."

Section 781.509(6) is modified to replace the term "examination" with the term "training course." Section 781.514(8) is modified to repeat the language of §781.503(l).

Comment: One commenter wrote the board and addressed the proposed jurisprudence examination requirement for licensed social workers. The commenter expressed neither support nor opposition for the rule proposal, but did make observations and ask questions.

Response: These observations and questions were examined as part of the dialogue with stakeholders who were present at the Rules Committee and board meetings. No change was made as a result.

Comment: One commenter addressed §781.508(b), and stated that the rule as proposed is unclear, and provided suggested language.

Response: The board agrees that the rule could be improved. The board and the commenter, who was present at the Rules Committee and board meetings, discussed this matter at length. The following change to the rule was adopted at the meeting, with the commenter's support: "As part of the required 30 clock-hours, a licensee must complete a minimum of six clock-hours of continuing education in professional ethics and social work values during the biennial renewal period." Additionally, it was agreed that §781.508(c) should be deleted and the remainder of the section relettered accordingly.

Comment: One commenter addressed §781.209(c) and expressed concern that the rule not be used to prevent valuable vehicles for input to the board, such as the appointment of a statewide task force to consider issues of importance.

Response: The board agrees. The rule as proposed will apply to standing board committees, in compliance with the board's enabling statute. The board will continue to seek broad-based input from the regulated community in a variety of ways, as the need arises, such as the formation of a statewide task force to study important issues and make recommendations to the board. No change was made as a result of the comment.

Comment: One commenter expressed opposition to the proposal to increase licensing and renewal fees.

Response: The board disagrees. A fee increase is necessary in order to maintain current levels of service by the board office. The Texas Legislature passed the General Appropriations Act, House Bill 1, 79th Regular Session (2005). Article 2 of the General Appropriations Act, Rider 85 Contingent Appropriation of Additional Fee Revenues, authorized the collection of additional revenue in the form of fees, which would then be appropriated to pay for expenses of Health Care Professional programs, including licensed social workers. No change was made as a result of the comment.

Comment: One commenter expressed support for §781.301(c) as an excellent additional educational requirement for new license holders.

Response: The board agrees and appreciates the comment. No change was made as a result of the comment.

Comment: One commenter did not indicate opposition or support for the rule proposal, but did express concerns about continuing education in general, noting that he has no computer or internet access to complete automated training course, expressing concerns about the high cost of traveling to workshops, and recommending that all continuing education be available through the completion of correspondence courses.

Response: The board disagrees. The board's continuing education requirements are flexible and provide for a variety of learning platforms to meet individual needs. Board-approved continuing education providers offer both in-person and independent study programs throughout the state. Computers with internet access are widely available in public libraries and other venues, including in the city of the commenter's residence. No change was made as a result of the comment.

Four comment letters were received. One commenter was an individual. Other commenters were National Association of Social Workers--Texas Chapter, Texas Society for Clinical Social Work, and Texas Association of Social Work Deans and Directors. Commenters were generally in favor of the rule proposal, but expressed concerns, asked questions, and made recommendations. Some commenters did express opposition to specific provisions, as described in this preamble.

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §781.102

The amendment is authorized by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, and to establish standards of conduct and ethics for license holders; by Occupations Code, §505.203, which authorizes the board to set fees; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Charles Horton
Executive Director
Texas State Board of Social Worker Examiners
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Proposal publication date: October 28, 2005
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER B. THE BOARD

22 TAC §§781.203, 781.209, 781.210, 781.217

The amendments are authorized by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, and to establish standards of conduct and ethics for license holders; by Occupations Code, §505.203, which authorizes the board to set fees; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

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SUBCHAPTER C. LICENSES AND LICENSING PROCESS

22 TAC §§781.301, 781.302, 781.305, 781.306, 781.310, 781.311, 781.318

The amendments and new section are authorized by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, and to establish stan-

dards of conduct and ethics for license holders; by Occupations Code, §505.203, which authorizes the board to set fees; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

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SUBCHAPTER E. LICENSE RENEWAL AND CONTINUING EDUCATION

22 TAC §§781.503, 781.508, 781.509, 781.514

The amendments are authorized by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, and to establish standards of conduct and ethics for license holders; by Occupations Code, §505.203, which authorizes the board to set fees; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

§781.503. License Renewal.

(a) At least 45 days prior to the expiration of a license, the board will send notice to a licensee that includes the expiration date of the license, a schedule of the renewal and penalty fees, and continuing competency activities needed to complete the renewal requirements.

(b) A license renewal form shall be furnished to licensees eligible for renewal. The form shall require the licensee to provide current addresses; telephone numbers; continuing education completed; a signed statement regarding any civil lawsuits, criminal cases and convictions or any complaints against, investigations involving, or actions against the licensee by any licensing or certification body; and a statement of continuing compliance with the Act and this chapter.

(c) The executive director will respond in writing to the application for renewal within 15 working days of initial receipt and of receipt of a completed application (if the initial application is deficient) notifying the applicant that his or her license is renewed, that the application is deficient, or that renewal is proposed for denial. Failure to process a renewal application in the time periods stated shall be governed by §781.305(h) and (i) of this title (relating to Application for Licensure).

(d) The board shall renew the license of a social worker whom has met all requirements for renewal including payment of all fees and submission of documentation of completion of all required continuing education.

(e) If a licensee has made timely and sufficient application for renewal, the license does not expire until the board has acted on the renewal. If the licensee claims to have made timely and sufficient application and is otherwise eligible for license renewal, his or her license will be considered to be current until the renewal is issued or until the board office receives the information that timely and sufficient application was not made.

(f) A licensee who has been recommended for disciplinary action must file a timely and complete application for license renewal. If the licensee fails to pay all fees or to document completion of required continuing education he or she must cease all social work practice until all requirements for license renewal are complete.

(g) The board may deny the renewal of a license if the licensee is a party to a formal disciplinary action. A formal action commences when the notice described in §781.602(c) of this title (relating to Disciplinary Action and Notices) is mailed by the board.

(h) A license that is not revoked or suspended as a result of formal proceedings shall be renewed provided that all other requirements are met.

(i) In the case of delay in the license renewal process because of formal disciplinary action, penalty fees shall not apply.

(j) If a complaint against a licensee is in process on the date that his or her license renewal is due:

(1) a notice will be sent to the licensee, certified mail return receipt requested to the mailing address on file with the board, requiring the licensee to renew his or her license or return his or her license to the board;

(2) the notice will state that the complaint process will continue until its final resolution or if the license is renewed; and

(3) unless the return receipt is received by the board, receipt of the notice will be presumed to have occurred as provided in §781.602 of this title.

(k) The board may refuse to renew the license of a person who fails to pay an administrative penalty imposed in accordance with the Act unless the enforcement of the penalty is stayed or a court has ordered that the administrative penalty is not owed.

(l) For all licenses renewed between January 1, 2007 and December 31, 2008, the jurisprudence training course must be completed each renewal period in order to renew the license. Completion of the jurisprudence training course shall count as three hours of the continuing education requirement for professional ethics and social work values, as referenced in §781.508(b) of this title (relating to Hour Requirements for Continuing Education).

§781.508. Hour Requirements for Continuing Education.

(a) A licensee must complete a total of 30 clock-hours of continuing education biennially obtained from board approved continuing education providers.

(b) As part of the required 30 clock-hours, a licensee must complete a minimum of six clock-hours of continuing education in professional ethics and social work values during the biennial renewal period.

(c) A clock-hour is defined as 60 minutes of standard time.

(d) A licensee may earn credit for ethics as a presenter or a participant.

(e) On petition by a licensee, the executive director may waive part, but not all, of the continuing education renewal requirements for good and just cause or may permit the licensee an additional period of time in which to complete all continuing education requirements. In all cases, the decision of the executive director may be appealed to the Professional Development Committee of the board. Should the committee overturn the decision of the executive director, the committee

may elect to waive the late fees accrued or determine that the late fees should be paid by the licensee. Should the decision of the executive director be upheld by the committee and the licensee be denied in the appeal, all late fees accrued will apply.

§781.509. Types of Acceptable Continuing Education.

Continuing education undertaken by a licensee shall be acceptable to the board as credit hours if the education falls in one or more of the following categories:

(1) participating in institutes, seminars, workshops, conferences, independent study programs, post graduate training programs, college academic or continuing education courses which are related to or enhance the practice of social work and are offered or sponsored by a board approved provider;

(2) teaching or presenting the activities described in paragraph (1) of this section;

(3) writing a published work or making a presentation directed toward or applicable to the profession of social work;

(4) providing professional guidance as a field instructor for social work interns in connection with a college or university accredited by or in candidacy status with CSWE;

(5) providing supervision to a social worker participating in the program in accordance with §781.313 of this title (relating to the Alternative Method of Examining Competency (AMEC) Program); or

(6) completion of the board's jurisprudence training course no more than once per renewal period, unless the board directs otherwise.

§781.514. Credit Hours Granted.

The board will grant the following credit hours toward the continuing education requirements for license renewal.

(1) One credit hour will be given for each hour of participation in a continuing education program by an approved provider.

(2) Credit may be earned, post-licensure, through successfully completing postgraduate training programs (e.g., intern, residency, or fellowship programs) or successfully completing social work related courses which are part of the curriculum of a graduate school of social work at a rate of five credit hours per each semester hour or its equivalent not to exceed 10 hours per renewal period. A licensee may complete the ethics requirement in §781.508(a)(2) of this title (relating to Hour Requirements for Continuing Education) only through a course specifically designated as an ethics course.

(3) Credit may be earned for teaching social work courses in an accredited college or university. Credit will be applied at the rate of five credit hours for every course taught, not to exceed 15 hours per renewal period. A licensee may complete the ethics requirement in §781.508(a)(2) of this title only through teaching a course specifically designated as an ethics course.

(4) A field instructor for a social work intern will be granted five credit hours for each college semester completed, not to exceed 20 credit hours per renewal period.

(5) A presenter of a continuing education program or an author of a published work, which imparts social work knowledge and skills, may be granted five credit hours for each original or substantially revised presentation or publication, not to exceed 10 credit hours per renewal period.

(6) Credit hours may be earned by successful completion of an independent study program directly related to social work offered or approved by an approved provider. With the exception of persons residing outside the United States, a maximum of 10 credit hours for independent study programs will be accepted per renewal period.

(7) A licensee may carry over to the next renewal period up to 10 credit hours earned in excess of the continuing education renewal requirements. Continuing education earned during the licensee's birth month may be used for the current renewal or for the following year.

(8) For all licenses renewed between January 1, 2007 and December 31, 2008, the jurisprudence training course must be completed in order to renew the license. Completion of the jurisprudence training course shall count as three hours of the continuing education requirement in professional ethics and social work values, as referenced in §781.508(b) of this title.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Charles Horton
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SUBCHAPTER F. COMPLAINTS AND VIOLATIONS

22 TAC §§781.602, 781.607, 781.608

The amendments are authorized by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, and to establish standards of conduct and ethics for license holders; by Occupations Code, §505.203, which authorizes the board to set fees; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

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SUBCHAPTER G. FORMAL HEARINGS

22 TAC §§781.701 - 781.704

The amendment and new sections are authorized by Occupations Code, §505.201, which authorizes the board to adopt rules

necessary to perform the board's duties, and to establish standards of conduct and ethics for license holders; by Occupations Code, §505.203, which authorizes the board to set fees; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

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22 TAC §§781.702 - 781.707

The repeals are authorized by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, and to establish standards of conduct and ethics for license holders; by Occupations Code, §505.203, which authorizes the board to set fees; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

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SUBCHAPTER H. SANCTION GUIDELINES

22 TAC §781.803

The amendment is authorized by Occupations Code, §505.201, which authorizes the board to adopt rules necessary to perform the board's duties, and to establish standards of conduct and ethics for license holders; by Occupations Code, §505.203, which authorizes the board to set fees; and by Occupations Code, §505.404, which requires the board to establish mandatory continuing education requirements for license holders.

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PART 37. TEXAS BOARD OF ORTHOTICS AND PROSTHETICS

CHAPTER 821. ORTHOTICS AND PROSTHETICS

The Texas Board of Orthotics and Prosthetics (board) adopts amendments to §§821.1, 821.2, 821.5 - 821.7, 821.9, 821.15, 821.17, 821.23, 821.27 - 821.29, 821.33 and 821.35, and the repeal of §821.25, concerning the licensure and regulation of orthotists, prosthetists, assistants, technicians, students, and orthotic and prosthetic facilities without changes to the proposed text as published in the December 23, 2005, issue of the *Texas Register* (30 TexReg 8614) and, therefore, the sections will not be republished.

The changes were made necessary by House Bill 2292, 78th Legislature, Regular Session, (2003), which changed the name of the "Texas Department of Health" to the "Department of State Health Services"; by the expiration of time for the filing and processing of applications under the grandfather provisions of Occupations Code, Chapter 605; by the need to establish guidelines for determining unique qualifications under Occupations Code, §605.254(a)(2); and to correct and simplify the rules.

The sections delete all references to provisional licensing; change "comprehensive orthotic care" to "extensive orthotic practice"; change "comprehensive prosthetic care" to "extensive prosthetic practice"; correctly identifies the agency, the "Department of State Health Services", to which the board is administratively attached; correct citations; allow applicants to submit professional references from practitioners who are licensed or certified by another state or national organization; disallow for renewal of a temporary license if the licensee has failed an examination administered by the board; require applicants to receive prior approval from the executive director before completing the required 80-hour planned, structured, and personalized tutorial after failing the examination three times; require applicants to wait a period of three years before reapplying for licensure and examination if they fail the examination six times; remove the language that allows applicants to qualify for licensure and examination as an orthotist and prosthetist with an associate's degree; require a bachelor's degree for student registration renewal; require accredited facilities to have the equipment and capabilities to provide casting, measuring, fitting, repairs and adjustments; and require accredited facilities to have a mirror that is attached to the wall or on a freestanding base for patient ambulation. The repeal deletes the sections pertaining to the provisional license.

No comments were received during the comment period concerning the proposed rules.

22 TAC §§821.1, 821.2, 821.5 - 821.7, 821.9, 821.15, 821.17, 821.23, 821.27 - 821.29, 821.33, 821.35

The amendments are adopted under Texas Occupations Code, Chapter 605, which provides the Texas Board of Orthotics and Prosthetics with the authority to adopt rules concerning the regulation of orthotists and prosthetists.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 14, 2006.

TRD-200602181
Wanda Furgason
Presiding Officer
Texas Board of Orthotics and Prosthetics
Effective date: May 4, 2006
Proposal publication date: December 23, 2005
For further information, please call: (512) 458-7111 x6972

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22 TAC §821.25

The repeal is adopted under Texas Occupations Code, Chapter 605, which provides the Texas Board of Orthotics and Prosthetics with the authority to adopt rules concerning the regulation of orthotists and prosthetists.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 14, 2006.

TRD-200602182
Wanda Furgason
Presiding Officer
Texas Board of Orthotics and Prosthetics
Effective date: May 4, 2006
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For further information, please call: (512) 458-7111 x6972

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TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 133. GENERAL MEDICAL PROVISIONS

The Texas Department of Insurance, Division of Workers' Compensation adopts the repeal of §§133.1, 133.2, 133.100, 133.104 - 133.106, 133.300 - 133.304, and 133.401 - 133.403, concerning medical billing and processing, and production of documents. The repeal is adopted without changes to the proposal as published in the February 10, 2006, issue of the *Texas Register* (31 TexReg 796).

The repeal of these sections is necessary for the Division to adopt an extensive reorganization of Chapter 133, and Chapter 134 to eliminate redundancies in existing rules and clarify medical billing and processing procedures. This reorganization includes the repeal of current medical billing, processing and reimbursement rules in Chapters 133 and replacement with clarified and reorganized rules which incorporate requirements of House Bill (HB) 7, enacted during the 79th Texas Legislature, Regular Session, effective September 1, 2005.

The Division simultaneously adopts new §§133.1, 133.2, 133.3, 133.10, 133.20, 133.200, 133.210, 133.230, 133.240, 133.250, 133.260, 133.270, and 133.280, published elsewhere in this issue of the *Texas Register*, concerning medical billing and processing, including new medical billing timeframes. The new rules are necessary to implement, on a permanent basis, portions of House Bill (HB) 7, enacted during the 79th Texas Legislature, Regular Session, effective September 1, 2005. The adopted rules will permit compliance with statutory changes to the Labor Code §408.027 and new §408.0271, and also provide billing and processing direction for participants in a workers' compensation health care network established under Insurance Code Chapter 1305. This adoption also organizes the rules regarding medical billing and processing to clarify and streamline the process. This will enable system participants to easily access specific portions of the medical billing rules, which are logically organized and follow the billing and reimbursement process. The adopted rules minimize micro-management of the process by providing guidance and direction rather than specific, detailed instructions that required adherence. This will allow system participants more flexibility in developing their medical billing and bill review processes. In addition, the new rules rely on the statutorily required Medicare reimbursement structures, incorporate concepts from TDI managed care rules, and eliminate many of the duplicative Division instructions thus providing consistency and standardization for workers' compensation system benefits with other health care delivery systems.

No comments were received.

SUBCHAPTER A. GENERAL RULES FOR REQUIRED REPORTS

28 TAC §133.1, §133.2

The repeals are adopted under the Labor Code §§408.027, 408.0271, 402.00111 and 402.061. Section 408.027 provides that a carrier may request additional documentation to clarify a provider's charges at any time during the 45-day period. Section 408.0271 permits carriers to request refunds when health care services provided to an injured employee are determined by the carrier to be inappropriate. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602074
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: May 1, 2006
Proposal publication date: February 10, 2006
For further information, please call: (512) 804-4288

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SUBCHAPTER B. REQUIRED REPORTS

28 TAC §§133.100, 133.104 - 133.106

The repeals are adopted under the Labor Code §§408.027, 408.0271, 402.00111 and 402.061. Section 408.027 provides that a carrier may request additional documentation to clarify a provider's charges at any time during the 45-day period. Section 408.0271 permits carriers to request refunds when health care services provided to an injured employee are determined by the carrier to be inappropriate. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602075
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: May 1, 2006
Proposal publication date: February 10, 2006
For further information, please call: (512) 804-4288

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SUBCHAPTER D. DISPUTE AND AUDIT OF BILLS BY INSURANCE CARRIERS

28 TAC §§133.300 - 133.304

The repeals are adopted under the Labor Code §§408.027, 408.0271, 402.00111 and 402.061. Section 408.027 provides that a carrier may request additional documentation to clarify a provider's charges at any time during the 45-day period. Section 408.0271 permits carriers to request refunds when health care services provided to an injured employee are determined by the carrier to be inappropriate. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602076
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: May 1, 2006
Proposal publication date: February 10, 2006
For further information, please call: (512) 804-4288

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SUBCHAPTER E. COMPELLING PRODUCTION OF DOCUMENTS

28 TAC §§133.401 - 133.403

The repeals are adopted under the Labor Code §§408.027, 408.0271, 402.00111 and 402.061. Section 408.027 provides that a carrier may request additional documentation to clarify a provider's charges at any time during the 45-day period. Section 408.0271 permits carriers to request refunds when health care services provided to an injured employee are determined by the carrier to be inappropriate. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602077
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: May 1, 2006
Proposal publication date: February 10, 2006
For further information, please call: (512) 804-4288

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CHAPTER 133. MEDICAL BILLING AND PROCESSING

The Commissioner of the Division of Workers' Compensation, Texas Department of Insurance, adopts new §§133.1, 133.2, 133.3, 133.10, 133.20, 133.200, 133.210, 133.230, 133.240, 133.250, 133.260, 133.270, and 133.280 concerning medical billing and processing, including new medical billing timeframes. The new rules are adopted to implement, on a permanent basis, portions of House Bill (HB) 7, enacted during the 79th Legislature, Regular Session, effective September 1, 2005. The adopted rules permit compliance with statutory changes to the Labor Code §408.027 and new §408.0271, and also provide billing and processing direction for participants in a workers' compensation health care network established under Insurance Code Chapter 1305. These adopted rules do not apply to political subdivisions with contractual relationships under Labor Code §504.053(b)(2). The adopted rules will replace the emergency rules adopted by the Commissioner of Workers' Compensation on November 3, 2005, and published in the November 18, 2005 issue of the *Texas Register* (30 TexReg 7621), with an extension, as published in the March 10, 2006 issue of the *Texas Register* (31 TexReg 1539).

The adopted rules are designed to minimize micro-management of the system, utilize existing Medicare reimbursement structures, and incorporate concepts from Texas Department of Insurance (TDI) managed care rules for consistency and standardization. The adopted rules also accommodate eBill initiatives by identifying forms and processes compatible with both paper and electronic processes. Additionally, the Division has adopted an extensive reorganization of Chapter 133, in conjunction with

the revision of Chapter 134 published elsewhere in this issue of the *Texas Register*, to eliminate redundancies in existing rules and clarify billing and processing procedures. The new rules are adopted with changes to the proposed text as published in the February 10, 2006 issue of the *Texas Register* (31 TexReg 798). This reorganization includes the adopted repeal of 20 billing, processing and reimbursement rules in Chapters 133 and 134, published elsewhere in this issue of the *Texas Register*.

The new rules are necessary to conform with changes by HB 7 to Labor Code §§408.027 and 408.0271. The adopted rules provide the following: for reimbursement, a health care provider must submit a medical bill to the insurance carrier on or before the 95th day after the date of service; insurance carriers must pay, reduce, deny or determine to audit a health care provider's medical bill not later than the 45th day after receipt of the medical bill; an insurance carrier may request additional documentation necessary to clarify the health care provider's charges at any time during the 45-day review period and the health care provider must provide the requested documentation not later than the 15th day after the date of receipt of the insurance carrier's request; procedures and timeframes for audits performed by an insurance carrier; and procedures and timeframes for insurance carriers to request refunds from health care providers.

This adoption also organizes the rules regarding medical billing and processing to clarify and streamline the process. This will enable system participants to easily access specific portions of the medical billing rules, which are now logically organized following the billing and reimbursement process.

The adopted rules also minimize micro-management of the process by providing guidance and direction rather than specific, detailed instructions that require adherence. The new rules allow system participants more flexibility in developing their medical billing and bill review processes. In addition, the adoption relies on the statutorily required Medicare reimbursement structures, incorporates concepts from TDI managed care rules, and eliminates many of the previous duplicative Division instructions, thus providing consistency and standardization with other health care delivery systems. The adopted rules also establish standards for reconsideration of medical bills and refunds of overpayments to health care providers.

A few changes are made to the proposed sections as published. However, none of the changes introduce new subject matter or affect additional persons other than those subject to the proposal as originally published. Throughout the sections the Division makes editorial and grammatical changes for ease of reading and clarity as a result of public comment.

Adopted Subchapter A, §§133.1 - 133.3, provides general provisions for medical billing and processing, including applicability of the chapter, definitions, and communications between health care providers and insurance carriers. No changes have been made to these rules as proposed.

Adopted Subchapter B sets out the billing procedures for health care providers by addressing the billing format, and submission of the medical bill. As a result of public comment, §133.10(b) was changed from the rule as proposed to allow a period of transition for pharmacists and pharmacy processing agents to change from billing form DWC-66 to the current National Council for Prescription Drug Programs (NCPDP) Universal Claim Form (UCF). Section 133.20 (relating to Medical Bill Submission by Health Care Provider) subsection (e)(1) has been changed to reference Labor Code §415.005 (relating to Overcharging By Health Care Providers Prohibited; Administrative Violation) in addition to §413.011 (relating to Reimbursement Policies and Guidelines; Treatment Guidelines and Protocols).

Adopted Subchapter C addresses medical bill processing and audits by insurance carriers. Section 133.200 sets out the procedures an insurance carrier should follow upon receipt of a medical bill from a health care provider. Section 133.210 addresses medical documentation. Section 133.230 provides procedures when an audit is conducted. Section 133.240 addresses medical payments and denials. As a result of public comment, proposed subsection (b)(2) of this section, which prohibited retrospective review of medical necessity of health care provided in accordance with Division-adopted treatment guidelines, has been deleted. Because treatment guidelines have not yet been adopted, it is more appropriate to address the application of treatment guidelines when they are adopted. Therefore, subsection (b)(2) was deleted and this issue will be addressed in the Disability Management rules when a treatment guideline or guidelines are adopted. Proposed subsection (e), regarding an insurance carrier provision of explanation of benefits (EOB) to health care providers and injured employees, has been changed to reflect an insurance carrier is only required to send an EOB to the injured employee when a payment denial is based on lack of medical necessity, health care provided by a non-approved health care provider, or relatedness. As public comment pointed out, it is not necessary for injured employees to receive copies of all EOBs. Requiring that all EOBs be sent to the injured employee could cause confusion and adds unnecessary administrative costs. Therefore, the rule was changed to require that EOBs be sent to injured employees only when payment is denied for the listed reasons. This provision is consistent with previous Division rules. Subsection (f) has been changed to reflect that an insurance carrier is not required to document in a claim file the insurance carrier's fair and reasonable reimbursement methodology but rather the reimbursement should be in accordance with §134.1 (relating to Medical Reimbursement) which specifies how the insurance carrier should maintain such documentation. As a result of public comment, the Division determined documentation requirements reflected in §134.1 were sufficient. Subsections (h) and (i) have been changed to delete the references to the injured employee. The injured employee's reconsideration and medical dispute resolution processes are addressed by adopted §133.270 (relating to Injured Employee Reimbursement for Health Care Paid). Therefore, the references to injured employees in subsection (h) and (i) are not necessary. Subsection (j) has been changed to replace a reference made to subsection (e) with a reference to §133.250 (relating to Reconsideration for Payment of Medical Bills). Section 133.250 describes the procedures for reconsideration of payment of medical bills. Section 133.260 addresses refunds. As a result of public comment, subsection (a) has been changed from proposal to delete the requirement that insurance carriers shall request a refund from a health care provider within 30 days from taking final action on a medical bill. Adopted subsection (a) requires an insurance carrier to request a refund within 240 days from the date of service or 30 days from completion of an audit performed in accordance with §133.230 (relating to Insurance Carrier Audit of a Medical Bill), whichever is later, when the insurance carrier determines that inappropriate health care was previously reimbursed, or when an overpayment was made for health care provided. This will allow the insurance carrier additional time to review services paid within 45 days, but still takes into consideration medical dispute resolution timeframes. Section 133.270 addresses when an injured employee may request reimburse-

ment for health care for which the injured employee has paid. As a result of public comment, proposed subsection (c) has been changed from proposal. Adopted subsection (c) reflects that insurance carrier reimbursement to the injured employee shall be in accordance with §134.1 (relating to Medical Reimbursement). This change was made for consistency with changes made to §133.280 as a result of public comment. Proposed subsection (f) has also been changed to indicate that an injured employee may, but is not required to submit a reconsideration request to the insurance carrier if reimbursement has been denied. An injured employee's reconsideration request is not required to be submitted in accordance with §134.250 (relating to Reconsideration for Payment of Medical Bills). Public comment indicated significant confusion regarding the injured employee's inclusion in §133.250 which focuses on reconsideration generated by a health care provider. The new language allows an injured employee and an insurance carrier to engage in a less structured non-mandatory reconsideration process if they choose, prior to an injured employee requesting medical dispute resolution in accordance §133.305. Section 133.280 describes the procedures for an employer to follow for reimbursement of health care paid. As a result of public comment, proposed subsection (b) has been changed to reflect that insurance carrier reimbursement shall be in accordance with §134.1. Adopted new subsection (c) indicates the employer may seek reimbursement for any payment made above the applicable Division fee guideline or contract amount from the health care provider who received the overpayment.

Insurance Code Chapter 1305 establishes that a medical bill for services provided through a workers' compensation health care network shall be paid, reduced, denied or audited in accordance with Labor Code §408.027. The adopted rules clarify that the medical billing and bill reviewing processes, including coding and reporting requirements, apply to services provided to an injured employee subject to a workers' compensation health care network as established under Insurance Code Chapter 1305, with any exceptions noted.

Section 133.1. Comment: A commenter recommends a language change to specifically note in the rule that Chapter 133 does not apply to a political subdivision with contractual relationships under §504.053(b)(2) of the Labor Code. Agency Response: The Division declines to make this change as Labor Code §504.053 already addresses this situation. The Division attempts to avoid unnecessary repetition of statutory language; however, this clarification is added elsewhere in this adoption preamble.

Section 133.1. Comment: A commenter recommends language to clarify the applicability to workers' compensation health care networks. Agency Response: The Division declines to make this change. The rule clearly lays out applicability and specifically identifies the portions of Chapter 133 that do not apply to health care services provided to injured employees subject to workers' compensation health care networks established under Insurance Code Chapter 1305.

Section 133.2. Comment: A commenter recommends defining the term "reasonable health care." Agency Response: The Division declines to extend the definition beyond the statute. The Labor Code definition for "health care reasonably required" provides adequate clarity to all interested parties, and is clear and understandable.

Section 133.2. Comment: Commenters recommend the terms "audit," "incomplete bill" and "corrected bill" be defined, as this will provide greater clarity regarding the use of these terms throughout the chapter. Agency Response: The Division declines to make the requested changes. The terms are commonly used and well understood in the medical billing and reimbursement process and definition is not necessary.

Section 133.2(2). Comment: Commenters recommend alternative language to include that a medical bill is considered received when it meets the requirements of a complete medical bill. Agency Response: The Division declines to make the change. The definition of a complete medical bill is consistent with the definitions included in Subchapter F of this chapter (relating to Electronic Medical Billing, Reimbursement, and Documentation). The suggested language incorrectly implies that the paper billing process and the electronic billing process are analogous. Receipt of a paper medical bill does not necessarily indicate completeness.

Section 133.2(3). Comment: Commenters suggest that the prudent layperson standard be added to the definition of emergency to be consistent with other managed care products. Agency Response: The Division acknowledges that other managed care systems utilize the "the prudent layperson" concept. However, the definition included in the rule mirrors the statutory language at Insurance Code §1305.004(13) and (15). When appropriate, as with these rules, it is the Division's intent to remain parallel with workers' compensation network rules to provide consistency in the workers' compensation system and leaving the definition as it is accomplishes that purpose.

Section 133.2(4). Comment: A commenter recommends the definition of final action be amended to prevent insurance carriers from circumventing the 45-day deadline by denying just one charge and leaving the others pending. The commenter also recommends the definition repeat language in §134.1 in addition to referencing §134.1. The commenter recommends the definition be amended to include denying "payment" rather than "charge" on a medical bill for final action. Agency Response: The Division declines to make these changes. Section 133.210(c) prohibits insurance carriers from separating charges on a medical bill and a denial of a charge on a medical bill constitutes final action on the entire bill. Additionally, the Division declines to repeat language included by reference to §134.1 since it is unnecessarily redundant.

Section 133.2(5). Comment: Commenters express concern that subsection §133.2(5) extends authority to all health care provider agents as the statute does for pharmacy processing agents in Labor Code §413.0111 and as reflected in §133.2(7). Agency Response: The Division clarifies that the definition of health care provider agents is intended to address billing practices already in place in the workers' compensation system. The definition does not extend any new authority to health care provider agents but clarifies that they must act within the confines of the Labor Code and Division rules. Pharmacy processing agents are a specific subset of health care provider agents and as such have unique authority and responsibilities through §413.0111 and are separately addressed in §133.2(7).

Section 133.2(8). Comment: A commenter recommends the definition of retrospective review be consistent with the definition in Insurance Code §1305.352. Agency Response: The definition is consistent with existing definitions of retrospective review, appearing in 28 TAC §19.2003. The Division also notes that Insurance Code §1305.352 actually addresses standards for retrospective review rather than a definition. The standards set out in this provision of the Insurance Code are accepted standards

and system participants are expected to comply with those standards.

Section 133.3. Comment: A commenter suggests additional language to cite §402.021 and mandate communication and interaction between health care providers, insurance carriers, and case managers. Agency Response: The Division declines to make the requested changes to further regulate the communication process between health care providers and insurance carriers. The Labor Code and Division rules already outline the interaction between system participants and anticipates a good faith effort from all system participants to actively communicate to foster appropriate return to work efforts.

Section 133.3. Comment: A commenter expressed support for subsection 133.3. Agency Response: The Division acknowledges and appreciates the support.

Section 133.3(b) and (c). Comment: A commenter recommends communication by mail or personal delivery be certified and that "all" communication related to medical bill processing be documented. Agency Response: The Division acknowledges the commenter's suggestion but feels the proposed language is more aligned with the Division's paperless communication initiative. Further, such a requirement is likely to impose unnecessary micro-management and potentially increase costs to the system. If system participants want to utilize certified mail and document all communication on medical bill processing, they are able to do so.

Section 133.10. Comment: A commenter recommends the effective date of medical billing rules be postponed until all insurance carriers are set up to receive electronic claims from pharmacists that are non-network or do not use third party billing agents. The commenter asserts Texas pharmacists must continue to have the option of using the paper claim forms currently required. The commenter believes these rules need to address both electronic and paper billing procedures. The commenter states pharmacies do not use, and should not be required to use, a third party billing agent to bill workers' compensation claims. Additionally, the commenter believes some pharmacies will be waived from the electronic billing requirements and must have a means to file workers' compensation claims. Agency Response: The Division declines to make this change. The effective dates of Subchapter F of this chapter (relating to Electronic Medical Billing, Reimbursement, and Documentation) will dictate the timeframes for implementation of the electronic medical billing process. However, these rules do apply to both electronic and paper medical billing. Section 133.10 directs electronic formats be in accordance with Subchapter F of this chapter. Until the electronic billing process is implemented, the National Council for Prescription Drug Programs (NCPDP) Universal Claim Form (UCF) will be the standard paper form for pharmacy billing beginning January 1, 2007. This supports the standardization concept included in §413.011 and assists in the transition to electronic billing. Additionally, there are no requirements that pharmacies use third party billing agents to process workers' compensation claims.

Section 133.10(b). Comment: A commenter recommended subsection §133.10(b) be amended to allow pharmacy bills be submitted on either the National Council for Prescription Drug Programs (NCPDP) form or the Division form DWC-66. Agency Response: The Division declines to make this change requesting a transition period that would allow use of both forms. The rule has been amended to require the use of the DWC-66 until December 31, 2006 and postpones the implementation of the NCPDP form until January 1, 2007. This change will allow adequate time for health care providers and insurance carriers to integrate these forms into their processes. To implement the concepts of §413.011 regarding health care reimbursement policies that reflect standardized reimbursement structures in other health care delivery systems, the Division has adopted the forms commonly used for medical billing including the NCPDP form. Continued use of a Division designed form hinders the transition to standardization with the other health care delivery systems. To allow bills to be submitted on either form would require insurance carriers to maintain dual processing systems and add to bill processing costs. In addition, for clarification purposes, the Division has added language to subsection (b) regarding pharmacy processing agents.

Section 133.20. Comment: A commenter recommends new subsections be added to specifically state that rules pertaining to a health care provider or an insurance carrier also pertain to their agent and are limited to the services the agent is performing on behalf of the health care provider or insurance carrier. Agency Response: The Division declines to further address the rights and responsibilities of health care provider and insurance carrier agents in these rules. The roles of health care provider agents and insurance carrier agents as they relate to the billing and reimbursement process are adequately addressed in these rules.

Section 133.20(e)(1). Comment: A commenter recommends the deletion of the terms "usual and customary" as this is not consistent with and is not defined by Labor Code §413.011. In addition, the commenter believes the deletion would help conform this rule to pharmacy reimbursement as established by Labor Code §408.028. The commenter asserts the subsection as written also does not conform to §134.1. Agency Response: The Division declines to make this change. The adopted rule is consistent with the Medicare payment policies as required in §413.011 and with §134.1 which required health care providers to bill in accordance with the fee guidelines established by the Division. The adopted rule is also consistent with §415.005, which provides that it is a violation for a health care provider to charge an insurance carrier an amount greater than that normally charged for similar treatment to a payor outside the workers' compensation system, except for mandated or negotiated charges. Section 408.028 does not address requirements for submitting bills.

Section 133.20(e)(1). Comment: Commenters recommended subsection §133.20(e)(1) be amended to repeat language included in Labor Code §415.005(a), as well as a reference to §415.005. Agency Response: The Division agrees with the recommendation to add the statutory reference to §415.005 and believes the reference is sufficient to further clarify the health care providers' billing responsibilities.

Section 133.20(e)(1). Comment: A commenter recommends this subsection be amended to allow health care providers to bill more than their usual and customary charge when the reimbursement in the applicable fee guideline is greater than the usual and customary charge. Agency Response: The Division declines to make the requested change. Such a change would be contrary to the intent of Labor Code §415.005(a), which states a health care provider commits a violation if the person charges an insurance carrier an amount greater than that normally charged for similar treatment to a payor outside the workers' compensation system, except for mandated or negotiated charges.

Section 133.20(i). Comment: A commenter requested clarification regarding how to indicate on the claim form that additional documentation is being submitted with the medical bill. Agency Response: The Division declines to make this change. Directions such as this are generally included in the Division's instructions on how to fill out medical billing forms and not by rule. Any necessary changes will be included in the next revision of those billing instructions.

Section 133.20(j). Comment: A commenter states the offer by the employer to pay medical bills should be required to be in writing and the employer should also waive any protections they might have. The commenter opines this subsection could be construed as price fixing. The commenter states that if a health care provider must waive the provisions of prompt pay when billing an employer then adherence to a fee schedule should also be waived. Agency Response: The Division acknowledges the commenter's concerns but feels the suggestion would be unduly restrictive. Billing the employer, instead of an insurance carrier, for medical services is an agreement reached between the health care provider and the employer. It is unclear what protection or benefits an employer derives from this arrangement, whereas, it may be a benefit to the health care provider. Generally, the Division does not dictate contractual arrangements. However, §133.280 establishes that the insurance carrier will reimburse the employer in accordance with §134.1 in order to preserve medical cost control.

Section 133.20(j). Comment: A commenter recommends subsection §133.20(j) be amended to except health care providers from waiving their rights when billing the employer if the employer refuses to provide their insurance carrier information. Agency Response: The Division declines to make this change. The Labor Code at §415.008 prohibits a person from knowingly or intentionally misrepresenting or concealing a material fact to obtain or deny a payment of a worker's compensation benefit. If this does occur, a health care provider should report this to the Division.

Section 133.20(l). Comment: A commenter expresses concern regarding the adequacy of 28 TAC §134.504 but will address this issue in future pharmacy reimbursement rules. Agency Response: The Division agrees that questions related to pharmacy reimbursement amounts should be addressed in rulemaking specifically related to pharmacy reimbursement policies.

Section 133.200. Comment: A commenter recommends the rule include a provision that requires insurance carriers to notify health care providers within five working days of the insurance carrier's receipt of a medical bill. Agency Response: The Division declines to make the change since this would add another administrative requirement to the billing process. The anticipated electronic billing process includes an electronic acknowledgement. The adopted rules include various checkpoints and time requirements that allow health care providers to follow the progress of a medical bill submission. Health care providers may always submit paper billings via certified mail or hand delivery if they choose.

Section 133.200(a)(1). Comment: A commenter recommends the subsection be amended to state a medical bill may also be returned if it belongs to another insurance carrier. Agency Response: The Division declines to make the requested change. Such micro-management is contrary to the intent of these rules. However, the Division acknowledges that the insurance carrier should follow good business practices in communicating with health care providers and return a medical bill that is not related to one of their policies.

Section 133.200(a)(2)(B). Comment: Commenters recommend subsection (a)(2)(B) be amended to allow the insurance carrier to return a bill as incomplete if the required documentation is not submitted with the medical bill. Agency Response: The Division declines to make the change. Section 133.2, regarding Definitions, defines a "complete medical bill" and §133.210 establishes documentation requirements. The health care provider is required to submit a complete medical bill and should include required documentation. If a health care provider fails to include required documentation, insurance carrier medical billing processes allow insurance carriers to request any necessary documentation or deny medical bills for lack of documentation.

Section 133.200(d). Comment: Commenters recommend subsection §133.200(d) be applied to returned incomplete bills only. Commenters stated some system limits may impact the number of line items that may be entered on a single bill. Agency Response: The Division declines to make this change. An insurance carrier combining or separating bills is contrary to the concept of adopted §133.240, regarding Medical Payments and Denials, which directs an insurance carrier to not change a health care provider's bill. In addition, this provision enhances the proper application of payment policies relating to coding, billing, and reporting. Processing health care provider bills differently than submitted may result in unintended consequences, for example the reconsideration process may directly be affected by this practice.

Section 133.230(a). Comment: Commenters recommend deletion of language in subsection §133.230(a) that allows audits only prior to final action because this will prevent insurance carriers from performing audits associated with fraud investigations and for reasons other than to determine medical necessity. Agency Response: The Division declines to make the recommended change. Labor Code §408.027 requires audits to be processed within 160 days of receipt of the medical bill. Section 408.027 establishes that insurance carriers pay, reduce, or deny a medical bill within 45 days of receipt of a complete medical bill. Insurance carriers additionally have the opportunity to audit medical bills prior to taking final action. Once an insurance carrier takes final action there should be no need to conduct an additional bill review and audit. Additionally, a health care provider is entitled to closure on a medical bill after the insurance carrier has had an opportunity to audit the medical bill and taken final action on the medical bill. These provisions deal directly with medical bill processing and should not be construed to limit activities not directly related to bills on which the insurance carrier is taking final action. Investigations of fraud are generally outside the scope of a standard bill review and audit conducted to determine the accuracy of a medical bill. Investigations of fraud should continue to be conducted as usual in coordination with the agency's fraud, compliance and regulation activities.

Section 133.230(d). Comment: Commenters recommend an amendment to §133.230(d) to incorporate a requirement that the health care provider provide any documentation necessary for the insurance carrier to complete the audit rather than documentation relating to the billings subject to audit. Agency Response: The Division declines to add the recommended language. Adopted §133.230(d) already requires the health care provider to provide any documentation related to the billing(s) subject to audit. This requirement should not be construed that

it allows insurance carriers to pursue information not related to the billings subject to audit.

Section 133.240. Comment: A commenter recommends adding peer review requirements to the billing and reimbursement rules. Agency Response: The Division declines to address peer review requirements in these rules. Peer review standards and sanctions are addressed in other Division rules.

Section 133.240. Comment: Commenters recommend the term "final action" as it is used in this section be defined. Agency Response: The Division declines to add a second definition. A definition of final action is included in §133.2(4) and is applicable throughout Chapter 133.

Section 133.240(a). Comment: A commenter requested clarification that bill review does not extend the insurance carriers responsibility to take final action within 45 days of the receipt of the medical bill. Agency Response: The insurance carrier may request documentation at any time prior to the 45th day after receipt of a complete medical bill. The insurance carrier must take final action or determine to audit the medical bill by the 45th day after the receipt of a complete medical bill. The 45-day timeframe to make or deny payment is not extended by a request for documentation. This is clearly stated in §133.240(a).

Section 133.240(a). Comment: A commenter states concern regarding the insurance carrier's 45-day timeframe to process a medical bill. Agency Response: The 45-day timeframe to pay, reduce, deny or determine to audit is a statutory requirement of §408.027.

Section 133.240(b). Comment: A commenter agrees with the use of treatment guidelines as a standard of reasonable health care and states this would improve the system. Agency Response: The Division appreciates the comment.

Section 133.240(b)(2). Comment: Commenters recommended deletion of §133.240(b)(2) as the Division does not have the statutory authority to adopt this provision, which is contrary to HB 7 goals. A commenter questions whether services may be disputed if an insurance carrier or utilization review agent disagrees with the health care provider regarding the provision of care in accordance with Division-adopted treatment guidelines. Agency Response: Subsection (b)(2) has been deleted because it is more appropriate to address the application of the treatment guidelines with the adoption of that guideline. The application of this concept is an integral portion of the Disability Management rules, which will likely include specific instructions for the use of treatment and return to work guidelines and the treatment planning process. Likewise, the Division will address statutory authority necessary to adopt treatment planning and other disability management rules when those rules are proposed and adopted.

Section 133.240(b)(2). Comment: A commenter supports this subsection but recommends additional language to specify an insurance carrier shall not deny payment on a medical bill based solely on the failure of a health care provider to adhere to Division-adopted treatment guidelines. Agency Response: The Division appreciates the comment. However, subsection (b)(2) has been deleted. The application and use of treatment guidelines will be addressed in future disability management rule making efforts.

Section 133.240(c). Comment: A commenter expresses concern regarding subsection (c) as this mandate may result in an insurance carrier being forced to pay a claim, regardless of whether it was accurately submitted, thus increasing health care costs. Agency Response: The Division clarifies the adopted rules allow insurance carriers to deny payment, audit, or request additional information to clarify a medical bill prior to issuing a payment. There is no indication that these requirements would result in incorrect payments or denials or increase health care costs.

Section 133.240(c). Comment: A commenter recommends subsection (c) be amended to prohibit an insurance carrier from changing a billing code with the intent to deny payment. Agency Response: The Division declines to make the requested change. The most current Medicare payment policies, including Correct Coding Initiatives (CCI), are required to be used in the Texas Workers' Compensation system by §413.011; therefore, no additional direction is necessary. Adding the language suggested by the commenter would make the provision difficult to enforce.

Section 133.240(d). Comment: Commenters recommended language change to §133.240(d) to allow insurance carriers to request documentation at any time. Agency Response: The Division declines to add the recommended language as Labor Code §408.027 specifies a 45-day timeframe.

Section 133.240(d). Comment: A commenter states that this requirement will force insurance carriers to deny bills because of an inability to request and receive clarification and documentation from the health care provider. Agency Response: The timeframes to request additional documentation are set statutorily. Insurance carriers must pay, reduce, deny or determine to audit not later that the 45th after receipt of the health care provider's claim per Labor Code §408.027.

Section 133.240(d). Comment: A commenter recommends language to limit the insurance carrier to a one-time request for documentation. Agency Response: The Division declines to make this change. The Labor Code at §408.027 specifically allows insurance carriers to request additional documentation any time during the 45 days after the receipt of a medical bill. The statute does not put a limit on the number of requests that can be made within that 45-day period.

Section 133.240(e). Comment: Commenters recommend that in subsection §133.240(e) the injured employee be removed from the requirement to receive an explanation of benefits (EOB). A commenter states that it is only when the payment is denied on the basis of compensability, liability, or coverage issues that notice to the injured employee should be provided and this is already required by subsection (g). Another commenter states that this requirement will result in confusion and needlessly increases administrative costs. A commenter recommended the injured employee receive an explanation of benefits when a medical bill is being denied for relatedness. Agency Response: The Division agrees that sending copies of all EOBs to the injured employee could confuse the injured employee. Since the health care provider has access to the medical dispute process there is no need for the injured employee to receive notification of all denials and no need for the injured employee to receive notification of paid medical bills. Requiring these EOBs to be sent to injured employees would have increased administrative costs with minimal quantifiable benefit to the injured employee. Consequently, §133.240 has been changed to require an EOB be sent to the injured employee only when payment is denied for a series of reasons related to medical necessity, approved doctors, or compensability/relatedness. The adopted rule closely reflects the requirements of the previous medical billing and reimbursement rules.

Section 133.240(f). Comment: Commenters recommend subsection §133.240(f) be amended so that the method the insurance carrier uses to calculate the payment be required to be documented in a reproducible format rather than in the claim file. Agency Response: The Division agrees to delete the requirement to document the reimbursement methodology in the claim file. The rule has been changed to reference §134.1, regarding Medical Reimbursement, which requires that reimbursement methodologies be documented.

Section 133.240(g). Comment: Commenters recommended deletion of subsection §133.240(g). Agency Response: The Division declines to make the recommended change. If billed health care services are denied due to compensability or extent of injury, the insurance carrier should have filed or concurrently file the applicable notice required by Labor Code §409.021. This requirement was contained in the previous medical billing rules and is not new to the workers' compensation system.

Section 133.240(g). Comment: A commenter offers alternative language related to an insurance carrier's rationale for denials in order to file notices as required by Labor Code §409.021, and §§124.2 and 124.3. Agency Response: The Division declines to make this change. The adopted language is consistent with the previous rule, which has not been confusing to system participants in the past.

Section 133.240(h) and (i). Comment: Commenters state that injured employees should not be allowed to request medical dispute resolution over a fee dispute between the health care provider and the insurance carrier. Agency Response: The Division agrees that an injured employee should not be inserted into fee disputes between a health care provider and the insurance carrier. The rule has been changed to clarify that a health care provider may file for reconsideration and proceed to medical dispute resolution if dissatisfied with the insurance carrier's final action. The Division further clarifies that injured employee reimbursement processes are addressed by §133.270, regarding Injured Employee Reimbursement for Health Care Paid.

Section 133.240(j). Comment: A commenter recommends that subsection §133.240(j) be amended to specifically state the insurance carrier is not required to respond to a resubmission in violation of this subsection. Agency Response: The Division declines to make this change. The Division clarifies that insurance carriers are not required to review medical bills resubmitted after final action has been taken.

Section 133.240(k). Comment: A commenter recommends language be amended in subsection §133.240(k) to delete the requirement that interest payments be paid at the same time as the medical bill payment. Agency Response: The Division declines to make the recommended change. The Labor Code at §408.027 establishes the timeframes for an insurance carrier to reimburse health care providers for a medical bill. Additionally, §413.019 of the Labor Code establishes the timeframe when interest accrues. Health care providers are entitled to know when they will be reimbursed for interest payments. The interest is due at the time of the medical payment and not at some future date. Further, for consistency in the data collection and monitoring processes, interest payments are required to be identified and processed on a bill-by-bill basis.

Section 133.240(k). Comment: A commenter recommends language to allow insurance carriers and health care providers to negotiate, and contract for additional penalties for untimely payment of medical bills. Agency Response: The Division declines to add language that would encourage an informal penalties structure or additional punitive payments outside those that are required by the Labor Code.

Section 133.240(k). Comment: A commenter states concern regarding the provision that interest begins to accumulate on or after the 60th day rather than after the 45th day from the date the insurance carrier originally received the complete medical bill. Agency Response: The Division declines to make this change because the timeframes for calculating interest are established by statute in Labor Code §413.019. The adopted language is consistent with the Labor Code and other Division rules related to the calculation and payment of interest.

Section 133.240(l). Comment: A commenter recommends subsection 133.240(l) be amended to allow all health care provider agents to remit a net amount to the health care provider that is less than the insurance carrier's full payment to the health care provider's agent; this would be parallel to subsection 133.240(m) regarding pharmacy processing agents. Agency Response: The Division declines to make the suggested change. The suggested change would extend to all health care agents authority consistent with pharmacy provider agents. Labor Code §413.0111 is applicable only to pharmacy processing agents and specifically requires rules adopted for reimbursement of prescription medical services to allow pharmacies to use agents as assignees to process claims under contractual terms. There is not a similar requirement for other health care providers in the statute.

Section 133.240(m). Comment: A commenter recommends this subsection be deleted, as it is confusing and unnecessary. Agency Response: The Division declines to make this change. This provision is necessary to clarify that reimbursement procedures and requirements for pharmacy processing agents, as noted in §413.0111 of the Labor Code, differ from those applicable to all other health care provider agents.

Section 133.250. Comment: Commenter states that proposed §133.250 does not address injured employees with respect to requests for reconsiderations. Agency Response: The Division clarifies §133.250 is applicable to health care providers only and §133.270 regarding Injured Employee Reimbursement for Health Care Paid addresses the injured employee's medical billing processes.

Section 133.250(b). Comment: Commenters recommend the timeframe in subsection 133.250(b) be changed from eleven months to six months from date of service, as the proposed timeframe seems unnecessarily long. Agency Response: The Division declines to make the requested change. The timeframe for reconsideration is set at eleven months from the date of service in order to allow health care providers as much opportunity as possible to access the medical dispute resolution since that process requires a dispute to be filed within one year of the date of service. Previously, the reconsideration process did not include any time restrictions and consequently was inconsistent with the requirements of the medical dispute resolution process. Additionally, all health care provider medical bills must go through the reconsideration process prior to filing a medical dispute. If the reconsideration timeframe was less than eleven months, it would effectively change the timeframes for the medical dispute resolution process to coincide with the reconsideration process.

Section 133.250(b). Comment: A commenter recommends the health care provider's timeframe for requesting reconsideration be extended as subsections (e), (f) and (g) create additional time

periods for the reconsideration process that may extend the entire process past the one-year deadline to request medical dispute resolution. Agency Response: The Division declines to make any changes to the timeframes associated with the reconsideration process. Timeframes have been included in the reconsideration process in order to speed the resolution of accounts and to coordinate the reconsideration and medical dispute resolution processes.

Section 133.250(c)(1). Comment: A commenter states subsection 133.250(c)(1) is in direct conflict with subsection (g). Agency Response: The Division declines to make the requested change. The two subsections are not in conflict because subsection (c) pertains to the original submission of a reconsideration request by the health care provider and subsection (g) provides direction for resubmission of the reconsideration request by the health care provider if an insurance carrier response has not been received.

Section 133.250(d). Comment: A commenter recommends a stamped "REQUEST FOR RECONSIDERATION" notation for all reconsideration requests be reinstated as in current §133.304. Agency Response: The Division declines to make the requested change because such an administrative requirement would impose unnecessary regulatory requirements and potentially add costs to the system. However, system participants may utilize this business practice if they wish.

Section 133.250(d). Comment: A commenter recommends language change to limit documentation requirements to those instances in which the insurance carrier has taken final action. Agency Response: The Division declines to make the requested change since documentation requirements apply to all phases of the billing and reimbursement process and cannot be limited to a specific type of medical bill or situation pursuant to Labor Code §408.027.

Section 133.250(d)(1). Comment: Commenters recommend subsection 133.250(d)(1) be amended to require modifiers and number of units in addition to the original billing codes. Agency Response: The Division declines to make the requested change. A reconsideration request may include corrections relating to modifiers and/or number of units. For this reason, a request for reconsideration may include changes in the number of units or modifiers from that in the original bill for proper processing and payment of the bill.

Section 133.250(d)(2). Comment: Commenters recommend subsection 133.250(d)(2) should require the original explanation of benefits always be submitted. Agency Response: The Division declines to make this change. A health care provider may not always have received an explanation of benefits from the insurance carrier as the rule allows a reconsideration request to be submitted if a health care provider has not received notification by the insurance carrier of final action on a medical bill.

Section 133.250(e). Comment: A commenter recommends the seven day timeframe for an insurance carrier to review a reconsideration request for completeness be extended to 30 days. The commenter infers that the rule requires seven days to process a reconsideration request. Agency Response: The Division declines to make the change. The seven day timeframe is established for an insurance carrier to determine if a reconsideration request is submitted according to rule requirements. Subsection (f) establishes that the insurance carrier has 21 days to actually process a complete reconsideration request and take final action.

Section 133.250(f). Comment: A commenter recommends the timeframe in subsection 133.250(f) be changed from 21 days to 21 business days to provide adequate time. Agency Response: The Division declines to make the suggested change. The use of days rather than business days is consistent with the other Division rules and provides adequate time for the insurance carrier to take action on a request for reconsideration.

Section 133.250(g). Comment: A commenter believes subsection §133.250(g) is in conflict with subsection §133.240(j) and requests clarification. Agency Response: The Division clarifies subsection §133.240(j) pertains to the original submission of medical bills for payment and the timeframe reflected in §133.250(g) pertains to the submission of medical bills for reconsideration of payment. Therefore, they are not in conflict.

Section 133.250(g). Comment: A commenter recommends clarification of subsection 133.250(g) as the health care provider should only have one opportunity for reconsideration before going to medical dispute resolution and this subsection seems to state otherwise. Agency Response: The Division clarifies that subsection §133.250(g) provides direction for resubmission of the reconsideration request by the health care provider only if an insurance carrier response is not received within 26 days.

Section 133.260. Comment: A commenter recommends a language change to require the insurance carrier, not the health care provider, to request medical dispute resolution in the event of a refund request. Agency Response: The Division declines to make this change. The Labor Code at §408.0271 requires the health care provider to reimburse the insurance carrier for payments received by the health care provider for inappropriate charges not later than the 45th day after the date of the insurance carrier's notice. The insurance carrier does not have an incentive to file medical dispute resolution if there is a disagreement because they have already received the refund.

Section 133.260(a). Comment: Commenters disagree with the insurance carrier 30-day time limit for requesting refunds. Other commenters recommended deletion of the 30-day timeframe in subsection §133.260(a). Agency Response: The Division agrees to change this provision, however, declines to remove all timeframes for requesting a refund. Section 408.0271 requires the health care provider to submit a request for medical dispute resolution if the health care provider disagrees with the insurance carrier's request for refund. Further, §133.307 (relating to Medical Dispute Resolution of a Medical Fee Dispute) establishes that requests for medical dispute resolution must be filed no later than one year after the date of service. Because of these requirements, the medical dispute timeframes must be considered in establishing an insurance carrier refund timeframe. Consequently, the timeframe has been changed to 240 days from the date of service or 30 days from completion of an audit performed in accordance with §133.230 (relating to Insurance Carrier Audit of a Medical Bill), whichever is later. The filing requirements established in the medical billing and reimbursement process were taken into consideration in establishing the 240 day and 30 day post audit timeframes. This will allow the insurance carrier additional time to review services paid within 45 days after receipt of a complete medical bill but still takes into consideration medical dispute resolution timeframes. The Division clarifies that in developing these timeframes the health care provider's appeal was considered equivalent to a reconsideration request.

Section 133.260(a). Comment: A commenter supports this subsection but recommends additional language to state that an in-

surance carrier waives any claim to an overpayment after the 30 days has expired. Agency Response: The Division clarifies the timeframe in this provision has been changed. However, the Division declines to make the requested change because the recommended language is unnecessary. The timeframes established in the subsection limits requests for refunds. In addition, §133.260(f) requires the health care provider to submit a refund to the insurance carrier whenever the overpayment is identified by the health care provider even though the insurance carrier has not requested a refund.

Section 133.260(g). Comment: Commenters recommend subsection 133.260(g) be amended to clarify the health care provider shall include a copy of the insurance carrier's original request for refund if requested and always provide the original explanation of benefits containing the overpayment. Agency Response: The Division declines to make this change. The Division clarifies a copy of the original explanation of benefits containing the overpayment may not be available to the health care provider, especially if the health care provider reimburses the insurance carrier a refund in accordance with subsection (f). The section requires a detailed explanation itemizing the refund and should identify all necessary information, including the name of the health care providers who billed and rendered the services and the injured employee. In addition, the detailed explanation is required to specify the total dollar amount being refunded and itemized by dollar amount, line item, date of service, and the amount of interest paid, if any, and the number of days on which interest was calculated.

Section 133.270. Comment: Commenters recommend the rule be amended to include a 95-day timeframe for injured employees to submit a request for reimbursement to the insurance carrier. Another recommended a 12-month timeframe. Agency Response: The Division declines to specify a timeframe for an injured employee to submit a request for reimbursement. The timeframe for a health care provider to submit a medical bill to the insurance carrier is specifically set at 95 days from the date of service by Labor Code §408.027. The Labor Code does not extend this limitation to injured employees seeking reimbursement for medical expenses. Consequently, no provision has been included to limit an injured employee's time to attempt to recover out-of-pocket medical expenses. This is extremely important due to the relative infrequency of injured employees seeking reimbursement for medical expenses from the insurance carrier. The injured employee may need an extended period of time to understand the process and to submit a request for reimbursement. Since injured employees have limited responsibility to pay medical expenses in the Texas Workers' Compensation System, it is appropriate that injured employees not be limited in their opportunity to recover out-of-pocket medical expenses.

Section 133.270. Comment: A commenter recommends injured employees be required, and not just allowed, to seek reimbursement for overpayments from health care providers. Agency Response: The Division declines to require the injured employee to seek reimbursement for overpayments. Injured employees are fully capable of making decisions concerning overpayments without Division intervention.

Section 133.270(d). Comment: A commenter recommends subsection 133.270(d) be amended to include a 95-day timeframe for injured employees to submit a request to health care provider for overpayment. Agency Response: The Division declines to specify a timeframe for an injured employee. The timeframe for a health care provider to submit a medical bill to the insurance carrier is specifically set at 95 days from the date of service by Labor Code §408.027. The Labor Code does not extend this limitation to injured employees seeking reimbursement for medical expenses. Consequently, no provision has been included to limit an injured employee's time to attempt to recover out-of-pocket medical expenses. This is extremely important due to the relative infrequency of injured employees seeking reimbursement for medical expenses from the insurance carrier. The injured employee may need an extended period of time to understand the process and to submit a request for reimbursement. Since injured employees have limited responsibility to pay medical expenses in the Texas Workers' Compensation System, it is appropriate that injured employees not be limited in their opportunity to recover out-of-pocket medical expenses.

Section 133.270(d). Comment: A commenter recommends the subsection be amended to require the insurance carrier, rather than the injured employee, to obtain overpayments from the health care provider. Agency Response: The Division declines to make this change. The transaction originally transpired between the injured employee and the health care provider. If an individual pays for health care services and is later determined to have overpaid based on his or her insurance coverage the appropriate result is that the individual seek refund of the overpayment from the health care provider. Additionally, the injured employee is only required to submit to the insurance carrier a request that includes documentation or evidence (such as itemized receipts) of the amount the injured employee paid the health care provider. This limited information may hinder an insurance carrier from properly requesting a refund from a health care provider and it is redundant and unnecessary for insurance carriers to be involved in the process.

Section 133.270(f). Comment: A commenter identifies a potential inconsistency between §§133.240, 133.250, and 133.270. Agency Response: The Division agrees clarification was necessary and §§133.240, 133.250, and 133.270 have been changed for improved rule coordination. References to the injured employee have been removed from §133.240 and a reference to §133.250 has been removed from §133.270. This clarifies that injured employee reimbursement processes are addressed by §133.270.

Section 133.280(a). Comment: Commenters recommend the rule be amended to include a 95-day timeframe for employers to submit a request for reimbursement. Agency Response: The Division declines to restrict the time period for employers to submit a request for reimbursement. The Division believes that in this instance employers and insurance carriers are best suited to determine the parameters for reimbursement timeframes.

Section 133.280(b). Comment: Commenters recommended language change to 133.280(b) to also reflect contract amount in addition to Division fee guideline amount. Commenters also recommended allowing the employer reimbursement for overpayment from the health care provider consistent with 133.270(d). Agency Response: The Division agrees with the recommended language change. Subsection (b) has been amended to direct reimbursement to the employer be in accordance with §134.1 which specifies medical reimbursement, and incorporates the contract amount as well as the applicable Division fee guideline amount. New subsection (c) has been added to allow the employer to seek reimbursement for overpayment from the health care provider.

For, with changes: Texas Medical Association, Broadspire, McKesson Health Solutions, Zenith Insurance, Flahive, Ogden

& Latson, Medtronic, Inc., American Insurance Association, Office of Injured Employee Counsel, State Office of Risk Management, Baker Botts, LLP, The Boeing Company, Texas Mutual Insurance Company, Lockheed Martin Aeronautics Company, Texas Association of School Boards Risk Management Fund, Hospital Corporation of America, Texas Pharmacy Association, Insurance Council of Texas, Property Casualty Insurers of America, and Association of Fire & Casualty Insurers of Texas

Neither For Nor Against: Fair Isaac Corporation

SUBCHAPTER A. GENERAL RULES FOR MEDICAL BILLING AND PROCESSING

28 TAC §§133.1 - 133.3

The new sections are adopted under Labor Code §§401.023, 401.024, 406.010, 408.003, 408.025, 408.0251, 408.027, 408.0271, 413.007, 413.011, 413.0111, 413.015, 413.019, 413.042, 413.053, 402.00111, and 402.061. Section 401.023 provides for the computation of an interest rate used in the calculation of interest due on late payments. Section 401.024 authorizes the Commissioner by rule to permit or require the transmission of information through electronic means. Section 406.010 authorizes the Commissioner to adopt rules necessary to specify the requirements for insurance carriers to provide claims service. Section 408.003 requires the insurance carrier to reimburse an employer for the amount of benefits paid directly to an injured employee to which the employee was entitled. Section 408.025 requires the Commissioner to adopt requirements for reports and records required to be filed within the Workers' Compensation System. Section 408.0251 requires the Commissioner to adopt rules regarding the electronic submission and processing of medical bills. Section 408.027 establishes the timeframe for a health care provider's claim submission, the timeframes for an insurance carrier's processing of a claim including requests for additional documentation and audit, the reimbursement during the pendency of an audit, and the section's applicability to all delivered health care whether or not subject to a workers' compensation health care network. Section 408.0271 permits insurance carriers to request refunds from health care providers upon the insurance carrier's determination that rendered health care services were inappropriate, permits health care providers to appeal that determination to the insurance carrier, and requires health care providers to remit payment upon final adverse determination by the insurance carrier. Section 413.007 requires the Division to maintain a statewide database of medical charges, actual payments, and treatment protocols. Section 413.011 requires the Commissioner to adopt the most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services, including applicable payment policies relating to coding, billing, and reporting, and may modify documentation requirements as necessary to meet other statutory requirements. Section 413.0111 provides for the contractual use of agents and assignees by pharmacies to process claims and act on behalf of the pharmacies. Section 413.015 permits an insurance carrier to contract with another entity to forward payments for medical services. Section 413.019 provides for the accrual of interest on late payments by the insurance carrier or health care provider beginning on the 60th day after the date the health care provider submits the bill to the insurance carrier until the bill is paid, or the health care provider receives notice of alleged overpayment from the insurance carrier. Section 413.042 specifies the limited circumstances under which a health care provider may seek reimbursement from an injured employee. Section 413.053 authorizes the Commissioner to establish standards for reporting and billing, governing both form and content. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Act. Section 402.061 authorizes the Commissioner to adopt rules necessary to administer the Act.

§133.1. Applicability of Medical Billing and Processing.

(a) This chapter applies to medical billing and processing for health care services provided to injured employees subject to a workers' compensation health care network established under Insurance Code Chapter 1305, and to injured employees not subject to such networks, with the following exceptions pertaining only to health care services provided to an injured employee subject to a workers' compensation health care network established under Chapter 1305:

(1) Subchapter D of this chapter (relating to Dispute of Medical Bills);

(2) §133.210(f) of this chapter (relating to Medical Documentation); and

(3) §133.240(b) and (i) of this chapter (relating to Medical Payments and Denials).

(b) This chapter applies to all health care provided on or after May 1, 2006. For health care provided prior to May 1, 2006, medical billing and processing shall be in accordance with the rules in effect at the time the health care was provided.

§133.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Bill review--Review of any aspect of a medical bill, including retrospective review, in accordance with the Act, rules, and the appropriate Division fee and treatment guidelines.

(2) Complete medical bill--A medical bill that contains all required fields as set forth in the billing instructions for the appropriate form specified in §133.10 of this chapter (relating to Required Billing Forms), or as specified for electronic medical bills in Chapter 135 of this title (relating to Electronic Medical Billing, Reimbursement, and Documentation).

(3) Emergency--Either a medical or mental health emergency as follows:

(A) a medical emergency is the sudden onset of a medical condition manifested by acute symptoms of sufficient severity, including severe pain, that the absence of immediate medical attention could reasonably be expected to result in:

(i) placing the patient's health or bodily functions in serious jeopardy, or

(ii) serious dysfunction of any body organ or part;

(B) a mental health emergency is a condition that could reasonably be expected to present danger to the person experiencing the mental health condition or another person.

(4) Final action on a medical bill--

(A) sending a payment that makes the total reimbursement for that bill a fair and reasonable reimbursement in accordance with §134.1 of this title (relating to Medical Reimbursement); and/or

(B) denying a charge on the medical bill.

(5) Health care provider agent--A person or entity that the health care provider contracts with or utilizes for the purpose of fulfilling the health care provider's obligations for medical bill processing under the Labor Code or Division rules.

(6) Insurance carrier agent--A person or entity that the insurance carrier contracts with or utilizes for the purpose of providing claims services or fulfilling the insurance carrier's obligations for medical bill processing under the Labor Code or Division rules.

(7) Pharmacy processing agent--A person or entity that contracts with a pharmacy in accordance with Labor Code §413.0111, establishing an agent or assignee relationship, to process claims and act on behalf of the pharmacy under the terms and conditions of a contract related to services being billed. Such contracts may permit the agent or assignee to submit billings, request reconsideration, receive reimbursement, and seek medical dispute resolution for the pharmacy services billed.

(8) Retrospective review--The process of reviewing the medical necessity and reasonableness of health care that has been provided to an injured employee.

§133.3. Communication Between Health Care Providers and Insurance Carriers.

(a) Any communication between the health care provider and insurance carrier related to medical bill processing shall be of sufficient, specific detail to allow the responder to easily identify the information required to resolve the issue or question related to the medical bill. Generic statements that simply state a conclusion such as "insurance carrier improperly reduced the bill" or "health care provider did not document" or other similar phrases with no further description of the factual basis for the sender's position does not satisfy the requirements of this section.

(b) Communication between the health care provider and insurance carrier related to medical bill processing shall be made by telephone or electronic transmission unless the information cannot be sent by those media, in which case the sender shall send the information by mail or personal delivery.

(c) Health care providers and insurance carriers shall maintain, in a reproducible format, documentation of communications related to medical bill processing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

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General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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SUBCHAPTER B. HEALTH CARE PROVIDER BILLING PROCEDURES

28 TAC §133.10, §133.20

The new sections are adopted under Labor Code §§401.023, 401.024, 406.010, 408.003, 408.025, 408.0251, 408.027, 408.0271, 413.007, 413.011, 413.0111, 413.015, 413.019, 413.042, 413.053, 402.00111, and 402.061. Section 401.023 provides for the computation of an interest rate used in the calculation of interest due on late payments. Section 401.024 authorizes the Commissioner by rule to permit or require the transmission of information through electronic means. Section 406.010 authorizes the Commissioner to adopt rules necessary to specify the requirements for insurance carriers to provide claims service. Section 408.003 requires the insurance carrier to reimburse an employer for the amount of benefits paid directly to an injured employee to which the employee was entitled. Section 408.025 requires the Commissioner to adopt requirements for reports and records required to be filed within the Workers' Compensation System. Section 408.0251 requires the Commissioner to adopt rules regarding the electronic submission and processing of medical bills. Section 408.027 establishes the timeframe for a provider's claim submission, the timeframes for an insurance carrier's processing of a claim including requests for additional documentation and audit, the reimbursement during the pendency of an audit, and the section's applicability to all delivered health care whether or not subject to a workers' compensation health care network. Section 408.0271 permits insurance carriers to request refunds from health care providers upon the insurance carrier's determination that rendered health care services were inappropriate, permits health care providers to appeal that determination to the insurance carrier, and requires health care providers to remit payment upon final adverse determination by the insurance carrier. Section 413.007 requires the Division to maintain a statewide database of medical charges, actual payments, and treatment protocols. Section 413.011 requires the Commissioner to adopt the most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services, including applicable payment policies relating to coding, billing, and reporting, and may modify documentation requirements as necessary to meet other statutory requirements. Section 413.0111 provides for the contractual use of agents and assignees by pharmacies to process claims and act on behalf of the pharmacies. Section 413.015 permits an insurance carrier to contract with another entity to forward payments for medical services. Section 413.019 provides for the accrual of interest on late payments by the insurance carrier or health care provider beginning on the 60th day after the date the health care provider submits the bill to the insurance carrier until the bill is paid, or the health care provider receives notice of alleged overpayment from the insurance carrier. Section 413.042 specifies the limited circumstances under which a health care provider may seek reimbursement from an injured employee. Section 413.053 authorizes the Commissioner to establish standards for reporting and billing, governing both form and content. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Act. Section 402.061 authorizes the Commissioner to adopt rules necessary to administer the Act.

§133.10. Required Billing Forms/Formats.

(a) Health care providers shall submit medical bills for payment:

(1) on standard forms used by the Centers for Medicare and Medicaid Services (CMS);

(2) on applicable forms prescribed for pharmacists and dentists specified in subsections (b) and (c) of this section; or

(3) in electronic format in accordance with Subchapter F of this chapter (relating to Electronic Medical Billing, Reimbursement, and Documentation).

(b) Pharmacists and pharmacy processing agents shall submit bills using the current National Council for Prescription Drug Programs (NCPDP) Universal Claim Form (UCF) for health care provided on or after January 1, 2007. Pharmacists and pharmacy processing agents shall use the Division form DWC-66 for health care provided on or before December 31, 2006.

(c) Dentists shall submit bills using the current American Dental Association claim form.

(d) All information submitted on required billing forms must be legible and completed in accordance with Division instructions.

§133.20. Medical Bill Submission by Health Care Provider.

(a) The health care provider shall submit all medical bills to the insurance carrier except when billing the employer in accordance with subsection (j) of this section.

(b) A health care provider shall not submit a medical bill later than the 95th day after the date the services are provided.

(c) A health care provider shall include correct billing codes from the applicable Division fee guidelines in effect on the date(s) of service when submitting medical bills.

(d) The health care provider that provided the health care shall submit its own bill, unless:

(1) the health care was provided as part of a return to work rehabilitation program in accordance with the Division fee guidelines in effect for the dates of service;

(2) the health care was provided by an unlicensed individual under the direct supervision of a licensed health care provider, in which case the supervising health care provider shall submit the bill;

(3) the health care provider contracts with an agent for purposes of medical bill processing, in which case the health care provider agent may submit the bill; or

(4) the health care provider is a pharmacy that has contracted with a pharmacy processing agent for purposes of medical bill processing, in which case the pharmacy processing agent may submit the bill.

(e) A medical bill must be submitted:

(1) for an amount that does not exceed the health care provider's usual and customary charge for the health care provided in accordance with Labor Code §§413.011 and 415.005; and

(2) in the name of the licensed health care provider that provided the health care or that provided direct supervision of an unlicensed individual who provided the health care.

(f) Health care providers shall not resubmit medical bills to insurance carriers after the insurance carrier has taken final action on a complete medical bill and provided an explanation of benefits except in accordance with §133.250 of this chapter (relating to Reconsideration for Payment of Medical Bills).

(g) Health care providers may correct and resubmit as a new bill an incomplete bill that has been returned by the insurance carrier.

(h) Not later than the 15th day after receipt of a request for additional medical documentation, a health care provider shall submit to the insurance carrier:

(1) any requested additional medical documentation related to the charges for health care rendered; or

(2) a notice the health care provider does not possess requested medical documentation.

(i) The health care provider shall indicate on the medical bill if documentation is submitted related to the medical bill.

(j) The health care provider may elect to bill the injured employee's employer if the employer has indicated a willingness to pay the medical bill(s). Such billing is subject to the following:

(1) A health care provider who elects to submit medical bills to an employer waives, for the duration of the election period, the rights to:

(A) prompt payment, as provided by Labor Code §408.027;

(B) interest for delayed payment as provided by Labor Code §413.019; and

(C) medical dispute resolution as provided by Labor Code §413.031.

(2) When a health care provider bills the employer, the health care provider shall submit an information copy of the bill to the insurance carrier, which clearly indicates that the information copy is not a request for payment from the insurance carrier.

(3) When a health care provider bills the employer, the health care provider must bill in accordance with the Division's fee guidelines and §133.10 of this chapter (relating to Required Billing Forms/Formats).

(4) A health care provider shall not submit a medical bill to an employer for charges an insurance carrier has reduced, denied or disputed.

(k) A health care provider shall not submit a medical bill to an injured employee for all or part of the charge for any of the health care provided, except as an informational copy clearly indicated on the bill, or in accordance with subsection (l) of this section. The information copy shall not request payment.

(l) The health care provider may only submit a bill for payment to the injured employee in accordance with:

(1) Labor Code §413.042;

(2) Insurance Code §1305.451; or

(3) §134.504 of this title (relating to Pharmaceutical Expenses Incurred by the Injured Employee).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

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Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4288

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SUBCHAPTER C. MEDICAL BILL PROCESSING/AUDIT BY INSURANCE CARRIER

28 TAC §§133.200, 133.210, 133.230, 133.240, 133.250, 133.260, 133.270, 133.280

The new sections are adopted under Labor Code §§401.023, 401.024, 406.010, 408.003, 408.025, 408.0251, 408.027, 408.0271, 413.007, 413.011, 413.0111, 413.015, 413.019, 413.042, 413.053, 402.00111, and 402.061. Section 401.023 provides for the computation of an interest rate used in the calculation of interest due on late payments. Section 401.024 authorizes the Commissioner by rule to permit or require the transmission of information through electronic means. Section 406.010 authorizes the Commissioner to adopt rules necessary to specify the requirements for insurance carriers to provide claims service. Section 408.003 requires the insurance carrier to reimburse an employer for the amount of benefits paid directly to an injured employee to which the employee was entitled. Section 408.025 requires the Commissioner to adopt requirements for reports and records required to be filed within the Workers' Compensation System. Section 408.0251 requires the Commissioner to adopt rules regarding the electronic submission and processing of medical bills. Section 408.027 establishes the timeframe for a health care provider's claim submission, the timeframes for an insurance carrier's processing of a claim including requests for additional documentation and audit, the reimbursement during the pendency of an audit, and the section's applicability to all delivered health care whether or not subject to a workers' compensation health care network. Section 408.0271 permits insurance carriers to request refunds from health care providers upon the insurance carrier's determination that rendered health care services were inappropriate, permits health care providers to appeal that determination to the insurance carrier, and requires health care providers to remit payment upon final adverse determination by the insurance carrier. Section 413.007 requires the Division to maintain a statewide database of medical charges, actual payments, and treatment protocols. Section 413.011 requires the Commissioner to adopt the most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services, including applicable payment policies relating to coding, billing, and reporting, and may modify documentation requirements as necessary to meet other statutory requirements. Section 413.0111 provides for the contractual use of agents and assignees by pharmacies to process claims and act on behalf of the pharmacies. Section 413.015 permits an insurance carrier to contract with another entity to forward payments for medical services. Section 413.019 provides for the accrual of interest on late payments by the insurance carrier or health care provider beginning on the 60th day after the date the health care provider submits the bill to the insurance carrier until the bill is paid, or the health care provider receives notice of alleged overpayment from the insurance carrier. Section 413.042 specifies the limited circumstances under which a health care provider may seek reimbursement from an injured employee. Section 413.053 authorizes the Commissioner to establish standards for reporting and billing, governing both form and content. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Act. Section 402.061 authorizes the Commissioner to adopt rules necessary to administer the Act.

§133.200. Insurance Carrier Receipt of Medical Bills from Health Care Providers.

(a) Upon receipt of medical bills submitted in accordance with §133.10(a)(1) and (2) of this chapter (relating to Required Medical Forms/Formats), an insurance carrier shall evaluate each medical bill for completeness as defined in §133.2 of this chapter (relating to Definitions).

(1) Insurance carriers shall not return medical bills that are complete, unless the bill is a duplicate bill.

(2) Within 30 days after the day it receives a medical bill that is not complete as defined in §133.2 of this chapter, an insurance carrier shall:

(A) complete the bill by adding missing information already known to the insurance carrier, except for the following:

(i) dates of service;

(ii) procedure/modifier codes;

(iii) number of units; and

(iv) charges; or

(B) return the bill to the sender, in accordance with subsection (c) of this section.

(3) The insurance carrier may contact the sender to obtain the information necessary to make the bill complete, including the information specified in paragraph (2)(A)(i) - (iv) of this subsection. If the insurance carrier obtains the missing information and completes the bill, the insurance carrier shall document the name and telephone number of the person who supplied the information.

(b) An insurance carrier shall not return a medical bill except as provided in subsection (a) of this section. When returning a medical bill, the insurance carrier shall include a document identifying the reason(s) for returning the bill. The reason(s) related to the procedure or modifier code(s) shall identify the reason(s) by line item.

(c) The proper return of an incomplete medical bill in accordance with this section fulfills the insurance carrier's obligations with regard to the incomplete bill.

(d) An insurance carrier shall not combine bills submitted in separate envelopes as a single bill or separate single bills spanning several pages submitted in a single envelope.

§133.210. Medical Documentation.

(a) Medical documentation includes all medical reports and records, such as evaluation reports, narrative reports, assessment reports, progress report/notes, clinical notes, hospital records and diagnostic test results.

(b) When submitting a medical bill for reimbursement, the health care provider shall provide required documentation in legible form, unless the required documentation was previously provided to the insurance carrier or its agents.

(c) In addition to the documentation requirements of subsection (b) of this section, medical bills for the following services shall include the following supporting documentation:

(1) the two highest Evaluation and Management office visit codes for new and established patients: office visit notes/report satisfying the American Medical Association requirements for use of those CPT codes;

(2) surgical services rendered on the same date for which the total of the fees established in the current Division fee guideline exceeds $500: a copy of the operative report;

(3) return to work rehabilitation programs as defined in §134.202 of this title (relating to Medical Fee Guideline): a copy of progress notes and/or SOAP (subjective/objective assessment plan/procedure) notes, which substantiate the care given, and indicate progress, improvement, the date of the next treatment(s) and/or service(s), complications, and expected release dates;

(4) any supporting documentation for procedures which do not have an established Division maximum allowable reimbursement (MAR), to include an exact description of the health care provided; and

(5) for hospital services: an itemized statement of charges.

(d) Any request by the insurance carrier for additional documentation to process a medical bill shall:

(1) be in writing;

(2) be specific to the bill or the bill's related episode of care;

(3) describe with specificity the clinical and other information to be included in the response;

(4) be relevant and necessary for the resolution of the bill;

(5) be for information that is contained in or in the process of being incorporated into the injured employee's medical or billing record maintained by the health care provider;

(6) indicate the specific reason for which the insurance carrier is requesting the information; and

(7) include a copy of the medical bill for which the insurance carrier is requesting the additional documentation.

(e) It is the insurance carrier's obligation to furnish its agents with any documentation necessary for the resolution of a medical bill. The Division considers any medical billing information or documentation possessed by one entity to be simultaneously possessed by the other.

(f) Workers' compensation health care networks established under Insurance Code Chapter 1305 may decrease the documentation requirements of this section.

§133.230. Insurance Carrier Audit of a Medical Bill.

(a) An insurance carrier may perform an audit of a medical bill that has been submitted by a health care provider to the insurance carrier for reimbursement. The insurance carrier may not audit a medical bill upon which it has taken final action.

(b) If an insurance carrier decides to conduct an audit of a medical bill, the insurance carrier shall:

(1) provide notice to the health care provider no later than the 45th day after the date the insurance carrier received the complete medical bill. For onsite audits, provide notice in accordance with subsection (c) of this section;

(2) pay to the health care provider no later than the 45th day after receipt of the health care provider's medical bill, for the health care being audited:

(A) for a workers' compensation health care network established under Insurance Code Chapter 1305, 85 percent of the applicable contracted amount; or

(B) for services not provided under Insurance Code Chapter 1305, 85 percent of:

(i) the maximum allowable reimbursement amounts established under the applicable Division fee guidelines;

(ii) the contracted amount for services not addressed by Division fee guidelines; or

(iii) the fair and reasonable reimbursement in accordance with §134.1 of this title (relating to Medical Reimbursement) for services not addressed by clause (i) or (ii) of this subparagraph;

(3) make a determination regarding the relationship of the health care services provided for the compensable injury, the extent of the injury, and the medical necessity of the services provided; and

(4) complete the audit and pay, reduce, or deny in accordance with §133.240 of this chapter (relating to Medical Payments and Denials) no later than the 160th day after receipt of the complete medical bill.

(c) If the insurance carrier intends to perform an onsite audit, the notice shall include the following information for each medical bill that is subject to audit:

(1) employee's full name, address, and Social Security number;

(2) date of injury;

(3) date(s) of service for which the audit is being performed;

(4) insurance carrier's name and address;

(5) a proposed date and time for the audit, subject to mutual agreement; and

(6) name and telephone number of the person who will perform the onsite audit, has the authority to act on behalf of the insurance carrier, and shall personally appear for the onsite audit at the scheduled date and time.

(d) During the insurance carrier's onsite audit, the health care provider shall:

(1) make available to the insurance carrier: all notes, reports, test results, narratives, and other documentation the health care provider has relating to the billing(s) subject to audit; and

(2) designate one person with authority to: negotiate a resolution, serve as the liaison between the health care provider and the insurance carrier, and be available to the insurance carrier's representative.

(e) On the last day of the onsite audit, the health care provider's liaison and the insurance carrier's representative shall meet for an exit interview. The insurance carrier's representative shall present to the health care provider's liaison a list of unresolved issues related to the health care provided and the billed charges. The health care provider's liaison and the insurance carrier's representative shall discuss and attempt to resolve the issues.

§133.240. Medical Payments and Denials.

(a) An insurance carrier shall take final action after conducting bill review on a complete medical bill, or determine to audit the medical bill in accordance with §133.230 of this chapter (relating to Insurance Carrier Audit of a Medical Bill), not later than the 45th day after the date the insurance carrier received a complete medical bill. An insurance carrier's deadline to make or deny payment on a bill is not extended as a result of a pending request for additional documentation.

(b) For health care provided to injured employees not subject to a workers' compensation health care network established under Insurance Code Chapter 1305, the insurance carrier shall not deny reimbursement based on medical necessity for health care preauthorized or

voluntarily certified under Chapter 134 of this title (relating to Benefits--Guidelines for Medical Services, Charges, and Payments)

(c) The insurance carrier shall not change a billing code on a medical bill or reimburse health care at another billing code's value.

(d) The insurance carrier may request additional documentation, in accordance with §133.210 of this chapter (relating to Medical Documentation), not later than the 45th day after receipt of the medical bill to clarify the health care provider's charges.

(e) The insurance carrier shall send the explanation of benefits in the form and manner prescribed by the Division and indicate any interest amount paid, and the number of days on which interest was calculated. The explanation of benefits shall be sent to:

(1) the health care provider when the insurance carrier makes payment or denies payment on a medical bill; and

(2) the injured employee when payment is denied because the health care was:

(A) determined to be unreasonable and/or unnecessary;

(B) provided by a health care provider other than

(i) the treating doctor selected in accordance with §408.022 of the Texas Labor Code,

(ii) a health care provider that the treating doctor has chosen as a consulting or referral health care provider,

(iii) a doctor performing a required medical examination in accordance with §126.5 of this title (relating to Procedure for Requesting Required Medical Examinations) and §126.6 of this title (relating to Order for Required Medical Examination), or

(iv) a doctor performing a designated doctor examination in accordance with §130.6 of this title (relating to Designated Doctor Examinations for Maximum Medical Improvement and/or Impairment Ratings); or

(C) unrelated to the compensable injury, in accordance with §124.2 of this title (relating to Carrier Reporting and Notification Requirements).

(f) When the insurance carrier pays a health care provider for health care for which the Division has not established a maximum allowable reimbursement, the insurance carrier shall explain and document the method it used to calculate the payment in accordance with §134.1 (relating to Medical Reimbursement).

(g) An insurance carrier shall have filed, or shall concurrently file, the applicable notice required by Labor Code §409.021, and §124.2 and §124.3 of this title (relating to Investigation of an Injury and Notice of Denial/Dispute) if the insurance carrier reduces or denies payment for health care provided based solely on the insurance carrier's belief that:

(1) the injury is not compensable;

(2) the insurance carrier is not liable for the injury due to lack of insurance coverage; or

(3) the condition for which the health care was provided was not related to the compensable injury.

(h) If dissatisfied with the insurance carrier's final action, the health care provider may request reconsideration of the bill in accordance with §133.250 of this chapter (relating to Reconsideration for Payment of Medical Bills).

(i) If dissatisfied with the reconsideration outcome, the health care provider may request medical dispute resolution in accordance with §133.305 of this chapter (relating to Medical Dispute Resolution - General).

(j) Health care providers, injured employees, employers, attorneys, and other participants in the system shall not resubmit medical bills to insurance carriers after the insurance carrier has taken final action on a complete medical bill and provided an explanation of benefits except as provided in §133.250 and §133.305 of this chapter.

(k) All payments of medical bills that an insurance carrier makes on or after the 60th day after the date the insurance carrier originally received the complete medical bill shall include interest calculated in accordance with §134.130 of this title (relating to Interest for Late Payment on Medical Bills and Refunds), without any action taken by the Division. The interest payment shall be paid at the same time as the medical bill payment.

(l) When an insurance carrier remits payment to a health care provider agent, the agent shall remit to the health care provider the full amount that the insurance carrier reimburses.

(m) When an insurance carrier remits payment to a pharmacy processing agent, the pharmacy's reimbursement shall be made in accordance with the terms of its contract with the pharmacy processing agent.

(n) An insurance carrier commits an administrative violation if the insurance carrier fails to pay, reduce, deny, or notify the health care provider of the intent to audit a medical bill in accordance with Labor Code §408.027 and Division rules.

§133.250. Reconsideration for Payment of Medical Bills.

(a) If the health care provider is dissatisfied with the insurance carrier's final action on a medical bill, the health care provider may request that the insurance carrier reconsider its action.

(b) The health care provider shall submit the request for reconsideration no later than eleven months from the date of service.

(c) A health care provider shall not submit a request for reconsideration until:

(1) the insurance carrier has taken final action on a medical bill; or

(2) the health care provider has not received an explanation of benefits within 50 days from submitting the medical bill to the insurance carrier.

(d) The request for reconsideration shall:

(1) reference the original bill and include the same billing codes, date(s) of service, and dollar amounts as the original bill;

(2) include a copy of the original explanation of benefits, if received, or documentation that a request for an explanation of benefits was submitted to the insurance carrier;

(3) include any necessary and related documentation not submitted with the original medical bill to support the health care provider's position; and

(4) include a bill-specific, substantive explanation in accordance with §133.3 of this chapter (relating to Communication Between Health Care Providers and Insurance Carriers) that provides a rational basis to modify the previous denial or payment.

(e) An insurance carrier shall review all reconsideration requests for completeness in accordance with subsection (d) of this section and may return an incomplete reconsideration request no later than seven days from the date of receipt. A health care provider may complete and resubmit its request to the insurance carrier.

(f) The insurance carrier shall take final action on a reconsideration request within 21 days of receiving the request for reconsideration. The insurance carrier shall provide an explanation of benefits for all items included in a reconsideration request in the form and format prescribed by the Division.

(g) A health care provider shall not resubmit a request for reconsideration earlier than 26 days from the date the insurance carrier received the original request for reconsideration or after the insurance carrier has taken final action on the reconsideration request.

(h) If the health care provider is dissatisfied with the insurance carrier's final action on a medical bill after reconsideration, the health care provider may request medical dispute resolution in accordance with §133.305 of this chapter (relating to Medical Dispute Resolution - General).

§133.260. Refunds.

(a) An insurance carrier shall request a refund within 240 days from the date of service or 30 days from completion of an audit performed in accordance with §133.230 (relating to Insurance Carrier Audit of a Medical Bill), whichever is later, when it determines that inappropriate health care was previously reimbursed, or when an overpayment was made for health care provided.

(b) The insurance carrier shall submit the refund request to the health care provider in an explanation of benefits in the form and manner prescribed by the Division.

(c) A health care provider shall respond to a request for a refund from an insurance carrier by the 45th day after receipt of the request by:

(1) paying the requested amount; or

(2) submitting an appeal to the insurance carrier with a specific explanation of the reason the health care provider has failed to remit payment.

(d) The insurance carrier shall act on a health care provider's appeal within 45 days after the date on which the health care provider filed the appeal. The insurance carrier shall provide the health care provider with notice of its determination, either agreeing that no refund is due, or denying the appeal.

(e) If the insurance carrier denies the appeal, the health provider:

(1) shall remit the refund with any applicable interest within 45 days of receipt of notice of denied appeal; and

(2) may request medical dispute resolution in accordance with §133.305 of this chapter (relating to Medical Dispute Resolution - General).

(f) The health care provider shall submit a refund to the insurance carrier when the health care provider identifies an overpayment even though the insurance carrier has not submitted a refund request.

(g) When making a refund payment, the health care provider shall include: a copy of the insurance carrier's original request for refund, if any; a copy of the original explanation of benefits containing the overpayment, if available; and a detailed explanation itemizing the refund. The explanation shall:

(1) identify the billing and rendering health care provider;

(2) identify the injured employee;

(3) identify the insurance carrier;

(4) specify the total dollar amount being refunded;

(5) itemize the refund by dollar amount, line item and date of service; and

(6) specify the amount of interest paid, if any, and the number of days on which interest was calculated.

(h) All refunds requested by the insurance carrier and paid by a health care provider on or after the 60th day after the date the health care provider received the request for the refund shall include interest calculated in accordance with §134.130 of this title (relating to Interest for Late Payment on Medical Bills and Refunds).

§133.270. Injured Employee Reimbursement for Health Care Paid.

(a) An injured employee may request reimbursement from the insurance carrier when the injured employee has paid for health care provided for a compensable injury, unless the injured employee is liable for payment as specified in:

(1) Insurance Code §1305.451, or

(2) §134.504 of this title (relating to Pharmaceutical Expenses Incurred by the Injured Employee).

(b) The injured employee's request for reimbursement shall be legible and shall include documentation or evidence (such as itemized receipts) of the amount the injured employee paid the health care provider.

(c) The insurance carrier shall pay or deny the request for reimbursement within 45 days of the request. Reimbursement shall be made in accordance with §134.1 (relating to Medical Reimbursement).

(d) The injured employee may seek reimbursement for any payment made above the Division fee guideline or contract amount from the health care provider who received the overpayment.

(e) Within 45 days of a request, the health care provider shall reimburse the injured employee the amount paid above the applicable Division fee guideline or contract amount.

(f) The injured employee may request, but is not required to request, reconsideration prior to requesting medical dispute resolution in accordance with §133.305 of this chapter (relating to Medical Dispute Resolution - General).

(g) The insurance carrier shall submit injured employee medical billing and payment data to the Division in accordance with §134.802 of this title (relating to Insurance Carrier Medical Electronic Data Interchange to the Division).

§133.280. Employer Reimbursement for Health Care Paid.

(a) An employer may request reimbursement from the insurance carrier when the employer has paid for health care provided for a compensable injury, and provided notice of injury in compliance with Labor Code §409.005.

(b) The employer shall be reimbursed in accordance with §134.1.

(c) The employer may seek reimbursement for any payment made above the Division fee guideline or contract amount from the health care provider who received the overpayment.

(d) The employer's request for reimbursement shall be legible and shall include:

(1) a copy of the health care provider's required billing form;

(2) any supporting documentation submitted by the health care provider as required in §133.210 of this chapter (relating to Medical Documentation); and

(3) documentation of the payment to the health care provider.

(e) The insurance carrier shall submit employer medical bill and payment data to the Division in accordance with §134.802 of this title (relating to Insurance Carrier Medical Electronic Data Interchange to the Division).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602083
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4288

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CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

The Texas Department of Insurance, Division of Workers' Compensation adopts the repeal of §§134.1, 134.5, 134.6, 134.800, 134.801, and 134.803, concerning medical policies and provider billing procedures. The repeal is adopted without changes to the proposal as published in the February 10, 2006, issue of the *Texas Register* (31 TexReg 806).

The repeal of these sections is necessary for the Division to propose an extensive reorganization of Chapter 134, in conjunction with the revision of Chapter 133, to eliminate redundancies in existing rules and clarify medical billing, processing and reimbursement procedures. This reorganization includes the repeal of current medical policy and provider billing rules in Chapter 134 and replacement with clarified and reorganized new rules that incorporate requirements of House Bill (HB) 7, enacted during the 79th Texas Legislature, Regular Session, effective September 1, 2005.

The Division simultaneously adopts new §§134.1, 134.100, 134.110, 134.120, and 134.130, published elsewhere in this issue of the *Texas Register*, concerning medical and miscellaneous reimbursement policies. The adopted new rules are necessary to implement, on a permanent basis, portions of HB 7. The adopted rules will permit compliance with statutory changes to the Labor Code §408.027, and also provide billing, processing and reimbursement direction for participants in a workers' compensation health care network established under Insurance Code Chapter 1305. This adoption also organizes the rules regarding medical billing, processing, and reimbursement to clarify and streamline the process. This will enable system participants to easily access specific portions of the medical billing and reimbursement rules, which are logically organized and follow the billing and reimbursement process. The adopted rules also minimize micro-management of the process by providing guidance and direction rather than specific, detailed instructions that required adherence. This will allow system participants more flexibility in developing their medical billing and bill review processes. In addition, the adopted rules rely on the statutorily required Medicare reimbursement structures, incorporate concepts from TDI managed care rules, and eliminate many of the duplicative Division instructions in previous rules thus providing consistency and standardization for workers' compensation system benefits with other health care delivery systems.

No comments were received.

SUBCHAPTER A. MEDICAL POLICIES

28 TAC §§134.1, 134.5, 134.6

The repeals are adopted under Labor Code §§408.027, 402.00111, and 402.061. Section 408.027 establishes the timeframe for a provider's claim submission, the timeframes for a carrier's processing of a claim including requests for additional documentation and audit, the reimbursement during the pendency of an audit, and the section's applicability to all delivered health care whether or not subject to a workers' compensation health care network. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code. Section 402.061 authorizes the Commissioner to adopt rules necessary to administer the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Effective date: May 1, 2006
Proposal publication date: February 10, 2006
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SUBCHAPTER I. PROVIDER BILLING PROCEDURES

28 TAC §§134.800, 134.801, 134.803

The repeals are adopted under Labor Code §§408.027, 402.00111, and 402.061. Section 408.027 establishes the timeframe for a provider's claim submission, the timeframes for a carrier's processing of a claim including requests for additional documentation and audit, the reimbursement during the pendency of an audit, and the section's applicability to all delivered health care whether or not subject to a workers' compensation health care network. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code. Section 402.061 authorizes the Commissioner to adopt rules necessary to administer the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

The Commissioner of the Division of Workers' Compensation, Texas Department of Insurance, adopts new §§134.1, 134.100, 134.110, 134.120, and 134.130, and amendments to §134.802, concerning medical billing reimbursements and reporting. The adopted rules will replace the emergency rules adopted by the Commissioner of the Division of Workers' Compensation on November 3, 2005, published in the November 18, 2005 issue of the *Texas Register* (30 TexReg 7621), with an extension, as published in the March 10, 2006 issue of the *Texas Register* (31 TexReg 1539). The new sections and the amended section are adopted with changes to the proposed text as published in the February 10, 2006 issue of the *Texas Register* (31 TexReg 808).

These adopted sections are necessary to implement, on a permanent basis portions of House Bill (HB) 7, enacted during the 79th Texas Legislature, Regular Session, effective September 1, 2005. The adopted sections are consistent with statutory changes to the Labor Code §408.027, and also provide medical reimbursement direction for participants in a workers' compensation health care network established under Insurance Code Chapter 1305. These adopted sections do not apply to political subdivisions with contractual relationships under Labor Code §504.053(b)(2).

The adopted sections are designed to minimize micro-management of the system, utilize existing Medicare reimbursement structures, and incorporate concepts from Texas Department of Insurance (TDI) managed care rules for consistency and standardization. The adopted rules also accommodate eBill initiatives by identifying forms and processes compatible with both paper and electronic processes. Additionally, extensive reorganization of Chapter 134, in conjunction with revision of Chapter 133 as published elsewhere in this edition of the *Texas Register*, is provided for in these adopted sections to eliminate redundancies in existing rules and clarify billing and reimbursement procedures. This initiative includes the adopted repeal of several current billing, processing and reimbursement rules in Chapters 133 and 134, as published elsewhere in this edition of the *Texas Register*. The adopted rules consolidate reimbursement methodologies and miscellaneous reimbursement amounts previously located in both Chapters 133 and 134 to Chapter 134. This adoption also organizes the rules regarding medical billing, processing, and reimbursement to clarify and streamline the process. This will enable system participants to easily access specific portions of the medical billing rules, which are now organized in the logical order of the billing and reimbursement process.

The adopted rules also minimize micro-management of this process by reducing specific, detailed instructions. This will allow system participants more flexibility in developing their medical billing and bill review processes. In addition, by eliminating many of the duplicative Division instructions and relying on the statutorily required Medicare reimbursement structures, and incorporating concepts from TDI managed care rules, the adopted rules provide consistency and standardization with other health care delivery systems.

The adopted sections clarify medical reimbursement and other miscellaneous reimbursement. The adopted sections also address insurance carrier medical bill reporting to the Division.

Minimal changes have been made to the proposed sections as published. However, none of the changes introduce new subject matter or affect additional persons other than those subject to the proposal as originally published. Throughout the sections the Division makes editorial and grammatical changes for ease of reading and clarity as a result of public comment.

Adopted §134.1 clarifies that the Division medical fee guidelines do not apply to medical services provided through a workers' compensation health care network established under Insurance Code Chapter 1305, except for examinations conducted pursuant to Labor Code §§408.004, 408.0041, and 408.151 which shall be reimbursed in accordance with §134.202. The adopted section also clarifies reimbursement for health care not provided through a workers' compensation health care network by specifically adding a reference to negotiated contracts and establishes the framework for fair and reasonable reimbursement.

Adopted §134.100 (which was previously addressed in repealed §134.5) establishes the reimbursement criteria for the treating doctor's attendance at a required medical examination. Adopted §134.110 (which was previously addressed in repealed §134.6) establishes criteria to determine reimbursement of the injured employee for travel expenses. Subsection (a)(1), establishes that an injured employee may be reimbursed for travel when the medical treatment for the compensable injury is not reasonably available and the injured employee travels more than 30 miles one way. Language has been changed to indicate that the distance calculation shall be determined "from where the injured employee lives" rather than from "the injured employee's residence." This provides consistency between these rules and the workers' compensation health care network rules.

Adopted §134.120 (which was previously addressed in repealed §133.106) establishes reimbursement for medical documentation. Adopted §134.130 (which was previously addressed in repealed §134.803) establishes interest for late payment on medical bills and refunds.

The adopted amendments to §134.802 make the language for insurance carrier medical bill reporting to the Division consistent with HB 7.

Section 134.1. Comment: A commenter recommends a language change to specifically note in the rule that Chapter 134 does not apply to political subdivisions with contractual relationships under §504.053(b)(2) of the Labor Code. Agency Response: The Division declines to make this change as Labor Code §504.053 already addresses this situation. The Division attempts to avoid unnecessary repetition of statutory language; however, this clarification is added elsewhere in this adoption preamble.

Section 134.1. Comment: A commenter recommends §134.1 be amended to include that treating doctors will be paid even when the patient does not show up. Agency Response: The Division declines to include language that would reimburse treating doctors for missed appointments. This approach would be con-

trary to the requirements §413.011(a) as it relates to Medicare reimbursement methodologies and payment policies relating to billing, coding and reporting.

Section 134.1(d). Comment: Commenters recommend language change to add a reference to Labor Code §415.005 which states a health care provider may not charge an amount greater than that normally charged for similar treatment to a payor outside the workers' compensation system, except for mandated or negotiated charges. Agency Response: The Division declines to add this reference to the explanation of fair and reasonable reimbursement. This statutory reference deals with usual and customary charges and not reimbursement.

Section 134.1(d)(1). Comment: Commenters recommend language to add a reference to Labor Code §408.028 to the definition of fair and reasonable. Agency Response: The Division declines to make the requested change. Section 413.011 provides requirements for guideline development. Section 408.028, regarding pharmaceutical services, does not add anything to the definition of fair and reasonable.

Section 134.1(e). Comment: Commenters recommend subsection 134.1(e) be amended to include that documentation pertaining to fair and reasonable reimbursement methodology shall retain its confidential and proprietary nature and shall not be subject to public disclosure. Agency Response: The Division declines to make the requested change. The insurance carrier must make an assertion that a particular reimbursement methodology is proprietary and confidential. The Division cannot determine whether methodologies used by insurance carriers in calculating fair and reasonable reimbursement are confidential and/or proprietary. The Division has obligations under the Public Information Act to release information that is not excepted from disclosure. An exception based on a claim that information is proprietary must be asserted and substantiated by the owner of the information.

Section 134.1(e). Comment: A commenter recommends a language change to require insurance carriers to share their documented methodology with the health care provider upon request. Agency Response: The Division declines to make this recommended change. A health care provider may file a medical fee dispute if dissatisfied with the reimbursement made by the insurance carrier. The Division may request the documentation of the reimbursement methodology from the insurance carrier if necessary to resolve the fee dispute. It is not necessary for the health care provider to receive this information in order to resolve the dispute.

Section 134.100(c). Comment: Commenters recommend the treating doctor's request for reimbursement for attendance at a required medical examination be in the form of an invoice and include adequate documentation. Another commenter recommends clarification that reimbursement under this subsection is a non-medical bill. Agency Response: The Division declines to make this change. The treating doctor's attendance at a required medical examination is in a medical capacity for the injured employee's benefit. The Division considers the treating doctor's time for travel and attendance at a required medical examination, in accordance with §134.100, a medical service. The Division clarifies that health care provider travel not in accordance with §134.100 is not considered a medical service.

Section 134.110. Comment: A commenter recommends qualification requirement for travel reimbursement remain at 20 miles one way. The commenter states there is no economic justification for imposing this hardship on injured employees. In addition, the cost of transportation has increased significantly in recent years and costs should not be borne by injured employees. Agency Response: The Division acknowledges the commenters concerns regarding the change from the previous rule. The Texas Insurance Code through the network rules establishes the distance of 30 miles as a standard for the network service area. Since travel expenses are not considered medical benefits they will be reimbursed under the same rules in both the network and non-network systems. Consequently, it is important that this statutorily indicated distance be maintained for consistency.

Section 134.110(a). Comment: A commenter recommends subsection 134.110(a) be amended to allow an injured employee to request travel reimbursement only when the medical services provided are medically necessary and related to the compensable injury. Agency Response: The Division declines to make this change. Subsection 134.110(a)(1) limits an injured employee's request for reimbursement from the insurance carrier for incurred travel expenses when the medical treatment is for a compensable injury and is not reasonably available within 30 miles from where the injured employee lives. An injured employee's medical treatment is provided at the direction of a health care provider and the injured employee likely has little knowledge of medical necessity or reasonableness. Since injured employees have limited responsibility to pay medical expenses and associated costs in the Texas Workers' Compensation System, it is appropriate that injured employees not be limited in their opportunity to recover out-of-pocket expenses.

Section 134.110(a)(1). Comment: Commenters recommend a language change to state "where the employee lives" rather than "employees' residence" to provide consistency with workers' compensation health care network rules. Agency Response: The Division agrees with the recommended language and the rule has been changed for consistency purposes.

Section 134.110(b). Comment: Commenters recommend a language change to the timeframe an injured employee has to submit a travel reimbursement request from one year to 95 days. Agency Response: The Division declines to make the recommended change in timeframes. The timeframe for a health care provider to submit a medical bill to the insurance carrier is specifically set at 95 days from the date of service by Labor Code §408.027. The Labor Code does not extend this limitation to injured employees seeking reimbursement for travel expenses. The timeframe is set at 12 months from the date of service to allow injured employees an extended period of time to attempt to recover out-of-pocket travel expenses. This is extremely important due to the relative infrequency of injured employees seeking travel expenses from the insurance carrier and the injured employee may need the additional time to gather the information necessary to submit the request.

Section 134.110(d). Comment: A commenter recommends subsection 134.110(d) be amended to specify that total reimbursement mileage is based on round trip mileage to the nearest location where medical treatment is reasonably available. Agency Response: The Division declines to make this change. While injured employees subject to a workers' compensation health care network must choose a treating doctor in accordance with network rules, an injured employee in the non-network system is entitled to choose any treating doctor on the Division's Approved Doctor List. The question of treatment not being reasonably available within 30 miles or outside 30 miles is a question of

circumstance and fact not able to be specifically addressed by this rule. If an insurance carrier disputes the reasonable availability of health care, a dispute regarding the requested travel reimbursement may be made and resolved through the benefit review process.

Section 134.120(d). Comment: A commenter recommends language change to provide that if an insurance carrier has denied benefits based on lack of documentation and such documentation can be produced, the injured employee may request such documentation and the insurance carrier should be responsible for the costs. Agency Response: The Division declines to make this change. The Division clarifies the health care provider is required to provide the injured employee, or the injured employee's representative, an initial copy of any existing medical documentation without charge. However, the injured employee, or the injured employee's representative, is required to reimburse the health care provider for subsequent requests for the same medical documentation. Further, the Division believes it to be appropriate for the workers' compensation system for an injured employee, or the injured employee's representative, requesting creation of medical documentation, such as a medical narrative, to be required to reimburse the health care provider for this additional information.

Section 134.120(e). Comment: A commenter recommends language change to require documentation be provided by the health care provider to the Office of Injured Employee Counsel upon request. Agency Response: The Division declines to make this change. The Division believes such a directive to be more appropriate within future Office of Injured Employee Counsel rules. Although Chapter 404 of the Labor Code provides broad access to information in the hands of the Division it does not provide for access to information held by health care providers.

Section 134.120(g). Comment: A commenter recommends subsection 134.120(g) be amended to specify the insurance carrier should only be liable for claim-specific narrative information specifically applicable to the compensable injury and directed towards the specific request made by the insurance carrier or the Division. Agency Response: The Division declines to make this change. The Division clarifies narrative reports are defined as original documents explaining the assessment, diagnosis, and plan of treatment for an injured employee and created at the written request of the insurance carrier or the Division. As such, it is an insurance carrier's prerogative to reimburse for narrative reports requested and submitted in accordance with this rule and that specifically address the issues brought forward. Additionally, it is a health care provider's responsibility to submit narrative reports in accordance with this rule and specifically address the issues brought forward. Further, the rule provides additional guidance as to what shall be submitted as a narrative report.

For with changes: Flahive, Ogden & Latson, Texas Medical Association, American Insurance Association, Office of Injured Employee Counsel, Baker Botts, LLP, The Boeing Company, Texas Mutual Insurance Company, Hospital Corporation of America, Texas Pharmacy Association, Insurance Council of Texas, Association of Fire & Casualty Insurers of Texas, Property Casualty Insurers of America

SUBCHAPTER A. MEDICAL REIMBURSEMENT POLICIES

28 TAC §134.1

The section is adopted under Labor Code §§401.023, 408.004, 408.0041, 408.021, 408.025, 408.027, 408.151, 413.007, 413.011, 413.019, 413.053, 402.00111, and 402.061. Section 401.023 provides for the computation of an interest rate used in the calculation of interest due on late payments. Section 408.004 provides for required medical examinations and reimbursement of both injured employee expenses incident to the examination and those of the doctor selected by the employee to attend. Section 408.0041 provides for designated doctor examinations and reimbursement of both injured employee expenses incident to the examination and those of the doctor selected by the employee to attend. Section 408.021 provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Section 408.025 requires the Commissioner to adopt requirements for reports and records required to be filed within the Workers' Compensation System. Section 408.027 establishes the timeframe for a health care provider's claim submission, the timeframes for an insurance carrier's processing of a claim including requests for additional documentation and audit, the reimbursement during the pendency of an audit, and the section's applicability to all delivered health care whether or not subject to a workers' compensation health care network. Section 408.151 provides for required medical examinations and designated doctor examinations during supplemental income benefits. Section 413.007 requires the division to maintain a statewide database of medical charges, actual payments, and treatment protocols. Section 413.011 requires the Commissioner to adopt the most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services, including applicable payment policies relating to coding, billing, and reporting, and may modify documentation requirements as necessary to meet other statutory requirements. Section 413.019 provides for the accrual of interest on late payments by the insurance carrier or health care provider beginning on the 60th day after the date the health care provider submits the bill to the insurance carrier until the bill is paid, or the health care provider receives notice of alleged overpayment from the insurance carrier. Section 413.053 authorizes the Commissioner to establish standards for reporting and billing, governing both form and content. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Act. Section 402.061 authorizes the Commissioner to adopt rules necessary to administer the Act.

§134.1. Medical Reimbursement.

(a) Medical reimbursement for health care services provided to injured employees subject to a workers' compensation health care network established under Insurance Code Chapter 1305 shall be made in accordance with the provisions of Insurance Code Chapter 1305, except as provided in subsection (b) of this section.

(b) Examinations conducted pursuant to Labor Code §§408.004, 408.0041, and 408.151 shall be reimbursed in accordance with §134.202 of this chapter (relating to Medical Fee Guideline).

(c) Medical reimbursement for health care not provided through a workers' compensation health care network shall be made in accordance with:

(1) the Division's fee guidelines;

(2) a negotiated contract; or

(3) subsection (d) of this section in the absence of an applicable fee guideline.

(d) Fair and reasonable reimbursement:

(1) is consistent with the criteria of Labor Code §413.011;

(2) ensures that similar procedures provided in similar circumstances receive similar reimbursement; and

(3) is based on nationally recognized published studies, published Division medical dispute decisions, and values assigned for services involving similar work and resource commitments, if available.

(e) The insurance carrier shall consistently apply fair and reasonable reimbursement amounts and maintain, in reproducible format, documentation of the insurance carrier's methodology(ies) establishing fair and reasonable reimbursement amounts. Upon request of the Division, an insurance carrier shall provide copies of such documentation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. MISCELLANEOUS REIMBURSEMENT

28 TAC §§134.100, 134.110, 134.120, 134.130

The sections are adopted under Labor Code §§401.023, 408.004, 408.0041, 408.021, 408.025, 408.027, 408.151, 413.007, 413.011, 413.019, 413.053, 402.00111, and 402.061. Section 401.023 provides for the computation of an interest rate used in the calculation of interest due on late payments. Section 408.004 provides for required medical examinations and reimbursement of both injured employee expenses incident to the examination and those of the doctor selected by the employee to attend. Section 408.0041 provides for designated doctor examinations and reimbursement of both injured employee expenses incident to the examination and those of the doctor selected by the employee to attend. Section 408.021 provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Section 408.025 requires the Commissioner to adopt requirements for reports and records required to be filed within the Workers' Compensation System. Section 408.027 establishes the timeframe for a health care provider's claim submission, the timeframes for an insurance carrier's processing of a claim including requests for additional documentation and audit, the reimbursement during the pendency of an audit, and the section's applicability to all delivered health care whether or not subject to a workers' compensation health care network. Section 408.151 provides for required medical examinations and designated doctor examinations during supplemental income benefits. Section 413.007 requires the division to maintain a statewide database of medical charges, actual payments, and treatment protocols. Section 413.011 requires the Commissioner to adopt the most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services, including applicable payment policies relating to coding, billing, and reporting, and may modify documentation requirements as necessary to meet other statutory requirements. Section 413.019 provides for the accrual of interest on late payments by the insurance carrier or health care provider beginning on the 60th day after the date the health care provider submits the bill to the insurance carrier until the bill is paid, or the health care provider receives notice of alleged overpayment from the insurance carrier. Section 413.053 authorizes the Commissioner to establish standards for reporting and billing, governing both form and content. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Act. Section 402.061 authorizes the Commissioner to adopt rules necessary to administer the Act.

§134.100. Reimbursement of Treating Doctor for Attendance at Required Medical Examination.

(a) When an injured employee's treating doctor is present at a required medical examination in accordance with §126.6 of this title (relating to Required Medical Examination), the insurance carrier shall reimburse the treating doctor for time as follows:

(1) at a rate of $100 an hour limited to four hours, unless the insurance carrier pre-approves extended time; and

(2) in quarter hour increments with any amount over 10 minutes considered an additional quarter hour.

(b) Reimbursement is limited to the time required to travel from the treating doctor's usual place of business to the place of the examination. In addition, it includes the duration of the examination and the time required to return from the examination location to the treating doctor's usual place of business. The travel shall be by the most direct route. This time does not include time spent for meals or other elective activities engaged in by the doctor.

(c) The treating doctor shall submit a request for reimbursement in accordance with §133.10 of this title (relating to Required Billing Forms/Formats).

(d) The injured employee's treating doctor shall be the only doctor permitted to attend and charge for the attendance at the examination.

(e) This section shall apply to all dates of travel on or after May 1, 2006.

§134.110. Reimbursement of Injured Employee for Travel Expenses Incurred.

(a) An injured employee may request reimbursement from the insurance carrier if the injured employee has incurred travel expenses when:

(1) medical treatment for the compensable injury is not reasonably available within 30 miles from where the injured employee lives; and

(2) the distance traveled to secure medical treatment is greater than 30 miles, one-way.

(b) The injured employee shall submit the request for reimbursement to the insurance carrier within one year of the date the injured employee incurred the expenses.

(c) The injured employee's request for reimbursement shall be in the form and manner required by the Division and shall include documentation or evidence (such as itemized receipts) of the amount of the expense the injured employee incurred.

(d) The insurance carrier shall reimburse the injured employee based on the travel rate for state employees on the date travel occurred, using mileage for the shortest reasonable route.

(1) Travel mileage is measured from the actual point of departure to the health care provider's location when the point of departure is:

(A) the employee's home; or

(B) the employee's place of employment.

(2) If the point of departure is not the employee's home or place of employment, then travel mileage shall be measured from the health care provider's location to the nearest of the following locations:

(A) the employee's home;

(B) the place of employment; or

(C) the actual point of departure.

(3) Total reimbursable mileage is based on round trip mileage.

(4) When an injured employee's travel expenses reasonably include food and lodging, the insurance carrier shall reimburse for the actual expenses not to exceed the current rate for state employees on the date the expense is incurred.

(e) The insurance carrier shall pay or deny the injured employee's request for reimbursement submitted in accordance with subsection (c) of this section within 45 days of receipt.

(f) If the insurance carrier does not reimburse the full amount requested, partial payment or denial of payment shall include a plain language explanation of the reason(s) for the reduction or denial. The insurance carrier shall inform the injured employee of the injured employee's right to request a benefit review conference in accordance with §141.1 of this title (relating to Requesting and Setting a Benefit Review Conference).

(g) This section shall apply to all dates of travel on or after May 1, 2006.

§134.120. Reimbursement for Medical Documentation.

(a) An insurance carrier is not required to reimburse initial medical documentation provided to the insurance carrier in accordance with §133.210 of this title (relating to Medical Documentation).

(b) An insurance carrier shall separately reimburse subsequent copies of medical documentation requested by the insurance carrier in accordance with §133.210 of this title.

(c) Upon request, the health care provider shall provide the injured employee, or the injured employee's representative, an initial copy of the medical documentation without charge. The requestor shall reimburse the health care provider for subsequent requests of the same medical documentation.

(d) If the injured employee, or the injured employee's representative, requests creation of medical documentation, such as a medical narrative, the requestor shall reimburse the health care provider for this additional information.

(e) The health care provider shall provide copies of any requested or required documentation to the Division at no charge.

(f) The reimbursements for medical documentation are:

(1) copies of medical documentation--$.50 per page;

(2) copies of hospital records--an initial fee of $5.00 plus $.50 per page for the first 20 pages, then $.30 per page for records over 20 pages;

(3) microfilm--$.50 per page;

(4) copies of X-ray films--$8.00 per film;

(5) narrative reports:

(A) one to two pages--$100;

(B) each page after two pages--$40 per page.

(g) Narrative reports are defined as original documents explaining the assessment, diagnosis, and plan of treatment for an injured employee written or orally transcribed and created at the written request of the insurance carrier or the Division. Narrative reports shall provide information beyond that required by prescribed medical reports and/or records. A narrative report should be single spaced on letter-size paper or equivalent electronic document format. Clinical or progress notes do not constitute a narrative report.

§134.130. Interest for Late Payment on Medical Bills and Refunds.

(a) Insurance carriers shall pay interest on medical bills paid on or after the 60th day after the insurance carrier originally received the complete medical bill, in accordance with §133.340 of this title (relating to Medical Payments and Denials).

(b) Health care providers shall pay interest to insurance carriers on requests for refunds paid later than the 60th day after the date the health care provider received the request for refund, in accordance with §133.260 of this title (relating to Refunds).

(c) The rate of interest to be paid shall be the rate calculated in accordance with Labor Code §401.023 and in effect on the date the payment was made.

(d) Interest shall be calculated as follows:

(1) multiply the rate of interest by the amount on which interest is due (to determine the annual amount of interest);

(2) divide the annual amount of interest by 365 (to determine the daily interest amount); then

(3) multiply the daily interest amount by the number of days of interest to which the recipient is entitled under subsection (a) or (b) of this section.

(e) The percentage of interest for each quarter may be obtained by accessing the Texas Department of Insurance's website, www.tdi.state.tx.us.

(f) This section shall apply to all dates of service on or after May 1, 2006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. MEDICAL BILL REPORTING

28 TAC §134.802

The amendments are adopted under Labor Code §§401.023, 408.004, 408.0041, 408.021, 408.025, 408.027, 408.151, 413.007, 413.011, 413.019, 413.053, 402.00111, and 402.061. Section 401.023 provides for the computation of an interest rate used in the calculation of interest due on late payments. Section 408.004 provides for required medical examinations and reimbursement of both injured employee expenses incident to the examination and those of the doctor selected by the employee to attend. Section 408.0041 provides for designated doctor examinations and reimbursement of both injured employee expenses incident to the examination and those of the doctor selected by the employee to attend. Section 408.021 provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Section 408.025 requires the Commissioner to adopt requirements for reports and records required to be filed within the Workers' Compensation System. Section 408.027 establishes the timeframe for a health care provider's claim submission, the timeframes for an insurance carrier's processing of a claim including requests for additional documentation and audit, the reimbursement during the pendency of an audit, and the section's applicability to all delivered health care whether or not subject to a workers' compensation health care network. Section 408.151 provides for required medical examinations and designated doctor examinations during supplemental income benefits. Section 413.007 requires the division to maintain a statewide database of medical charges, actual payments, and treatment protocols. Section 413.011 requires the Commissioner to adopt the most current reimbursement methodologies, models, and values or weights used by the federal Centers for Medicare and Medicaid Services, including applicable payment policies relating to coding, billing, and reporting, and may modify documentation requirements as necessary to meet other statutory requirements. Section 413.019 provides for the accrual of interest on late payments by the insurance carrier or health care provider beginning on the 60th day after the date the health care provider submits the bill to the insurance carrier until the bill is paid, or the health care provider receives notice of alleged overpayment from the insurance carrier. Section 413.053 authorizes the Commissioner to establish standards for reporting and billing, governing both form and content. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Act. Section 402.061 authorizes the Commissioner to adopt rules necessary to administer the Act.

§134.802. Insurance Carrier Medical Electronic Data Interchange to the Division.

(a) The insurance carrier shall submit medical bill and payment data to the Division within 30 days after the insurance carrier makes payment, denies payment, or receives a refund of overpayment on a medical bill.

(b) Insurance carriers shall submit medical bill and payment data electronically in the form and format prescribed by the Division.

(c) The Division shall prescribe the form, format, and content of the required medical bill and payment data submission.

(d) This section shall apply to all dates of service on or after July 15, 2000, for facility and professional medical services except pharmacy and dental services.

(e) This section shall apply to all dates of service on or after January 1, 2005, for pharmacy and dental services in addition to the already required facility and professional medical services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. PROSPECTIVE AND CONCURRENT REVIEW OF HEALTH CARE

28 TAC §134.600

The Commissioner of the Division of Workers' Compensation, Texas Department of Insurance, adopts amendments to §134.600, concerning Preauthorization, Concurrent Review, and Voluntary Certification of Health Care. The adopted rule will replace the emergency rule adopted by the Commissioner of the Division of Workers' Compensation on November 3, 2005, published in the November 18, 2005, issue of the *Texas Register* (30 TexReg 7624), with an extension published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1539). The amended section is adopted with changes to the proposed text as published in the February 10, 2006, issue of the *Texas Register* (31 TexReg 812).

The amendments are necessary to implement portions of House Bill (HB) 7, enacted during the 79th Legislature, Regular Session, effective September 1, 2005. The amendments permit expedited compliance with statutory changes to the Labor Code as a result of changes to §413.014 and new §408.0042. The changes affected by HB 7 include revisions to Labor Code §413.014(c) which requires that rules adopted under this section require health care providers to seek preauthorization and concurrent review at a minimum for certain treatments including physical and occupational therapy, and creation of new Labor Code §408.0042(d), which requires health care providers to seek preauthorization of treatments for any injury or diagnosis not accepted as compensable by the insurance carrier (carrier) following an examination by the treating doctor.

This adopted section does not apply to networks certified under Insurance Code Chapter 1305 or political subdivisions with contractual relationships under Labor Code §504.053(b)(2).

The adoption addresses several statutory requirements by incorporating the provisions of Labor Code §408.028, regarding pharmaceutical closed formularies, and §413.011, regarding treatment guidelines, protocols, and treatment plans, as well as amendments to §413.014 and new §408.0042. In addition, this adoption reflects the Division's efforts to coordinate this section with anticipated future Division rulemaking initiatives related

to Chapter 137 (related to Disability Management) and rules pertaining to treatment guidelines and treatment plans.

A few changes are made to the proposed sections as published. However, none of the changes introduce new subject matter or affect additional persons other than those subject to the proposal as originally published. Throughout the rule, particularly in subsections (g) and (h), the Division makes editorial and grammatical changes for ease of reading and clarity as a result of public comment.

Subsections (a) - (f), (i), (j), (m) - (o), and (q) - (t) are adopted as proposed.

Adopted subsection (g) is changed from the proposal and addresses the need for preauthorization when an carrier requests a treating doctor examination to define the compensable injury as set forth in Labor Code §408.0042. This provision aids in the communication between parties and brings the denial of the preauthorization request to the forefront, which may foster earlier resolution of disputes. Subsection (g)(1)(B), which required a statement initialed by the injured employee acknowledging possible responsibility for charges related to the health care services provided if the injury/diagnosis is finally adjudicated as not being work-related, is deleted. This subsection was deleted because of concern that the provision could have a negative impact on injured employees and return to work outcomes. Additional language is added as a result of public comment to clarify the Division's intent for carriers to review requests pursuant to Labor Code §408.0042 for both issues of medical necessity and compensability. The carrier is required to address whether the requested treatment/service is medically necessary and whether the injury/diagnosis is related to the compensable injury. Regardless of the issue of compensability, it is important to the workers' compensation system that the issue of medical necessity be addressed when the care is needed as receiving early treatment promotes injured employees' prompt recovery and return to work. Paragraphs (4) and (5) of this subsection include additional language as proposed to clarify the proper venue for resolving issues of either medical necessity or compensability. Subsection (g)(4) is added to clarify that the requestor or employee may file a compensability/extent of injury dispute upon receipt of a carrier's denial based on the determination that the injury/diagnosis was not compensable or work-related. New subsection (g)(5) is added to clarify that medical dispute resolution is the proper forum for denials based on medical necessity but not for denials in which the issue is compensability.

Subsection (h) is changed from proposal to clarify that carriers are required to approve or deny requests based solely on the medical necessity of the health care, except for requests submitted in accordance with subsection (g), which are related to §408.0042.

Adopted subsection (k) is changed from the proposal and provides an enforcement mechanism for carriers that fail to comply with any timeframe requirements of this section. Specific references to subsection (i) and (j) are removed to reinforce the importance of compliance with the section in its entirety, as well as with the timeframes stated in the section.

Subsection (p) is changed from the proposal at paragraph (9), which indicates that durable medical equipment in excess of $500 billed charges per item will require preauthorization.

General Comment: A commenter expressed a general assessment of the workers' compensation system as a whole as a result of HB 7 implementation efforts, including observations that the current system is already overloaded, underpaid, overworked, and breaking down at a rapid pace. The commenter additionally has some generalized observations about the basic tenets of the rule, but primarily focuses on the belief that the denial processes were discriminatory and arbitrary. The commenter states that the denial processes are not favorable towards chiropractic providers and are used as a delaying tactic to avoid payment.

Agency Response: The Division notes the commenter's concerns about the current system. The Division has taken many steps in an effort to develop a fair and effective preauthorization process to address the burdens of the current system and notes that an enforcement mechanism has been added to the rule to address inconsistencies in the process.

General Comment: A commenter states proper preauthorization requests are not being replied to within the mandated timeframe, and that carriers are not being compliant, and there seems to be a lack of enforcement.

Agency Response: The Division acknowledges the commenter's concerns. New subsection (k) clarifies that there is an enforcement mechanism to assure that preauthorization requests are processed in an efficient and effective manner. In order for the Division to take action, a complaint must first be received by the Division for investigation.

General Comment: A commenter recommends language be added to clarify the preauthorization rule does not apply to services rendered to employees participating in a workers' compensation network under Chapter 1305.

Agency Response: The Division declines to make this change as Labor Code §504.053 already addresses this situation. The Division attempts to avoid unnecessary repetition of statutory language; however, this clarification is added elsewhere in this adoption preamble.

(a) and (p)(5)(C): Commenters recommend definitions for medical necessity and surgical interventions. Commenters recommend that language be added to clarify that a surgical intervention is a surgery previously preauthorized by the carrier under subsection (p)(1), (2), and (3).

Agency Response: The Division declines to add definitions for these terms as it is believed that the terms are so widely used in the industry as to have a plain, commonly accepted meaning. Additionally, the Division declines to make the recommended change to subsection (p)(5)(C) because the language addition is not necessary.

(a)(1): Commenters recommend the definition of ambulatory surgical services be changed to reference the definition in §134.402. Commenters state this would provide necessary clarification of services that are included on the list under subsection (p)(2).

Agency Response: The Division declines to make this change. The term "ambulatory surgical services" is not defined in §134.402 (relating to Ambulatory Surgical Center Fee Guideline). Therefore, reference to §134.402 is not appropriate in this definition.

(a)(4): Commenters recommend language to clarify services provided by Division exempted programs is subject to retrospective review for the purposes of reimbursement by the carrier.

Agency Response: The Division clarifies that services subject to preauthorization and concurrent review are not subject to retrospective review. Conversely, exempted work hardening/work

conditioning programs, as defined by subsection (a)(4), that do not require preauthorization or concurrent review are subject to retrospective review.

(b): Commenters recommend clarification regarding the prevailing provision if §134.600 conflicts with services requiring treatment plans.

Agency Response: The Division clarifies that subsection (b) as proposed resolves conflicts between Division-adopted treatment guidelines and this section. Treatments and services covered within the treatment guidelines will continue to require preauthorization or concurrent review if they are included on the lists in subsection (p) or (q). The Division will monitor the situation for future rulemaking initiatives in the establishment of Chapter 137 (relating to Disability Management) and other applicable rules pertaining to treatment guidelines and treatment plans.

(e): Commenters recommend retaining the proposed deleted language that references a carrier's agent to include utilization review agents.

Agency Response: The Division declines to make the suggested change because carriers are allowed to use carrier's agents and utilization review agents in many processes pertaining to workers' compensation, not just in the preauthorization and concurrent review processes. The term "carrier agent" is defined in Chapter 133 (relating to General Medical Provisions), and the definition includes a utilization review agent.

(f) and (f)(2): A commenter recommends CPT codes be included in the components of a request, which improves a carrier's ability to approve treatments more quickly. Another commenter states carriers should not require health care providers to specify CPT codes as well as require the exact number of codes in each visit because a treatment plan is fluid and changes daily based on a patient's response to previous therapy.

Agency Response: The Division maintains that the preauthorization and concurrent review processes should focus on the delivery of health care or treatment provided to return the injured employee to work. While including CPT codes in preauthorization and concurrent review requests may be helpful to some carriers, such codes are not necessary in determining the medical necessity of the treatment or services. The Division notes that requiring such codes for the preauthorization and concurrent review processes would result in additional administrative burdens for providers and insurance carriers. Mandating specific CPT codes is likely to result in rigid and cumbersome preauthorization and concurrent review processes in which requests are unintentionally denied due to unnecessary administrative requirements.

(f): Commenters recommend an additional "shall" be included to provide clarification to the requestors as to their expected participation in the workers' compensation system.

Agency Response: The Division declines to make this change because the term "shall" is already included in the requirements of subsection (f).

(f): A commenter recommends language that allows injured employees to seek preauthorization be deleted from the rule because all health care should be coordinated with the treating doctor.

Agency Response: The Division declines to change the rule to limit the requestor to the treating doctor. The requirement of the Labor Code at §413.014 allows the claimant or health care provider to request preauthorization, and the rule language is consistent with the statutory requirement.

(f)(2): A commenter recommends adding language to decrease confusion by specifying "the maximum number of units of specific healthcare treatments."

Agency Response: The Division declines to incorporate the recommendation because this terminology was previously contained in subsection (e)(2) and has not been reported by system participants as confusing or difficult to apply. Additionally, the Division notes that the commenter's specific language recommendation may cause confusion.

(g): Commenters have concerns about the language that allows a health care provider to receive preauthorization approval based on medical necessity, yet be denied payment for the treatment or service from a workers' compensation carrier due to a compensability challenge. Commenters recommend either this issue be reconsidered and changed or develop a new rule to address situations where the health care provider is denied payment due to a determination that the injury is non-compensable or not work-related. A recommendation is made that would hold carriers accountable for preauthorized services and require carriers to coordinate benefits with the injured employee's group health.

Agency Response: The Division acknowledges the commenters' concerns but has no jurisdictional authority to regulate health care outside the workers' compensation system. The Labor Code mandates that carriers participating in the workers' compensation system are required to pay for health care only if the injury is compensable. Addressing the issue of medical necessity as it arises is important to encourage early treatment and promote injured employees' prompt recovery and return to work. If an injury or diagnosis is deemed not compensable or is not a work-related injury, the health care providers are extended the same collection opportunities as every other health care provider not in the workers' compensation system. The Division notes that the health care provider is in the most appropriate position to collect on the health care services rendered since the health care provider has a direct relationship with the injured employee and has specific knowledge of the health care services rendered. Requiring a workers' compensation carrier to coordinate collection of payment from a group health carrier or injured employee for health care services not related to a compensable injury is likely to result in a negative financial impact to the workers' compensation carrier and increase overall costs in the system because it requires resources to be used for non-workers' compensation related activities. The Division is hopeful that newly promulgated §126.14 (relating to Treating Doctor Examination to Define Compensable Injury) may be used as a tool to communicate the limits of health care that may be provided in the workers' compensation system. The Division will monitor the frequency of these occurrences and will continue to review this issue.

(g) and (h): Commenters recommend clarification be provided regarding subsections (g) and (h) as they seem to be in conflict. Subsection (g) implies denials may be based on medical necessity, unrelated injury/diagnosis, or both. Subsection (h) states the carrier shall review for both medical necessity and relatedness. In addition, subsection (h) appears in conflict with Labor Code §408.0042(d).

Agency Response: The Division notes clarification was needed regarding subsections (g) and (h). Therefore, subsections (g)

and (h) have been changed to clarify that requests submitted in accordance with §408.0042 are required to be reviewed for both issues of medical necessity and relatedness. Regardless of the issue of relatedness, it is important to the workers' compensation system that the issue of medical necessity be addressed when the care is needed because receiving early treatment promotes injured employees' prompt recovery and return to work. In addition, it may also be a negative impact to the system if the diagnosis is ultimately compensable and the issue of medical necessity was not addressed.

(g): A commenter supports this subsection.

Agency Response: The Division appreciates the comment.

(g): A commenter recommends a carrier be prevented from denying payment for preauthorized services when the injury/diagnosis is not compensable or work-related unless the carrier has provided clear notice that the injury/diagnosis is in a compensability dispute.

Agency Response: The Division declines to change the rule. However, the Division clarifies that subsection (l)(3) establishes that an insurance carrier is required to include in an approval a notice of any unresolved dispute regarding the denial of compensability or liability or an unresolved dispute of extent or relatedness to the compensable injury. Additionally, the Division notes that Chapter 133 (relating to General Medical Provisions) addresses carriers' medical payment denials based on a non-compensable injury or when the condition for which the health care was provided was not related to the compensable injury. The Division notes the concern related to denials of payment for previously preauthorized care and will continue to review this issue.

(g)(1)(B): A commenter recommends the deletion of this subsection, which provides that the request contain an initialed statement by the injured employee. This requirement is unnecessary because §413.042 allows the health care provider to pursue a private claim against an injured employee if the injury is finally adjudicated as non-compensable or not work-related. The commenter further states that injured employees that are unable to pay for medical care may be intimidated by medical cost and refuse health care even if the injury is finally adjudicated as compensable or work-related. This lack of care may result in a longer recovery period and negatively impact return to work outcomes.

Agency Response: The Division agrees with the commenter's recommendation and subsection (g) has been changed to delete this requirement.

(g)(1)(B): Commenter recommends a change to clarify in the injured employee's initialed statement that the injured employee may be liable "if the injury/diagnosis is finally adjudicated as not work-related."

Agency Response: The Division declines this recommendation and clarifies that subsection (g) has been changed to delete the required injured employee's initialed statement.

(g)(1)(B): A commenter states that the subsection does not indicate who is to retain a copy of the initialed statement and recommends a copy be provided to the injured employee. The commenter also recommends this statement be provided in a variety of languages.

Agency Response: The Division declines this recommendation and clarifies that subsection (g) has been changed to delete the required injured employee's initialed statement.

(h): A commenter states this subsection implies that the examination to define the compensability, rather than the treatment requested for a non-accepted diagnosis, requires preauthorization.

Agency Response: The Division notes clarification was needed and subsections (g) and (h) have been changed to clarify that requests submitted in accordance with Labor Code §408.0042 are required to be reviewed for both issues of medical necessity and compensability. The Division further clarifies that the examination to define the compensability does not require preauthorization and, the process is clarified by §126.14 (relating to Treating Doctor Examination to Define Compensable Injury).

(i): A commenter recommends adoption of preauthorization timeframes set forth in 28 TAC §10.102(e) - (g) in order to standardize preauthorization timeframes for both network and non-network services and also with HMOs under the Insurance Code.

Agency Response: The Division declines to change the rule to require a three calendar day timeframe as used in the workers' compensation network rules. No changes were proposed to the timeframes included in subsection (i), which prior to adoption were contained in subsection (f). The networks have the flexibility to design their preauthorization system through contracts with their health care providers in order to comply with the network timeframes. Preauthorization in the non-network workers' compensation system is established by this rule and not subject to specific contractual negotiations between carriers and health care providers. Therefore, a three working day timeframe is more appropriate than the network timeframe.

(i): A commenter recommends the section allow pharmacists to dispense and be reimbursed for an emergency supply of a prescribed drug. This could be limited to three working days, which is consistent with a carrier's response time on a preauthorization request.

Agency Response: The Division declines to make the recommended change; however, §134.501 (relating to Initial Pharmaceutical Coverage) offers such provisions. Section 134.501 states that, for injuries which occur on or after December 1, 2002, the carrier shall pay for specified pharmaceutical services sufficient for the first seven days following the date of injury, regardless of issues of liability for or compensability of the injury that the carrier may have, if, prior to providing the pharmaceutical services, the health care provider obtains both a verification of insurance coverage, and an oral or written confirmation that an injury has been reported. The Division will monitor the situation for future rulemaking initiatives in the establishment of closed formularies pursuant to the Labor Code at §408.028.

(i): A commenter recommends adding language to require the carrier to contact both the requestor and the employee to approve or deny the request.

Agency Response: The Division appreciates the comment but clarifies that subsection (j) provides that the carrier communicate to the requestor and the employee regarding the carrier's response. The Division declines to make the suggested change because subsection (i) is a mechanism to expedite the preauthorization and concurrent review processes. Subsection (j) requires the carrier to provide written notification to the employee, employee's representative, and requestor. The Division believes that written notification to the injured employee is the most appropriate and clear method of communication in this circumstance.

(i): A commenter recommends the carrier response time to a surgery request should be extended to 15 days instead of three. The commenter states surgeries are unusual and are often known far in advance of the actual surgery date and URAs are generally not provided with the necessary medical records that are pertinent to the review of the surgical recommendation in such short timeframes. Such a provision would ensure inappropriate, and expensive treatment would not be provided, which would reduce costs.

Agency Response: The Division declines to make the rule change to extend the carrier's response time for recommended surgeries, as the three-day carrier response time has been in effect since 1997 and has not been widely reported by system participants as unduly burdensome. The Division feels that the three-day timeframe is appropriate for all parties and the time parameters provide sufficient time to review the request without causing undue delay or interruption of treatment to the injured employee. Further, there is nothing in the rule prohibiting the health care provider from anticipating the surgical recommendation, and requesting the carrier allow the pertinent medical records be sent to the carrier in advance of the preauthorization request.

(m): A commenter recommends clarification on what a "reasonable opportunity" is in light of the fact physicians must communicate with physicians. This prohibits the carrier from meeting the three-day response timeframe.

Agency Response: The Division disagrees that clarification of reasonable opportunity is necessary as this terminology was previously contained in subsection (e)(2) and has not been reported by system participants as confusing or difficult to apply. The Division believes that this terminology is so widely used in the industry as to have a plain, commonly accepted meaning. Additionally, the three-day timeframe is believed to be appropriate to provide sufficient time to review and discuss the request without causing undue delay or interruption of treatment to the injured employee.

(m): A commenter recommends that the denial include both a description and source of the screening criteria utilized in making the denial.

Agency Response: The Division declines to add the suggested language because it does not offer additional clarity to the subsection. The Division notes that either a description of the screening criteria used, or the source of the screening criteria is required by subsection (m).

(m): A commenter questions the deletion of previous subsection (m) regarding the rule's severability clause.

Agency Response: The Division removed the severability clause previously in the rule in an effort to more closely align its rules with Texas Department of Insurance rules. Additionally, the Division clarifies that the previous severability clause is unnecessary and provides no additional legal protection.

(m)(4): A commenter recommends rewording to establish plain language descriptions of the complaint and appeal process, and the deletion of the rest of the paragraph.

Agency Response: The Division declines to make this change because such a description is more appropriate in other Division rules. The Division intends to promulgate and amend existing rules regarding complaints and the appeal process. The Division notes that when a carrier denies the medical necessity of a service, the health care provider is entitled to the clinical basis for the denial, a description or the source of the screening criteria that were utilized as guidelines in making the denial, and the principle reasons for the denial.

(o)(1): A commenter recommends language to change the timeframe for reconsideration from 15 working days to 90 working days.

Agency Response: The Division declines to make the suggested change because such a lengthy period for reconsideration requests would unnecessarily prolong the preauthorization process and it is important to the workers' compensation system that the issue of medical necessity be addressed when the care is needed as injured employees' receiving early treatment promotes prompt recovery and return to work. In addition, an injured employee's medical condition could undergo a substantial change within 90 days. Such a change would necessitate the submission of a new request.

(o)(4): A commenter suggests that the treating doctor should have the ability to guarantee payment to his consultants for a second opinion and diagnostic studies to support a substantial change in condition.

Agency Response: The Division declines to make the suggested change because it would be unduly burdensome to the preauthorization and concurrent review process and increase costs to the system.

(o)(4): A commenter recommends clarification regarding the carrier's responsibility if there was no substantial change in the employee's medical condition.

Agency Response: The Division clarifies that the preauthorization process should again be afforded to the requestor if the requestor provides objective clinical documentation to support the requestor's assertion that a substantial change in medical condition has occurred relating to a previously denied preauthorization request. A substantial change is a fact-specific determination, which is determined on a case-by-case basis. A substantial change in condition might be supported by information contained in objective documentation, such as: current diagnosis; current symptoms; responsiveness to therapy to date; work status update; pertinent findings; and pertinent diagnostic testing. The carrier should consider these elements when making this determination during the reconsideration process.

(o): A commenter recommends subsection (k) regarding administrative penalty for non-compliance apply to this subsection as well.

Agency Response: The Division agrees with the recommendation to extend the administrative penalties for non-compliance to all subsections containing timeframes. The rule now reflects this recommendation. Additionally, the Division clarifies that it is the Division's intention to monitor system participants regarding compliance with timeframes.

(p): A commenter is concerned with the deletion of some of the services (durable medical equipment, diagnostic services) from the list of services that require preauthorization. The commenter believes this will result in over-utilization and increased costs and recommended this be re-evaluated.

Agency Response: The Division clarifies that durable medical equipment and repeat individual diagnostic studies have been retained, and are in subsection (p), paragraphs (8) and (9) of this section.

(p): Commenters recommend clarification on how subsection (p)(12) - (14) shall be coordinated with the other list items.

Agency Response: The Division clarifies that the purpose of subsection (b) is to resolve conflicts between Division-adopted treatment guidelines and this section. Treatments and services covered within the treatment guidelines will continue to require preauthorization or concurrent review if they are included on the lists in subsection (p) or (q). Treatments and services not covered within the treatment guidelines and not specifically included on the lists in subsection (p) or (q) will require preauthorization per subsection (p)(12). The Division anticipates that treatments and services specifically listed in subsection (p) or (q) may be included in required treatment plans. The Division will consider and monitor the situation relative to future rulemaking initiatives in the establishment of Chapter 137 (relating to Disability Management) and rules pertaining to treatment guidelines and treatment plans. In addition, subsection (p)(14) requires treatment for an injury or diagnosis that is not accepted by the carrier pursuant to Labor Code §408.0042 and §126.14 of this title to be preauthorized. Subsection (g) specifically addresses requests submitted in accordance with subsection (p)(14).

(p): A commenter supports the inclusion of chronic pain management/interdisciplinary pain rehabilitation, discograms, and repeated diagnostic examinations over $350 on the list of services requiring preauthorization.

Agency Response: The Division appreciates the comment. However, the Division clarifies that discograms are not on the list of non-emergency health care requiring preauthorization unless it is a repeat individual diagnostic study.

(p)(5): A commenter recommends statutory support for the rationale for the six physical/occupational visits allowed by the rule be clearly delineated in the preamble. Another commenter states the Division has no authority to create this exception in the absence of expressed legislative intent. The commenter recommends the exception should be the same as the three working days the carrier has to respond instead of two weeks.

Agency Response: The Division clarifies that preauthorization is required for physical therapy and occupational therapy services as mandated by §413.014. The allowance of a short period where preauthorization is not required in order to avoid a delay in treatment for an injured employee is not contrary to that requirement. It is appropriate for the details of the preauthorization process to be specified in this rule, including when the requirement begins. Pursuant to §413.011(g), the Commissioner may adopt rules that are designed to promote appropriate health care at the earliest opportunity after the injury to maximize injury healing and improve stay-at-work and return-to-work outcomes. Section 402.061 authorizes the Commissioner to implement and enforce the Texas Workers' Compensation Act. This implementation requires the Act to be viewed as a whole to ensure the goals of the Act are achieved. In addition, physical therapy and occupational therapy services provided during this initial period are subject to retrospective review. Therefore, the carrier is not obligated to pay for such services if they are not medically necessary.

(p)(5): A commenter recommends physical and occupational therapy evaluations be included because an evaluation without treatment has been extremely disruptive and cumbersome for providing continuous care.

Agency Response: The Division declines to make this change because the Labor Code §413.014 requires the commissioner's rules under that section to specify physical and occupational "therapy" are to be preauthorized. An evaluation is not therapy; and, an evaluation may occur that does not result in physical/occupational therapy services being medically necessary.

(p)(5): A commenter states that there is no reason post-surgery physical/occupational therapy cannot be requested at the time of the surgical request or simultaneously with the surgery itself.

Agency Response: The Division agrees that it is feasible to request physical and occupational therapy at the time of the surgical request or simultaneously with the surgery itself. This section does not prevent this from occurring; in fact, subsection (p)(13) encourages such foresight through requiring preauthorization of treatment plans.

(p)(5)(B): A commenter asks whether Health Care Procedural Coding System (HCPCS) Level II temporary codes for physical and occupational therapy services in a home setting apply to only HCPCS Level II codes S9129 and S9131 or if the temporary codes also include G0151 and G0152.

Agency Response: The Division clarifies that both sets of temporary codes referenced by the commenter for physical and occupational therapy services in a home setting are included in Level II temporary codes pursuant to subsection (p)(5)(B) and require preauthorization and concurrent review processing.

(p)(5)(B): Commenters recommend language changes to subsection (p)(5)(B) to include "procedures/professional services" as well as temporary codes. Commenters state this change would include all G-codes, including electronic stimulators, and S-codes, including home care training, that may be provided as physical and occupational therapy services.

Agency Response: The Division declines to make this change as Labor Code §413.014 requires the commissioner's rules adopted under that section to require preauthorization and concurrent review of physical and occupational therapy services. The Division, after extensive review and input by system stakeholders via an emergency rule, and a pre-proposal rule draft, believes physical and occupational therapy services are adequately identified as adopted in this subsection, and not necessarily identified as everything a physical or occupational therapist is allowed to do within their practice act. However, the Division clarifies that temporary G-codes specifically listing services of physical/occupational therapists in a home health setting require preauthorization in accordance with subsection (p)(5)(B).

(p)(5)(C): Commenters recommend a change to reflect "six sessions" rather than "six visits" to eliminate the interruption of treatment for at least three days in order to obtain preauthorization. Some commenters recommend extending the timeframe to 30 days for which the delivery of physical and occupational therapy services need not require preauthorization and concurrent review. Some commenters state that the extension of this timeframe may result in decreased costs to the system and prevent delay in providing health care to the injured employee.

Agency Response: The Division declines to make the recommended change because the timeframe for physical and occupational therapy services needing preauthorization and concurrent review has been extended from two visits, as stated in the adopted emergency rule, to six visits as currently written in an effort to address concerns regarding cost in the system and to prevent delay in health care delivery to the injured employee.

(p)(5)(C): Commenters recommend the Division define "visit" with regard to physical and occupational session because such a clarification will enhance the communication between system participants, expedite the preauthorization and bill review processes, and minimize unnecessary disputes.

Agency Response: The Division declines to make this change. The Division believes that the term "visit" is so widely used in the medical field as to have a plain, commonly accepted meaning. The Division feels that defining such a term is unnecessary and may cause confusion amongst system participants.

(p)(9): Commenters recommend language specify that durable medical equipment in excess of $500 billed charges per item require preauthorization. Such a clarification will enhance the communication between system participants and expedite the preauthorization process.

Agency Response: The Division agrees to make the suggested change in an effort to enhance communication between system participants.

(p)(10): A commenter recommends Commission on Accreditation of Rehabilitation Facilities (CARF) accredited pain management programs not be required to obtain preauthorization and to be the same as CARF accredited work hardening/work conditioning programs.

Agency Response: The Division declines to make this change because pain management programs have been identified as items historically highly requested in the preauthorization process. Additionally, Labor Code §413.014 requires a preauthorization exemption for CARF accredited work hardening/work conditioning programs. The Labor Code does not include such a provision for pain management programs.

(p)(12): A commenter inquires about the screening criteria carriers will use to determine medical necessity for treatment/services not addressed by a Division treatment guideline.

Agency Response: The Division's future rulemaking initiative includes the establishment of Chapter 137 (relating to Disability Management). This chapter may include treatment protocols not addressed by treatment guidelines or treatment planning. Until these rules are fully implemented, the Division clarifies that carriers should continue to use their individually established screening criteria.

(p)(12) and (13): A commenter recommends that the section be revised to include a list of specific services because the current section is not descriptive enough.

Agency Response: The Division will take this comment into consideration and monitor the situation relative to future rulemaking initiatives in the establishment of Chapter 137 (relating to Disability Management) and applicable rules pertaining to treatment guidelines and treatment plans.

(q): A commenter recommends concurrent review apply only to inpatient length of stay as the remainder of the items on the list should not require a one-day turnaround. Other commenters recommend physical/occupational therapy be removed as the one-day turnaround is unrealistic for these types of treatments.

Agency Response: The Division declines to make this change and clarifies that per subsection (i)(2) a one-day turn around time applies only to inpatient stays and not all items on the concurrent review list.

(q)(3): Commenters state that any request for physical and occupational therapy services beyond the initial authorization that is above and beyond the initial six visits would be considered outside the current evidence-based treatment guidelines (i.e., Official Disability Guideline (ODG), American College of Occupational and Environmental Medicine (ACOEM)).

Agency Response: The Division will take this comment into consideration and monitor the situation relative to future rulemaking initiatives in the establishment of Chapter 137 (relating to Disability Management) and rules pertaining to treatment guidelines and treatment plans.

(r): A commenter recommends hospitals be given the ability to obtain preauthorization or verification of payment for any proposed service, not just those listed in subsection (p). The commenter also recommends that such services should not be subject to retrospective review of medical necessity.

Agency Response: The Division declines to make this change. The list of services requiring preauthorization is comprehensive, especially in relation to hospital services. Further, requiring preauthorization for more or all services that hospitals provide would be unduly costly to the system. Verification of payment is accomplished through receipt of an explanation of benefits in accordance with Chapter 133 (relating to General Medical Provisions).

(s): A commenter suggests limiting preauthorization controls to only individual doctors or individual workers' compensation claims. The commenter recommends that doctors be regulated by the Insurance Commissioner and not under the purview of the Division of Workers' Compensation.

Agency Response: The Division declines to make the suggested changes because it unnecessarily limits the regulatory authority needed by the Division to enforce applicable statutory and rule provisions. The Division of Workers' Compensation is a division within the Texas Department of Insurance and is statutorily required to administer and operate the Texas Workers' Compensation System pursuant to §402.001(b) of the Labor Code, which includes the regulation of all system participants.

(t): Commenters recommend that the Division provide detailed clarification of how the list items should be reported in subsequent reporting requirements.

Agency Response: The Division utilizes notifications to inform participants of established forms and implementation periods. Notifications are disbursed with ample time to allow carriers to capture Division-required data. Additionally, the Division has granted extensions when appropriate to accommodate the needs of a carrier. The Division anticipates utilizing the same cooperative working relationships with carriers and other system participants for ongoing data collection efforts and consequently the Division declines the recommendation to specify by rule.

For: Medtronic.

For, with changes: Memorial Hermann Worklink; Riata Therapy Specialists, PLLC; Concentra Medical Center; Texas Medical Association; Work & Rehab; American Insurance Association; Denton Management Associates, LLC; GENEX Services, Inc.; Office of Injured Employee Counsel; State Office of Risk Management; The Boeing Company; Texas Mutual Insurance Company; Texas Association of School Boards Risk Management Fund; TIRR Rehabilitation Center; Concentra Health Services; Midland Memorial Hospital; Fair Isaac Corporation; Insur-

ance Council of Texas; Property Casualty Insurers Association of America; and individuals.

Against: Baker Chiropractic and Flahive, Ogden & Latson.

Neither for nor Against: CS Stars.

The amendments are adopted under Labor Code §§413.014, 408.0042, 402.00111 and 402.061. Section 413.014 requires that the Commissioner's preauthorization and concurrent review rules adopted under this section include at a minimum the list of services specified in that section. Section 408.0042(d) requires preauthorization of treatments for any injury or diagnosis not accepted as compensable by the carrier following a requested examination by the treating doctor. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

§134.600. Preauthorization, Concurrent Review, and Voluntary Certification of Health Care.

(a) The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:

(1) Ambulatory surgical services: surgical services provided in a facility that operates primarily to provide surgical services to patients who do not require overnight hospital care.

(2) Concurrent review: a review of on-going health care listed in subsection (q) of this section for an extension of treatment beyond previously approved health care listed in subsection (p) of this section.

(3) Diagnostic study: any test used to help establish or exclude the presence of disease/injury in symptomatic persons. The test may help determine the diagnosis, screen for specific disease/injury, guide the management of an established disease/injury, and formulate a prognosis.

(4) Division exempted program: a Commission on Accreditation of Rehabilitation Facilities (CARF) accredited work conditioning or work hardening program that has requested and been granted an exemption by the Division from preauthorization and concurrent review requirements.

(5) Final adjudication: the Commissioner has issued a final decision or order that is no longer subject to appeal by either party.

(6) Outpatient surgical services: surgical services provided in a freestanding surgical center or a hospital outpatient department to patients who do not require overnight hospital care.

(7) Preauthorization: prospective approval obtained from the insurance carrier (carrier) by the requestor or injured employee (employee) prior to providing the health care treatment or services (health care).

(8) Requestor: the health care provider or designated representative, including office staff or a referral health care provider/health care facility that requests preauthorization, concurrent review, or voluntary certification.

(9) Work conditioning and work hardening: return to work rehabilitation programs as defined in Chapter 134 of this title (relating to Benefits--Guidelines for Medical Service, Charges and Payments).

(b) When Division-adopted treatment guidelines conflict with this section, this section prevails.

(c) The carrier is liable for all reasonable and necessary medical costs relating to the health care:

(1) listed in subsection (p) or (q) of this section only when the following situations occur:

(A) an emergency, as defined in Chapter 133 of this title (relating to General Medical Provisions);

(B) preauthorization of any health care listed in subsection (p) of this section that was approved prior to providing the health care;

(C) concurrent review of any health care listed in subsection (q) of this section that was approved prior to providing the health care; or

(D) when ordered by the Commissioner; or

(2) per subsection (r) of this section when voluntary certification was requested and payment agreed upon prior to providing the health care for any health care not listed in subsection (p) of this section.

(d) The carrier is not liable under subsection (c)(1)(B) or (C) of this section if there has been a final adjudication that the injury is not compensable or that the health care was provided for a condition unrelated to the compensable injury.

(e) The carrier shall designate accessible direct telephone and facsimile numbers and may designate an electronic transmission address for use by the requestor or employee to request preauthorization or concurrent review during normal business hours. The direct number shall be answered or the facsimile or electronic transmission address responded to by the carrier within the time limits established in subsection (i) of this section.

(f) The requestor or employee shall request and obtain preauthorization from the carrier prior to providing or receiving health care listed in subsection (p) of this section. Concurrent review shall be requested prior to the conclusion of the specific number of treatments or period of time preauthorized and approval must be obtained prior to extending the health care listed in subsection (q) of this section. The request for preauthorization or concurrent review shall be sent to the carrier by telephone, facsimile, or electronic transmission and, include the:

(1) specific health care listed in subsection (p) or (q) of this section;

(2) number of specific health care treatments and the specific period of time requested to complete the treatments;

(3) information to substantiate the medical necessity of the health care requested;

(4) accessible telephone and facsimile numbers and may designate an electronic transmission address for use by the carrier;

(5) name of the provider performing the health care; and

(6) facility name and estimated date of proposed health care.

(g) A health care provider may submit a request for health care to treat an injury or diagnosis that is not accepted by the carrier in accordance with Labor Code §408.0042.

(1) The request shall be in the form of a treatment plan for a 60 day timeframe.

(2) The carrier shall review requests submitted in accordance with this subsection for both medical necessity and relatedness.

(3) If denying the request, the carrier shall indicate whether the denial is based on medical necessity and/or unrelated injury/diagnosis in accordance with subsection (m).

(4) The requestor or employee may file an extent of injury dispute upon receipt of a carrier's response which includes a denial due to unrelated injury/diagnosis, regardless of the issue of medical necessity.

(5) Requests which include a denial due to unrelated injury/diagnosis may not proceed to medical dispute resolution based on the denial of unrelatedness. However, requests which include a denial based on medical necessity may proceed to medical dispute resolution for the issue of medical necessity in accordance with subsection (o).

(h) Except for requests submitted in accordance with subsection (g) of this section, the carrier shall approve or deny requests based solely upon the medical necessity of the health care required to treat the injury, regardless of:

(1) unresolved issues of compensability, extent of or relatedness to the compensable injury;

(2) the carrier's liability for the injury; or

(3) the fact that the employee has reached maximum medical improvement.

(i) The carrier shall contact the requestor or employee by telephone, facsimile, or electronic transmission with the decision to approve or deny the request as follows:

(1) within three working days of receipt of a request for preauthorization; or

(2) within three working days of receipt of a request for concurrent review, except for health care listed in subsection (q)(1) of this section, which is due within one working day of the receipt of the request.

(j) The carrier shall send written notification of the approval or denial of the request within one working day of the decision to the:

(1) employee;

(2) employee's representative; and

(3) requestor, if not previously sent by facsimile or electronic transmission.

(k) The carrier's failure to comply with any timeframe requirements of this section shall result in an administrative violation.

(l) The carrier shall not withdraw a preauthorization or concurrent review approval once issued. The approval shall include:

(1) the specific health care;

(2) the approved number of health care treatments and specific period of time to complete the treatments; and

(3) a notice of any unresolved dispute regarding the denial of compensability or liability or an unresolved dispute of extent of or relatedness to the compensable injury.

(m) The carrier shall afford the requestor a reasonable opportunity to discuss the clinical basis for a denial with the appropriate doctor or health care provider performing the review prior to the issuance of a preauthorization or concurrent review denial. The denial shall include:

(1) the clinical basis for the denial;

(2) a description or the source of the screening criteria that were utilized as guidelines in making the denial;

(3) the principle reasons for the denial, if applicable;

(4) a plain language description of the complaint and appeal processes, if denial was based on Labor Code §408.0042, include notification to the injured employee and health care provider of entitlement to file an extent of injury dispute in accordance with Chapter 141 of this title (relating to Dispute Resolution--Benefit Review Conference); and

(5) after reconsideration of a denial, the notification of the availability of an independent review.

(n) The carrier shall not condition an approval or change any elements of the request as listed in subsection (f) of this section, unless the condition or change is mutually agreed to by the health care provider and carrier and is documented.

(o) If the initial response is a denial of preauthorization, the requestor or employee may request reconsideration. If the initial response is a denial of concurrent review, the requestor may request reconsideration.

(1) The requestor or employee may within 15 working days of receipt of a written initial denial request the carrier to reconsider the denial and shall document the reconsideration request.

(2) The carrier shall respond to the request for reconsideration of the denial:

(A) within five working days of receipt of a request for reconsideration of denied preauthorization; or

(B) within three working days of receipt of a request for reconsideration of denied concurrent review, except for health care listed in subsection (q)(1) of this section, which is due within one working day of the receipt of the request;

(3) The requestor or employee may appeal the denial of a reconsideration request regarding medical necessity by filing a dispute in accordance with Labor Code §413.031 and related Division rules.

(4) A request for preauthorization for the same health care shall only be resubmitted when the requestor provides objective clinical documentation to support a substantial change in the employee's medical condition. The carrier shall review the documentation and determine if a substantial change in the employee's medical condition has occurred.

(p) Non-emergency health care requiring preauthorization includes:

(1) inpatient hospital admissions, including the principal scheduled procedure(s) and the length of stay;

(2) outpatient surgical or ambulatory surgical services as defined in subsection (a) of this section;

(3) spinal surgery;

(4) all non-exempted work hardening or non-exempted work conditioning programs;

(5) physical and occupational therapy services, which includes those services listed in the Healthcare Common Procedure Coding System (HCPCS) at the following levels:

(A) Level I code range for Physical Medicine and Rehabilitation, but limited to:

(i) Modalities, both supervised and constant attendance;

(ii) Therapeutic procedures, excluding work hardening and work conditioning;

(iii) Orthotics/Prosthetics Management;

(iv) Other procedures, limited to the unlisted physical medicine and rehabilitation procedure code; and

(B) Level II temporary code(s) for physical and occupational therapy services provided in a home setting;

(C) except for the first six visits of physical or occupational therapy following the evaluation when such treatment is rendered within the first two weeks immediately following:

(i) the date of injury, or

(ii) a surgical intervention previously preauthorized by the carrier;

(6) any investigational or experimental service or device for which there is early, developing scientific or clinical evidence demonstrating the potential efficacy of the treatment, service, or device but that is not yet broadly accepted as the prevailing standard of care;

(7) all psychological testing and psychotherapy, repeat interviews, and biofeedback, except when any service is part of a preauthorized or Division exempted return-to-work rehabilitation program;

(8) unless otherwise specified in this subsection, a repeat individual diagnostic study:

(A) with a reimbursement rate of greater than $350 as established in the current Medical Fee Guideline, or

(B) without a reimbursement rate established in the current Medical Fee Guideline;

(9) all durable medical equipment (DME) in excess of $500 billed charges per item (either purchase or expected cumulative rental);

(10) chronic pain management/interdisciplinary pain rehabilitation;

(11) drugs not included in the Division's formulary;

(12) treatments and services that exceed or are not addressed by the Commissioner's adopted treatment guidelines or protocols and are not contained in a treatment plan preauthorized by the carrier;

(13) required treatment plans; and

(14) any treatment for an injury or diagnosis that is not accepted by the carrier pursuant to Labor Code §408.0042 and §126.14 of this title (relating to Treating Doctor Examination to Define the Compensable Injury).

(q) The health care requiring concurrent review for an extension for previously approved services includes:

(1) inpatient length of stay;

(2) all non-exempted work hardening or non-exempted work conditioning programs;

(3) physical and occupational therapy services as referenced in subsection (p)(5) of this section;

(4) investigational or experimental services or use of devices;

(5) chronic pain management/interdisciplinary pain rehabilitation; and

(6) required treatment plans.

(r) The requestor and carrier may voluntarily discuss health care that does not require preauthorization or concurrent review under subsections (p) and (q) of this section respectively.

(1) Denial of a request for voluntary certification is not subject to dispute resolution for prospective review of medical necessity.

(2) The carrier may certify health care requested. The carrier and requestor shall document the agreement. Health care provided as a result of the agreement is not subject to retrospective review of medical necessity.

(3) If there is no agreement between the carrier and requestor, health care provided is subject to retrospective review of medical necessity.

(s) An increase or decrease in review and preauthorization controls may be applied to individual doctors or individual workers' compensation claims, by the Division in accordance with Labor Code §408.0231(b)(4) and other sections of this title.

(t) The carrier shall maintain accurate records to reflect information regarding requests for preauthorization, or concurrent review approval/denial decisions, and appeals, if any. The carrier shall also maintain accurate records to reflect information regarding requests for voluntary certification approval/denial decisions. Upon request of the Division, the carrier shall submit such information in the form and manner prescribed by the Division.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602080
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: May 2, 2006
Proposal publication date: February 10, 2006
For further information, please call: (512) 804-4288

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

SUBCHAPTER C. VEHICLE INSPECTION AND MAINTENANCE; LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT PROGRAM; AND EARLY ACTION COMPACT COUNTIES

DIVISION 2. LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT PROGRAM

30 TAC §114.62, §114.64

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §114.62 and §114.64 *without changes* to the proposed text as published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8805) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission adopts these revisions in order to implement requirements of House Bill (HB) 1611, authored by Representative Warren Chisum, passed during the 79th Legislature, 2005. During the 77th Legislature, 2001, the legislature adopted HB 2134, which contained provisions designed to assist low income individuals with repairs, retrofits, or retirement of vehicles that fail emissions inspections. As required by HB 2134, the commission adopted rules providing the minimum guidelines for counties to implement a low income vehicle repair assistance, retrofit, and accelerated vehicle retirement program (LIRAP).

Only those counties that have implemented a vehicle inspection and maintenance (I/M) program are eligible for participation in the LIRAP. Under the program, monetary assistance is provided for emission-related repairs directly related to bringing the vehicle into compliance or for replacement assistance for a vehicle that has failed the required emissions test. Vehicle eligibility criteria, such as the vehicle having been registered for the past two years in the participating county, have been developed and adopted by the commission. Emission-related repairs covered by the program are required to be performed at a Texas Department of Public Safety (DPS)-recognized emissions repair facility. Participating counties may administer the program themselves or contract with a private entity or another county to administer the program. Participating counties may expend no more than 5.0% of the funds received from the state for administrative costs. These rules provide for a minimum of $30 and a maximum amount of $600 for emission-related repairs, retrofit equipment, and installation; and a minimum of $600 and a maximum amount of $1,000 toward the purchase price of a replacement vehicle.

During the 79th Legislature, the legislature adopted HB 1611, revising three key elements of the program. The legislation allows for the LIRAP to be administered by the counties in accordance with Texas Government Code, Chapter 783 (relating to Uniform Grant and Contract Management), and allows for programmatic costs such as call-center management, application oversight, invoice analysis, education, outreach, and advertising to be covered by LIRAP funds. This revision allows for program administrators to utilize additional resources to attract and increase program participation. The legislation deleted the requirement that only 5.0% of the funds provided to a county to fund the LIRAP be used to cover administrative costs. Finally, the legislation changed the vehicle registration eligibility requirement from two years to 12 months. This revision will increase participation and make assistance available to those vehicle owners who have lived in the county for at least one year.

SECTION BY SECTION DISCUSSION

Administrative and grammatical changes were made throughout the sections to bring the existing rule language into agreement with Texas Register requirements, agency guidelines, and guidance provided in the *Texas Legislative Council Drafting Manual*, November 2004.

The adopted amendment to §114.62, LIRAP Funding, establishes revised program requirements. Section 114.62(b) deletes the requirement that no more than 5.0% of the money provided by the commission to a local county or its LIRAP designee may be used for administration of the program. Subsection (b) also requires the LIRAP to be administered in accordance with Texas Government Code, Chapter 783, and allows for programmatic costs such as call-center management, application oversight, invoice analysis, education, outreach, and advertising to be covered by the LIRAP funds.

The adopted amendment to §114.64, LIRAP Requirements, updates the requirements for establishing and implementing a LIRAP. Subsection (b)(3) deletes the requirement that an eligible vehicle be currently registered in and have been registered in the program county for the two years immediately preceding the application for assistance. Subsection (b)(3) decreases the time required for a vehicle to be registered in a participating county to 12 months in order to meet eligibility for the LIRAP.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted amendments in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the amendments do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments are intended to attract and increase program participation, and allow more effective management by local program administrators. While the LIRAP as a whole is intended to protect the environment and reduce risks to human health from environmental exposure, the adopted amendments to the program are administrative and do not possess that specific intent. Because the adopted amendments concern local administration of the LIRAP, the amendments are unlikely to adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. As previously stated, the LIRAP is intended to protect human health and the environment, and regardless of the adopted amendments, the program will continue. It is therefore unlikely that these amendments will adversely affect in a material way the environment or the public health and safety of the state or a sector of the state. Because the adopted amendments will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, the adopted amendments do not fit the definition of "major environmental rule" in Texas Government Code, §2001.0225.

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because this rulemaking does not constitute a major environmental rule, a regulatory impact analysis is not required.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that

restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact assessment for the adopted amendments. The adopted amendments will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adopted amendments also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking action and found that the adopted rulemaking is an action identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in §505.11, and therefore will require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. The commission determined that under 31 TAC §505.22, this rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and ozone levels will be reduced as a result of the adopted rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal area (31 TAC §501.32).

This rulemaking does not authorize any new air contaminants and is intended to revise administrative and eligibility requirements of the existing LIRAP as a result of new legislation. Therefore, this rulemaking is consistent with the applicable policy and goal.

PUBLIC COMMENT

A public hearing on this proposal was held in Austin on January 24, 2006, at 10:00 a.m. in Building F, Room 2210 at the Texas Commission on Environmental Quality complex, located at 12100 Park 35 Circle, but no oral comments were received. Written comments were submitted by Sierra Club, Houston Regional Group (Sierra-Houston) and North Central Texas Council of Governments (NCTCOG).

RESPONSE TO COMMENTS

Sierra-Houston supported the amendments but was concerned that the removal of the 5.0% limit for administrative costs, could allow administrative costs to balloon. Sierra-Houston suggested the implementation of a 20% administrative cost if not by regulation/rule, then implemented administratively to ensure that taxpayer's dollars are not wasted and that as much of the money goes to actual low income vehicle repair assistance, retrofit, and accelerated retirement as possible.

The commission appreciates the support and concurs that administrative costs should be kept to a minimum. In new grant/contracts signed with each participating county, the commission has incorporated language expressing that the amount allowed for administrative costs must not exceed 20% of annual expenditures. The commission did not revise the rule in response to this comment.

NCTCOG supported the amendments but felt that the rule did not address several portions of HB 1611 and requested that the commission establish guidelines for all provisions in HB 1611. NCTCOG stated that the rule amendments failed to address inter-county sharing of funds as stated in HB 1611 allowing that a participating county may enter into an agreement with other participating counties within the same region and agree to have the money collected in any one county used in any other participating county in the same region.

The flexibility of inter-county sharing of funds was incorporated into the grant/contracts signed with each participating county. New grant/contracts with each participating county included language allowing a participating county to agree that its LIRAP funds be used in any other LIRAP participating county within the same region. The commission did not revise the rule in response to this comment.

NCTCOG requested that the commission consider increasing the qualifying income level and replacement compensation amount. NCTCOG suggested increasing the qualifying income level to 300% of the federal poverty rate and replacement compensation to $2,000 based on a sliding scale. Vehicle owners at 200% of the poverty rate would be eligible for $600 in repair compensation or $2,000 in replacement compensation. Vehicle owners at 300% would be eligible for $300 in repair compensation or $1,000 in replacement compensation.

The commission appreciates the comment. Consideration to increase the income eligibility criteria for low income vehicle owners and financial assistance for repair or replacement of eligible vehicles is beyond the scope of this rulemaking. The commission did not revise the rule in response to this comment.

NCTCOG stated the rule amendment failed to address the creation of a subaccount of the Clean Air Account for other air quality programs established in Section 382.202(q) of HB 1611 and how unexpended LIRAP money in this subaccount may be used for these programs. HB 1611 authorized that fees collected that are available to fund LIRAP, but that are not appropriated for LIRAP, be transferred into a subaccount of the Clean Air Account and be appropriated only for various air quality programs in consultation with the commission. These air quality programs may include: additional outreach and education programs to increase public awareness of air quality issues, an enhanced Aircheck Texas Repair and Replacement Assistance Program, enhanced remote sensing programs, regional smoking vehicle programs, projects to reduce counterfeit inspection stickers, and other air quality programs aimed at reducing emissions. NCTCOG requested that the TCEQ establish guidelines for all HB 1611 provisions.

The 79th legislature did not appropriate funds during the 2006 and 2007 biennium for the new subaccount of the Clean Air Account created in §382.202(q) of HB 1611. This new subaccount is to be funded from LIRAP fees collected but not appropriated to fund the LIRAP program. The legislation does not authorize the depositing or transferring of unexpended LIRAP funds appropriated for LIRAP into this subaccount. If the legislature appropriates funding for the subaccount for the purposes provided by §382.202(q), the commission will provide guidance. The commission did not revise the rule in response to this comment.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and §5.013, which states the commission's authority over various statutory programs. The amendments are also adopted under Texas Health and Safety Code (THSC), §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC, Chapter 382 (also known as the Texas Clean Air Act), and to adopt rules that differentiate among particular conditions, particular sources, and particular areas of the state. The amendments are also adopted under THSC, §382.002, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.013, which authorizes the commission to designate air quality control regions in order to implement air quality standards; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §§382.201 - 382.218, which provide the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of the federal Clean Air Act (42 United States Code, §§7401 *et seq*.), to coordinate with federal, state, and local transportation planning agencies to develop and implement transportation programs and other measures necessary to demonstrate and maintain attainment of the National Ambient Air Quality Standards, and to fund the establishment of the LIRAP. Specifically, the amendments are adopted under THSC, §382.209, as amended by HB 1611.

The adopted amendments implement TWC, §§5.102, 5.103, and 5.105; and THSC, §§382.002, 382.011, 382.012, 382.019, and 382.201 - 382.218.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 14, 2006.

TRD-200602168
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Effective date: May 4, 2006
Proposal publication date: December 30, 2005
For further information, please call: (512) 239-5017

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CHAPTER 304. WATERMASTER OPERATIONS

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendments to §§304.1 - 304.3, 304.11 - 304.13, 304.15, 304.16, 304.21, 304.31 - 304.34, 304.42, 304.44, 304.62, and 304.63. Sections 304.1 - 304.3 and §304.16 are adopted *with changes* to the proposed text as published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7364). Sections 304.11 - 304.13, 304.15, 304.21, 304.31 - 304.34, 304.42, 304.44, 304.62, and 304.63 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted rulemaking clarifies that Chapter 304 applies to all watermaster programs, other than the Rio Grande Water Division, created under Texas Water Code (TWC), Chapter 11, and all watermasters appointed by the executive director under TWC, Chapter 11. The adopted rulemaking deletes requirements regarding the repealed Wagstaff Act (TWC, §11.028), makes changes for corrective and administrative purposes and to provide clarity, and changes the watermaster's reporting requirements to the water right holders from quarterly to annually.

SECTION BY SECTION DISCUSSION

Throughout the adopted rulemaking, the transport of water and the use of watercourses are added to the activities regulated by the rules to be consistent with 30 TAC Chapter 297 and TWC, Chapter 11.

Also throughout the rulemaking, minor changes are made to provide consistency in the language used in the rules and to conform to the standards set out in the *Texas Legislative Council Drafting Manual*, November 2004.

The adopted amendment to §304.1, Applicability, clarifies that Chapter 304 applies to any watermaster program, other than the Rio Grande Water Division, created under TWC, Chapter 11. Also, the amendment clarifies that Chapter 304 applies to any matters related to water rights within each water division, or segment of a water division. The rule is changed from the proposed version to add that Chapter 304 applies to all water rights, permits, authorizations, orders, and any other matters related to water rights within each water division, segment of a water division, "or watermaster program" other than the Rio Grande. This change is made after staff review indicated that while the beginning of the applicability statements in §304.1 include "or watermaster program created by or under the Texas Water Code, Chapter 11," the statement relating to water rights had omitted "or watermaster program." It is clear from the beginning of the section that watermaster programs are covered; this additional change is made to make that intent consistent throughout the section. "Watermaster program" must be included because watermaster programs may be created under the TWC, Chapter 11, Subchapter I, and by the legislature, and these rules need to be flexible to cover for those programs.

The adopted amendment to §304.2, Appointment of Watermaster, clarifies that under TWC, Chapter 11, the executive director can appoint a watermaster for each water division or segment of a water division. The rule is changed from the proposed version to add that a watermaster may be appointed for a "watermaster program" as well as a water division or segment of a water division. This change is made after staff review indicated that while the beginning of the applicability statements in §304.1 include "or watermaster program created by or under the Texas Water Code, Chapter 11," §304.2 did not include "or watermaster program" as a program for which the executive director may appoint a watermaster. It is clear from the beginning of §304.1 that watermaster programs are covered by these rules; this additional change is made to make that intent consistent throughout the chapter. "Watermaster program" must be included because watermaster programs may be created under TWC, Chapter 11,

Subchapter I, and by the legislature, and these rules need to be flexible to account for those programs.

The adopted amendment to §304.3, Definitions, changes the definition of "Agent" to clarify that an agent is one who is designated by a water right holder to act on the holder's behalf. This change was necessary to provide an adequate definition of "Agent."

The adopted amendment to §304.3 also changes the definition of return flow to be consistent with the definition of return flow found in §297.1, Definitions, and defines a water division to include the entire water division and any segments thereof. The definition for the term "Transport" is added in the adopted rules in response to comments received, and is defined as "the discharge, conveyance, and subsequent diversion of water under Texas Water Code, §11.042." The definition of this term is necessary because "transport" is not meant to include any transport of water (e.g., in a pipeline) not regulated by the commission under TWC, Chapter 11. The adopted amendment also clarifies that the definition of watermaster relates to the person appointed by the executive director under TWC, Chapter 11 and that the definitions in §297.1 are applicable to this chapter. Additionally, the amendment to this section changes the reference from the Texas Water Commission to the Texas Commission on Environmental Quality.

The adopted amendment to §304.11, Difference in Operations, conforms to the Texas Register requirements and the standards set out in the *Texas Legislative Council Drafting Manual*, November 2004.

The adopted amendment to §304.12, Identification of Diversion Facilities, Outlet Works, and Points of Return, adds the term ". . . or watercourses" to clarify that the transport of water in a watercourse is an activity regulated by the watermaster in his administration of bed and banks authorizations and the execution of his duties.

The adopted amendment to §304.13, Requirement for Measuring Devices, conforms to the Texas Register requirements and the standards set out in the *Texas Legislative Council Drafting Manual*, November 2004.

The adopted amendment to §304.15, Declarations of Intent To Divert or Release Water, changes the section title to "Declarations of Intent to Divert, Transport, or Release Water." In addition, the adopted amendment clarifies in subsections (a), (b), and (e) that the transport of water in a watercourse is an activity regulated by the watermaster in his administration of bed and banks authorizations and the execution of his duties.

The adopted amendment to §304.16, Records of Diversions, Releases, and Impoundments, changes the section title to "Records of Diversions, Transport, Releases, and Impoundments." The adopted amendment clarifies in subsection (a) that the transport of water is an activity regulated by the watermaster in his administration of bed and banks authorizations and the execution of his duties.

The adopted amendment to §304.16(a) is also changed from the proposed rule in response to comments received and clarifies that diversion reports must be filed within seven calendar days from the termination of the declaration of intent or other report period. The adopted rule language is changed because the proposed rule did not state whether the requirement is for calendar or work week days.

The adopted amendment to §304.21, Allocation of Available Waters, deletes requirements relative to TWC, §11.028 (Wagstaff Act), which has been repealed, and reletters the subsequent subsections. The adopted amendment also corrects the references to other commission rules by adding a reference to §297.57, Emergency Suspension of Permit Conditions, and deleting the reference to §297.61, Amendments by Executive Director. In addition, the adopted amendment deletes the provision that a failure to comply with a watermaster order is a violation of the TWC. This provision is moved to Subchapter D, §304.32, Violations, because the provision relates to violations and is more properly part of that section.

The adopted amendment to §304.31, General, clarifies that a failure to comply with the commission's rules or the watermaster's or commission orders could result in enforcement proceedings.

The adopted amendment to §304.32, Violations, clarifies that a failure to comply with the commission's rules or a watermaster or commission order could result in enforcement proceedings.

The adopted amendment to §304.33, Enforcement Actions, adds "transport" to paragraph (2) to clarify that the watermaster may take action for a violation of the bed and bank statutes and to incorporate minor editorial changes to ensure the language conforms to the Texas Register requirements.

The adopted amendment to §304.34, Field Citation by Watermaster, incorporates minor editorial changes to ensure the language conforms to the Texas Register requirements. In addition, the adopted amendment to the figure in subsection (d) adds the terms "use" and "transport" to clarify that a violation of the bed and bank statute is a violation subject to a field citation issued by the watermaster.

The adopted amendment to §304.42, Reports, changes the watermaster reporting requirements to the water right holders, from quarterly to annually. This less frequent reporting requirement is sufficient, because the watermaster provides a summary with each authorization when a declaration of intent is made. This summary provides information needed by the water right holders.

The adopted amendment to §304.44, Appointment of an Agent, adds the words "transport" and "water" to the activities regulated by the rule to be consistent with Chapter 297 and TWC, Chapter 11.

The adopted amendment to §304.62, Determination of Assessment Rates, provides specificity regarding the fees that are currently assessed for various uses authorized by statute. The adopted amendment also provides consistency with existing permits use types. Explanatory statements regarding the specified uses are added to provide clarity.

The adopted amendment to §304.63, Assessment of Cost, incorporates minor editorial changes to ensure the language conforms to Texas Register requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rules are not subject to §2001.0225, because they do not meet the definition of a "major environmental rule" as defined in the Texas Government Code. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to

human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The primary purposes of this adopted rulemaking action are: 1) to clarify that Chapter 304 is applicable to all TCEQ Watermaster Programs, including the Concho River Watermaster Program; 2) to clarify the existing fee structure to establish specific rates for currently permitted general uses that were enacted by the legislature; 3) to delete references to the repealed Wagstaff Act; 4) to change the watermaster's reporting frequency to the water right holders from quarterly to annually; 5) to clarify that the watermaster regulates the use of watercourses to transport water; 6) to provide consistency between the commission's rules regulating water rights by changing the definition of return flows in Chapter 304 to that currently found in Chapter 297; 7) to clarify the definition of agent; 8) to clarify that the definition of water division includes any segments of a water division; and 9) to provide consistency in the language used in the commission's other water rights rules and to conform to the standards set out in the *Texas Legislative Council Drafting Manual*.

Regarding the Concho River, the 79th Legislature enacted House Bill (HB) 2815 creating the Concho River Watermaster Program by adding TWC, Chapter 11, Subchapter K. TWC, §11.561 provides that "{a} provision of {the Water Code} or a rule adopted by the commission that relates to watermasters and does not conflict with the provisions of {subchapter K} applies to the program established under this subchapter." Therefore, since Chapter 304 contains rules adopted by the commission that relate to a watermaster, it is already applicable to the Concho River Watermaster Program to the extent that it does not conflict with HB 2815. Section 304.1 provided that it is "applicable to each water division created by the commission pursuant to the Texas Water Code, §11.325, outside of the Rio Grande Water Division, and to all water rights and matters related to water rights within each such water division . . .." Changing the reference from TWC, §11.325 to TWC, Chapter 11, clarifies that Chapter 304 is applicable to any water division, or watermaster program, other than the Rio Grande Water Division, created under TWC, Chapter 11.

In addition, this rulemaking clarifies existing general assessment fees for agricultural and other specific uses that were added by the legislature as separate water rights and are issued in existing water rights. This adopted rulemaking also deletes references to the Wagstaff Act, originally codified in TWC, §11.028, which was repealed by the legislature in 1997. Therefore, this adopted rulemaking seeks to streamline, clarify, and update existing rules in response to legislative action.

Furthermore, this adopted rulemaking addresses administrative issues concerning the watermaster program and does not address environmental risks or exposures. For example, the adopted rulemaking adds references to "transport" and "watercourses" to clarify that the watermaster regulates the use of watercourses in his division. These authorizations are issued by the commission under §297.16. Once they are issued, the watermaster administers these authorizations within his area. The adopted rulemaking also changes the definition of water division to clarify that the definition also includes any segments of a water division. In addition, the adopted rulemaking provides consistency between the commission's rules on water rights by changing the definition of return flows in Chapter 304 to the definition currently used in Chapter 297. Changes are also adopted to add and correct references to other commission rules and statutes regulating water rights. The adopted rulemaking also makes stylistic changes in conformance with the *Texas Legislative Council Drafting Manual* and reduces the watermaster's reporting requirements to the water right holders from quarterly to annually. Therefore, this adopted rulemaking does not constitute a major environmental rule, and is not subject to a formal regulatory analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that the adopted government action has no impact on private real property.

The purpose of this adopted rulemaking is to streamline and clarify the watermaster program and to update existing rules in response to legislative action. In order to achieve this purpose, the commission adopts the following actions: 1) amends the applicability section so that it is clear that Chapter 304 applies to any water division or watermaster program, other than the Rio Grande Water Division created under TWC, Chapter 11; 2) amends the existing fee structure to establish specific rates for currently permitted general uses that were enacted by the legislature; 3) deletes references to the repealed Wagstaff Act; 4) changes the frequency of the watermaster's reporting to the water right holders from quarterly to annually; 5) adds references to "transport" and "watercourse" to clarify that the watermaster administers bed and bank authorizations once issued by the commission; 6) changes the definition of return flows in Chapter 304 to that currently stated in other commission rules to provide consistency in regulating water rights; 7) to clarifies the definition of agent; 8) amends the definition of water division to include segments of a water division; 9) adds references to other commission rules and statutes regulating water rights; and 10) makes other revisions to provide consistency in the language used in the commission's other water rights rules and to conform to the standards set out in the *Texas Legislative Council Drafting Manual*. These actions do not impact private real property rights.

As defined by Texas Government Code, §2007.002(1), the commission is a "governmental entity" covered by the Texas Private Real Property Rights Preservation Act (the Act) codified in Chapter 2007. This adopted rulemaking is a governmental action to which the Act applies since Texas Government Code, §2007.003(a)(1), makes the Act applicable to "the adoption . . . of a rule . ..." Texas Government Code, §2007.002(4), provides that "{p}rivate real property' means an interest in real property recognized by common law, including a . . . groundwater or surface water right of any kind . . .." However, this adopted rulemaking, if adopted, does not result in a burden or impact on private real property rights, nor restrict or limit any owner's right to such property that exists in the absence of this rulemaking.

Regarding the Concho River Watermaster Program, this adopted rulemaking clarifies that the commission's existing Chapter 304 rules already apply to the program as required by statute. The 79th Legislature enacted HB 2815 and established the Concho River Watermaster Program effective September 1, 2005. Newly enacted TWC, §11.561, states that "{a} provision of {the Water Code} or a rule adopted by the commission that relates to watermasters and does not conflict with the provisions of (Water Code, Chapter 11, subchapter K) applies to the (Concho River Watermaster Program)." This adopted rulemaking clarifies that the existing rules found in this chapter are already

applicable to the Concho River Watermaster Program as dictated by HB 2815, as well as any other water division created under TWC, Chapter 11, other than the Rio Grande Water Division. Therefore, these adopted amendments do not affect an owner's private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rules. The adoption of the amendments to Chapter 304 have no impact on private real property since, by statute, Chapter 304 already applies to the Concho River Watermaster Program if it does not conflict with TWC, Chapter 11, Subchapter K. Also, the changes are administrative in nature and do not affect the actual water right or interbasin use.

Regarding the other adopted changes, the establishment of a fee structure, the deletion of provisions relating to the repealed Wagstaff Act, the addition of references to applicable rules and statutes, the changes in the definitions of water division and return flows, the change in the watermaster reporting to the water right holders from quarterly to annually, and stylistic changes are administrative changes to existing rules and these changes have no impact on private real property since they are administrative in nature. The addition of the terms "transport" and "watercourses" do not affect private real property since bed and banks authorizations are existing authorizations to use watercourses for delivering water down beds and banks as specified in TWC, §11.042. The other adopted changes streamline, clarify, and update the commission's rules as well as provide consistency with the commission's other regulations.

Therefore, since the adopted rulemaking is administrative in nature, it will neither impose a burden nor have an impact on private real property.

Furthermore, promulgation and enforcement of these adopted rules will not result in a statutory or a constitutional taking of private real property. The rulemaking, if adopted, would not restrict or limit the owner's rights to property nor reduce its value by 25% or more beyond that which will otherwise exist in the absence of the regulations. A water right is a private real property right, however, water right holder's rights are regulated under existing statutory law, which this adopted rulemaking does not change.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the rules are neither identified in the Coastal Coordination Council Act Implementation Rules, 31 TAC §505.11, nor will they affect any action/authorization as identified in §505.11. Therefore, the adopted rulemaking is not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

During the public comment period, which closed on December 12, 2005, the commission received several written comments from Texas Genco, LLC (Texas Genco).

RESPONSE TO COMMENTS

Texas Genco commented that in §304.1 and §304.2, the terms "segment" and "segment of a water division" are not defined, and that criteria for determining a segment should be included in the rule. Texas Genco argued that segments should be defined as all priority water rights in order to protect them and also to protect contract deliveries.

RESPONSE

The commission has made no change to the rules to define "segment of a water division." The purpose of this rule change is to ensure that all possible watermaster programs, other than the Rio Grande, that may be created and administered by the commission are covered by Chapter 304, including those that may be created by the legislature. A watermaster program may not be limited to an entire water division, and may include river basins and segments in or not in a water division.

Texas Genco commented that the term "transport" is used throughout the rule but is not defined.

RESPONSE

The commission agrees with the comment and adds the definition of "Transport" to the definitions in §304.3. Transport is defined as "the discharge, conveyance, and subsequent diversion of water in a watercourse under Texas Water Code, §11.042."

Texas Genco commented that §304.16(a) does not specify that diverters' reports are required within seven business or calendar days, and recommended that the term be calendar days to be consistent throughout the rule.

RESPONSE

The commission agrees with the comment and amends the proposed rule to state that reports must be filed within seven calendar days from the termination of the declaration of intent or other report period.

Texas Genco commented that in §304.16(b), concerning water charged under a declaration, the rule should clarify the phrase "to the extent water is available for appropriation" to distinguish whether the phrase means any amount of flow, whether or not the amount is so low or so high that water cannot physically be pumped with a diverter's facilities.

RESPONSE

The commission has made no change the rule to define "to the extent water is available for appropriation." Determining whether water is available for appropriation is the watermaster's decision made by considering the amount of flow, whether the water is appropriated to someone else, whether the water can actually be used, and possibly other relevant factors. The factors the watermaster can consider should not be limited in this rule.

Texas Genco commented that in §304.16(b)(1), the phrase "within 10%" should be clarified either as the total amount diverted over the whole declaration of intent or as on a daily basis during the declaration of intent.

RESPONSE

The commission disagrees with the comment and has made no change to the rule. The duration of a request for diversion will be in the declaration of intent provided by the water user. Some requests are for total amounts of water diverted over longer periods of time. The total amount diverted for calculation of the penalty is for the period requested.

Texas Genco commented that in §304.16(b)(2), the "penalty rate calculation" is insufficient to dissuade diverters from diverting more than their approved declaration of intent during times of water shortage and recommended that diversions in excess of 110% should be considered a violation of §304.32 and §304.33.

RESPONSE

The commission has made no change to the rule, because it is unnecessary. It is currently a violation to divert water without

proper authorization under §304.32(a)(1), which could include taking more water than is authorized by the watermaster.

Texas Genco commented that in §304.16(b)(3), a diverter should not be penalized if their actual diversion is less than 90% of the state amount of the declaration, and recommended exemption from the fees.

RESPONSE

The commission has made no change to the rule to exempt diverters from fees if the actual diversion is less than 90% of the amount stated in the declaration of intent. The watermaster needs to be able to penalize water right holders that don't take all their requested water because when diverters are not taking what they request, the amount available to other diverters is difficult to determine. Additionally, as part of the watermaster's administrative processes, all diverters have the opportunity to adjust their diversion amounts with the watermaster without penalty.

Texas Genco commented that in §304.21, the rule should be modified to say that the watermaster "will" cancel or modify declarations of intent when available flow is not sufficient to meed demands, rather than "may" cancel these declarations.

RESPONSE

The commission disagrees with the comment and has made no change to the rule. Some discretion on the part of the watermaster to consider the facts of each situation is necessary.

Texas Genco asked the commission to clarify if assessments rates apply to all issued water rights including those that have not been used.

RESPONSE

The commission responds that assessments are based on the amount of water authorized to be used in the water right, regardless of whether the water rights have been used. The commission has made no change to the rules because this is clear in the rules.

Texas Genco also commented that in §304.62, the assessment rate factor for "indirect reuse" should be the same as the rate factor for a new municipal or consumptive water right rate (from 0.50 to 1.00).

RESPONSE

The commission disagrees with the comments and responds that not all reuse is for municipal or consumptive use. Additionally, the assessment rate for reuse is in addition to the assessment rate for the underlying use of the water. A high assessment rate for "reuse" is necessary, therefore, the commission has made no change to the rule.

Texas Genco commented that the definition of reuse in proposed §304.62 is not consistent with Chapter 297.

RESPONSE

The commission has made no change to the definition of reuse in §304.62, because it is the correct definition. The commission intends to change the definition of "reuse" in Chapter 297 at a future date to clarify that reuse, as used in the rules, means returning water to a watercourse under TWC, §11.042.

Texas Genco commented that under §304.63, Assessment of Costs, the commission should only charge a reuse fee once for a specified volume of water if the water is transported several times and provided an example where water is assessed for a bed and banks transport, and then assessed later when the water is reused at the reuse rate.

RESPONSE

The commission disagrees with the comment and responds that both assessments are reasonable, because the watercourse is being used for two distinct purposes, transport only and transport for reuse. The example provided by Texas Genco is one which would be assessed for a bed and banks transport, and assessed later when the water is reused at the reuse rate. The commission also notes that the "bed and banks" assessment rate is only 0.05.

SUBCHAPTER A. INTRODUCTORY PROVISIONS

30 TAC §§304.1 - 304.3

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, Rules; §11.042, Delivering Water Down Banks and Beds; §11.325, Water Divisions; §11.326, Appointment of Watermaster; §11.327, Duties of Watermaster; §11.453, Appointment of Watermaster; §11.454, Duties and Authority of the Watermaster; §11.455, Assessments; §11.555, Duties and Authority of Watermaster; and §11.561, Applicability of Other Law and Commission Rules.

The adopted amendments implement TWC, §§5.103, 11.042, 11.325 - 11.327, 11.453 - 11.455, 11.555, and 11.561.

§304.1. Applicability.

Other than the Rio Grande Water Division, the provisions of this chapter are applicable to each water division created by the commission or watermaster program created by or under Texas Water Code, Chapter 11, each watermaster appointed by the executive director under Texas Water Code, Chapter 11, and to all water rights, permits, authorizations, orders, and any other matters related to water rights within each water division, segments of a water division, or watermaster program. Water rights and matters inside the Rio Grande Water Division are governed by Chapter 303 of this title (relating to Operation of the Rio Grande). All other rules promulgated by the commission are also applicable to the water rights subject to this chapter unless in conflict with the provisions of this chapter, in which event the provisions of this chapter will govern.

§304.2. Appointment of Watermaster.

Under Texas Water Code, Chapter 11, the executive director may appoint one watermaster for each water division, segment of a water division, watermaster program, or the same person may be appointed watermaster for two or more water divisions or segments. In a water division in which the office of watermaster is vacant, the executive director has the powers of a watermaster.

§304.3. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise. In addition, the definitions in §297.1 of this title (relating to Definitions) are applicable to this chapter.

(1) Account--The record of diversion, transport, and use of state water and watercourses maintained by the watermaster for each purpose of use authorized for each owner's separate portion of a water right, or the record of impoundment and releases for each owner's separate portion of an on-channel reservoir authorized under a water right, except those reservoirs exempted in accordance with Texas Water Code, §11.142. An account will also be established for each separate arrangement by a contractual buyer to purchase state water.

(2) Agent--A person that is designated by a water right holder to act on behalf of a water right holder in regard to diversion use, transport, or impoundment of state water in a watercourse, payment of a watermaster assessment, or, for a contractual buyer, in regard to diversion, transport, use, or impoundment of state water.

(3) Allocation--The division of available flow between water right holders by the watermaster. This also includes regulation of diversions by water right holders in order to meet demands for exempt domestic and livestock users.

(4) Assessment--The cost to be levied by the commission to water right holders to finance watermaster operations.

(5) Contractual buyer--A person that impounds, or diverts water under a contractual permit, or under a particular water right under contract with the holder of that water right, where such contract has been accepted for filing by the executive director.

(6) Declaration of intent--A statement submitted by a diverter to the watermaster describing an intent under a specific water right or contractual purchase arrangement to divert or transport water in a watercourse, or to make a dedicated release of stored water, for a specified period of time and in association with an authorized facility.

(7) Dedicated release--The release of lawfully stored water from a reservoir, under a specific water right, for specific authorized uses downstream.

(8) Diversion facility--Any dam, pump, canal, or other such device used to take water, for other than exempt uses, from a watercourse or impoundment.

(9) Diverter--Any water right holder, agent, or contractual buyer who impounds, takes, diverts, transports water in a watercourse, or makes a dedicated release of state water.

(10) Measuring device--A device designed for the measurement of rates of flow or quantities of water.

(11) Report of diversion, transport of water, release, or impoundment--A report that the diverter is required to submit to the watermaster after recording the amount of water actually diverted, transported in a watercourse, or released during the period of a declaration of intent, or a report for the impoundment of water, as well as any additional information required by the watermaster. The watermaster may specify a report period that is different from the declaration of intent period.

(12) Return water or return flow--That portion of state water diverted from a water supply and beneficially used and which is not consumed as a consequence of that use and returns to a watercourse. Return flow includes sewage effluent.

(13) Salt water diversion--Diversion of state water from the Gulf of Mexico or its bays and arms, or any watercourse or reservoir subject to tidal influence, or when the water right specifies diversion of salt or brackish water; and where, for such cases, the diversion has no significant adverse effect on the supply of water for other authorized diverters, and the diversion does not require protection from junior appropriators.

(14) Transport--The discharge, conveyance, and subsequent diversion of water in a watercourse under Texas Water Code, §11.042.

(15) Water division--A specific area of the state, designated by the commission under Texas Water Code, §11.325 for the purpose of administering water rights. The term "water division" includes the entire water division and any segments thereof.

(16) Watermaster--The person appointed by the executive director under Texas Water Code, Chapter 11, to administer water rights in a given water division, segment of a water division, or group of water divisions.

(17) Water right--A right acquired under the laws of the state and the rules of the Texas Commission on Environmental Quality to impound, divert, transport, or use state water. Contractual permits and water contracts are not included under this definition.

(18) Water right holder--A person or entity that owns a water right. In the case of divided interests, this term will apply to each separate owner.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Acting Deputy Director, Office of Legal Services
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For further information, please call: (512) 239-6087

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SUBCHAPTER B. REGULATION OF THE USE OF STATE WATER OR WATERCOURSES

30 TAC §§304.11 - 304.13, 304.15, 304.16

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, Rules; §11.042, Delivering Water Down Banks and Beds; §11.326, Appointment of Watermaster; §11.327, Duties of Watermaster; §11.453, Appointment of Watermaster; §11.454, Duties and Authority of the Watermaster; §11.455, Assessments; §11.555, Duties and Authority of Watermaster; and §11.561, Applicability of Other Law and Commission Rules.

The adopted amendments implement TWC, §§5.103, 11.042, 11.326, 11.327, 11.453 - 11.455, 11.555, and 11.561.

§304.16. Records of Diversions, Transport, Releases, and Impoundments.

(a) Each diverter that has submitted a declaration of intent shall submit to the watermaster a report including the actual amount of water diverted, transported, or released during the period of the subject declaration of intent. Water right owners with accounts for impoundment will submit reports of daily inflows, reservoir levels, transported volumes, diversions, and releases to the watermaster. The watermaster may specify a report period. The report period may be different from the period of the declaration of intent. The watermaster shall provide forms to be used for the reports. Each diversion or impoundment facility, including borrowed and rented pumps, used during the period of the declaration of intent shall be designated on the report by the identification number assigned by the watermaster. Reports must be complete and signed by the diverter. Reports must be received or postmarked within seven calendar days from the termination of the period of the declaration of intent, or other report period specified by the watermaster. If such report is incomplete or not timely filed, the watermaster may cancel any existing declaration of

intent for that account and allow no further impoundment, transport, diversion, or dedicated release until the report is properly filed.

(b) To the extent that water was available for diversion during the period of a declaration of intent, the subject account will be charged as follows.

(1) If the actual diversion is within 10% of the amount stated in the declaration of intent, the charge will be the actual amount diverted.

(2) If the actual diversion is greater than 110% of the amount stated in the declaration of intent, the charge will be the amount actually diverted plus twice the amount greater than 110%.

(3) If the actual diversion is less than 90% of the amount stated in the declaration of intent, the charge will be 90% of the stated amount.

(4) For a declaration of intent that was modified, including cancellation or extension, the charge will consist of the sum of two parts, one for the period before modification, and one for the period after modification. For each of the two periods, the charge will be determined by applying paragraph (1), (2), or (3) of this subsection relative to the amount declared for the particular period. If a modified declaration of intent is subsequently modified further, resulting in multiple parts, the procedure described in this subsection will be applied to each part.

(c) Any amount charged under subsection (b) of this section will apply against the yearly authorization, but only the amount of water actually diverted will apply toward perfection of a water right.

(d) The watermaster shall have the discretion to waive the accounting provisions contained in subsections (b) and (c) of this section for excessive or inadequate diversions due to circumstances beyond the control of the diverter.

(e) In addition to the report to be submitted to the watermaster under subsection (a) of this section, each water right holder or his agent shall submit to the executive director a written report of the amount of water actually diverted and used during the preceding calendar year under a specific water right in accordance with §295.202 of this title (relating to Reports). This report is required even if no water is used. The form for this report can either be one furnished by the executive director, or be a form approved by the executive director prior to the submission of the report.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. ALLOCATION OF AVAILABLE WATERS

30 TAC §304.21

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, Rules; §5.506, Emergency Suspension of Permit Conditions Relating to Beneficial Inflows to Affected Bays and Estuaries and Instream Uses; §11.042, Delivering Water Down Banks and Beds; §11.148, Emergency Suspension of Permit Conditions; §11.326, Appointment of Watermaster; §11.327, Duties of Watermaster; §11.453, Appointment of Watermaster; §11.454, Duties and Authority of the Watermaster; §11.455, Assessments; §11.555, Duties and Authority of Watermaster; and §11.561, Applicability of Other Law and Commission Rules.

The adopted amendment implements TWC, §§5.103, 5.506, 11.042, 11.148, 11.326, 11.327, 11.453 - 11.455, 11.555, and 11.561.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. ENFORCEMENT REGARDING WATERMASTER OPERATIONS

30 TAC §§304.31 - 304.34

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, Rules; §7.002, Enforcement Authority; §11.042, Delivering Water Down Banks and Beds; §11.081, Unlawful Use of State Water; §11.326, Appointment of Watermaster; §11.327, Duties of Watermaster; §11.453, Appointment of Watermaster; §11.454, Duties and Authority of the Watermaster; §11.455, Assessments; §11.555, Duties and Authority of Watermaster; and §11.561, Applicability of Other Law and Commission Rules.

The adopted amendments implement TWC, §§5.103, 7.002, 11.042, 11.081, 11.326, 11.327, 11.453 - 11.455, 11.555, and 11.561.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. ADMINISTRATION

30 TAC §304.42, §304.44

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, Rules; §11.042, Delivering Water Down Banks and Beds; §11.326, Appointment of Watermaster; §11.327, Duties of Watermaster; §11.453, Appointment of Watermaster; §11.454, Duties and Authority of the Watermaster; §11.455, Assessments; §11.555, Duties and Authority of Watermaster; and §11.561, Applicability of Other Law and Commission Rules.

The adopted amendments implement TWC, §§5.103, 11.042, 11.326, 11.327, 11.453 - 11.455, 11.555, and 11.561.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 13, 2006.

TRD-200602138
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Effective date: May 3, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 239-6087

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SUBCHAPTER G. FINANCING WATERMASTER OPERATIONS

30 TAC §304.62, §304.63

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, Rules; §11.042, Delivering Water Down Banks and Beds; §11.326, Appointment of Watermaster; §11.327, Duties of Watermaster; §11.329, Compensation and Expenses of Watermaster; §11.453, Appointment of Watermaster; §11.454, Duties and Authority of the Watermaster; §11.455, Assessments; §11.555, Duties and Authority of Watermaster; §11.558, Fees; and §11.561, Applicability of Other Law and Commission Rules.

The adopted amendments implement TWC, §§5.103, 11.042, 11.326, 11.327, 11.329, 11.453 - 11.455, 11.555, 11.558, and 11.561.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6087

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CHAPTER 321. CONTROL OF CERTAIN ACTIVITIES BY RULE

SUBCHAPTER B. CONCENTRATED ANIMAL FEEDING OPERATIONS

30 TAC §321.33, §321.36

The Texas Commission on Environmental Quality (commission) adopts the amendments to §321.33 and §321.36 *without changes* to the proposed text as published in the February 24, 2006, issue of the *Texas Register* (31 TexReg 1187) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission adopted the current version of the Chapter 321, Subchapter B rules on July 15, 2004, to make the Texas rules consistent with federal regulations. This adopted rulemaking is an administrative change that makes state requirements consistent with federal requirements by modifying the date that existing dry litter poultry operations must obtain authorization and the date that all concentrated animal feeding operations (CAFOs) have to develop and implement a nutrient management plan (NMP). For consistency with the federal rules, this rulemaking extends the deadline for existing dry litter poultry operations to obtain a permit from April 13, 2006, to July 31, 2007, and extends the deadline for all CAFOs to develop and implement an NMP from December 31, 2006, to July 31, 2007.

SECTION BY SECTION DISCUSSION

The adopted amendment to §321.33(f), Applicability and Required Authorizations, makes the deadline for existing dry litter poultry operations to obtain authorization consistent with changes to the federal requirement. The deadline for existing dry litter poultry operations to obtain authorization under a permit is extended from April 13, 2006, to July 31, 2007.

The adopted amendment to §321.36(d)(1), Texas Pollutant Discharge Elimination System General Requirements for Concentrated Animal Feeding Operations, makes the deadline for CAFOs to develop and implement an NMP consistent with changes to the federal requirement. The deadline for CAFOs to develop and implement an NMP is extended from December 31, 2006, to July 31, 2007.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and made a determination that the rulemaking is not subject to §2001.0225. The adopted rulemaking does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225, and the rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b) because it does not meet any of the four applicability requirements listed in §2001.0225(a). Texas Government Code, §2001.0225(a), applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

"Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely af-

fect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking, which is an administrative change to the rules, does not have a material adverse effect on the economy or sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission performed an assessment of these rules in accordance with Texas Government Code, §2007.043. The specific purpose of this rulemaking is to make an administrative change that makes state requirements consistent with federal requirements by modifying the date that existing dry litter poultry operations must obtain authorization and the date that all CAFOs have to develop and implement an NMP. The rulemaking substantially advances this stated purpose.

This rulemaking adopts a rule by a governmental entity. Therefore, Texas Government Code, Chapter 2007 applies. However, this governmental action does not result in a burden on private real property. If adopted, this rulemaking only changes the dates regarding when existing dry litter poultry operations obtain authorization and when CAFOs are required to develop and implement an NMP. Therefore, the adoption of the rules does not result in a constitutional or statutory taking of private real property and no private real property interests are burdened or impacted by this rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that it is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et. seq*., and therefore, must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council. The commission determined that the amendments are consistent with CMP goals and policies because the rulemaking is an administrative rule that makes state requirements consistent with federal requirements concerning the date existing dry litter poultry operations must obtain authorization and the date that all CAFOs have to develop and implement an NMP. These changes do not have direct or significant adverse effect on any coastal natural resource areas; do not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendments do not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the CMP.

PUBLIC COMMENT

A public hearing for this rulemaking was held in Austin on March 15, 2006. The public comment period for this rulemaking closed at 5:00 p.m. on March 27, 2006. Comments were received from Texas Poultry Federation (TPF), Jackson Walker, L.L.P. on behalf of Texas Poultry Federation (JW), Texas State Soil & Water Conservation Board (TSSWCB), Pilgrim's Pride Corporation (PPC), Texas State Representative Jim McReynolds (Representative McReynolds), Texas Farm Bureau (TFB), Texas Cattle Feeders Association (TCFA), and Texas State Senator Todd Staples (Senator Staples).

RESPONSE TO COMMENTS

Comment

TFB supported the proposed rules.

RESPONSE

The commission acknowledges this comment.

Comment

TPF, JW, TSSWCB, and PPC commented that they support the rulemaking to extend the deadlines for dry litter poultry and development of NMPs as this is consistent with the recent actions taken by the United States Environmental Protection Agency (EPA) to amend the federal CAFO rule to extend these deadlines. While they support the deadline extensions, they believe the commission should go further. TPF, JW, TSSWCB, and PPC stated that the Second Circuit Court of Appeals in *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2nd Cir. 2005), eliminated portions of the federal CAFO rule that requires CAFOs to apply for National Pollutant Discharge Elimination System permits or otherwise demonstrate they have no potential to discharge. TPF, JW, TSSWCB, and PPC stated that the Second Circuit clearly vacated those provisions and that the Second Circuit decision is final and that portion of the federal rule that Texas relied upon to regulate dry litter poultry is no longer the law. Based on the action of the Second Circuit, the commission should eliminate the requirement for dry litter poultry operations to obtain a permit and amend the rule language to reflect that change. PPC further commented that the commission should eliminate the requirement to obtain a permit for both new and existing dry litter poultry operations. Representative McReynolds commented that the Second Circuit decision has rendered a final opinion on the issue of the rules requiring entities to be permitted if they have no potential to discharge and urged the TCEQ to look at the decision and numerous pieces of legislation regarding dry litter poultry. JW suggested amending §321.33(a) and (f) to include language creating an exception for dry litter poultry operations under the duty to apply requirement. PPC supported the language submitted by JW. JW, Representative McReynolds, TSSWCB, and PPC also stated that dry litter poultry operations in the state have, or will soon have, water quality management plans developed by the TSSWCB and to require dry litter poultry operations to also have a permit is not necessary. Representative McReynolds and TSSWCB commented that the commission should consider making permit coverage voluntary for dry litter poultry. JW and PPC commented that the commission should make similar changes to the CAFO general permit. JW and PPC further commented that a duty to apply exceeds federal requirements. JW, TSSWCB, and PPC commented that not addressing

the duty to apply puts Texas at a competitive disadvantage when seeking new poultry investments.

RESPONSE

These comments are beyond the scope of the current rulemaking, the purpose of which is to make state requirements consistent with federal requirements by modifying the date that existing dry litter poultry operations must obtain authorization and the date that all CAFOs have to develop and implement an NMP. Texas was delegated the National Pollutant Discharge Elimination System permitting program, therefore, the commission regulations are required to be consistent with federal regulations.

Comment

TCFA commented about the need for consistency among the permitting and NMP deadlines contained in Chapter 321, Subchapter B rules and the CAFO general permit. TCFA suggested that the commission remove specific dates from the CAFO general permit and replace those specific dates with references to the CAFO rules that contain the required compliance deadlines. TCFA also suggested that the commission consider additional deadline extensions in light of EPA's anticipated rulemaking.

RESPONSE

The commission agrees with the TCFA comment about maintaining consistency between the CAFO rules and the CAFO general permit. We are in the process of amending our general permit and will consider this comment during that process. The commission disagrees that additional deadline extensions are necessary at this time. The purpose of this rulemaking is to maintain consistency with the federal CAFO rules.

Comment

Senator Todd Staples commented that in light of the *Waterkeeper Alliance* and EPA's current efforts to revise its rules, the commission should extend the regulatory deadlines for all dry litter poultry facilities until Texas receives final guidance from EPA.

RESPONSE

This comment is beyond the scope of the current rulemaking, the purpose of which is to make state requirements consistent with federal requirements by modifying the date that existing dry litter poultry operations must obtain authorization and the date that all CAFOs have to develop and implement an NMP. Texas was delegated the National Pollutant Discharge Elimination System permitting program, therefore, the commission regulations are required to be consistent with federal regulations.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which establish the commission's general authority to adopt rules; TWC, §26.011, regarding the commission's authority over water quality in the state; TWC, §26.027, which provides the commission's authority to issue permits for the discharge of waste into or adjacent to water in the state; TWC, §26.0286, regarding the procedures applicable to permits for certain CAFOs; TWC, §26.040, which provides the commission the authority to issue general permits to authorize the discharge of waste into or adjacent to water in the state; TWC, §26.121, which provides that no person may discharge sewage, municipal waste, recreational waste, agricultural waste, industrial waste, or other waste into or adjacent to any water in the state except as authorized by the commission; and TWC, §26.302, regarding the regulation of poultry facilities.

The adopted amendments implement TWC, §§5.102, 5.103, 5.105, 26.011, 26.027, 26.0286, 26.040, 26.121, and 26.302.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 13, 2006.

TRD-200602141
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Effective date: May 3, 2006
Proposal publication date: February 24, 2006
For further information, please call: (512) 239-6087

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)

SUBCHAPTER E. CLAIMS PROCESSING--PURCHASE VOUCHERS

34 TAC §5.58

The Comptroller of Public Accounts adopts new §5.58, concerning recovery of certain state agency overpayments, without changes to the proposed text as published in the March 3, 2006, issue of the *Texas Register* (31 TexReg 1416). A brief description of the new section follows.

Subsection (a) defines important terms used in the section.

Subsection (b) specifies the scope of the recovery audit program, including the criteria for determining whether a state agency is exempt from the program.

Subsection (c) requires a state agency to cooperate fully with the recovery audit program. The subsection also specifies the circumstances under which a state agency may direct a consultant not to pursue recovery of a payment that the consultant considers to be an overpayment.

Subsection (d) governs the deposit of money recovered by a state agency under the recovery audit program.

No comments were received regarding adoption of the new section.

The new section is adopted under Government Code, §2115.003.

The new section implements Government Code, Chapter 2115.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 12, 2006.

TRD-200602122
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: May 2, 2006
Proposal publication date: March 3, 2006
For further information, please call: (512) 475-0387

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PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 65. EXECUTIVE DIRECTOR

34 TAC §65.3

The Employees Retirement System of Texas (System) adopts amendments to §65.3, concerning Records of the System, without changes to the proposed text as published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1611).

This rule is adopted so that the amount of the charges allowed for providing public information and copies of public information in the possession of the System will conform to statewide standards.

No comments were received on the proposed amendments.

The amendments are adopted under Texas Government Code §815.102, which provides authorization for the Board of Trustees to adopt rules for the transaction of any other business of the board. No other statutes are affected by the adopted amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 13, 2006.

TRD-200602126
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Effective date: May 3, 2006
Proposal publication date: March 10, 2006
For further information, please call: (512) 867-7421

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CHAPTER 73. BENEFITS

34 TAC §73.17

The Employees Retirement System of Texas (ERS) adopts amendments to §73.17, concerning Disability Retirement--Eligibility, without changes to the proposed text as published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1612).

Section 73.17 is adopted to clarify the executive director's authority to request medical and other information in connection with Texas Government Code §814.208 and related statutes from ERS disability retirees to determine whether such retirees continue to meet the eligibility requirements for disability retirement and associated health insurance benefits as provided in Texas Government Code §§814.201 - 814.211 and Texas Insurance Code Chapter 1551. This section is also adopted in order to define the term "comparable pay" and to affirm ERS staff's authority and practice in calculating and adjusting comparable pay to reflect changes in state pay that a disability retiree would likely have realized if he or she had not retired.

No comments were received on the proposed amendments.

The amendments are adopted under Texas Government Code, §815.102 which provides authorization for the Board of Trustees to adopt rules relating to the administration of the funds of the retirement system and for the transaction of other business of the Board. No other statutes are affected by the adopted amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 13, 2006.

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Paula A. Jones
General Counsel
Employees Retirement System of Texas
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Proposal publication date: March 10, 2006
For further information, please call: (512) 867-7421

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CHAPTER 81. INSURANCE

34 TAC §§81.1, 81.3, 81.5, 81.7 - 81.9, 81.11

The Employees Retirement System of Texas (ERS) adopts amendments to §§81.1, 81.3, 81.5, 81.7, 81.9, and 81.11, and new rule, §81.8, without changes to the proposed text as published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1612).

New §81.8 and amendments to §§81.1, 81.3, 81.7, and 81.9 concern the establishment of an incentive credit to waive health coverage, an optional TRICARE Supplemental health plan under the Texas Employees Group Benefits Program (GBP), and nonsubstantive administrative modifications of the rules. The TRICARE Supplemental health plan is contingent upon the selection of a qualified Carrier by the ERS Board of Trustees. These rules are adopted in order to update and clarify the rules and to comply with and conform to House Bill 417 and Senate Bill 1863, 79th Legislature, Regular Session, as they may be harmonized in light of changes made to the same section of the law. Both bills authorize a TRICARE Supplement for those eligible participants who waive health coverage, and Senate Bill 1863 creates an incentive credit to be applied toward the premium of either optional coverage or the TRICARE Supplement for those eligible participants who waive health coverage.

Section 81.1 is adopted to add definitions for TRICARE and the TRICARE Supplement and to clarify that TRICARE Supplement premiums are included in the definition of Insurance premium expense.

Section 81.3 is adopted to add subsection (c) to provide statutory references for board approval of one or more TRICARE Supplement Carrier(s) to offer supplemental health benefits to eligible GBP participants who waive health coverage.

Section 81.7 is adopted to: (1) reference new §81.8 regarding the participation and enrollment requirements for those new employees and retirees who are eligible to waive health coverage and receive an incentive credit; (2) allow an annual opportunity to waive health coverage; (3) add the TRICARE Supplement as an optional coverage; and (4) make conforming reference changes.

Section 81.7(g)(1) is adopted to remove a reference to the cancellation of health coverage by a participant who is assigned to active military duty. This provision is no longer needed because a GBP participant may apply for, elect, or continue enrollment in optional coverage without concurrent enrollment in health coverage.

Section 81.7(h)(8)(C) is adopted to remove a reference that allowed an employee to re-enroll after the close of the annual enrollment opportunity. This provision is no longer needed due to the automation of the annual enrollment opportunity.

New §81.8(a) is adopted to establish who is eligible to waive health coverage along with the events that permit an election to waive health coverage.

New §81.8(b) is adopted to clarify that an individual who waives health coverage and later elects to apply for health coverage is subject to the applicable provisions of this chapter.

New §81.8(c) is adopted to clarify the amount of and the eligibility requirements to receive the incentive credit, and to delineate that: (1) the incentive credit may only be used for optional coverage specified by the system or the TRICARE Supplement; (2) coverage under the TRICARE Supplement ends when the participant attains age 65; however, the incentive credit will be applied toward eligible optional coverage; and (3) optional coverage is not considered voluntary coverage for the purposes of the incentive credit.

New §81.8(d) is adopted to clarify that the offering of a TRICARE Supplement is contingent upon the selection of a qualified Carrier by the ERS Board of Trustees.

Section 81.9(a) is adopted to include those enrolled in the TRICARE Supplement plan as an exempted group under the ERS grievance procedures. This section also adds the terms "carrier" and "administering firm" as entities that may formally deny an insurance claim and mail notice of the denial and right of appeal to a person. These changes are needed to update and clarify the rules with regard to grievance procedures. The section is also adopted to clarify that the grievance procedures apply to both a denial of benefits and other adverse decisions by an insurance carrier or administering firm.

Section 81.9(d) is adopted to clarify existing practice that a notice of appeal to the Board regarding a decision by the Executive Director must be in writing and filed with ERS within the specified time period.

Throughout Chapter 81, including §81.5 and §81.11, the words "legislature" and "program" have been capitalized, and the word "State" in State of Texas has been changed to lower case. These changes are needed for consistency in the rules, and these words are either proper nouns or refer to definitions. The word "title" has been changed to chapter for correct reference purposes.

No comments were received on the proposed amendments and new rule.

The amendments and new rule are adopted under Texas Insurance Code, §§1551.009, 1551.052, and 1551.221. No other statutes beyond Chapter 1551, Insurance Code, are affected by these adopted rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 13, 2006.

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Paula A. Jones
General Counsel
Employees Retirement System of Texas
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For further information, please call: (512) 867-7421

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 809. CHILD CARE AND DEVELOPMENT

The Texas Workforce Commission (Commission) adopts amendments to the following sections of Chapter 809, relating to Child Care and Development without changes to the proposed text as published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8828):

Subchapter B, General Management, §809.14

Subchapter C, Requirements to Provide Child Care, §809.42

Subchapter K, Funds Management, §809.231

The Texas Workforce Commission (Commission) adopts amendments to the following section of Chapter 809, relating to Child Care and Development with changes to the proposed text as published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8828):

Subchapter B, General Management, §809.15

The Commission adopts the repeal of the following section of Chapter 809, relating to Child Care and Development without changes to the proposal as published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8828):

Subchapter C, Requirements to Provide Child Care, §809.49

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

Subchapter C. Requirements to Provide Child Care

The Commission adopts the repeal of §809.49, relating to parent advisory groups. Among other changes, House Bill (HB) 2961, enacted by the 79th Texas Legislature, Regular Session (2005), repealed Texas Human Resources Code §44.002(c), which required licensed child care centers to have a parent advisory committee if more than 30 percent of a center's licensed capacity was purchased through the child care subsidy system. The re-

peal became effective immediately upon signature of the Governor on May 27, 2005. As a result of the repeal, Commission rule §809.49, which requires licensed child care centers to have a Parent Advisory Group, is no longer necessary.

Subchapter B. General Management and Subchapter K. Funds Management

The Commission adopts §809.14 and §809.15, relating to promoting consumer education and other quality improvement activities, respectively, in order to describe the allowable consumer education and other quality improvement activities that Local Workforce Development Boards (Boards) may fund with Commission child care funds. The Commission also adopts §809.231, relating to provider reimbursement rates, in order to include providers participating in certain school readiness models as eligible to receive a higher graduated reimbursement rate for the provision of direct child care services consistent with recent actions by the 79th Texas Legislature (2005).

The federal Child Care and Development Fund (CCDF) statute (42 U.S.C. §9858(e)) requires that at least four percent of the funds each state receives be expended on allowable quality activities as set forth in the CCDF regulations (45 C.F.R. §98.51(a)). These quality activities include:

- providing comprehensive consumer education to parents and the public;

- increasing parental choice; and

- improving the quality and availability of child care.

Until September 1, 2001, the Commission passed down the federal requirement for quality expenditures to each Local Workforce Development Board (Board). At that time, Commission rule §800.58 required that each Board use at least four percent of its total annual child care expenditures on quality activities. The intent of the rule was to ensure that the state would meet the federal four percent quality set-aside.

In 2001, the Legislature determined that much of the state's four percent quality expenditure requirement could be met through the child care licensing and monitoring activities conducted by the Texas Department of Family and Protective Services (DFPS), and appropriated CCDF dollars to DFPS for licensing and monitoring activities. This action signaled a strategic shift in responsibility for fulfilling the federal quality requirements from the Commission--whose subsidized child care activities typically are limited to about 12 percent of the total regulated child care market--to DFPS--whose licensing and monitoring activities affect the entire range of the regulated child care market. Since State Fiscal Year 2002 (SFY'02), the Legislature has continued to appropriate CCDF dollars to DFPS, and the state has relied primarily on those expenditures to meet the federal four percent quality requirement.

As a result of the Legislature's decision to rely primarily on DFPS licensing and monitoring activities to meet the federal quality requirement, the Commission's quality performance measures relating to professional development training and Texas Rising Star (TRS) Provider certification were reduced and eventually eliminated by the Legislature.

Based on the funding appropriated by the Legislature for each year beginning with SFY'02, and the corresponding annual targets for average number of children served per day assigned by the Legislative Budget Board, the Commission and the Boards have had to use the majority of CCDF funds appropriated to the Agency, including the quality earmarked funds, for direct child care subsidies. The Boards have also continued to fund direct quality child care through higher reimbursement rates for TRS providers. The Legislature clearly intended that the Commission focus on providing direct subsidized child care as a support service for parents who are transitioning from welfare or who are at risk of becoming dependent on welfare, consistent with the federal direction at CCDF's creation in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Only minimal amounts of child care funds have been available each year at the state and local levels for nondirect quality child care services.

To the extent that funds are available in excess of those required to meet legislative performance targets for direct child care services, the Legislature enacted several laws in 2003 and 2005 that focus those quality expenditures on certain activities that prepare children for school. Senate Bill (SB) 280, enacted by the 78th Texas Legislature, Regular Session (2003), amended Chapter 2308 of the Texas Government Code by adding §2308.319, which encourages Boards to use local funds for collaborative reading initiatives.

Also in 2003, the Legislature enacted SB 76, amending Chapter 29 of the Texas Education Code to encourage the coordination and integration of early childhood development and child care programs and the creation of a school readiness rating system. The law charges the State Center for Early Childhood Development (State Center) with establishing pilot sites where child care, prekindergarten, and Head Start entities may coordinate and share information, facilities, and resources. It also charges the State Center with designing a school readiness rating system that determines whether an early childhood program is preparing children for kindergarten. As a result of SB 76, the State Center established 11 Texas Early Education Model (TEEM) pilot sites across the state. In 2005, the Legislature increased funding for the State Center and expanded the TEEM pilots.

Article IX, Rider 14.36 of the General Appropriations Act, 79th Legislature (2005), states:

School Readiness Model. Out of federal funds appropriated to the Texas Workforce Commission in Strategies A.3.1, TANF Choices Child Care; A.3.2, Transitional Child Care; and A.3.3, At-risk Child Care, up to $50 million for the biennium shall be made available to child care providers participating in integrated school readiness models developed by the State Center for Early Childhood Development at the University of Texas Health Science Center. This initiative shall be implemented in a way to avoid any decline in the number of children receiving child care during the 2006 - 2007 biennium.

These legislative actions provide a framework for the legislative emphasis on preparing children for school.

Texas Government Code §531.0312 designates the Texas Information and Referral Network/2-1-1 Texas (2-1-1 Texas) operated by the Texas Health and Human Services Commission (HHSC) as the single point of coordination for statewide information and referral services. Because 2-1-1 Texas is the state's designated entity for information and referral services, the Commission contracts with HHSC to provide comprehensive child care information and referral services to parents and the general public through 2-1-1 Texas.

Additionally, the 79th Texas Legislature, Regular Session (2005), enacted HB 2048 that directs HHSC expand its 2-1-1 Texas Web site to include information on all available public and private child care and early education services in order to provide the public

with an accessible online statewide database. HB 2048 amends §531.0312 of the Texas Government Code to require Boards, independent school districts, and the Texas Head Start Collaboration Office to provide 2-1-1 Texas with eligibility and availability information on their respective services.

Therefore, based on the actions of the Legislature, the Commission adopts §809.15, relating to quality improvement activities, to provide that, to the extent that funds are available for quality improvement activities, the Boards may fund quality improvement activities designed to promote the following:

(1) collaborative reading initiatives;

(2) school readiness, early learning, and literacy; and

(3) support for child care consumer education through 2-1-1 Texas.

The Commission also adopts §809.14, relating to consumer education, to include provisions relating to recent actions of the 79th Texas Legislature regarding the Texas Information and Referral System and the 2-1-1 Texas system, as well as to provide consumer education relating to school readiness and early learning. Further, the Commission adopts §809.231 in order to include child care providers participating in the State Center's school readiness models in the Commission's tiered reimbursement rates.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

(Note: Minor editorial changes are made throughout Chapter 809, Subchapters B, C, and K, that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER C. REQUIREMENTS TO PROVIDE CHILD CARE

§809.49. Provider Advisory Groups.

The Commission adopts the repeal of §809.49, requiring licensed child care centers to establish a Parent Advisory Group, as previously provided in §44.002(c) of the Texas Human Resources Code. HB 2961 repealed §44.002 of the Texas Human Resources Code, thereby removing the statutory requirement for parent advisory committees.

The Commission received no comments on the proposed repeal.

SUBCHAPTER B. GENERAL MANAGEMENT

§809.14. Promoting Consumer Education.

As provided by 42 U.S.C §9858(e) and further delineated in 45 C.F.R. §98.33(a), the Commission is required to certify that it collects and disseminates to parents and the general public consumer education information that promotes informed child care choices by parents. At a minimum, this information shall include information about the full range of child care providers available and health and safety requirements. Since December 2003, the Commission has contracted with HHSC to provide comprehensive child care information and referral services to parents and the general public through the statewide 2-1-1 Texas system. The amendments to §809.14 are designed to enhance the 2-1-1 Texas system relating to child care by requiring Boards to refer parents--including those who are not eligible or are no longer eligible for subsidized child care--to the 2-1-1 Texas system for child care information. The adopted rules also require Boards to include information concerning child care programs designed to improve school readiness, early learning, and literacy as part of the Boards' consumer education information.

The Commission adopts §809.14(a) to require Boards to provide consumer education information to parents who are eligible for Commission-funded child care services; parents who are placed on a Board's waiting list; parents who are no longer eligible for Commission-funded child care services; and applicants who are not eligible for Commission-funded child care services. The Commission adopts this provision in order to ensure that the Boards' child care consumer education is provided to as broad a population as possible. Additionally, the Commission believes that the requirement to provide consumer education information to parents no longer eligible for Commission-funded child care services further reinforces the requirements of §302.0046(b) of the Texas Labor Code and §809.72(6)(A) of this chapter, which require Boards to provide information regarding other child care services to parents whose children have been removed from care in order to serve a child in a priority group.

The Commission adopts §809.14(b) to describe what the consumer education information shall contain. The new §809.14(b)(1) states that the consumer information shall include information about the Texas Information and Referral Network/2-1-1 Texas information and referral system. This requirement is consistent with recent legislative direction that child care information and referral be provided by 2-1-1 Texas.

The new §809.14(b)(2) states that the consumer education information shall also contain the Web site and telephone number of DFPS, so parents may obtain health and safety requirements, including information on the prevention and control of infectious diseases (including immunizations), building and physical premises safety, minimum health and safety training appropriate to the provider setting, and the regulatory compliance history of child care providers. Because DFPS is the designated entity for the State of Texas to regulate child care providers, the Commission believes that the consumer information shall direct parents to the DFPS Web site and phone number to obtain this information. The Agency has reviewed the DFPS Web site and has determined that it contains the information required by federal child care regulations regarding health and safety. Although not required by the adopted rules, the Commission encourages Boards to review periodically the information provided on the DFPS Web site and provide printed material from the Web site to parents.

Adopted §809.14(b)(3) requires that the consumer education information provide a description of the full range of eligible child care providers meeting the requirements set forth in §809.41 of this chapter, including the option for parents to choose self-arranged care. The Commission includes this in order to implement the federal child care requirement in 45 C.F.R. 98.33(a), which states that parents be provided information on the full range of providers available to them.

Adopted §809.14(b)(4) requires that the consumer education information also include a description of programs available in the local workforce development area (workforce area) relating to school readiness and quality rating systems, including the school readiness models developed by the State Center, and the TRS criteria. The Commission includes this provision in order to emphasize the direction of the Legislature, particularly Article IX, Rider 14.36 of the 2005 General Appropriations Act, relating to school readiness, early learning, and literacy. The Commission includes a description of the TRS criteria because the TRS sys-

tem is provided for in state law pursuant to Texas Government Code §2308.315.

Finally, the Commission adopts §809.14(c) requiring Boards to cooperate with HHSC to provide 2-1-1 Texas with information, as determined by HHSC, for inclusion in the 2-1-1 Texas statewide information and referral network. The Commission adopts this in order to implement the provisions of HB 2048, enacted by the 79th Texas Legislature (2005), which amends §531.0312 of the Texas Government Code to require Boards to provide 2-1-1 Texas with eligibility and availability information on their respective services.

Comment: One commenter supported the efforts to educate the public about the 2-1-1 Texas information system and supports the use of CCDF funds for the statewide development of a fully functioning 2-1-1 Texas system for child care information. In addition, the commenter supported providing consumer education information to the broadest population.

Response: The Commission agrees with the comment and appreciates the support of the rules.

Comment: One commenter inquired if §809.14 requires only that customers be referred to 2-1-1 Texas and if the referral could be provided orally.

Response: The information required in §809.14(b) encompasses more than an oral referral to 2-1-1 Texas. The consumer information details the contact information for DFPS so parents may obtain health and safety information, a description of the full range of eligible child care providers, and a description of programs available in the workforce area relating to school readiness and quality rating systems, as well as information on 2-1-1 Texas. The Commission's intent is that this consumer information be provided in writing.

Comment: One commenter stated that the consumer education information should also include information on existing child care programs that already meet or exceed the school readiness criteria outside of the school readiness models.

Response: The Commission appreciates the comment and emphasizes that the school readiness models currently being tested by the State Center represent the first step in the development of a school readiness rating system. When fully developed and implemented, the school readiness rating system is expected to include school readiness programs that may not currently be participating in the TEEM pilots. The language in §809.14(b)(4) is designed to anticipate the development of a statewide school readiness and quality rating system.

Comment: One commenter stated that the Board will bear a financial cost of replacing existing consumer guides with the new consumer education information and asked if the new requirements could be implemented once the existing guides have been depleted.

Response: The Commission does not believe that this requirement will result in additional costs for the Boards. The previous rules required Boards to update the consumer guides on a regular basis with information on individual child care providers in their workforce areas. By removing the requirement to provide information on individual providers, the Commission believes that the amount of consumer information will be reduced, which will result in reduced overall costs for the Boards. The Commission intends that the new requirements for consumer education be implemented as soon as practicable following the date these rules become effective.

Comment: One commenter requested guidance on whether the information related to quality rating systems applies to state accreditation from the State Center, the National Association for the Education of Young Children, or other accreditation.

Response: The Commission appreciates the commenter's request for guidance on including quality rating systems information. The rules require information related only to the school readiness models developed by the State Center and information related to TRS. However, Boards may include information related to other school readiness and quality rating systems that may exist within each workforce area.

§809.15. Quality Improvement Activities.

The Commission adopts amendments to §809.15, relating to quality improvement activities, in order to align the allowable quality child care activities with the legislative direction relating to collaborative reading initiatives; school readiness, early learning, and literacy; and support for 2-1-1 Texas. The new §809.15(a) states that local public transferred funds and local private donated funds, as well as child care funds allocated to the Boards under Chapter 800, Subchapter B of this title (including the CCDF quality earmarked funds), to the extent used for nondirect care quality activities, may only be used for:

- collaborative reading initiatives;

- school readiness, early learning, and literacy; and

- local-level support to promote child care consumer education provided by 2-1-1 Texas.

During the rule development process, several Boards requested clarification from the Commission concerning the types of activities that may be funded to support collaborative reading, school readiness, early learning, and literacy. The Boards noted that professional development and training, as well as the purchase of resource materials and curriculum for professional development, are key components in providing early learning and literacy activities for children. The Commission adopts §809.15(b) to allow professional development and training for child care providers as well as the purchase of curriculum and curriculum-related resources, provided that the professional development and training and curriculum and related resources are designed to support collaborative reading initiatives, school readiness, early learning, and literacy.

In order to provide additional guidance to the Boards, the Commission offers the following guidelines and examples of the types of activities that may be funded to support the allowable quality initiatives. It is the Commission's intention that Boards be allowed to expend quality dollars for professional development and training using research-based curriculum, as well as the purchase of resource materials that support a print-rich environment designed to aid in the early learning and literacy development of children. Examples of activities to support collaborative reading initiatives, school readiness, early learning, and literacy include, but are not limited to:

- professional development relating to early learning workshops;

- Center for Improving the Readiness of Children for Learning and Education (CIRCLE) Train the Trainer training;

- literacy kits for child care providers;

- school readiness, early learning, and literacy awareness campaigns;

- scholarships for college courses relating to early learning, literacy, and school readiness; and

- training using research-based curriculum approved by the State Board of Education, Texas Education Agency, or recognized by the State Center.

It is not the intention of the Commission that Boards use quality dollars to purchase classroom consumable materials such as pencils, crayons, or art supplies. While the Commission recognizes that these materials are a supporting element that aid in a child's progress toward school readiness, the Commission believes that quality dollars should be targeted toward building the infrastructure necessary to provide early education professionals with the training, curriculum, and curriculum-related resources needed to promote school readiness, early learning, and literacy.

During the rule development process, several Boards expressed concern that the focus on school readiness, early learning, and literacy would lead Boards to direct quality dollars toward preschool children and away from infants and toddlers. In the preamble to the proposed rules, the Commission emphasized that Boards would not be limited to funding quality activities only for preschool. The Commission believes that the proposed rules provide Boards with the flexibility to fund early learning and literacy activities for all age groups, including infants and toddlers.

However, in response to concerns addressed through public comment, the Commission has added new §809.15(c), which explicitly allows Boards to fund quality improvement activities designed to meet the needs of children in any age group eligible for Commission-funded child care, as well as children with disabilities. The Commission intends to allow Boards the flexibility to fund collaborative reading initiatives and school readiness, early learning, and literacy activities that meet the specific needs of any target population or age group within each workforce area.

New §809.15(d) allows Boards to give priority in funding allowable nondirect child care quality activities to child care facilities:

- participating in the integrated school readiness models developed by the State Center;

- implementing components of school readiness curricula approved by the State Center; or

- participating in or voluntarily pursuing TRS Provider certification.

The Commission includes these provisions to address concerns by the Boards that they will not be able to continue providing appropriate professional development activities designed to promote the TEEM model or TRS certification.

The adopted §809.15(e) states that expenditures certified by a public entity may include expenditures for any quality improvement activity described in 45 C.F.R. §98.51. The Commission included this subsection to allow public entities and the Boards the flexibility to use the maximum amount of public expenditures allowed under federal regulations.

The Commission adopts the removal of §809.15(a) requiring Boards to ensure that providers receive orientation, technical assistance, and ongoing training to improve the quality of child care. The Legislative Budget Board has eliminated the Commission's quality performance measure relating to professional development training; therefore, the Commission finds this requirement is no longer necessary in Commission rules.

The Commission also adopts the removal of §809.15(b) requiring that Boards recognize TRS providers. However, the Commission clarifies that Boards are not prohibited from providing professional development and training to TRS providers. As mentioned previously, the Commission includes provisions in §809.15(b) and §809.15(c)(2) in order to include professional development training to TRS providers.

The Commission adopts the removal of §809.15(c) requiring Boards to provide quality activities described in 45 C.F.R. §98.51. This provision is removed in order to emphasize that child care funds, to the extent used for quality child care activities, shall be directed at activities described in adopted §809.15(a).

Finally, the Commission adopts the removal of §809.15(d) allowing Boards to establish other voluntary criteria for improving quality. The Commission removes this provision to emphasize that child care funds, to the extent used for quality child care activities, shall be directed at activities described in the adopted §809.15(a).

Comment: Five commenters supported the emphasis and focus on school readiness.

Response: The Commission thanks the commenters for their support.

Comment: One commenter was supportive of the Commission's emphasizing that Boards are not limited to funding quality activities targeted to serving preschool age children.

Response: The Commission appreciates the commenter's support.

Comment: One commenter supported the Commission's efforts to increase the number of three- and four-year-olds who have access to quality child care and early education.

Response: The Commission agrees and appreciates the commenter's support.

Comment: Ten commenters urged the Commission to continue to support quality child care for all children, including those between birth and three years of age, as well as children with disabilities. Two of the commenters expressed concern that under the proposed rules quality improvement activities geared toward infants and toddlers will not be promoted and the term "school readiness activities" implies a primary focus on three- and four-year-olds. Other commenters noted that meaningful professional development opportunities for child care providers are an essential factor in improving the quality of child care. The commenters also noted that specific training in the areas of serving children with disabilities, infants, and toddlers must be included in professional development activities. Additionally, one commenter recommended that the proposed rule changes include language specifying that quality activities will be designed to meet the needs of children of all ages receiving child care services.

Response: The Commission agrees and adds new §809.15(c) stating that allowable activities may be designed to meet the needs of any age group eligible for Commission-funded child care services, including children with disabilities. The Commission believes that the skills of each age group build upon each other and early learning, literacy, and school readiness activities should not be geared toward one specific age group.

Additionally, the Commission emphasizes that the rule provides Boards with the flexibility to fund early learning, literacy, and school readiness activities for children with disabilities. The Commission encourages Boards to explore professional development opportunities for child care providers that focus on strategies to assist children with disabilities in becoming prepared to enter school.

Comment: Five commenters noted that in the past Boards have utilized CCDF funds for caregiver training specifically related to the unique needs of infants and toddlers, including training on topics such as brain development and shaken baby syndrome.

Response: The Commission agrees that funds may be used for caregiver training to meet the needs of infants and toddlers. The Commission believes that elements of brain development training are related to early learning and would be allowable activities. However, training specific to shaken baby syndrome is related to health and safety and is a requirement for child care licensing. Therefore, it is the Commission's understanding that funding for training related to health and safety requirements would be provided through DFPS.

Comment: One commenter stated that investing in young children, starting at birth, to help them develop to their full potential, impacts the long-term economic outlook for all communities and that the TRS program is an important component in meeting those needs.

Response: The Commission agrees that investing in young children impacts the long-term economic outlook for communities. The proposed rules do not change the TRS program, which remains intact.

Comment: Eleven commenters noted that Boards need to have local flexibility in designing quality improvement activities that meet the unique needs of their workforce areas. The commenters stated that Boards have utilized CCDF funds for caregiver training on quality components of child care and on specific topics such as working with children with special needs; providing technical assistance to home-based providers; providing essential materials and equipment for classrooms; and providing lending libraries. Commenters also cited specific training on topics as indicated through local training needs surveys has included training on working with children with special needs, positive guidance techniques, recognizing child abuse and neglect, child growth and development, stress reduction for children, and applying developmentally appropriate practices.

The commenters also stated that CCDF has a broad focus and expressed appreciation for Boards' efforts to support a broad range of innovative programs and activities to strengthen the child care infrastructure and improve parents' access to high-quality child care services. The commenters also stated that Boards must have the flexibility to work with their communities to determine their individual needs and to develop supportive activities to meet those needs.

Response: The Commission believes that, given the limited resources of CCDF and the legislative priorities on early learning, the statewide focus must be on early learning, literacy, and school readiness. The Commission's intent in the proposed rules is to provide Boards the flexibility to focus on early learning for home-based providers or professional development activities specific to the training needs of the local area. The Commission agrees with the need for sustainability at the local level and believes that focusing the limited CCDF funds on building the infrastructure necessary to provide early education professionals with training, curriculum, and curriculum-related resources will lead to long-term investments with tangible outcomes. Further, the Commission believes that, with the exception of child abuse and neglect and stress reduction for children, all of the training topics in the commenters' list relate to early learning, literacy, and school readiness. Training on abuse and neglect and stress reduction are related to health and safety, the focus of DFPS, the agency that regulates health and safety of child care facilities. The Commission believes the proposed rules allow flexibility for Boards to work within their communities. In fact, the Commission encourages Boards to use CCDF funds for early learning, literacy, and school readiness to create partnerships with other groups in the workforce area to leverage their funds for other types of quality initiatives.

Although the CCDF program has a broad focus, a primary goal of the CCDF program is to assist low-income working parents in purchasing child care services. CCDF was not designed to be the only funding source for quality improvement initiatives. In fact, the Commission subsidizes direct child care services for about 12 percent of the total capacity of the regulated child care market. However, the licensing and monitoring activities of DFPS affect the entire regulated child care market. Therefore, Boards are encouraged and expected to work with local community partners to determine how quality activities allowed by §809.15 can contribute to the broad child care needs of the community.

Comment: Three commenters requested that scholarships for both associate's degrees in child development and teachers currently working in licensed facilities be included as allowable quality activities. The commenters stated that child development fundamentals that are taught in college-level courses are essential to quality child care, and professional development training does not replace these fundamentals.

Response: The Commission believes that the rules allow flexibility for Boards to provide scholarships for specific courses related to early learning, literacy, and school readiness. However, the Commission believes that scholarships for degree plans that also include general coursework--such as English composition, college math, college algebra, and personal computing--are too broad and would not be considered allowable activities. The Commission includes professional development activities in college courses that are related to early learning, literacy, and school readiness.

Comment: One commenter urged the Commission to clearly define the types of professional development activities needed to ensure that very young children are "pre-school" ready.

Response: The Commission does not believe it is necessary to provide a precise definition of the types of professional development activities that are allowed in rule as this may unduly limit the flexibility of Boards to fund early learning and school readiness programs in their workforce areas.

Comment: Three commenters noted that, because of the recent hurricanes, Boards need the flexibility to give child care providers the necessary training to serve children who have been displaced from their homes and are in need of mental health services.

Response: The Commission agrees that the need exists for mental health training for child care providers in order to meet the needs of the families and children displaced by the hurricanes. However, the Commission recognizes that CCDF alone cannot meet the needs of those displaced by the hurricanes. For that

reason, the Commission applied for and has received a National Emergency Grant to provide child care services to children displaced by the hurricanes. The Commission encourages Boards to work with the Texas Department of State Health Services, the agency charged with the delivery of public mental health services for adults and children.

Comment: One commenter stated that proposed §809.15(a) is too narrow and that quality indicators related to ratios, group sizes, and physical facilities should be addressed. The commenter noted that low child-to-staff ratios are positively correlated with good outcomes for children; group sizes allowed under DFPS place children in jeopardy of cognitive and academic delays; and physical facilities are directly responsible for academic delays.

Response: The Commission appreciates the comment that environmental factors related to ratios, group sizes, and physical facilities may be important factors in school success; however, the Commission does not believe these are the determining factors that affect academic success. Additionally, the Commission believes that issues related to child-to-staff ratios, group size, and physical facilities (especially related to child safety) are best addressed through child care licensing and regulation. The Commission again emphasizes that it subsidizes direct child care services to about 12 percent of the total capacity of the regulated child care market. However, the licensing and monitoring activities of DFPS, which include standards for child-to-staff ratios and physical facilities, affect the entire regulated child care market. Additionally, the Commission has encouraged DFPS to establish a tiered-licensing system, which may include lower ratios for any licensed facility (beyond just those with subsidized children) seeking to exceed minimum licensing standards.

Comment: Regarding §809.15(b), one commenter noted that there is no mention of the ability to purchase assessment tools and that a teacher's planned, purposeful interaction with young children and the ability of a teacher to have objective information about a child's understanding and skills is essential to school readiness. The commenter questioned whether assessment tools would be considered a curriculum-related support resource.

Response: The Commission believes assessment tools are curriculum-related support resources. However, the Commission emphasizes that assessment tools must be connected to the implementation of a specific curriculum and include training related to school readiness, early learning, and literacy.

Comment: One commenter noted that the rule change would not allow the use of quality funding to purchase adaptive equipment for a child with a disability if it was needed by a provider, which seems contrary to the requirements of the Americans with Disabilities Act.

Response: The Commission believes that the adopted rules do allow for the purchase of adaptive equipment, as long as the purchase is in conjunction with training. However, the Commission encourages Boards to consider supplying the training and collaborating with local governments, local early childhood intervention offices, private nonprofits (such as Easter Seals and United Way) to identify other funding sources to provide adaptive equipment.

Comment: One commenter stated that the proposed rule changes do not sufficiently define "collaborative reading initiatives."

Response: The Commission agrees that guidance should be provided, but believes that a definition in rule would unnecessarily limit Boards' flexibility. The Commission will issue a Workforce Development Letter to provide further guidance on collaborative reading initiatives.

Comment: One commenter requested clarification on the definition in the proposed rules of providers who are "voluntarily pursuing participation" in the TEEM project. The commenter noted that a provider may voluntarily pursue participation in TEEM, but regardless of quality funds, may never meet the TEEM requirements. The commenter did not believe those providers should receive priority in the funding of quality activities.

Response: The Commission appreciates the comment and has revised language in §809.15(d). The Commission recognizes that child care facilities may not have the option to voluntarily participate in the TEEM project. Therefore, the Commission adds rule language to clarify that Boards may give priority for quality activities to providers that may wish to implement components of school readiness curricula as approved by the State Center. The Commission appreciates the concern that child care facilities may not be in a position to meet the TEEM requirements. The rule language is not intended to require Boards to fund any facility implementing components of the school readiness curricula. Rather, the Commission intends that if a Board chooses to prioritize quality funds for non-TEEM facilities in order to assist facilities with implementing components of the curricula, the Board should provide such funds using criteria that includes the child care facility's willingness to make a commitment to meeting school readiness criteria.

Comment: One commenter stated that the local community has benefited from participation in TEEM and that the community will continue to support it. However, the commenter noted that not all child care centers have the structural support to successfully participate in the TEEM system. The commenter noted that expansion of TEEM should continue, while quality funds are directed toward provider training for quality components and specific topics such as children with special needs, technical assistance to home-based providers, essential classroom materials and equipment, lending libraries, and more.

Response: The Commission appreciates the commenter's concerns and is aware that not every child care facility may be in a community with a TEEM site. However, the Commission believes that the proposed rules allow Boards to provide professional development and curriculum support for child care providers (including home-based providers) who are not participating in TEEM, as long as the activities are directed toward caregiver training involving early learning, literacy, or school readiness. The Commission also believes that a focus on early learning, literacy, and school readiness does not exclude children with special needs. Caregivers working with children with special needs may benefit tremendously from training on preparing children with special needs for early learning and school readiness.

Comment: One commenter requested clarification of "TEEM activities" and whether center classrooms participate in TEEM in its entirety or whether the center can participate in selected components, such as only teacher training, use of CIRCLE curricula without instruction, or use of assessment tools without teacher training.

Response: The Commission clarifies that TEEM activities refer to child care providers participating in integrated school readi-

ness models. In addition, the Boards may choose to fund quality activities for providers that are not included in the TEEM partnerships, but are incorporating components of the State Center's CIRCLE training. However, the Commission emphasizes that the purchase of curricula or resource materials must be linked with appropriate training.

Comment: Regarding the requirements under Article IX, Rider 14.36, relating to school readiness models, one commenter noted that the Board serves a 12-county workforce area, yet only one TEEM partnership currently exists in the urban part of the workforce area. Additional resources for this one project would divert funding away from the rural counties, thereby creating inequity.

Response: The Commission believes that Boards have the flexibility to design quality activities that will benefit the entire workforce area, and the Boards are not limited to directing activities solely to a TEEM project. The Commission emphasizes that Boards may choose to fund professional development activities for providers that are not included in the TEEM partnerships, but incorporate components of the State Center's CIRCLE training.

Comment: One commenter requested assurance that Boards can use quality funds to provide necessary tools to support home-based child care providers as well as providers caring for children with special needs.

Response: The Commission agrees that quality funds may be used for professional development specifically designed to meet the early learning and school readiness needs of children with disabilities or designed for home-based providers.

Comment: One commenter noted that collaboration between the private sector and public sector, as well as the for-profit and nonprofit sectors, should continue to be encouraged.

Response: The Commission agrees and encourages Boards to seek public-private partnerships in their workforce areas. The CCDF State Plan documents evidence of public-private partnerships such as the 2-1-1 Texas collaboration. TEEM also is an excellent example of collaboration among profit, nonprofit, and publicly supported providers.

Comment: Eight commenters expressed concern that the proposed rules imply an overly narrow definition of school readiness and early learning, one that places too heavy a focus on cognitive development at the expense of children's social and emotional development-two critical components in achieving school readiness. The commenters noted that a child's emotional and social well-being is as critical to early learning and literacy as phonemic awareness and print-rich environments. One of the commenters recommended that language be added in the proposed rule to include activities that support the social and emotional development of all children.

Response: The Commission disagrees that the proposed rules imply a narrow focus only on the cognitive development of children and only address the reading and literacy aspect of a child's development. The Commission agrees that each of the developmental domains is important for children. Dr. Susan Landry, Director of the State Center for Early Childhood Development, issued a report in 2005 entitled "Effective Early Childhood Programs." The report discusses the fact that all of the developmental domains are intertwined and linked in children's growth. Dr. Landry states that children's primary developmental domains--physical, social/emotional, and cognitive--have complex interrelations, and that school readiness requires a solid development, not only in the cognitive domain, but also in all of the major developmental domains. The Commission does not believe it is necessary to specify in rule that activities supporting the social and emotional development of children are included as quality activities. The rules do not limit activities to one particular developmental domain.

Comment: One commenter recommended the continued use of funds for children with disabilities and school age care.

Response: The Commission agrees with the comment and believes that the rules provide Boards with the flexibility to focus on professional development activities related to early learning and school readiness that meets the specific needs of school age children and children with disabilities. Collaborative reading activities that encourage reading may also be geared toward school age children.

Comment: Regarding the use of local match funds for quality activities, one commenter stated that Boards should be given the flexibility to continue supporting the needs of both children and providers.

Response: The Commission agrees that Boards should support the needs of both children and providers and believes that the proposed rules allow for that flexibility.

Comment: Two commenters noted that if a Board is meeting or is on track to meet its performance target, then the use of local match funds for quality activities is an excellent avenue to support the needs of the workforce area. One of the commenters recommended that the Commission allocate additional local match for direct care and, if it is not needed for Boards to meet the performance target for children in care, then reissue the funds for any quality activities.

Response: The Commission disagrees with the contention that as long as a Board is meeting, or is on track to meet, its performance targets it should be allowed to fund any type of quality activities with CCDF funds not needed to meet performance targets. The Commission believes that, in an environment of limited funds, quality dollars must be focused on statewide goals with high impact. Otherwise, funding for quality activities will be scattered and largely ineffective.

Comment: Two commenters noted that the Board depends upon its local partners to secure local match and the availability of quality funds enables the Board to continue building good relationships with its local partners because the Board needs to be giving back to the community in terms of quality, not just more children in care. The commenters also stated that at some point local contributors would not provide the level of local match if there were no return on their investment.

Response: The Commission acknowledges the support provided by local partners in the securing of local match. It is not the Commission's intent to limit local donations and the Commission believes that this will not happen. However, given the limited funds available, the Commission believes that it is essential that quality activities focus on early learning and school readiness. Furthermore, by specifying that CCDF quality funds be used for activities related to school readiness, early learning, and literacy as well as support for 2-1-1 Texas, Boards and local child care organizations should look to other funding sources to expand the total amount of dollars spent on quality child care. Viewing CCDF as the primary source for any and all quality initiatives reduces the incentive in local areas to look to other available

funding sources that complement and enhance CCDF in order to meet the broad child care needs of local communities.

Comment: One commenter requested clarification regarding the use of matching funds derived from certification of expenditures from public entities for quality activities. The commenter inquired whether the federal funds could be spent on any quality activities.

Response: Regarding the use of federal funds derived from certification of expenditures from a public entity, the local funds can be expended on any quality activity allowed in the federal regulations set forth in 45 C.F.R. §98.51. However, pursuant to this chapter, the resulting federal funds can be expended only on activities related to early learning, literacy, school readiness, collaborative reading initiatives, or local support for 2-1-1 Texas.

SUBCHAPTER K. FUNDS MANAGEMENT

§809.231. Provider Reimbursement Rates.

The Commission adopts §809.231(d) to require Boards to establish graduated reimbursement rates for child care providers participating in integrated school readiness models developed by the State Center. The Commission adopts this amendment to implement the direction of the Legislature as provided by Article IX, Rider 14.36 of the General Appropriations Act, 79th Texas Legislature (2005), which requires the Commission to make available up to $50 million of the federal funds appropriated to the Commission for Choices, Transitional, and At-Risk Child Care in the 2006-07 biennium, to child care providers participating in State Center integrated school readiness models. By making more funds available, through higher reimbursement rates, to providers participating in the school readiness models, the Commission will be in a position to demonstrate its intention to implement the intent of Article IX, Rider 14.36, as required by the Legislature. The Commission also emphasizes that graduated reimbursement rates for TRS providers will remain a direct care quality expenditure, as directed by Texas Government Code §2308.315.

The Commission adopts §809.231(e) to provide that the minimum reimbursement rates established under §809.231(d) shall be at least five percent greater than the maximum rate established for providers not meeting the requirements of §809.231(d) for the same category of care up to, but not to exceed, the provider's published rate.

Finally, the Commission adopts the removal of §809.231(g), which allows Boards to provide incentives to providers to recognize other quality criteria in addition to those in §809.231(d). The Commission removes this provision to limit the use of graduated reimbursement rates to those programs recognized by state statute, such as programs participating in the integrated school readiness models (as provided in Article IX, Rider 14.36 of the General Appropriations Act, 79th Legislature) and the TRS providers (as provided in Texas Government Code §2308.315). The Commission emphasizes that it is not removing the ability of Boards to provide incentives to providers that voluntarily meet or attempt to meet quality criteria. The Commission believes that the new §809.15(b), which allows Boards to provide professional development and to purchase curriculum resources--as well as the newly adopted §809.15(c), which allows Boards to prioritize nondirect quality funds for providers participating in or pursuing participation in school readiness models and TRS certification pursuant to Texas Government Code §2308.316--provide the Boards the opportunity to focus incentives on quality programs recognized by the Legislature.

Comment: One commenter expressed support for higher reimbursement rates for providers participating in TRS or TEEM.

Response: The Commission appreciates the commenter's support of higher reimbursement rates for TRS and TEEM providers.

Comment: One commenter questioned whether providers participating in TEEM, but not participating in TRS, will be required to have a provider agreement.

Response: The Commission will not require Boards to have a provider agreement with providers that are participating in the TEEM project.

Comment: One commenter noted that the TRS program is the only program recognized by the state to receive higher reimbursement rates; however, the TRS criteria do not measure school readiness.

Response: The Commission recognizes that the current TRS criteria do not measure school readiness outcomes of children. However, §2308.315 of the Texas Government Code requires Boards to establish graduated reimbursement rates for TRS providers. Section 809.221(d)(2) reflects this statutory requirement.

The Commission also notes that in 1999, when the Legislature required higher reimbursement rates for TRS providers, school readiness was not a stated goal of the TRS criteria. However, the Commission is currently considering adding school readiness as a criterion for TRS providers. Additionally, the Commission recognizes that TRS was the only program available in 1999 to receive the higher reimbursement. By adopting the new §809.221(d)(1), the Commission adds child care providers participating in the State Center's school readiness models as eligible to receive higher reimbursement rates.

Comment: Regarding provider reimbursement rates, one commenter requested clarification on TEEM providers being eligible for the graduated rate increase. The commenter asked whether the provider would only receive the rate increase for the age groups participating in the TEEM project (three- to four-year-olds) or would the rate increase apply across all of the provider's rates.

Response: It is the Commission's intent that the graduated reimbursement rate for a provider participating in the TEEM project will apply across all of the provider's age-group rates, not just the three-to-four year old age group. The Commission recognizes that separate reimbursement rates based on classroom age groups may pose an administrative burden for providers and Boards.

Comment: One commenter recommended that reimbursement rates need to be increased and should be based on the quality of the program. In addition, the commenter noted that reimbursement rates should be determined by an annual market rate survey that encompasses all providers from all socioeconomic levels.

Response: The Commission notes that the existing rule requires Boards to establish reimbursement rates based on a market rate survey and other local factors. The Commission also notes that an annual market rate survey encompassing a representative sample of provider types is conducted annually and the Commission provides the results of the market rate survey to the Boards.

Comments were received from:

Senator Judith Zaffirini, Texas State Senate

Deborah L. Butts, East Texas Workforce Development Board

Woody Engebretson, Rural Capital Area Workforce Development Board

Ann McCain, Central Texas Workforce Board

Alan Miller, Alamo Workforce Development Board

Lisa Witkowski, Workforce Solutions for Tarrant County

Peggy Grunwell, Converse Child Care Center Board Liaison

Frank Guevara, Palo Alto College

Kaitlin Guthrow, Texas Early Childhood Education Coalition

Nancy Hard, Family Service Association

Suzanne Hinds, Collaborative for Children

Susan Hoff, Child Care Group

Tere Holmes, The Children's Courtyard

Sandra Lamm and Louanne Aponte, Texas Association of Child Care Resource and Referral Agencies

Ruth Lightfoot, Alamo Area Council of Governments

Dr. Teri Perryman, Texas Medical Association

Josette Saxton, Texans Care for Children

Jennifer Vogel, San Marcos Consolidated Independent School District

John A. Whitcamp, Child Care Associates

Dr. Stephen Barnett

Earlene Gonzales

The Agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the Agency's legal authority.

SUBCHAPTER B. GENERAL MANAGEMENT

40 TAC §809.14, §809.15

The amended sections are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code, §44.002, regarding Administrative Rules.

The adopted amendments affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.15. Quality Improvement Activities.

(a) Local public transferred funds and local private donated funds, as provided in §809.20 of this subchapter, as well as child care funds allocated to the Boards in Chapter 800, Subchapter B of this title, to the extent used for nondirect care quality improvement activities, shall only be used for the following:

(1) Collaborative reading initiatives

(2) School readiness, early learning, and literacy

(3) Local-level support to promote child care consumer education provided by 2-1-1 Texas

(b) Allowable activities may include the following to support the quality improvement activities described in subsection (a) of this section:

(1) Professional development and training for child care providers

(2) Purchase of curriculum and curriculum-related support resources for child care providers

(c) Activities in subsection (a) of this section may be designed to meet the needs of children in any age group eligible for Commission-funded child care, as well as children with disabilities.

(d) In funding quality activities allowable under this section, a Board may give priority to child care facilities:

(1) participating in the integrated school readiness models developed by the State Center for Early Childhood Development at the University of Texas Health Science Center;

(2) implementing components of school readiness curricula as approved by the State Center; or

(3) participating in or voluntarily pursuing participation in Texas Rising Star Provider certification, pursuant to Texas Government Code §2308.316.

(e) Expenditures certified by a public entity, as provided in §809.20 of this subchapter, may include expenditures for any quality improvement activity described in 45 C.F.R. §98.51.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602097
Reagan Miller
Deputy Director for Workforce and UI Policy
Texas Workforce Commission
Effective date: May 1, 2006
Proposal publication date: December 30, 2005
For further information, please call: (512) 475-0829

♦ ♦ ♦

SUBCHAPTER C. REQUIREMENTS TO PROVIDE CHILD CARE

40 TAC §809.42

The amended section is adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources, Code §44.002, regarding Administrative Rules.

The adopted amendments affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602098

Reagan Miller
Deputy Director for Workforce and UI Policy
Texas Workforce Commission
Effective date: May 1, 2006
Proposal publication date: December 30, 2005
For further information, please call: (512) 475-0829

♦ ♦ ♦

40 TAC §809.49

The repeal is adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code, §44.002, regarding Administrative Rules.

The repeal affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602099
Reagan Miller
Deputy Director for Workforce and UI Policy
Texas Workforce Commission
Effective date: May 1, 2006
Proposal publication date: December 30, 2005
For further information, please call: (512) 475-0829

♦ ♦ ♦

SUBCHAPTER K. FUNDS MANAGEMENT

40 TAC §809.231

The amended section is adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code, §44.002, regarding Administrative Rules.

The adopted amendments affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2006.

TRD-200602100
Reagan Miller
Deputy Director for Workforce and UI Policy
Texas Workforce Commission
Effective date: May 1, 2006
Proposal publication date: December 30, 2005
For further information, please call: (512) 475-0829

♦ ♦ ♦

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Adopted Rule Review

Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 105, Foundation School Program, Subchapter AA, Commissioner's Rules Concerning Optional Extended Year Program; Subchapter BB, Commissioner's Rules Concerning State Aid Entitlements; and Subchapter CC, Commissioner's Rules Concerning Severance Payments, pursuant to the Texas Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 105 in the December 16, 2005, issue of the *Texas Register* (30 TexReg 8453).

The TEA finds that the reasons for adopting 19 TAC Chapter 105, Subchapters AA and CC, continue to exist. Changes are needed in Subchapter AA to update the text of the rule to reflect existing statute and the related rider and agency administration of the program. The TEA plans to propose amendments to Subchapter AA at a future date. No changes are necessary to rules in Subchapter CC. The TEA is proposing no amendments to these rules at this time.

Relating to 19 TAC Chapter 105, Subchapter BB, the TEA finds the following. The reasons do not exist for adopting §105.1011, Distribution of Foundation School Fund, and §105.1014, State Reimbursement for Electrical Utility Restructuring. Section 105.1011 has expired and the statutory authority for §105.1014 was repealed. The TEA plans to propose the repeals of §105.1011 and §105.1014 in the near future. The reasons for adopting §105.1012, Additional State Aid for Professional Staff Salaries, continue to exist. The TEA is proposing no amendment to this rule at this time.

The TEA received no comments related to the rule review of 19 TAC Chapter 105, Subchapters AA-CC.

This concludes the review of 19 TAC Chapter 105.

TRD-200602153
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: April 13, 2006

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 22 TAC §165.6(f)

DISCLOSURE AND CONSENT FORM
MEDICAL, SURGICAL, AND DIAGNOSTIC PROCEDURES

PATIENT NAME: _____
DATE OF BIRTH: _____ **AGE:** ____

This Form has been adopted by the Texas Medical Board in accordance with the requirements of §164.052(c), Texas Occupations Code and is published in 22 Texas Administrative Code §165.6(f). The purpose of this Form is to allow the physician to obtain the required consents for an abortion to be performed on an unemancipated minor. This Form is available for downloading on the Texas Medical Board web site at "www.tmb.state.tx.us".

Part I. Information about Patient Consent Requirements and Parental Consent Requirements.

TO THE PATIENT: As the patient, you have the right to be given information about your health condition, our plans for your care, and the risks and hazards of the planned care. You have the right to provide written consent for the medical procedures agreed to be performed. As your physician, I am required by law to provide this information to you, and to have your consent, or permission, before we can start any medical procedure on you. This is called the "Patient Consent Requirement." Your signature at the bottom of Part IV of this Form is your consent for me to perform the medical procedures that are checked below in Part II.

TO THE PATIENT'S PARENT, LEGAL GUARDIAN, OR MANAGING CONSERVATOR: As the parent, legal guardian, or managing conservator of a child, you have the right to be given information about your child or ward's health condition, our plans for her care, and the risks and hazards of the planned care. You are also required to provide written consent, or permission, for the medical procedures agreed to be performed on your child or ward, unless otherwise stated in law. This called the "Parental Consent Requirement".

A child includes each patient who is under 18 years old, unmarried, and has not had the disabilities of minority removed by court order. In Texas, this is called an "unemancipated minor." I am required by law to have the written consent of either one of the patient's parents, legal guardian, or managing conservator before we can perform an abortion on an unemancipated minor. The Parental Consent Requirement does not apply if the unemancipated minor has a court order waiving the parental consent requirement (a "judicial bypass order")

The Parental Consent Requirement has two parts. The first part requires one of the patient's parents, legal guardian, or managing conservator to initial each page of this Form. Their initials mean that they have had the chance to read this information (or to have it read to them) and to ask questions. The initialing of each page can be done at any time and at any location. The second part requires either one of the patient's parents, legal guardian, or managing conservator to sign the Parental Consent in Part V of this Form. This Form must be signed either in the physician's office or clinic in front of a witness, or in any location in front of a person who is a notary public. The purposes of these signing requirements are to help make sure that only those persons listed on the Parental Consent in Part V of this Form are the ones who actually sign it.

Part II. Surgical and Medical Procedures.

The surgical and/or medical procedures that are planned to be performed on the patient are the ones that are checked below. As used in this Form, "abortion" means the use of any means to terminate the pregnancy of a female known by the attending physician to be pregnant with the intention that the termination of the pregnancy by those means will, with reasonable likelihood, cause the death of the fetus.

Surgical Abortion Procedures:

_____ Dilatation and Curettage (D&C)

_____Dilatation and Evacuation (D&E)

_____Manual Vacuum Aspiration

_____Machine Vacuum Aspiration

Medical Abortion Procedures:

_____Methotrexate

_____Misoprostol

Other as listed:

_____

_____

Part III. Risks and Hazards.

There are risks and hazards related to the surgical and medical procedures planned for the patient. The following list is not meant to scare the patient, but to give her and her parent, legal guardian, or managing conservator adequate information to be used in making their decisions to have the physician perform the particular procedures checked above.

The patient should read and initial the following blanks. Her initials mean she has read the information (or had it read to her) and agrees with the statement.

_____ I have been told by the physician or physician's assistant about the following risks and hazards that may occur in connection with any surgical, medical, and/or diagnostic procedure:

(A) Potential for infection.
(B) Blood clots in veins and lungs.
(C) Hemorrhage.
(D) Allergic reactions.
(E) Even death.

_____ I have been told by the physician or physician's assistant about the followings risks and hazards that may occur with a surgical abortion:

(A) Hemorrhage (heavy bleeding).
(B) A hole in the uterus (uterine perforation) or other damage to the uterus.
(C) Sterility.
(D) Injury to the bowel and/or bladder.
(E) A possible hysterectomy as a result of complication or injury during the procedure.
(F) Failure to remove all products of conception that may result in an additional procedure.

_____ I have been told by the physician or physician's assistant about the followings risks and hazards that may occur with a medical/non-surgical abortion:

(A) Hemorrhage (heavy bleeding).
(B) Failure to remove all products of conception that may result in an additional procedure.
(C) Sterility.
(D) Possible continuation of pregnancy.

_____ I have been told by the physician or physician's assistant about the following risks and hazards that may occur with this particular procedure:

(A) Cramping of the uterus or pelvic pain.
(B) Infection of the female organs: uterus, tubes, and ovaries.
(C) Cervical laceration, incompetent cervix.
(D) Emergency treatment for any of the above named complications.
(E) Other as written:

_____

_____

_____I have been told by the physician or physician's assistant about the following other information that is required by law to be discussed before I can give my voluntary and informed consent to an abortion: (See §171.11 and §171.12, Texas Health and Safety Code):

(1) the probable gestational age of the fetus;
(2) the medical risks associated with carrying the child to term;
(3) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;
(4) the father is liable for assistance in the support of the child without regard to whether the father has offered to pay for the abortion;
(5) public and private agencies provide pregnancy prevention counseling and media referrals for obtaining pregnancy medications or devices, including emergency contraception for victims of rape or incest; and
(6) the woman has the right to review the printed materials provided by the Department of State Health Services.

Part IV. Patient's Consent for Surgical or Medical Procedures.

To meet the Patient Consent Requirement, the patient must complete Part IV of this Form. An initial on each blank means that the patient has read (or had the information read to her) and agrees with the statement. The patient's signature means that she is agreeing to have the abortion procedures set out above.

Patient Consent Statement:

_____I understand that my doctor_____ (print the name of your doctor) is going to perform an abortion on me, which will end my pregnancy and will result in the death of the fetus.

_____I understand that I am not being forced to have this abortion and have the choice on whether to have this procedure.

_____I give my permission to this doctor and such other associates, technical assistants, and other health providers as the doctor thinks is needed to perform the abortion on me using the surgical and medical procedures checked above.

_____I understand that my physician may discover other or different conditions that require additional or different procedures than those planned.

_____I give my permission to my physician and such associates, technical assistants and other health care providers to perform such other procedures that are advisable in their professional judgment.

_____I ☐ **do** ☐ **do not give my permission for the use of blood** and blood products as deemed necessary.

_____I understand that my doctor cannot make any promise regarding the end results of the abortion or my care.

_____I understand that there are risks and hazards that could affect me if I have the surgical or medical procedures checked above.

_____I have been given an opportunity to ask questions about my condition, alternative forms of treatment, risk of non-treatment, the procedures to be used, and the risks and hazards involved.

_____ I understand that information about abortion that is included in the law as the Woman's Right to Know Act has been made available to me as required by §§171.001, *et seq.*, Texas Health and Safety Code.

_____ I believe that I have sufficient information to give this informed consent.

This Form has been fully explained to me. I have read it or have had it read to me, the blank spaces have been filled in, and I believe that I understand what it says. By my signature below, I give my voluntary consent to have the surgical and medical procedures performed on me that are listed above.

_____
Printed Name of Patient

_____ _____
Signature of Patient Date

Part V. Parental Consent for Surgical or Medical Procedures.

To meet the Parental Consent Requirement, one of the parents, the legal guardian, or the managing conservator of the patient must initial each page of this Form and complete Part V of this Form. An initial on each page blank means that the parent, legal guardian, or managing conservator has had the opportunity to read the information (or to have the information read to them) and has had the opportunity to ask questions to the physician or the physician's assistant about this information. The signature of the parent, legal guardian, or managing conservator means that the person signing is agreeing to have the abortion procedures performed on the patient as set out above.

Parental Consent Statement:

_____I understand that the doctor listed above is going to perform an abortion on the patient, which will end her pregnancy and will result in the death of the fetus.

_____ I have had the opportunity to read this Form (or have it read to me) and have initialed each page.

_____I have had the opportunity to ask questions to the physician or the physician's assistant about the information in this Form and the surgical and medical procedures to be performed on the patient.

_____ I believe that I have sufficient information to give this informed consent.

By my signature below, I state and affirm that I am the patient's:

☐ Father ☐ Mother ☐ Legal Guardian ☐ Managing Conservator

By my signature below, I give permission for _____ (print the name of the patient), who is an unemancipated female, to have the surgical or medical procedure set out above.

_____
Printed Name of Parent, Legal Guardian,
or Managing Conservator

_____ _____
Signature of Parent, Legal Guardian, Date
or Managing Conservator

Part VI. Physician Declaration:

I and/or my assistant have explained the procedure and the contents of this Form to the patient and her parent, legal guardian, or managing conservator as required and have answered all questions. To the best of my knowledge, the patient and her parent, legal guardian, or managing conservator have been adequately informed and have consented to the above-described procedure.

_____ _____
Signature of Physician Date

Part VII. Authentication of Parent, Legal Guardian, or Managing Conservator.

The signature of the parent, legal guardian, or managing conservator must be authenticated. This means that the parent, legal guardian, or managing conservator must sign Part V of this Form in front of either a witness in the physician's office or clinic or in front of a person who is a notary public. These choices are explained below:

(A) The signing in front of a witness in the physician's office or clinic can occur at any time prior to the procedure. The signing may be done in the office or clinic of the physician performing the procedure. The signing may be done in the office or clinic of another physician who is involved with the care of the patient if the following conditions are met: (1) there is a referral and communication system in place between the physicians; and (2) there are trained medical personnel in the office where the signing is done who are easily accessible to answer any questions of the patient and/or the parent, legal guardian, or managing conservator.

OR

(B) The signing in front of a person who is a notary public can occur at any time and at any place prior to the procedure. The signed and initialed form with the notary statement than can be brought to the physician's office or clinic by the patient.

These signing requirements do not require the parent, legal guardian, or managing conservator to be present with the patient at the time of the procedure.

Option (A) - To be completed by the person who witnesses the signing by the parent, legal guardian, or managing conservator in the physician's office or clinic:

I witnessed the signature of the parent, legal guardian, or managing conservator on Part V of this Form in the physician's office or clinic.

_____ _____

Printed Name of Witness Date

_____

Signature of Witness

Option (B) - To be completed by the notary public who notarizes the signing by the parent, legal guardian, or managing conservator, as provided in Part V, above:

State of Texas §

§

County of _____ §

This instrument was acknowledged before me on the _____ day of _____, A.D., 20____

by _____ (print name).

(SEAL)

_____

Notary Public, State of Texas

My commission expires: _____

Figure: 22 TAC §185.23(d)(9)

TEXAS PHYSICIAN ASSISTANT BOARD
P.O. Box 2018, MC-263
Austin, Texas 78768-2018

PROFESSIONAL LIABILITY CLAIMS REPORT

FILE ONE REPORT FOR EACH DEFENDANT PHYSICIAN ASSISTANT

PART I COMPLETE FOR ALL CLAIMS OR COMPLAINTS AND FILE WITH THE TEXAS - PHYSICIAN ASSISTANT BOARD WITHIN 30 DAYS FROM RECEIPT OF COMPLAINT OR CLAIM. INCLUDE COPY OF CLAIM LETTER AND/OR PLAINTIFF'S COMPLAINT.

1. Name and address of insurer:

_____

_____

_____

2. Defendant physician assistant:

_____

License number: _____

3. Plaintiff's name:

_____

4. Policy number:

_____

5. Date claim reported to insurer/self-insured physician assistant:

_____

6. Type of complaint:_____ claim only _____ lawsuit

7. Initial reserve amount after investigation:

_____
(If this is not determined within 30 days, report this data within 105 days of filing the Part I report with the board)

_____
Person completing this report (SIGNATURE)

_____ _____
Person completing this report (PRINT NAME) Phone number

PART II COMPLETE AFTER DISPOSITION OF THE CLAIM AS DEFINED IN 22 TAC, INCLUDING DISMISSALS OR SETTLEMENTS. FILE WITH THE TEXAS PHYSICIAN ASSISTANT BOARD WITHIN 105 DAYS AFTER DISPOSITION OF THE CLAIM. A COPY OF A COURT ORDER OR SETTLEMENT AGREEMENT MAY BE USED AS PROVIDED IN 22 TAC.

8. Date of disposition: _____

9. Type of Disposition:

_____ (1) Settlement

_____ (2) Judgment after trial

_____ (3) Other (please specify)

_____

10. Amount of indemnity agreed upon or ordered on behalf of this defendant:

$ _____. Note: If percentage of fault was not determined by the court or insurer in the case of multiple defendants, the insurer may report the total amount paid for the claim followed by a slash and the number of insured defendants. (Example: $100,000/3)

11. Appeal, if known: _____Yes _____ No. If yes, which party:

_____

_____
Person completing this report (SIGNATURE)

_____ _____
Person completing this report (PRINT NAME) Phone number

Figure: 30 TAC §303.72(a)

$$\text{Municipal Assessment Rate} = \frac{I - M(N)}{(RF_s)(AF_s) + AF_1 + (RF_2)(AF_2) + (RF_3)(AF_3)...(RF_n)(AF_n)}$$

Where:

I : Income needed to meet the adopted budget

M : Base charge per account

N : Total number of accounts to be assessed in the water division

n : Code number corresponding to a category or type of use

RF_n : Rate factor for each of the following categories of use:

municipal - RF_1 = 1.00
industrial - RF_2 = 1.00
irrigation - RF_3 = 0.80
mining - RF_4 = 1.00
hydroelectric - RF_5 = 0.05
recreation - RF_6 = 1.00
recharge - RF_7 = 0.50
salt water - RF_8 = 0.10
spreader dam diversion - RF_9 = 0.40
secondary use - RF_{10} = 0.50
water-in-transit discharge - RF_{11} = 1.00
water-in-transit diversion - RF_{12} = 1.00
on-channel storage - RF_s = 0.40

AF_n : Total water division authorization to be assessed for each of the above categories of use, which are used in this section as follows:

Municipal--The total amount of water authorized for diversion under a water right for this purpose.

Industrial, Mining, Recreation, or Salt Water Diversions--The total amount of water authorized for consumptive use for each of these categories of use under a water right; in the event there is no specific authorization for consumptive use, the assessment shall be based on the total amount of water authorized for diversion under the water right;

Irrigation, Hydroelectric, Recharge, Spreader Dam Diversions, or Secondary Use--The total amount of water authorized for diversion for each of these categories of use under a water right;

On-channel Storage--The total amount authorized for impoundment under a water right; this category only includes on-channel reservoirs authorized under the Texas Water Code, §11.121;

Water-in-Transit Discharge--The total amount of water authorized for discharge under a water right for water-in-transit;

Water-in-Transit Diversion--The total amount of water authorized for diversion under a water right for water-in-transit.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Fuel Ethanol and Biodiesel Production Incentive Program Guidelines

Chapter 16, Texas Agriculture Code, authorizes the Fuel Ethanol and Biodiesel Production Incentive Program. These guidelines set forth the requirements and procedures for the Program, which will be administered by the Texas Department of Agriculture. These guidelines will become effective upon the effective date of the rules for this program, as promulgated by the Office of the Governor, Economic Development and Tourism Office. **These guidelines supercede those published in the February 10, 2006, issue of the *Texas Register* (31 TexReg 901).**

I. DEFINITIONS.

In these guidelines:

(1) "Account" means the fuel ethanol and biodiesel production account.

(2) "ASTM" means the American Society for Testing and Materials.

(3) "Biodiesel" means a monoalkyl ester that:

(A) is derived from vegetable oils, rendered animal fats, or renewable lipids, or a combination of those ingredients; and

(B) meets the requirements of ASTM D6751, the standard specification for B- 100 biodiesel.

(4) "Department" means the Texas Department of Agriculture

(5) "Fuel ethanol" means ethyl alcohol that:

(A) has a purity of at least 99 percent, exclusive of added denaturants;

(B) has been denatured in conformity with a method approved by the Bureau of Alcohol, Tobacco, Firearms, and Explosives of the United States Department of Justice;

(C) meets the requirements of ASTM D4806, the standard specification for ethanol used as a motor fuel; and

(D) is produced exclusively from agricultural products or by- products, or municipal solid waste.

(6) "Office" means the Office of the Governor - Texas Economic Development and Tourism.

(7) "Producer" means a person who operates a fuel ethanol or biodiesel plant in this state.

II. PLANT REGISTRATION.

(a) To be eligible for a grant for fuel ethanol or biodiesel produced in a plant, a producer must apply to the Department for the registration of the plant. A producer may apply for the registration of more than one plant.

(b) An application for the registration of a plant must show to the satisfaction of the Department and the Office that:

(1) The plant is capable of producing fuel ethanol or biodiesel by providing:

(A) a copy of the producer's Internal Revenue Service (IRS) Form 637 and related documents including documentation of any site visit by IRS staff;

(B) confirmation of registration with the Environmental Protection Agency (EPA) under 40 CFR Part 79 that shows the producer is registered as a Fuel Manufacturer or Additive Manufacturer;

(C) if applicable, a copy of the producer's permits and/or documents issued by the Tax and Trade Bureau and/or Bureau of Alcohol, Tobacco, Firearms and Explosives;

(D) a copy of all Texas Commission on Environmental Quality permits for the plant, including applicable permits for air discharge, wastewater discharge and storage tanks; and

(E) if applicable, a copy of any Texas Fuels license required by the state Comptroller of Public Accounts;

(2) the producer has made a substantial investment of resources in this state in connection with the plant;

(3) the plant constitutes a permanent fixture in this state by providing documentation from an independent Certified Public Accountant firm, county tax appraiser, or bank officer showing an approximate capital investment in the physical plant, and including a statement that the plant is a permanent fixture in the state; and

(4) any other information that the Department shall reasonably require.

(c) The Department shall review all program applications for registration of a fuel ethanol or biodiesel facility and make a determination, based on the guidelines, to approve or decline the application. The Office shall review the Department's determination to approve or decline all eligible program applications for registration of a fuel ethanol or biodiesel facility submitted to the Office by the Department and issue its concurrent determination to approve or decline the application based on the Department's review.

(d) An application must be on the form promulgated by the Department for this purpose. A separate application is required for each plant. Applications are available from the Department at: www.agr.state.tx.us, or by calling the Department at 877-428- 7848. Completed applications for registration should be mailed to: FUEL ETHANOL AND BIODIESEL PRODUCTION INCENTIVE PROGRAM, c/o Texas Department of Agriculture, RED Division, P.O. Box 12847, Austin, Texas 78711.

III. REPORTS.

(a) Monthly Reports Required To Be Eligible For A Grant.

(1) On or before the fifth business day of each month, a producer shall report the following information to the Department on a form promulgated by the Department. A separate form is required for each registered plant. Forms are available from the Department.

(A) the number of gallons of fuel ethanol or biodiesel produced at each registered plant operated by the producer during the preceding month;

(B) the number of gallons of fuel ethanol or biodiesel imported into this state by the producer during the preceding month;

(C) the number of gallons of fuel ethanol or biodiesel sold or blended with motor fuels by the producer during the preceding month; and

(D) the total value of agricultural products consumed in each registered plant operated by the producer during the preceding month.

(2) An authorized representative of the producer must sign reports. The Department will accept original reports or reports via fax or electronic mail by the fifth business day of the month in order to determine eligibility under this section, but the Department must receive a signed original report by the 20th day of the month for the producer to be eligible for a grant. Contact information for report transmission is as follows: Fuel Ethanol and Biodiesel Production Incentive Program, Texas Department of Agriculture, RED Division, P.O. Box 12847, Austin, Texas 78711, Fax (888) 216-9867, Email:finance@agr.state.tx.us

(3) After the monthly report is filed with the Department, revisions will be allowed to be submitted if received by the Department on or before the 20th day of the month. After the 20th day of the month, changes will only be allowed at the recommendation of Department staff.

(4) In accordance with the governing statute, a producer who fails to file a report as required by this section is ineligible to receive a grant for the period for which the report is not filed. Reporting requirements become effective upon the date the application is approved. The producer's first report following approval may include production from the full calendar month in which the application is approved.

(b) Other Reporting Requirements Required To Be Eligible For A Grant.

(1) No later than 30 days after filing with the EPA, the producer shall provide copies to the Department of the following (as applicable):

(A) the producer's Fuel Additive Manufacturer Annual Report;

(B) the producer's Fuel Manufacturer Annual Report; and

(C) the producer's Fuel Manufacturer Quarterly Report.

(2) No later than 30 days after the state fiscal year quarter end (November 30, February 28, May 31, August 31), the producer shall provide to the Department an Independent Accountant's Report, on form RED -102 to cover the quarter. This form is available on the Department's website, or by contacting the Department.

IV. FEE ON FUEL ETHANOL AND BIODIESEL.

No later than 30 days after the state fiscal year quarter end (November 30, February 28, May 31, August 31), the producer shall remit a fee in an amount equal to 3.2 cents for each gallon of fuel ethanol or biodiesel produced at the registered plant covered by the monthly reports for that quarter, subject to the following restrictions:

(1) For each state fiscal year (September 1 through August 31), the fee shall be paid on only the first 18 million gallons of fuel ethanol or biodiesel produced at any one registered plant.

(2) Fees for fuel ethanol or biodiesel produced, not to exceed 18 million gallons annually, at a registered plant shall be paid until the 10th anniversary of the date production from the plant begins.

(3) Fees are payable by check or cashiers check and should be payable to the Texas Department of Agriculture, Fuel Ethanol and Biodiesel Production Incentive Program and should be mailed to : Texas Department of Agriculture, RED Division, P.O. Box 12076, Austin, TX 78711-2076..

V. FUEL ETHANOL AND BIODIESEL GRANTS.

(a) After reviewing the monthly reports and all other pertinent documentation, the Department shall approve or decline the grant. If a grant is declined, the producer shall be promptly notified by certified mail with a notification giving the reasons for denial.

(b) A Monthly Report (as described above in III.(a)) that is not filed according to these guidelines and Chapter 16 of the Agriculture Code will disqualify the producer from receiving a payment for the month covered by the report. Other reporting requirements, as described in III.(b), are required to be submitted and approved by the Department before a grant request will be approved. In the event of missing or incomplete documents under III.(b), above, the producer will be notified and will have 30 days from the date of the notice to rectify any deficiencies. After 30 days, the grant will be withdrawn from consideration.

(c) A producer is entitled to receive 20 cents for each gallon of fuel ethanol or biodiesel produced in each registered plant operated by the producer until the 10th anniversary of the date production from the plant begins.

(d) For each state fiscal year (September 1 through August 31) a producer may not receive grants for more than 18 million gallons of fuel ethanol or biodiesel produced at any one registered plant.

(e) The Department shall make grants not less often than quarterly. The Department anticipates awarding grants following the end of state fiscal year quarter end (November 30, February 28, May 31, August 31).

(f) To be eligible for a grant, the producer must be in compliance with all aspects of the program.

(g) If the Office or the Department determine that the amount of money available to pay grants is not sufficient to distribute the full amount of grant funds to eligible producers as provided by these guidelines, the Department shall proportionately reduce the amount of each grant for each gallon of fuel ethanol or biodiesel produced as necessary to continue the incentive program through the remainder of the state fiscal year. The Department is not authorized to access the fund for any purpose other than the making of grants under the program.

These guidelines are subject to change without republication. The most current guidelines and other information regarding the Fuel Ethanol and Biodiesel Production Incentive Program Guidelines can be found on the Department's website at www.agr.state.tx.us.

TRD-200602245
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: April 19, 2006

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Request for Proposals: Urban Schools Grant Program

Pursuant to the Texas Agriculture Code, §§48.001 - 48.005 and the Texas Administrative Code, Title 4 §§1.800 - 1.804, the Texas Department of Agriculture (TDA) hereby requests proposals for agricultural projects designed to foster an understanding and awareness of agriculture in elementary students for the period of September 1, 2006 through August 31, 2007, from certain Texas urban school districts. A total amount of up to $2,500 may be awarded to an eligible elementary school in a single grant cycle.

Eligibility. Proposals must be submitted by a Texas public elementary school from an urban school district with an enrollment of at least 49,000 students. According to Texas Education Agency's (TEA) 2004-2005 records, the eligible school districts are: Houston Independent School District; Dallas Independent School District; Fort Worth Independent School District; Austin Independent School District; Cypress-Fairbanks Independent School District; Northside Independent School District; El Paso Independent School District; Arlington In-

dependent School District; San Antonio Independent School District; Fort Bend Independent School District; Aldine Independent School District; North East Independent School District; Garland Independent School District; and Plano Independent School District.

If your school district is not listed above and you feel it meets the minimum student enrollment of 49,000, you will need to attach TEA verification of enrollment in addition to your application.

Proposal Requirements. Each proposal may not exceed six pages and must include the following:

1. A cover page with the project title, name of the school district and elementary school, both the principal's and project coordinator's names along with their contact information (school address, email, telephone and fax numbers).

2. A detailed project description including the role of each grade level that will participate in the project.

3. A statement of the educational benefits of the project, including how the project will improve the students' understanding of agriculture.

4. A project budget including a detailed schedule of anticipated costs for the project.

Deadline and Submission Information. Proposals should be submitted to Catherine Wright, Grants Manager, Texas Department of Agriculture, P. O. Box 12847, Austin, Texas 78711. The street address is 1700 North Congress, 11th Floor, Austin, Texas 78701.

Proposals must be received no later than 5:00 p.m. June 15, 2006. One original and seven copies must be submitted. Fax copies will not be accepted.

Please contact Catherine Wright at (512) 463-7700 or by email at Catherine.Wright@agr.state.tx.us with any questions you may have.

Proposal Evaluations. Proposals will be evaluated based on the requirements set forth above by a panel appointed by the Commissioner of the Texas Department of Agriculture. The panel shall review the proposals and make funding recommendations to the Commissioner. The panel shall consist of representatives from the following: the Texas Department of Agriculture, education, livestock industry, specialty crop industry, row crop industry, horticulture industry and the Texas Cooperative Extension.

Approved Projects. The announcement of the grant awards will be made by August 2006. All approved projects will have a start date of September 1, 2006 and must be completed by August 31, 2007. Project Coordinators will be required to submit quarterly progress reports and budget reports. Upon completion of the project, a project summary of the educational results of the project and photographs to document such results will be due within six weeks. All awards will be subject to audit.

Reporting Requirements. Approved projects are required to submit the following reports:

1. Project Progress Reports. These reports are due on a quarterly basis from one to three pages in length detailing accomplishment of project objectives for the time periods specified in the award document.

2. Final compliance project report due either upon completion of the project or thirty (30) days after the termination of the contract. The final report shall be submitted in a hard copy format and an electronic format on a diskette utilizing Word. The final report shall contain:

a. A project summary -history of the project, its objectives, importance, effort, results, and commercial applications of the project;

b. A description of the successes, challenges, and any limitations of the program; and

c. A description of future plans, including how the project will continue after the grant is expended and how additional funding might address expansion efforts.

3. Project Budget Reports. Budget reports are due on a quarterly basis for the time periods specified in the award document that details the grant award spent to date.

4. Final Budget report is due thirty (30) days after the completion of the project or the termination of the contract.

General Compliance Information.

1. All grant awards are subject to the availability of appropriations and authorizations by the Texas Legislature.

2. Any information or documentation submitted to TDA is subject to disclosure under the Texas Public Information Act.

3. Awarded grant projects must remain in full compliance with state and federal laws and regulations or be subject to termination at the discretion of TDA.

4. Upon grant award, TDA and the Texas State Auditor's Office shall have access to and the right to examine all books, accounts, records, files and other papers or property belonging to or in use by the grantee and pertaining to the grant award. Additionally, these records must remain available and accessible no less than three (3) years after the termination of the grant project.

5. In any year in which a financial audit is conducted, a copy must be submitted to both TDA, including the audit transmittal letter, management letter, and any schedules in which the grantee's funds are included.

6. In accordance with Texas Government Code Ann., §783.007, grant awards shall comply in all respects with the Uniform Grant Management Standards (UGMS). Upon grant award, grantees can be provided a copy or it may be downloaded from http://www.governor.state.tx.us/divisions/stategrants/guidelines/files/UGMS062004.doc.

Texas Public Information Act. All proposals shall be deemed, once submitted, to be the property of the TDA and are subject to the Texas Public Information Act, Texas Government Code, Chapter 552.

TRD-200602247
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: April 19, 2006

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Office of the Attorney General

Access and Visitation Grant Request for Applications

Under 42 U.S.C. 669b, the Federal Government provides to states grants for Access and Visitation programs. These grants may be used to establish and administer programs to support and facilitate noncustodial parents' access to and visitation with their children. Eligible activities include:

* mediation,

* counseling,

* education,

* development of parenting plans,

* visitation enforcement, and

* development of guidelines for visitation and alternative custody arrangements.

Projects funded under this program do not have to run on a statewide basis. Entities eligible for funding include: courts, local public entities, and private nonprofit organizations with a minimum of two years operating history. Matching funds (cash or in-kind) of at least 10% are required. Preference will be given to those proposals emphasizing early intervention, co-parenting education, alternative dispute resolution services, and visitation enforcement programs for parents with cases in the IV-D child support program.

State Fiscal Year 2007 Special Funding Term

Grant funds for State Fiscal Year 2007 will run for an eleven-month period: October 1, 2006 to August 31, 2007. Grantees successfully performing program services may be eligible for an extension of funding through State Fiscal Year 2008 based on availability of funds. It is expected that approximately 10 grants ranging from $13,800 to $73,500 (for the 11-month period--annualized grant amount is approximately $15,000 to $80,500) will be awarded.

Statewide Toll-Free Telephone Hotline Project

In addition, the Office of the Attorney General is inviting proposals for one project to provide a statewide, toll-free, telephone hotline providing legal information regarding access and visitation, custody, paternity establishment, and child support as well as, legal resources for parents, and a website with shared parenting information and legal resources. Applicants proposing to provide hotline services will need to demonstrate the ability to: provide brief legal services to approximately 1,200 parent calls per month, provide paper and electronic copies of legal resources to callers, host an internet website that provides parents with comprehensive access, visitation, custody, paternity and child support information, provide accurate and appropriate referrals to local providers of access and visitation, mediation, and legal services, and adequately track customer satisfaction with hotline and web-based services. Funding levels for the Statewide Toll-Free Telephone Hotline Project will be at the Office of the Attorney General's discretion.

The application deadline for submission is 5:00 p.m. CDST, on June 9, 2006. Applications received after the deadline will be considered noncompliant and will not be considered. Applications must be received at the following physical address by application deadline, postmark dates will not be accepted.

Office of the Attorney General

Office of Family Initiatives

5500 Oltorf Street, MC 039

Austin, Texas 78741

A written request must be submitted on the Attorney General of Texas Website (www.oag.state.tx.us). Once a written request is submitted, a complete application packet may be downloaded from the Attorney General of Texas Website.

Questions regarding this application process may be directed, in writing, to:

General Questions:

Noelita Lugo

Office of the Attorney General

MC 039

P.O. Box 12017

Austin, Texas 78711-2017

Phone (512) 460-6261

Fax (512) 460-6070

noelita.lugo@cs.oag.state.tx.us

Programmatic:

Michael Hayes

Office of the Attorney General

MC 039

P.O. Box 12017

Austin, Texas 78711-2017

Fax (512) 460-6070

michael.hayes@cs.oag.state.tx.us

Financial:

Mark A. Hernandez

Office of the Attorney General

MC 039

P.O. Box 12017

Austin, Texas 78711-2017

Fax (512) 460-6070

mark.hernandez@cs.oag.state.tx.us

Answers to questions received before May 19, 2006 may be posted on the Office of the Attorney General's Website with the application packet.

For information regarding this publication, you may contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.

TRD-200602154
Stacey Schiff
Deputy Attorney General
Office of the Attorney General
Filed: April 13, 2006

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Brazos Valley Council of Governments

Notice of Request for Proposals for Job Readiness Programs

On April 19, 2006, the Brazos Valley Council of Governments (BVCOG) and Workforce Solutions, Brazos Valley Board (WSBVB) release a Request for Proposal (RFP) for Job Readiness Training. The Board is seeking contractors to provide job readiness training throughout the counties of Brazos, Burleson, Grimes, Leon, Madison, Robertson, and Washington. Job Readiness training may include pre-employment job readiness skills for customers seeking employment, resume writing, job search skills, computer skills, workplace English, adult literacy, basic skills tutoring retail, child care, customer service, office support, computer applications, construction, managing money, core trade technologies, Work Keys Profiling and assessment, and rapid response services.

Bidders Conference

A Bidders Conference will be held to discuss this RFP and to answer other questions concerning the procurement process. The Bidders Conference will be held at 1:00 p.m., Monday, May 1, 2006 at the Workforce Solutions Brazos Valley Board in the Leon Room located at:

Workforce Solutions Brazos Valley Board

3991 East 29th Street

Bryan, Texas 77802

Due Date

An original and four copies of a written proposal are due to the Board's offices no later than 5:00 p.m., May 19, 2006. No proposals will be accepted after this deadline.

Potential respondents may pose written questions concerning this RFP by e-mail or fax. Contact Board Consultant Richard Rogers at richard@swtexas.net. The RFP may be viewed and printed from the Internet on www.bvjobs.org. The contact person for this RFP is Richard Rogers (512) 963-4895.

TRD-200602211
Tom Wilkinson
Executive Director
Brazos Valley Council of Governments
Filed: April 17, 2006

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Texas Cancer Council

Request for Proposals (RFP) # 07-01 - Physical Rehabilitation for Cancer Survivors

Notice of Invitation: The Texas Cancer Council announces the availability of state funds to be awarded to support Goal V: Survivorship of the *Texas Cancer Plan.* Funds will be awarded to the selected applicant (entity or individual) that can provide a community based cancer rehabilitation program that provides psychological support and physical rehabilitation and that leverages community partners to donate needed services and resources. Services must be free of charge for those without the ability to pay. Initial funding will be awarded from September 1, 2006 through August 31, 2007 with a maximum funding amount of $100,000. Successful programs may be funded for an additional two years. It is anticipated that one project will be selected under this initiative to receive Council funding.

Introduction: The Texas Cancer Council is the state agency dedicated to reducing the human and economic impact of cancer on Texans through the promotion and support of collaborative, innovative, and effective programs and policies for cancer prevention and control. The Council's initiatives are guided by the philosophy that a cooperative and unified effort by public, private, and volunteer sector agencies and individuals increases the ability of limited resources to serve more people and minimizes duplication of effort. All funded programs of the Texas Cancer Council will support implementation of the *Texas Cancer Plan.* Reaching underserved populations with culturally sensitive programs must be a priority for all funded programs providing community outreach.

Background: The end of cancer treatment is not the end of the cancer experience (President's Cancer Panel, 2003-2004 Annual Report). A diagnosis of cancer is the beginning of the survivorship journey. Disease and treatment related factors can contribute to declining physical fitness, fatigue, and consequently, reduced quality of life. Fatigue is one of the most commonly reported complaints in cancer survivors with 70% of cancer patients reporting fatigue during therapy and up to 30% reporting long term symptoms (van Wert et al., 2006). Van Wert and colleagues (2006) assessed the effects of a multidimensional rehabilitation program on cancer related fatigue and demonstrated statistically significant and clinically relevant reductions in fatigue. A review of exercise studies in cancer survivors (Courneya, 2003) revealed improvements in exercise capacity, body composition, and quality of life scores for survivors in treatment and out of treatment. Included studies found favorable results in both unsupervised home exercise programs and supervised exercise programs. Results suggest that rehabilitation programs should include a physical training component. Studies also demonstrate the safety of exercise in oncology patients (Franklin & Packel, 2006).

Successful rehabilitation starts early in the treatment process (Stubblefield et al., 2006).

The optimal cancer rehabilitation team includes the patient's physicians, nurses and therapists during the inpatient phase and a network of supportive services after discharge including home care agencies, social workers, nutrition counselors, support groups, and educational outreach programs. Continued pain and symptom management facilitate the rehabilitation process (Stubblefield et al., 2006).

The *Texas Cancer Plan* provides a road map for addressing the burden of cancer in Texas. Goal V provides objectives, strategies, and action steps to assist cancer program planners in identifying and meeting the needs of cancer survivors. Successful proposals will identify specific areas of the *Texas Cancer Plan* that will be addressed by the proposed project.

Purpose: The Texas Cancer Council is seeking to fund a program that will provide physical conditioning and psychological support to cancer patients in convenient community settings free of charge. A successful program will have the support of community health care providers, provide services to patients referred by community physicians, demonstrate the financial support of the community, and conduct program evaluation that demonstrates improvement in quality of life for clients. The program will, to the greatest extend possible, leverage the donation of services, equipment, space, and other program costs by community partners. The program must offer services that are culturally sensitive to all populations within the community.

Eligibility Requirements: To be considered for funding, a proposal must be submitted by an entity or individual that will serve as the fiscal agent and legal contractor for the project. The lead entity may be a governmental agency, educational institution, a nonprofit organization, a for-profit organization or an individual applicant.

Applicant Qualifications: The applicant will:

Have experience in providing physical rehabilitation for cancer survivors,

Have the appropriate medical supervision,

Provide for a full range of physical training including aerobics conditioning, muscle strength and endurance conditioning, improvement in flexibility, and maintaining adequate nutrition, supervised by trained personnel,

Have access to the cancer survivor population through relationships with physicians practicing in the community,

Have the ability to provide services in multiple settings, including inpatient, outpatient, and in the home,

Have no organizational affiliations that would prevent the program from being available to all eligible citizens in the community,

Have appropriate liability coverage,

Have experience in evaluating program impact.

Proposal requirements: One original proposal **and five copies** are due at the Council office by 5:00 p.m. on Monday, June 12, 2006. Proposals must be submitted according to the Council's Proposal Guide utilizing TCC proposal forms. **Proposals sent by facsimile machine or electronically will not be accepted.** Instructions provide informa-

tion about disallowable expenses, reimbursement policies, legislative performance measures, and reporting requirements. Proposal forms and instructions, a copy of the *Project Guide* and a copy of the *Texas Cancer Plan* can be obtained by calling (512) 463-3190 or can be found on our web at www.tcc.state.tx.us.

Funding Awards: TCC staff will review proposals for completeness and technical merit. The Council will make final funding decisions on or about August 4, 2006. Written notification of approval will be sent on or about August 7, 2006. All applicants will receive written notification of the Council's decisions regarding their proposal within two weeks of the Council's decisions.

The Council's funding decisions will be based on:

applicant's qualifications to successfully accomplish the program,

reasonableness of budgeted amounts and appropriateness of budget justifications,

evidence of a sound and effective program,

completeness and clarity of the proposal.

All Council projects are funded via a cost reimbursement basis. Requests for reimbursement may be submitted monthly or quarterly, as preferred by the project.

Council funding is based on the merit of the proposal received and the availability of funding.

The Council has sole discretion and reserves the right to reject any or all proposals received in response to this funding announcement. This announcement does not constitute a commitment by the Council to award a contract or to pay costs incurred in the preparation of a proposal.

Use of funds: Funds may not be used for indirect costs, remodeling of buildings or reduction of deficits from pre-existing operations. Further, funds may not be used to supplant existing funds or services, or to duplicate existing resources or services.

Additional information: For additional information about this funding announcement, contact Jane Osmond, Program Manager, Texas Cancer Council, P.O. Box 12097, Austin, Texas 78711, (512) 438-3060 or e-mail to:josmond@tcc.state.tx.us.

TRD-200602243
Sandra Balderrama
Executive Director
Texas Cancer Council
Filed: April 19, 2006

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Request for Proposals (RFP) # 07-02 - Cancer Control in the Asian Population

Notice of Invitation: The Texas Cancer Council announces the availability of state funds to be awarded to support the goals of the *Texas Cancer Plan.* The selected program will implement components of three *Texas Cancer Plan* goals: Goal I--Prevention Information and Services; Goal II--Early Detection and Treatment; and Goal V--Survivorship. Funds will be awarded to the selected applicant (entity or individual) to provide a community-based program to educate Asian Americans about cancer prevention and early detection and to support Asian Americans concerning cancer survivorship. Initial funding will be awarded from September 1, 2006 through August 31, 2007 with a maximum annual funding amount of $100,000. Successful programs may be funded for an additional two years. It is anticipated that two projects will be selected under this initiative to receive Council funding.

Introduction: The Texas Cancer Council is the state agency dedicated to reducing the human and economic impact of cancer on Texans through the promotion and support of collaborative, innovative, and effective programs and policies for cancer prevention and control. The Council's initiatives are guided by the philosophy that a cooperative and unified effort by public, private, and volunteer sector agencies and individuals increases the ability of limited resources to serve more people and minimizes duplication of effort. All funded programs of the Texas Cancer Council will support implementation of the *Texas Cancer Plan.* Reaching underserved populations with culturally sensitive programs must be a priority for all funded programs providing community outreach.

Background: While Asian Americans have a relatively low risk of cancer overall, their cancer death rate is climbing faster than that of any other racial group (Asian American Network for Cancer Awareness, Research, and Training (AANCART), 2005). Cancer has been the leading cause of death for female Asian Americans since 1980, even though cardiovascular disease is the leading cause of mortality for all U.S. groups, all ages. Asian American females were the first American demographic group for which cancer is the leading cause of death.

Asian Americans also suffer disproportionately from several forms of cancer: liver cancer is the third highest cancer site and stomach cancer is the fourth highest cancer site, compared to breast and prostate cancers being third and fourth, respectively, in all Americans. Cervical cancer rates in Vietnamese women are five times higher than the rate for Anglo American women. Vietnamese men have the highest rate of liver cancer, which is usually caused by exposure to the Hepatitis B virus, among all racial/ethnic groups and Korean men have the highest rate of stomach cancer of all racial/ethnic groups (NCI, 1996). Further, Asian American women over 40 have the lowest mammogram screening rates in the country (AANCART, 2005) with low Pap smear test and colorectal screening rates, as well (Maxwell, Bastani, Warda, 2000 in Intercultural Cancer Council, 2001).

The *Texas Cancer Plan* provides a road map for how to begin remedying these cancer disparities for Asian Americans. Goal I, Goal II and Goal V provide objectives, strategies, and action steps to assist cancer program planners in identifying and meeting the cancer needs in Texas that are addressed by this RFP. Successful proposals will identify specific areas of the *Texas Cancer Plan* that will be addressed by the proposed project.

Purpose: The Texas Cancer Council is seeking to fund a program that will, consistent with the above language from the *Texas Cancer Plan*, educate Asian Americans in Texas regarding cancer prevention and early detection and support Asian Americans in Texas concerning cancer survivorship. A successful program will:

Offer services that are culturally sensitive by providers that are culturally competent to Asian Americans,

Use existing evidence-based practices, when available,

Include measurable objectives that demonstrate program success,

Work through community coalitions if they exist or, if not, consider developing one,

Work through community systems (i.e. work sites, schools, faith-based groups) when applicable to the project,

Ensure that any new resource that is to be developed does not already exist, and

Conduct program evaluation that demonstrates the effectiveness of the interventions.

Eligibility Requirements: To be considered for funding, a proposal must be submitted by an entity or individual that will serve as the fiscal agent and legal contractor for the project. The lead entity may be a governmental agency, educational institution, a non-profit organization, a for-profit organization, or an individual applicant.

Applicant Qualifications: The applicant will:

Have community support from the Asian-American community(ies) it is targeting,

Be linguistically competent in the languages spoken by its target audience,

Have experience in community outreach,

Have expertise in cancer issues or partner with entities that can provide cancer-specific medical advice,

Have an infrastructure that can accommodate the proposed activities, and

Have experience in evaluating program impact or partner with a program evaluator.

Proposal Requirements: One original proposal **and five copies** are due at the Council office by 5:00 p.m. on Monday, June 12, 2006. Proposals must be submitted according to the Council's Proposal Guide utilizing TCC proposal forms. **Proposals sent electronically or by facsimile machine will not be accepted.** Instructions provide information about disallowable expenses, reimbursement policies, legislative performance measures, and reporting requirements. Proposal forms and instructions, a copy of the *Project Guide*, and a copy of the *Texas Cancer Plan* can be obtained by calling (512) 463-3190 or can be found on the web at www.tcc.state.tx.us.

Funding Awards: TCC staff will review proposals for completeness and technical merit. The Council will make final funding decisions on or about August 4, 2006. Written notification of approval will be sent on or about August 7, 2006. All applicants will receive written notification of the Council's decisions regarding their proposals within two weeks of the Council's decisions.

The Council's funding decision will be based on:

applicant's qualifications to successfully accomplish the program,

reasonableness of budgeted amounts and appropriateness of budget justifications,

evidence of a sound and effective program, and

completeness and clarity of the proposal.

All Council projects are funded via a cost reimbursement basis. Reimbursement may be submitted monthly or quarterly, as preferred by the project.

Council funding is based on the merit of the proposal received and the availability of funding.

The Council has sole discretion and reserves the right to reject any or all proposals received in response to this funding announcement. This announcement does not constitute a commitment by the Council to award a contract or to pay costs incurred in the preparation of a proposal.

Use of funds: Funds may not be used for indirect costs, remodeling of buildings or reduction of deficits from pre-existing operations. Further, funds may not be used to supplant existing funds or services, or to duplicate existing resources or services.

Additional information: For additional information about this funding announcement, contact Jane Osmond, Program Manager, Texas Cancer Council, P.O. Box 12097, Austin, Texas 78711, (512) 438-3060, or e-mail to: josmond@tcc.state.tx.us.

TRD-200602242
Sandra Balderrama
Executive Director
Texas Cancer Council
Filed: April 19, 2006

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of April 7, 2006, through April 13, 2006. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on April 19, 2006. The public comment period for these projects will close at 5:00 p.m. on May 19, 2006.

FEDERAL AGENCY ACTIONS:

Applicant: Aspect Energy, LLC; Location: The project site is located in Galveston Bay, in the southern half of State Tract (ST) 345, approximately 2,868 feet southwest of the edge of the Houston Ship Channel, approximately 4 miles northwest of Port Bolivar, in Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Bolivar, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 322369; Northing: 3253586. Project Description: The applicant proposes to install, operate and maintain structures and equipment necessary for oil and gas drilling and production activities in support of the Fireball Well Prospect. Specifically, the applicant is requesting authorization to install a 250-foot-long by 70-foot-wide by 3-foot-thick shell pad, six 3-pile mooring clusters, and a 10-foot by 20-foot timber pile and timber structure well protector platform. Approximately 1,945 cubic yards of material would be discharged into the bay to support the well pad. Water depth in the project area ranges from -9 to -10 feet mean low lower water. Approximately 0.40 acre of bay bottom will be impacted as a result of the proposed activity. No oyster reefs or seagrasses will be affected. CCC Project No.: 06-0234-F1; Type of Application: U.S.A.C.E. permit application #24131 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Railroad Commission under §401 of the Clean Water Act.

Applicant: Davis Petroleum Corporation; Location: The project is located in State Tract 30 in Sabine Lake, Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Arthur South, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 413344; Northing: 3304976 for Well Number 4, and Easting: 413204; Northing: 3303993 for Well Num-

ber 3. Project Description: The applicant proposes to drill two wells, No. 3 and No. 4, install and maintain production and well platforms, and install one 1,957-foot-long, 6-inch pipeline from proposed Well No. 3 to existing Well No. 1 (Permit 23012). The pipeline will be installed to a depth of 3 feet below the lake mud line by jetting or trenching. Approximately 1,200 cubic yards of lake bottom material will be displaced by the installation of the pipeline. The applicant also proposes to place approximately 2,667 cubic yards of crushed shell or rock, or gravel as a stabilizing pad for the keyway barge. CCC Project No.: 06-0237-F1; Type of Application: U.S.A.C.E. permit application #24158 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Railroad Commission under §401 of the Clean Water Act.

Applicant: City of Jamaica Beach; Location: The project is located along the Gulf of Mexico shoreline, approximately 500 feet south of the Buccaneer Drive and Jamaica Beach Road intersection, in Jamaica Beach, Galveston County, Texas. The proposed sand source (borrow area) is located approximately 3700 feet south of the Eight-Mile Road and Sportsman Road intersection, in Galveston, Galveston County, Texas. The project site can be located on the U.S.G.S. quadrangle map entitled: Lake Como, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 308244; Northing: 3229525. The borrow area can be located on the U.S.G.S quadrangle map entitled: Virginia Point, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 315517; Northing: 3237155. Project Description: The applicant proposes to amend CESWG Department of the Army (DA) permit 23573 which authorized the discharge of up to 200,000 cubic yards of native material for beach nourishment within a 50-acre project site. The permitted sand source was the Sunbird borrow area. DA permit 23573 was issued on April 19, 2005 and is scheduled to expire on December 31, 2010. The applicant proposes to modify the existing permit and discharge approximately 50,000 cubic yards of material into 10.6 acres of open waters of the Gulf of Mexico, within the original limits of the existing permit. The original 50-acre permit area will remain. The applicant is also requesting a variance of Special Condition #2 of DA Permit 23573, which states, "No beach nourishment activities or any other work will be conducted during the Kemp's ridley sea turtle nesting period, from March 15th to September 30th". The variance is sought for the 2006 calendar year only. The applicant proposes to follow several avoidance and minimization measures to ensure that the beach nourishment activities are not likely to adversely affect Kemp's ridley sea turtles. Furthermore, the applicant proposes to utilize a different sand source than was previously permitted. The applicant proposes to excavate approximately 2.83 acres of dune swale wetlands adjacent to West Galveston Bay to obtain the fill material for the project site. Additionally, approximately 2.66 acres of herbaceous, grazed wetlands will be filled to provide an access road to the sand source. The 2.66 acres of wetland will be restored upon project completion. As mitigation for converting 2.83 acres of wetlands to open waters, the applicant proposes to vegetate 2.58 acres of newly restored dune at the Jamaica Beach Subdivision. As further mitigation, the borrow site landowner proposes to eradicate 1.10 acres of salt cedar stands on his property to allow more productive wetland vegetation to colonize. The borrow site land owner has submitted a separate DA application to excavate approximately 14.11 acres of additional wetlands contiguous with the borrow source for anticipated future projects. CCC Project No.: 06-0239-F1; Type of Application: U.S.A.C.E. permit application #23573(01) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act.

Applicant: Taylor Lake Development, Limited; Location: The project site is located in Taylor Lake, within the Seabrook Island Subdivision, on Lots 10 through 16, northwest of the Sea Channel Drive and Breezewood Drive intersection, in Seabrook, Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: League City, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 302480; Northing: 3274184. Project Description: The applicant is requesting authorization to discharge fill material into 0.24 acre of wetland habitat to create lots for residential development. The wetland areas to be impacted as a result of the proposed activity are located above the mean high tide elevation of Taylor Lake. The area is surrounded by residential development and is comprised primarily of saltmarsh bulrush, eastern false willow, and saltmeadow cordgrass. To compensate for impacts to the aquatic environment, the applicant is proposing to restore and enhance a 2.66-acre wetland area located in the northwestern section of Horsepen Bayou. CCC Project No.: 06-0244-F1; Type of Application: U.S.A.C.E. permit application #24145 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Tammy Brooks, Program Specialist, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200602225
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: April 18, 2006

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.009, and 304.003, Tex. Fin. Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 04/24/06 - 04/30/06 is 18% for Consumer[1]/Agricultural/Commercial[2] credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 04/24/06 - 04/30/06 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §Sec. 304.003 for the period of 05/01/06 - 05/31/06 is 7.75% for Consumer/Agricultural/Commercial credit thru $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 05/01/06 - 05/31/06 is 7.75% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment, or other similar purpose.

TRD-200602226
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: April 19, 2006

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Credit Union Department

Application for a Merger or Consolidation

Notice is given that the following application has been filed with the Credit Union Department and is under consideration:

An application was received from East Texas Professional Credit Union (Longview) seeking approval to merge with Mid-Valley Federal Credit Union (White Oak). East Texas Professional Credit Union will be the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200602228
Harold E. Feeney
Commissioner
Credit Union Department
Filed: April 19, 2006

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Application to Expand Field of Membership

Notice is given that the following application has been filed with the Credit Union Department and is under consideration:

An application was received from South Texas Credit Union, Kenedy, Texas to expand its field of membership. The proposal would permit employees of Dynasty Enterprises, Inc., who work in or are paid from Kenedy, Texas, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200602227
Harold E. Feeney
Commissioner
Credit Union Department
Filed: April 19, 2006

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Applications to Expand Field of Membership - Approved

PosTel Family Credit Union, Wichita Falls, Texas - See *Texas Register* issue, dated January 27, 2006.

Texans Credit Union, Richardson, Texas - See *Texas Register* issue, dated January 27, 2006.

Applications to Amend Articles of Incorporation - Approved

Entex-United Credit Union, Tyler, Texas - See *Texas Register* issue, dated February 24, 2006.

Articles of Incorporation - 50 Years to Perpetuity - Approved

Texans Credit Union, Richardson, Texas

Wharton County Teachers Credit Union, Wharton, Texas

Midland Municipal Employees Credit Union, Midland, Texas

Corpus Christi SP Credit Union, Corpus Christi, Texas

Tyler City Employees Credit Union, Tyler, Texas

Highway District 9 Credit Union, Waco, Texas

Odessa Employees Credit Union, Odessa, Texas

Orange County Employees Credit Union, Orange, Texas

TexDot-WF Credit Union, Wichita Falls, Texas

Southern Star Credit Union, Houston, Texas

TRD-200602229
Harold E. Feeney
Commissioner
Credit Union Department
Filed: April 19, 2006

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Texas Education Agency

Public Notice Announcing the Availability of the Proposed Long-Range Plan for Technology, 2006-2020, for Public Comment

Texas Education Code, Chapter 32, directs the State Board of Education to develop a state long-range technology plan. The first plan was adopted in 1988 and a revised plan was adopted in 1996. As a result of changes in technology and state and federal legislation, the Educational Technology Advisory Committee has been charged with developing a new long-range plan for technology.

The Proposed Long-Range Plan for Technology, 2006-2020, is available on the Texas Education Agency (TEA) Educational Technology web page at http://www.tea.state.tx.us/technology/etac/index.html. The proposed long-range planning document may be reviewed and/or downloaded from this web page address until May 28, 2006. In addition, instructions for submitting public comments are available from the same site. The Proposed Long-Range Plan for Technology, 2006-2020, will also be available for viewing at the TEA Library (Ground Floor), 1701 North Congress Avenue, Austin, Texas 78701.

Procedures for submitting written comments about the Proposed Long-Range Plan for Technology, 2006-2020. The TEA will accept written comments pertaining to the Proposed Long-Range Plan for Technology, 2006-2020, by mail to Anita Givens, TEA, Instructional Materials

and Educational Technology Division, 1701 North Congress Avenue, Room 3-110, Austin, Texas 78701, or by e-mail to etac@tea.state.tx.us.

Timetable for completing the Long-Range Plan for Technology, 2006-2020. After review and consideration of all public comments, the TEA will make necessary/appropriate modifications and will submit the new plan to the State Board of Education in September 2006 and to the Texas Legislature in December 2006.

Further Information. For more information, contact the Instructional Materials and Educational Technology Division by mail at 1701 North Congress Avenue, Room 3-110, Austin, Texas 78701; by telephone at (512) 463-9400; by fax at (512) 463-9090; or by e-mail at etac@tea.state.tx.us.

TRD-200602230
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: April 19, 2006

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Texas Commission on Environmental Quality

Enforcement Orders

An agreed order was entered regarding Arnold Felts dba A & D General Store, Docket No. 2002-1146-MLM-E on 04/04/2006 assessing $9,390 in administrative penalties with $8,190 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at 210/403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pine Tree Estates 2 Landowner Association Inc., Docket No. 2004-0003-MWD-E on 04/04/2006.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at 817/588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KGA Corporation, Inc., Docket No. 2003-1155-PST- E on 04/04/2006 assessing $6,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Okpohworho, Staff Attorney at 713/422-8918, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Lone Oak, Docket No. 2003-1336-MWD-E on 04/04/2006 assessing $18,213 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at 713/422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Weldon Alders dba Woodland Hills Water Company dba Lakeview Water System dba Fairfield Estates, Docket No. 2004-0480-PWS-E on 04/04/2006 assessing $22,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at 713/422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding PT Gas Service Company, L.C. dba Workingmans Friend 529, Docket No. 2004-0506-PST-E on 04/04/2006 assessing $13,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shana Horton, Staff Attorney at 512/239-1088, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lakewind Enterprises, Inc. dba Tidwell Conoco, Docket No. 2004-1638-PST-E on 04/04/2006 assessing $950 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at 512/239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Het & Harsh Corporation dba Sonic Quick Stop, Docket No. 2004-1824-PST-E on 04/04/2006 assessing $3,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at 512/239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Truman Loving, Docket No. 2004-1999-OSI-E on 04/04/2006 assessing $750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at 512/239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of La Joya, Docket No. 2004-2110-MWD-E on 04/04/2006 assessing $12,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mike Meyer, Enforcement Coordinator at 512/239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rohm and Haas Texas Incorporated, Docket No. 2005-0152-AIR-E on 04/05/2006 assessing $19,500 in administrative penalties with $3,900 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at 713/422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Landed I, Ltd. dba J.H. Walker Trucking, Docket No. 2005-0255-PST-E on 04/04/2006 assessing $2,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at 512/239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shujat Swati dba Super Stop 24, Docket No. 2005- 0322-PST-E on 04/04/2006 assessing $4,050 in administrative penalties with $810 deferred.

Information concerning any aspect of this order may be obtained by contacting Colin Barth, Enforcement Coordinator at 512/239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Environmental Management Services of Texas, Inc., Docket No. 2005-0358-IHW-E on 04/04/2006 assessing $625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at 512/239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Groveton, Docket No. 2005-0450-MWD-E on 04/04/2006 assessing $13,000 in administrative penalties with $2,600 deferred.

Information concerning any aspect of this order may be obtained by contacting Caroline Sweeney, Staff Attorney at 512/239-0665, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Price Construction, Ltd., Docket No. 2005-0491-AIR- E on 04/04/2006 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Davis, Staff Attorney at 512/239-5487, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sunoco Partners Marketing & Terminals L.P., Docket No. 2005-0519-AIR-E on 04/04/2006 assessing $95,077 in administrative penalties with $19,015 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at 512/239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Epley Enterprises, Inc., Docket No. 2005-0587-MLM- E on 04/05/2006 assessing $6,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at 512/239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jefferson County Water Control & Improvement District No. 10, Docket No. 2005-0621-MWD-E on 04/04/2006 assessing $9,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at 713/767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Dow Chemical Company, Docket No. 2005- 0716-AIR-E on 04/05/2006 assessing $51,750 in administrative penalties with $10,350 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at 210/403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sang Eun Woo dba Family Mart, Docket No. 2005- 0777-PST-E on 04/04/2006 assessing $5,795 in administrative penalties with $1,159 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at 817/588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding William Donald Smith dba Kingmont Mobile Home Park, Docket No. 2005-0790-PWS-E on 04/04/2006 assessing $1,523 in administrative penalties with $305 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at 713/767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cemex Cement of Texas, L.P., Docket No. 2005- 0793-AIR-E on 04/04/2006 assessing $70,525 in administrative penalties with $14,105 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at 512/239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Casey Shepelwich, Docket No. 2005-0802-LII-E on 04/04/2006 assessing $250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at 512/239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Olsen Estates Property Owner's Association, Docket No. 2005-0947-PWS-E on 04/04/2006 assessing $1,980 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tel Croston, Enforcement Coordinator at 512/239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brazoria County Fresh Water Supply District No. 1, Docket No. 2005-0952-MWD-E on 04/04/2006 assessing $8,775 in administrative penalties with $1,755 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at 713/767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chevron U.S.A., Inc., Docket No. 2005-1091-AIR-E on 04/04/2006 assessing $3,848 in administrative penalties with $770 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at 512/239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Frank A. Daugherty Trust dba Indian Springs Water Company, Docket No. 2005-1122-PWS-E on 04/04/2006 assessing $2,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mike Meyer, Enforcement Coordinator at 512/239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jimmie Hahn, Inc., Docket No. 2005-1132-IWD-E on 04/04/2006 assessing $11,250 in administrative penalties with $2,250 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at 361/825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding AVS Management Inc dba Toor Shell Food Mart, Docket No. 2005-1191-PST-E on 04/05/2006 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rachael Gaines, Staff Attorney at 512/239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shell Pipeline Company, LP, Docket No. 2005-1236- AIR-E on 04/04/2006 assessing $14,600 in administrative penalties with $2,920 deferred.

Information concerning any aspect of this order may be obtained by contacting Daniel Siringi, Enforcement Coordinator at 409/899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Southern Ready Mix, Inc., Docket No. 2005-1245- MLM-E on 04/04/2006 assessing $12,150 in administrative penalties with $2,430 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at 512/239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Countryside Nursery & Landscape, Inc., Docket No. 2005-1310-EAQ-E on 04/04/2006 assessing $6,000 in administrative penalties with $1,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Ruben Soto, Enforcement Coordinator at 512/239-4571, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lee-Var, Inc. dba Palmer of Texas, Docket No. 2005- 1331-WQ-E on 04/04/2006 assessing $4,960 in administrative penalties with $992 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at 512/239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shapla, Inc. dba Stop N Stock, Docket No. 2005- 1365-PST-E on 04/04/2006 assessing $8,160 in administrative penalties with $1,632 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at 817/588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Caddo Mills, Docket No. 2005-1418-MWD-E on 04/04/2006 assessing $2,592 in administrative penalties with $518 deferred.

Information concerning any aspect of this order may be obtained by contacting Brian Lehmkuhle, Enforcement Coordinator at 512/239-4482, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Enbridge Pipelines (East Texas), L.P., Docket No. 2005-1428-AIR-E on 04/04/2006 assessing $8,393 in administrative penalties with $1,679 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at 817/588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Etoile Water Supply Corporation, Docket No. 2005- 1438-PWS-E on 04/04/2006 assessing $810 in administrative penalties with $162 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at 210/403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hines Nurseries, Inc., Docket No. 2005-1447-IWD-E on 04/04/2006 assessing $5,940 in administrative penalties with $1,188 deferred.

Information concerning any aspect of this order may be obtained by contacting Carolyn Lind, Enforcement Coordinator at 903/535-5145, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shawn & Sameer, Inc. dba Eastland Minit Mart 1, Docket No. 2005-1459-PST-E on 04/04/2006 assessing $11,500 in administrative penalties with $2,300 deferred.

Information concerning any aspect of this order may be obtained by contacting Scott Barnett, Enforcement Coordinator at 713/767-3523, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Galveston County Landfill TX, LP, Docket No. 2005- 1501-MLM-E on 04/04/2006 assessing $10,812 in administrative penalties with $2,162 deferred.

Information concerning any aspect of this order may be obtained by contacting Joseph Daley, Enforcement Coordinator at 817/588-5928, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Regency Gas Services Waha, LP, Docket No. 2005- 1529-AIR-E on 04/04/2006 assessing $30,625 in administrative penalties with $6,125 deferred.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at 512/239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gillani Energy Company dba Super B Food Store, Docket No. 2005-1560-PST-E on 04/04/2006 assessing $11,250 in administrative penalties with $2,250 deferred.

Information concerning any aspect of this order may be obtained by contacting Sandy VanCleave, Enforcement Coordinator at 512/239-0667, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding STS Gas Services, Inc. dba Greatwood Outpost, Docket No. 2005-1572-PST-E on 04/04/2006 assessing $6,745 in administrative penalties with $1,349 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at 817/588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Eastern Transmission, LP, Docket No. 2005- 1608-AIR-E on 04/04/2006 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at 512/239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Channel Shipyard Company, Inc., Docket No. 2005- 1609-AIR-E on 04/04/2006 assessing $15,660 in administrative penalties with $3,132 deferred.

Information concerning any aspect of this order may be obtained by contacting Kimberly Morales, Enforcement Coordinator at 713/422-8938, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cotton Center Producers, Inc., Docket No. 2005- 1617-MLM-E on 04/04/2006 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at 210/403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sivells Bend Independent School District, Docket No. 2005-1627-PWS-E on 04/04/2006 assessing $1,830 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mac Vilas, Enforcement Coordinator at 512/239-2557, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ConocoPhillips Company, Docket No. 2005-1660- AIR-E on 04/04/2006 assessing $7,200 in administrative penalties with $1,440 deferred.

Information concerning any aspect of this order may be obtained by contacting Amy Burgess, Enforcement Coordinator at 512/239-2540, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Five Nine Seven Limited Partnership dba Ramblewood Mobile Home Park, Docket No. 2005-1675-MWD-E on 04/04/2006 assessing $7,000 in administrative penalties with $1,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at 512/239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Enterprise Products Operating L.P., Docket No. 2005-1700-IWD-E on 04/04/2006 assessing $7,372 in administrative penalties with $1,474 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at 512/239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chevron Phillips Chemical Company LP, Docket No. 2005-1709-AIR-E on 04/04/2006 assessing $3,850 in administrative penalties with $770 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at 713/422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Martin Product Sales LLC, Docket No. 2005-1740- MWD-E on 04/04/2006 assessing $9,850 in administrative penalties with $1,970 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at 512/239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Alonzo Aguilar dba Aguilar's Grocery, Docket No. 2005-1749-PST-E on 04/04/2006 assessing $9,450 in administrative penalties with $1,890 deferred.

Information concerning any aspect of this order may be obtained by contacting Shontay Wilcher, Enforcement Coordinator at 512/239-2136, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Horse Heaven Stables, Inc. dba Ms. Agnes Cafe, Docket No. 2005-1754-PWS-E on 04/04/2006 assessing $1,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Amanda King-Zrubek, Enforcement Coordinator at 512/239-0824, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Continental Cabinets Manufacturing, Inc., Docket No. 2005-1759-AIR-E on 04/04/2006 assessing $3,750 in administrative penalties with $750 deferred.

Information concerning any aspect of this order may be obtained by contacting Bryan Elliott, Enforcement Coordinator at 512/239-6162, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Golden Spread Redi-Mix, Inc., Docket No. 2005- 1762-IWD-E on 04/04/2006 assessing $4,410 in administrative penalties with $882 deferred.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at 512/239-6589, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding 2001 Milenium Corporation dba Chevron Food Mart, Docket No. 2005-1771-PST-E on 04/04/2006 assessing $800 in administrative penalties with $160 deferred.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at 512/239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Del Rio, Docket No. 2005-1777-PWS-E on 04/04/2006 assessing $1,800 in administrative penalties with $360 deferred.

Information concerning any aspect of this order may be obtained by contacting Sandy VanCleave, Enforcement Coordinator at 512/239-0667, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Held Enterprises, Inc. dba Preston West Golf Course, Docket No. 2005-1797-PWS-E on 04/04/2006 assessing $788 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Amanda King-Zrubek, Enforcement Coordinator at 512/239-0824, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Atlanta, Docket No. 2005-1802-MWD-E on 04/04/2006 assessing $18,500 in administrative penalties with $3,700 deferred.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at 512/239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Farmers Dairies, LTD, Docket No. 2005-1810-AIR-E on 04/04/2006 assessing $8,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at 512/239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Taft, Docket No. 2005-1831-MWD-E on 04/04/2006 assessing $5,520 in administrative penalties with $1,104 deferred.

Information concerning any aspect of this order may be obtained by contacting Brent Hurta, Enforcement Coordinator at 512/239-6589, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Flomot Water Supply Corporation, Docket No. 2005- 1853-PWS-E on 04/04/2006 assessing $563 in administrative penalties with $113 deferred.

Information concerning any aspect of this order may be obtained by contacting Sandy VanCleave, Enforcement Coordinator at 512/239-0667, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Albertson's Inc dba Albertson's Express 933, Docket No. 2005-1859-PST-E on 04/04/2006 assessing $3,640 in administrative penalties with $728 deferred.

Information concerning any aspect of this order may be obtained by contacting Shontay Wilcher, Enforcement Coordinator at 512/239-2136, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Darryl Haley dba Haley Enterprises, Docket No. 2005-1892-MSW-E on 04/04/2006 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator at 512/239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ceres Environmental Services, Inc., Docket No. 2005-1997-MSW-E on 04/04/2006 assessing $1,550 in administrative penalties with $310 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator at 512/239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Earnhardt El Paso Motors, LP dba BMW of El Paso and Mazda of El Paso, Docket No. 2005-2042-AIR-E on 04/04/2006 assessing $1,170 in administrative penalties with $234 deferred.

Information concerning any aspect of this order may be obtained by contacting John Barry, Enforcement Coordinator at 409/899-8781, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200602237
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: April 19, 2006

♦ ♦ ♦

Notice of Executive Director's Response to Public Comments and Explanation of Changes on General Permit Number TXG130000

This general permit is proposed under the authority found in Texas Water Code (TWC), §26.040. General Permit Number TXG130000 would authorize surface discharges of wastewater into or adjacent to waters in the state from concentrated aquatic animal production facilities, aquatic animal production facilities, and certain facilities engaged in related activities.

Prior to issuing a general permit, the executive director (ED) of the Texas Commission on Environmental Quality (commission or TCEQ) must comply with TWC, §26.040(d) and 30 TAC §205.3(c). Both provisions require the ED to respond to all timely public comments that raise "relevant and material" or "significant" issues. The ED must make these responses publicly available and must file them with the commission's Chief Clerk at least ten days before the TCEQ considers whether to approve the general permit. Accordingly, the ED now files this response to comments (Response) to address concerns raised by the public with regard to a proposed general permit under the Texas Pollutant Discharge Elimination System (TPDES). In certain instances the general permit was revised in response to comments received.

In addition, the ED has made additional changes to the General Permit. These changes are intended to clarify provisions in the General Permit, to refer to other current regulatory requirements, and to provide consistency within the General Permit and with other state and federal regulations. The ED also corrected section numbering errors and made grammatical and stylistic changes.

The Executive Director's Response to Comments

The Office of Chief Clerk received timely letters from the following entities: Texas Parks & Wildlife Department (TPWD), the Texas Aquaculture Association (TAA), and the Texas Agricultural Research and Extension Center, Corpus Christi (TAES-CC). Some of these public comments have prompted changes in the proposed general permit while others have not.

Comment Number 1: The TPWD recommended changing the word "salinity" to "total dissolved solids" in Part II. Section B.1.d. relating to limitations on coverage. TPWD commented that salinity is usually measured in parts per thousand (ppt). The criteria cited is 500 milligrams per liter (mg/L), which is a parts per million (ppm) measurement. A 500 mg/L measurement is more consistent with a total dissolved solids measurement than a salinity measurement, which may indicate a drafting error.

The TAA commented that the maximum salinity difference of 500 mg/L is reasonable for freshwater streams but not applicable to coastal areas where discharges to saltwater are common.

Response Number 1: The TCEQ agrees with TPWD's recommendation and has changed the term "salinity" in Part II. Section B.1.d. to "total dissolved solids." For freshwater water bodies, total dissolved solids is an appropriate surrogate for salinity and was the intended constituent to be associated with the 500 mg/L value. However, upon further investigation and in response to the TAA comment, the TCEQ believes that a separate salinity threshold for estuarine and marine water bodies is warranted. The TCEQ proposes that Part II. Section B.1.d. read in its entirety as follows: "Any aquaculture facility discharging wastewater to a freshwater receiving water can do so under this general permit only if the difference between the discharge's total dissolved solids (TDS) and the freshwater receiving water's TDS is less than 500 mg/L. Any aquaculture facility discharging wastewater to an estuarine or marine receiving water can do so under this general permit only if the difference between the discharge's salinity and the estuarine or marine re-

ceiving water's salinity is less than 2 parts per thousand (ppt). If the applicable conditions above are not met, the facility must obtain an individual TPDES permit."

Comment Number 2: TPWD commented that the proposed notice of intent (NOI) should be amended to include information comparable to that required for registrations. The previous mechanism for authorizing aquaculture discharges, 30 TAC Chapter 321, Subchapter O, used an application form that required adequate information to assess whether a given facility was eligible for registration, such as species type(s), production levels, feeding rates for cold water species, and discharge location and volume.

Response Number 2: The NOI specific to this general permit is currently under development and will include the requirements found in 30 TAC §205.4(f) for all general permits, and all information necessary to make a determination regarding eligibility for coverage under this general permit. The information requested in the NOI will include, but is not limited to, species type(s), production levels, feeding rates for cold water species, discharge location, and estimated volume of wastewater in gallons per day as requested by the TPWD.

Comment Number 3: TPWD commented that the language in Part III. Section B.3. of the proposed general permit regarding drugs, medications, and chemicals used in aquaculture operations may be too narrow so that the use of Investigational New Animal Drugs (INADs) and regulation-deferred compounds is prohibited.

TPWD states that if TCEQ does not expressly authorize the use of INADs, it may hamper aquatic animal research and treatment in Texas. TPWD has previously encouraged TCEQ to allow the use of INADs at certain aquaculture facilities, and TCEQ has authorized this usage on a case-by-case basis. TPWD states that, although it may be unusual to allow such case-by-case approvals in a general permit, it would not be cost-effective for either TCEQ or applicants to require individual wastewater discharge permits for otherwise qualifying facilities that seek to use INADs.

TPWD also suggests that the use of regulation-deferred compounds at a facility authorized under the general permit should be reviewed on a case-by-case basis. TPWD also commented that the use of low regulatory compounds at levels specified by the United States Food and Drug Administration (FDA) and used as directed in FDA guidance poses no threat to water quality, and TCEQ should clarify that use of low regulatory compounds is authorized.

The TAA submitted a similar request that INADs be treated the same as drugs and chemicals approved by the United States Environmental Protection Agency (EPA) or FDA.

Response Number 3: The recently published 40 Code of Federal Regulations (CFR) Part 451 entitled "Concentrated Aquatic Animal Production Point Source Category" addresses the use of INADs and sets out a regulatory scheme that must be followed in order to obtain approval of their use. 40 CFR §451.3(a) states that "a permittee subject to this Part must notify the permitting authority of the use in a concentrated aquatic animal production facility subject to this Part of any investigational new animal drug (INAD) or an extralabel drug use where such a use may lead to a discharge of the drug to water of the U.S." 40 CFR §451.3(a)(1) states that a "permittee must provide a written report to the permitting authority of an INAD's impending use within 7 days of agreeing or signing up to participate in an INAD study." 40 CFR §451.3(a)(2) states "For INADs and extralabel drug uses, the permittee must provide an oral report to the permitting authority as soon as possible, preferably in advance of use, but no later than 7 days after initiating use of that drug." 40 CFR §451.3(a)(3) states the permittee must also provide a written report to the permitting authority within 30 days after initiating the use of INADs and extra label drug. 40 CFR §451.3(a) further states that "Reporting is not required for an INAD or extralabel drug use that has been previously approved by FDA for a different species or disease if the INAD or extralabel use is at or below the approved dosage and involves similar conditions of use."

After reviewing the comments of the TWPD and the TAA, the ED has revised the general permit to include the requirements from the newly promulgated 40 CFR Part 451 guidelines for the use of INADs and for the use of low regulatory compounds. Subsequent communication from the TPWD indicates the comment on the use of regulation-deferred compounds is no longer valid. Therefore, no changes will be made to the permit in regard to regulation-deferred compounds.

Part III. Section B.3 now reads in its entirety:

Drugs, Medications and Chemicals.

(a) Drugs, medications and chemicals approved by the United States Environmental Protection Agency (EPA) or the United States Food and Drug Administration (FDA) for aquaculture use may be used in water which will be discharged. Treatment shall be limited to those aquatic species and to those purposes for which approval was granted. Treatment shall be used only as necessary, and only as directed on the product label. The water shall be diluted, held for a specific time, or neutralized prior to discharge as directed on the product label or as necessary to comply with 30 TAC Chapter 307 (relating to Texas Surface Water Quality Standards) or as needed to be below the concentration level used for a long-term static treatment, whichever is the lowest concentration. Records of all drugs, medications, and chemicals utilized for treatment shall be maintained on a monthly basis at the facility and shall be readily available for inspection by authorized representatives of the executive director for at least three years. Records shall include treatment concentrations, discharge volumes and dates, and a product label or Material Safety Data Sheet (MSDS) for each drug, medication, or chemical utilized.

(b) Notification, outlined below, shall be provided to the TCEQ's Stormwater and Pretreatment Team, of the use of any investigational new animal drug (INAD) or any extralabel drug, as defined at 40 CFR 451.3 General Definitions, where such a use may lead to a discharge of the drug. Reporting is not required for an INAD or extralabel drug use that has been previously approved by FDA for a different species or disease if the INAD or extralabel use is at or below the approved dosage and involves similar conditions of use.

(i) The permittee must provide a written report of an INAD's impending use within 7 days of agreeing or signing up to participate in an INAD study. The written report must identify the INAD to be used, method of use, the dosage, and the disease or condition the INAD is intended to treat.

(ii) For INADs and extralabel drug uses, the permittee must provide an oral report as soon as possible, preferably in advance of use, but no later than 7 days after initiating use of that drug. The oral report must identify the drugs used, method of application, and the reason for using that drug.

(iii) For INADs and extralabel drug uses, the permittee must provide a written report within 30 days after initiating use of that drug. The written report must identify the drug used and include: the reason for treatment, date(s) and time(s) of the addition (including duration), method of application; and the amount added.

(c) Notification of the use of compounds that have undergone review by the FDA and have been determined to be drugs of low regulatory priority, shall be provided using the requirements outlined for INADs and extralabel drugs in Part III. Section B.3.(b).

Comment Number 4: TPWD commented that the citations to the TAC in Part III. Section B.4. are incorrect. The TPWD states that "the citations should be corrected as follows: ". . .disease, as defined in 31 TAC §57.111 or §69.77 (should be §69.75) shall. . ." ". . .and shall comply with all the requirements of 31 TAC §57.11 (should be §57.114) or §69.77 as well as . . ."

Response Number 4: The citations have been changed as requested. Part III. Section B.4. now reads as follows: "Any discharger authorized under this general permit engaged in the propagation and/or rearing of shrimp which exhibit one or more manifestations of disease, as defined in 31 TAC §57.111 or §69.75 shall immediately report the observations to the TCEQ's regional office and Wastewater Permitting Section (MC-148), and to the Texas Parks and Wildlife Department (TPWD), and shall comply with all the requirements of 31 TAC §57.114 or §69.77 as well as other actions deemed appropriate by the TPWD. The TPWD shall be notified immediately of the diagnosis. Any actions which are deemed as necessary by the discharger to prevent transmission of the disease to aquatic life endemic to water in the state shall be implemented as soon as possible. The executive director may additionally require cessation of the discharge of effluent from infected portions of the facility as necessary to protect aquatic life in the receiving stream from potential adverse effects."

Comment Number 5: TPWD made the following comments on the need for corrections of the following typographical errors: "Part I.1 and 2. Concentrated aquatic animal production facilities Correct typographical error as follows: 'multiple ponds that are individually owned, managed or leased ponds. . ." (delete "ponds"); "Part II. Section C.1. - Correct typographical error as follows: ' . . .utilize this notices (change "notices" to "notice") as necessary. . .'"; "Part II. Section C.6. - Correct typographical error as follows: '...under this general permit prior (delete "prior" here), or authorization under a separate individual or general permit, prior. . .'"; "Part III Section B.8. - Correct typographical error as follows: 'All discharges from (delete "from") shall comply. . .'"; "Notice of Authorization by General Permit - Correct typographical error as follows: 'A facility that only temporarily holds and do (change "do" to "does") not feed aquatic species.'"

Response Number 5: The errors cited by TPWD have been corrected as requested.

Comment Number 6: TAES-CC cites the high quality of water discharged from their experimental systems, which it alleges is better than that required for coverage under the proposed general permit. TAES-CC requests reconsideration of some of the general permit conditions that must be met in order to operate under the proposed general permit. For instance, the TAES-CC comments that in order to meet the proposed permit levels, the facility must pump the discharge to other ponds for further treatment, rather than release the effluent. However, at the TAES-CC facility, they run the risk of losing valuable data if the culture water is pumped instead of released at the termination of a research study. While TAES-CC indicates that it is planning for the future construction of new ponds to capture the effluent water, the facility would not qualify for coverage under the terms of the current draft general permit in the interim. TAES-CC also stresses that its total volume released is comparatively small and it continually makes efforts to improve effluent water quality.

The TAES-CC requested that a special provision be made to exempt it from meeting the total suspended solids and five-day carbonaceous biochemical oxygen demand ($CBOD_5$) load limits currently required for coverage under the proposed general permit. To meet the standards, TAES-CC states that it must pump in new water from the adjacent lagoon. Currently, the research facility discharges less then 30 days a year.

Response Number 6: The ED recognizes that the general permit may not be suitable for all aquaculture discharges. Standard effluent limitations (including $CBOD_5$) in the general permit are based on the size of the anticipated discharge and are applied to all similarly-sized facilities seeking coverage under the general permit. The standard effluent limitations are expected to maintain a 5.0 mg/L dissolved oxygen criterion under worst case default modeling conditions. If effluent limitations under the general permit are too stringent or a facility otherwise does not qualify for coverage under the general permit, a facility may apply for an individual permit. On the opposite end of the spectrum, if site-specific data (hydraulic characterization, historical headwater, and temperature values, etc.) calls for special permit provisions *less* stringent than those in the general permit, it may be beneficial for an applicant to seek an individual wastewater permit. For these reasons, the ED did not change the general permit as requested by the TAES-CC.

Comment Number 7: The TAES-CC requested that the maximum number of discharge days required by the general permit be increased from 30 to 60 days a year so that effluent may be diluted and the permit limits proposed in the general permit can be met.

The TAA made the same comment. TAA proposed that a shrimp research facility in the coastal zone be allowed to qualify for a general permit even if it discharges more than 30 days a year so long as its maximum daily flow was low. TAA gave the flow rate of 0.5 million gallons per day (MGD) as an example of an acceptable flow rate under their proposal.

Response Number 7: As requested by TAES, the ED has revised the general permit to increase the maximum number of discharge days from 30 to 60 days a year. The general permit's regulatory predecessor, 30 TAC Chapter 321, Subchapter O, requires shrimp research facilities within the coastal zone to discharge less than 30 days per year. The general permit, which supercedes 30 TAC Chapter 321, Subchapter O, includes more restrictive conditions permit conditions while maintaining the maximum flow rate of less than five million gallons per day for shrimp research facilities. Therefore, Part II. Section A.3.(c)(i) has been changed to the following: "discharges less than 60 days per year";

Comment Number 8: TAA comments that it does not see the justification for requiring an individual permit for retail bait dealers solely because the facility is required to obtain an exotic species permit from TPWD.

Response Number 8: After discussion with the TPWD, the provision which excludes retail bait dealers which are required to obtain an exotic species permit from the TPWD, from obtaining coverage under this general permit has been removed. In order to receive authorization from the TPWD to possess an exotic species, the facility must include controls to prevent escape and/or release. Due to this requirement of the TPWD this exclusion was not required. Part II. Section A.1.(a) now reads: "Retail bait dealers"; Part II. Section B.1.(f) which reads, "Retail bait dealers which are required by the Texas Parks and Wildlife Department (TPWD) to obtain an exotic species permit," was also removed from the general permit.

Comment Number 9: TAA states that it appreciates the work that the TCEQ has done regarding the $CBOD_5$ limits included in the general permit but still believes that the development of BOD reaction coefficients for aquaculture waste would allow the $CBOD_5$ limitations to be modified in such a way that more facilities would be allowed under the general permit. The TAA has seen data that suggests $CBOD_5$ from aquaculture effluent exerts only half as much load on the receiving waters as the same amount of $CBOD_5$ from a domestic wastewater treatment plant. TAA acknowledges that additional data is necessary to demonstrate this supposition.

Response Number 9: Model assumptions used in deriving the general permit effluent limitations are based on EPA approved values. TCEQ's conservative default modeling assumptions are expected to maintain a 5.0 mg/L minimum dissolved oxygen concentration in the receiving waters during worst case conditions of low headwater flow and high temperature. Revising model assumptions, such as the BOD reaction coefficients, used in deriving the limitations could result in less protection for waters in the state. While TCEQ agrees that a reduced BOD reaction rate for aquaculture wastewater, as opposed to domestic wastewater, is theoretically likely, a substantial data set quantifying this correlation does not yet exist. The TCEQ will consider this modification in the future as additional data becomes available, and no changes were made to the general permit.

Other Changes to the General Permit

The ED has made additional recommendations for changes to the general permit. These additional changes are intended to provide clarity in regulatory requirements and to provide internal consistency and consistency with other general permits and regulations. The ED has also made grammatical and stylistic changes not noted here.

Change Number 1. The definitions of "Existing facilities" and "New facilities" were removed from the draft permit. These definitions were carried over from 30 TAC Chapter 321, Subchapter O regarding aquaculture registrations. However, these terms are not used in the general permit, thereby necessitating the deletions.

Change Number 2. The definitions for "Operator" and "Owner" have been changed to provide consistency between the general permit and the definitions found in 30 TAC §305.2(24) and (26). These definitions now read as follows:

Operator - The person responsible for the overall operation of a facility.

Owner - The person who owns a facility or part of a facility.

Change Number 3. Part II. Section A.2.(a)(i) and (ii) were modified to provide internal consistency regarding the definition of aquatic animal production facility and the standards for Tier II coverage. This section was also changed to provide consistency with 40 CFR 122, Appendix C. Specifically, the word "or" was deleted in subsection (i) and the word "or" was changed to "and" in subsection (ii) to be consistent with the definition of an "Aquatic animal production facility" as defined by this general permit. Therefore, the referenced subsections are changed accordingly:

(i) discharges less than 30 days per year;

(ii) produces less than 20,000 pounds harvest-weight of aquatic species per year; and

Change Number 4. Part II. Section C.3. was revised to clarify when coverage begins after the submission of an NOI. The following language is added to the end of Part II. Section C.3.: "Authorization under the terms and conditions of this general permit begins when the applicant is issued a written approval of the NOI. Following review of the NOI, the Executive Director shall either confirm coverage by providing a notification and an authorization number to the applicant or notify the applicant that coverage under this general permit is denied."

Change Number 5. Part II. Section C.4. was revised to clarify that a change in a permittee's charter number as registered with the Texas Secretary of State (SOS) is considered a change in ownership for regulatory purposes under this general permit. If a permittee's charter number changes, there shall be no lapse in coverage if a Notice of Termination (NOT) and NOI are submitted as required by this permit. This change is made to address the differences between the databases managed by the commission and the SOS. The following language is added to the end of Part II. Section C.4.: "Coverage under this general permit is not transferable. If the owner or operator of the regulated entity changes, the present owner must submit a Notice of Termination (NOT) and the new owner must submit a NOI. The NOT and NOI must be submitted concurrently no fewer than 10 days before the transfer occurs. Any change in a permittee's Charter Number, as registered with the Texas Secretary of State, is considered a change in ownership of the company and would require the new operator to apply for permit coverage as stated above. If the NOT and NOI are submitted as required under this provision, there will be no lapse in authorization for this facility."

Change Number 6. Part II. Section D. Termination of Coverage, was revised to provide clarity to the permittee of conditions that trigger the need for the permittee to file an NOT. This language is also included in all other general permits issued by the commission. This section now reads in its entirety: "A permittee shall terminate coverage under this general permit through the submittal of a Notice of Termination (NOT), on a form approved by the executive director, when the owner or operator of the facility changes, the discharge becomes authorized under an individual permit, the use of the property changes and is no longer subject to regulation under this general permit, or the discharge becomes unnecessary, is delayed, or is completed. Authorization to discharge terminates at midnight on the day that an NOT is postmarked for delivery to the TCEQ."

Change Number 7. Part II. Section F.1. was revised to add clarity to the general permit by citing 30 TAC §205.5(d). Section 205.5(d) sets out the current requirements under which a general permit may be amended, revoked, or cancelled. This language is also included in other general permits issued by the commission. Part II. Section F.1. now reads in its entirety: "This general permit is effective from the date of issuance for a term of five years, unless otherwise amended, revoked, or cancelled by the commission prior to that date. Authorizations for discharge under the provisions of this general permit may be issued until the expiration date of the permit. This general permit may be amended, revoked, or cancelled by the commission after notice and comment as provided by 30 TAC §§205.3 and 205.5."

Change Number 8. Part II. Section F.4. was revised to include the citation which requires a permittee to obtain coverage under an individual permit if the general permit is not renewed at least 90 days before expiration. This refers to the regulatory requirements found in 30 TAC §205.5(d). The section now reads, in its entirety: "According to 30 TAC §205.5(d) (relating to Permit Duration, Amendment, and Renewal), if the commission has made a determination that the general permit will not be renewed at least 90 days before the expiration date, permittees authorized under this general permit shall submit an application for an individual permit before the expiration date. If the application for an individual permit is submitted before the general permit expiration date, authorization under this expiring general permit remains in effect until the issuance or denial of an individual permit."

Change Number 9. Part III. Section D.2.(i)(i) and (ii) were revised to provide clarification on the size of evaporation ponds used for disposal of wastewater through evaporation. This numbering of this section was corrected. Part III. Section D.2.(i)(i) and (ii) now read in their entirety:

(i) Level II facilities authorized under Part II. Section A.2.(c) which dispose of wastewater by evaporation ponds shall meet the following criteria:

(i) Evaporation ponds shall be sized to prohibit overflow. Evaporation ponds shall be sized using:

(1) The year with the lowest net evaporation (for a minimum period of record of 25 years) or other appropriate data (i.e. worst precipitation and worst pan/lake evaporation). The calculation should include the

volume of effluent routed to the evaporation pond on a monthly basis for an entire year.

(2) The average net evaporation (for the entire period of record) or other appropriate data (i.e. average precipitation and average pan/lake evaporation). When two consecutive average years are reviewed, there should be no accumulation of water in the evaporation system. The calculation should include the volume of effluent routed to the evaporation pond on a monthly basis for an entire year.

(ii) Evaporation pond shall be operated to maintain a minimum freeboard of two feet.

(iii) There shall be no discharge of wastewater to surface water in the state.

Change Number 10. Part V.9. was revised to clarify that 30 TAC §205.4 governs the suspension and revocation of an authorization under the general permit. The section now reads in its entirety: "Authorization under this general permit may be suspended or revoked for the reasons stated in 30 TAC §205.4 (relating to Authorizations and Notices of Intent). The filing of a notification by the discharger of planned changes or anticipated noncompliance, does not stay any permit condition."

TRD-200602217
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Filed: April 18, 2006

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapter 101 and the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 101, General Air Quality Rules, under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, of the United States Environmental Protection Agency (EPA) regulations concerning state implementation plans (SIPs). The repealed, new, and amended sections will be submitted to the EPA as revisions to the Texas SIP.

The proposed rulemaking would address deficiencies in the commission's Discrete Emission Reduction Credit Program as identified by the EPA in the October 5, 2005, edition of the *Federal Register* (70 FR 58154). The proposed rules would also implement revisions to Texas Health and Safety Code, §382.0172(c), as required by Senate Bill 784, 79th Legislature, 2005, which allow greater flexibility in the generation of credits for emission reductions outside the United States.

A public hearing on this proposal will be held in Austin on May 22, 2006, at 2:00 p.m. in Building B, Room 201A, at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, a staff member will be available to discuss the proposal 30 minutes before the hearing.

Persons planning to attend the hearing who have special communication or other accommodation needs, should contact Lola Brown, Office of Legal Services at (512) 239-0348. Requests should be made as far in advance as possible.

Comments may be submitted to Lola Brown, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-054-101-PR. Comments must be received by 5:00 p.m., May 30, 2006. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Beecher Cameron, Air Permits Division, at (512) 239-1495 or Steve Sun, Air Permits Division, at (512) 239-3554.

TRD-200602146
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Filed: April 13, 2006

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Notice of Water Quality Applications

The following notices were issued during the period of April 5, 2006 through April 17, 2006.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P O Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

CHAMBERS COUNTY IMPROVEMENT DISTRICT NO. 1 has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014461001 to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 980,000 gallons per day. The facility will be located approximately 1,400 feet east of Farm-to-Market Road 1405 and approximately 2,200 feet north of the intersection of Farm-to-Market Road 1405 and McKinney Street in Chambers County, Texas.

CHAMPION TECHNOLOGIES, INC. which operates an organic chemical manufacturing plant, has applied for a renewal of TPDES Permit No. WQ0004306000, which authorizes the discharge of cooling tower blowdown, storm water, and previously monitored effluent (PME) at a daily average dry weather flow not to exceed 0.0044 million gallons per day via Outfall 001; boiler blowdown on an intermittent and flow variable basis via internal Outfall 101. The facility is located 3130 Farm-to-Market Road 521, approximately 2.25 miles north of the intersection of Farm-to- Market Road 521 and State Highway 6, in the City of Fresno, Fort Bend County, Texas.

CHAPEL HILL INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. 13821-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 32,000 gallons per day. The facility is located approximately 1,300 feet east of the intersection of Farm-to-Market Road 1735 and County Road SE-18 in Titus County, Texas.

DELTA COUNTY MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. 10744-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located approximately 0.5 mile west and 0.3 mile south of the intersection of Farm-to-Market Road 64 and Farm-to-Market Road 128 and immediately west of South Third Street in Delta County, Texas.

CITY OF EDGEWOOD has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014648001, to authorize the discharge of treated domestic

wastewater at a daily average flow not to exceed 200,000 gallons per day. Authorization to discharge was previously permitted by expired permit no. 10560-001. The facility is located approximately 6,000 feet north of the intersection of Farm-to-Market Road 859 and U. S. Highway 80 and 2,200 feet east of Farm-to-Market Road 859 in Van Zandt County, Texas.

HARRIS COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 89 has applied for a major amendment to TPDES Permit No. WQ0012939001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 250,000 gallons per day to a daily average flow not to exceed 950,000 gallons per day. The facility is located north of Fellows Road, approximately 3,600 feet west of the intersection of Fellows Road and Farm- to-Market Road 518 (Cullen Boulevard) in Harris County, Texas.

JASPER COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO.1 has applied for a renewal of TPDES Permit No. 10808-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 410,000 gallons per day. The facility is located approximately 2,000 feet due south of the intersection of U.S. Highway 96 and State Highway 62 in Jasper County, Texas.

JOLLY TRUCK WASH, LLC which operates the Jolly Truck Wash, has applied for a renewal of Permit No. WQ0004150000, which authorizes the disposal of truck wash water and treated domestic wastewater by irrigation of 3.2 acres at a daily average flow not to exceed 12,000 gallons per day. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site are located at the southeast corner of U.S. Highway 82-287 and Farm-to- Market Road 2393 in the community of Jolly, Clay County, Texas. The facility and land application site are located in the drainage area of Bennett Creek, in Segment No. 0211 of the Red River Basin.

KAUFMAN COUNTY FWSD NO. 1A has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to TPDES Permit No. WQ0013910001 to authorize an additional treatment site and outfall and authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 700,000 gallons per day to a daily average flow not to exceed 995,000 gallons per day combined total from Outfalls 001 and 002. The current permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 700,000 gallons per day at the permitted site and outfall (Site B and Outfall 002). The draft permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 350,000 gallons per day from the existing site and outfall and a daily average flow not to exceed 600,000 gallons per day from the proposed site and outfall (Site A, Outfall 001). The facility at Site A is located approximately 600 feet north of U.S. Highway 80, approximately two miles east of the City of Forney in Kaufman County, Texas (Site A, Outfall 001). The facility at Site B will be located 1,500 feet southeast of an unimproved road (Helms Road), 3,400 feet west of Big Brushy Creek and 3,800 feet south of the east bound lanes of U.S. Highway 80 in Kaufman County, Texas (Site B, Outfall 002).

KELLER'S CREAMERY, LP which operates a milk processing plant, has applied for a renewal of Permit No. WQ0003390000, which authorizes the disposal of process wastewater and boiler blowdown on 128 acres of coastal bermuda and rye grass at an application rate not to exceed 2.2 acre-feet per acre irrigated per year (acre-feet/acre/year) and on 3.0 acres of landscaping in the vicinity of the wastewater treatment plant at an application rate not to exceed 2.0 acre-feet/acre/year; and sludge from the sequencing batch reactors on the 128 acres of irrigation tracts at an application rate not exceed 2.4 dry tons per acre applied per year. This permit will not authorize a discharge of pollutants into water in the State. The facility and disposal sites are located at 1015 East Broadway on the north side of State Highway 11, approximately 2,400 feet east of the intersection of State Highway 37 and State Highway 11 near the City of Winnsboro, Wood County, Texas.

KEESHAN & BOST CHEMICAL CO., INC. which operates a facility that manufactures organic acetate esters and alcohols, has applied for a renewal of TPDES Permit No.WQ0002068000, which authorizes the discharge of process wastewater commingled with utility wastewaters and storm water runoff at a daily average flow not to exceed 33,000 gallons per day via Outfall 001, and storm water runoff on an intermittent and flow variable basis via Outfall 002. The facility is located at 22102 State Highway 6, on the south side of State Highway 6, approximately two miles east of the City of Manvel, Brazoria County, Texas.

CITY OF KYLE AND AQUA OPERATIONS, INC. has applied for a renewal of TPDES Permit No. 11041-002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,500,000 gallons per day. The facility is located approximately 2.7 miles northwest of the intersection of State Route 21 and Farm-to-Market Road 2720 in Hays County, Texas.

LAZY NINE MUNICIPAL UTILITY DISTRICT AND FOREST CITY SWEETWATER LIMITED PARTNERSHIP have applied for a new permit, Proposed Permit No. WQ0014629001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 700,000 gallons per day via surface irrigation of 285 acres of non-public access rangeland. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility will be located approximately 6.2 miles west of the Village of Bee Cave near State Highway 71 in Travis County, Texas. The disposal site will be located on the south side of State Highway 71, approximately 3 miles west of the Village of Bee Cave in Travis County, Texas.

LOWER COLORADO RIVER AUTHORITY AND BRAZOS RIVER AUTHORITY has applied to the Texas Commission on Environmental Quality (TCEQ) for a minor amendment to the Texas Pollutant Discharge Elimination System (TPDES) permit to authorize a change in disinfection method from chlorination to ultraviolet light. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,200,000 gallons per day. The facility is located approximately 9,150 feet southeast of the intersection of U.S. Highway 183 and State Highway 29, and approximately 4,000 feet north of the South Fork San Gabriel River in Williamson County, Texas.

CITY OF MOUNT ENTERPRISE has applied for a renewal of TPDES Permit No. 14283-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 60,000 gallons per day. The facility is located north of County Road 3207, 0.5 mile west of the intersection of U.S. Highway 259 and County Road 3207 in Rusk County, Texas.

CITY OF NAZARETH has applied for a renewal of Permit No. 10979-001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 5,000 gallons per day via evaporation and surface irrigation of 47 acres of non-public access perennial pasture land. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 2,400 feet north and 3,200 feet west of the intersection of State Highway 86 and Farm-to-Market Road 168, west of the City of Nazareth, in Castro County, Texas.

CITY OF NOCONA has applied for a renewal of TPDES Permit No. 10355-003, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 224,000 gallons per day. The facility is located 0.3 mile east of State Highway 175 (Montague

Street); approximately 0.7 mile south of the intersection of U.S. Highway 82 and State Highway 175 in the City of Nocona in Montague County, Texas.

RHODIA INC which operates an inorganic chemicals plant which produces sulfuric acid, operates a liquid sulfur dioxide terminal, and from a hazardous waste incinerator, has applied for a major amendment to TPDES Permit No. WQ0000542000 to increase the effluent limitations for total manganese and total thallium at internal Outfall 101 (this action is required to correct a typographical error in the current permit). The current permit authorizes the discharge of treated process wastewater, treated incinerator wastewater, utility wastewater, and contaminated storm water runoff at a daily average flow not to exceed 1,400,000 gallons per day via Outfall 001. The facility is located at 8615 Manchester Street, approximately one-half mile west of the intersection of Manchester Street and Interstate Loop 610, in the City of Houston, Harris County, Texas.

RIVERCREST INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. 11204-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 15,000 gallons per day. The facility is located adjacent to and west of U.S. Highway 271, approximately 5-1/2 miles northwest of the City of Talco in Red River County, Texas.

CITY OF ROYSE CITY has applied for a renewal of TCEQ Permit No. 10366-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately one mile south of the intersection of Interstate Highway 30 and FarmtoMarket Road 35 in Rockwall County, Texas.

SOUTH CENTRAL WATER COMPANY has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014667001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 950,000 gallons per day. The facility is located 6,700 feet southwest of the intersection of Lower Seguin Road and Farm- to-Market Road 1518 in Bexar County, Texas.

TENASKA GATEWAY PARTNERS, LTD which operates the Tenaska Gateway Generation Station, a combined cycle electric power generation plant, has applied for a renewal of TPDES Permit No. 04111, which authorizes the discharge of cooling tower blowdown and previously monitored effluents (i.e., demineralizer wastewater, neutralized wastewater, boiler blowdown, and storm water) at a daily average flow not to exceed 1,500,000 gallons per day via Outfall 001. The facility is located adjacent to State Highway 315, approximately 0.5 miles southwest of the intersection of State Highway 315 and State Highway 840, and approximately 7.5 miles northeast of the City of Mount Enterprise, Rusk County, Texas.

DEIFILIA AUREA JIMINEZ TIDWELL AND DORMAN WAYNE TIDWELL who operate a vehicle exterior washing facility, have applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of Permit No. WQ0003054000, which authorizes the disposal of wastewater from exterior washing of trucks, tailers, and other vehicles at a daily average flow not to exceed 650 gallons per day via evaporation. This permit will not authorize a discharge of pollutants into water in the State. The facility and evaporation ponds are located at the northwest intersection of Interstate Highway 20 and County Road 3111, at the Joy Wright Exit, approximately two miles southwest of the City of Liberty City, Smith County, Texas. The facility and evaporation ponds are located in the drainage area of Belle Creek in Segment No. 0505 of the Sabine River Basin.

TRINITY INDUSTRIES, INC. has applied for a renewal of TPDES Permit No. 14249-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 8,750 gallons per day. The facility is located approximately 1,900 feet southeast of the intersection of U.S. Highway 80 and County Road 3438 in Harrison County, Texas.

Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 30 DAYS OF THE ISSUED DATE OF THIS NOTICE

NORTHWEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 20 has applied for a minor amendment to the Texas Pollutant Discharge Elimination System (TPDES) permit to authorize a reduction of the Final phase flow. The application requests to reduce the Final phase flow to an annual average flow not to exceed 1,700,000 gallons per day and to add a Interim phase with an annual average flow not to exceed 1,500,000 gallons per day. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,100,000 gallons per day. The facility is located approximately 6,500 feet north and 8,700 feet east of the intersection of Farm-to-Market Road 1960 and Stuebner Airline Road, approximately 2 1/4 miles northeast of the same intersection in Harris County, Texas.

Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 10 DAYS OF THE ISSUED DATE OF THIS NOTICE

CITY OF WINTERS has applied for a minor amendment to the TCEQ permit to omit Special Provisions No. 10 on Page 23 and No. 16 on Page 24 since the provisions are not applicable. The existing permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 530,000 gallons per day via surface irrigation of 282 acres of non-public access land. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 5,600 feet east and 2,900 feet south of the intersection of State Highway 153 and U.S. Highway 83, southeast of the City of Winters in Runnels County, Texas.

TRD-200602236
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: April 19, 2006

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Notice of Water Rights Application

Notices issued April 17 and April 18, 2006:

APPLICATION NO. 5914; TXU Mining Company LP (TXU or Applicant), 1601 Bryan Street, Dallas, Texas 75201-3411 has applied for a Water Use Permit to maintain two existing reservoirs on Smith Creek for domestic and livestock purposes and to divert and use not to exceed 135 acre-feet of water per year from the reservoirs and from tributaries of Smith Creek, Cypress Basin, for industrial (mining) purposes in the Monticello Lignite Mining Area in Titus County. On March 24, 2006, Applicant requested to modify the original application to remove one diversion point and to authorize diversion and use of water from the two reservoirs. The Commission will review the application as submitted by the applicant and may or may not grant the application as requested. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 14-1318C; San Angelo Water Supply Corporation , P.O. Box 1928, San Angelo, Texas 76902 (applicant), has requested a revision to their application for an amendment to Certificate of Adjudication No. 14-1318 to modify Special Condition 5C of the original Certificate, relating to passage of certain flows, in the Colorado River Basin, Tom Green County. The Commission will review the revised application as submitted by the applicant and may or may not grant the application as requested. The Commission may make other modifications to Special Condition 5C or eliminate Special Condition 5C altogether. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 14-1190C; The Upper Colorado River Authority, applicant, 512 Orient Street, San Angelo, Texas 76903, has applied for an amendment to a Certificate of Adjudication to use the bed and banks of the North Concho River and the Concho River, Colorado River Basin, in Tom Green and Concho Counties to deliver water to the City of Paint Rock for municipal use based on a Water Sales Agreement. The Commission will review the application as submitted by the applicant and may or may not grant the application as requested. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, by May 19, 2006.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at 512- 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200602235

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: April 19, 2006

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Proposed Enforcement Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075, which requires that the commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 29, 2006.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 29, 2006.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the commission in **writing.**

(1) COMPANY: Brownsville Independent School District; DOCKET NUMBER: 2005-1153-PST-E; IDENTIFIER: Regulated Entity Reference Number (RN) RN101646370; LOCATION: Brownsville, Cameron County, Texas; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to amend, update, or change information on the underground storage tank (UST) registration form; 30 TAC §334.10(b), by failing to have the required UST records maintained, readily accessible, and available for inspection; and 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,612; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(2) COMPANY: Paul Leggett dba Country Lake Water Supply and Steve Boone dba Country Lake Water Supply; DOCKET NUMBER: 2005-0657-PWS-E; IDENTIFIER: RN103196879; LOCATION: Carthage, Panola County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(iii) and (F), and (3)(A)(ii), and THSC, §341.033(d), by failing to collect and submit routine monthly water samples, by failing to collect and submit five routine samples as required for bacteriological analysis, and by failing to collect and submit repeat samples for bacteriological analysis; PENALTY: $1,980; ENFORCEMENT COORDINATOR: Mac Vilas, (512) 239-2557; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(3) COMPANY: CP Red Oak Partners, Limited dba Red Oaks; DOCKET NUMBER: 2005-1733-EAQ-E; IDENTIFIER: RN104445523; LOCATION: Cedar Park, Williamson County, Texas; TYPE OF FACILITY: subdivision; RULE VIOLATED: 30 TAC §213.21(d), by failing to receive approval of an Edwards Aquifer Contributing Zone Plan prior to commencing construction; PENALTY: $26,400; ENFORCEMENT COORDINATOR: Dana Shuler, (512) 239-2505; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(4) COMPANY: H.E. Butt Grocery Company; DOCKET NUMBER: 2005-1688-AIR-E; IDENTIFIER: RN104163308; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(b), by failing to prevent a nuisance caused by odors released from the treatment plant; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(5) COMPANY: Jasper Oil Company; DOCKET NUMBER: 2006-0025-OSS-E; IDENTIFIER: RN101735165; LOCATION: Hillister, Tyler County, Texas; TYPE OF FACILITY: store; RULE VIOLATED: 30 TAC §285.32(a)(2), by failing to have a watertight pipe from the sewer stub out to the treatment system; and 30 TAC §385.33(d)(2)(E), by failing to provide the required minimum surface application area for the volume of wastewater being disposed; PENALTY: $840; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(6) COMPANY: K-Yoba, Inc. dba Jedco 21; DOCKET NUMBER: 2006-0053-PST-E; IDENTIFIER: RN101738979; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2)(A)(i)(III) and (d)(1)(B)(ii) and the Code, §26.3475(a) and (c)(1), by failing to conduct release detection for the piping associated with the UST system, by failing to test the line leak detectors, and by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.10(b), by failing to maintain UST records and make immediately available for inspection; 30 TAC §334.7(d)(3), by failing to notify the commission of any change or addition to the UST system; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube; and 30 TAC §334.45(c)(3)(A), by failing to install a functioning UL-listed emergency shutoff valve; PENALTY: $4,480; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-4575; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(7) COMPANY: NNS Enterprises, Inc. dba EZ Mart; DOCKET NUMBER: 2006-0097-PST-E; IDENTIFIER: RN102349743; LOCATION: Portland, Nueces County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(a)(1)(A), (b)(2)(A)(i)(III), (d)(1)(B)(ii), and the Code, §26.3475(a) and (c)(1), by failing to provide a method of release detection capable of detecting a release, by failing to perform a piping tightness test for the pressurized line, by failing to test line leak detectors, and by failing to reconcile inventory control records on a monthly basis; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(8) COMPANY: Maxine McMurry dba Primrose Mobile Home Park; DOCKET NUMBER: 2006-0049-PWS-E; IDENTIFIER: RN101228005; LOCATION: Crowley, Tarrant County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.42(l), by failing to compile and maintain a facility operations manual for operator review and reference; 30 TAC §290.46(f) and (m)(1), by failing to maintain water works operation and maintenance records and by failing to ensure the three 315-gallon pressure tanks are inspected annually; 30 TAC §290.121(a), by failing to maintain an up-to-date chemical and microbiological monitoring plan; and 30 TAC §290.45(b)(1)(A)(i) and (ii) and THSC, §341.0315(c), by failing to provide a minimum well production capacity of at least 1-1/2 gallons per minute per connection and by failing to provide a pressure tank capacity of at least 50 gallons per connection; PENALTY: $336; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200602214
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Filed: April 18, 2006

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Department of State Health Services

Designation of Employee Health Center at the Texas Commission on Environmental Quality as a Site Serving Medically Underserved Populations

The Department of State Health Services (department) is required under the Occupations Code, §157.052, to designate sites serving medically underserved populations. In addition, the department is required to publish notice of such designations in the *Texas Register* and to provide an opportunity for public comment on the designations.

Accordingly, the department has designated the following as a site serving medically underserved populations: Employee Health Center at Texas Commission on Environmental Quality, located at 12100 Park 35 Circle, Building F, Suite 1304, Austin, Texas 78753. The designation is based on eligibility as a site serving a disproportionate number of clients eligible for federal, state or locally funded health care programs.

Oral and written comments on this designation may be directed to Brian King, Program Specialist, Health Professions Resource Center, Center for Health Statistics, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756; telephone (512) 458-7261. Comments will be accepted for 30 days from the publication date of this notice.

TRD-200602219
Cathy Campbell
General Counsel
Department of State Health Services
Filed: April 18, 2006

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Texas Health and Human Services Commission

Public Notice Correction

A notice of proposed rulemaking for 1 TAC §354.1430 and §354.1432, concerning Telemedecine Services, was published in the April 21, 2006, issue of the *Texas Register* (31 TexReg 3335). As part of those proposed rules, HHSC announced a public hearing date.

The current notice corrects the public hearing date included in the preamble of the proposed Telemedicine Services rules. The correct date for the public hearing is Tuesday, May 16, 2006, at 1:30 p.m. in the

public hearing room of the Health and Human Services Commission, 11209 Metric Boulevard, Building H, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Meisha Spencer at (512) 491-1453.

TRD-200602241
Wendy Pellow
Assistant General Counsel
Texas Health and Human Services Commission
Filed: April 19, 2006

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Texas Department of Housing and Community Affairs

Notice of Public Hearing

Multifamily Housing Revenue Bonds (Riverside Villas) Series 2006

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Parkview Elementary, 6900 Bayberry, Fort Worth, Tarrant County, Texas 76137, at 6:00 p.m. on May 16, 2006 with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $15,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to Riverside Villas Apartments, L.P., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing, and equipping a multifamily housing development (the "Development") described as follows: 248-unit multifamily residential rental development located at approximately the 8800 block of N. Riverside Drive, Tarrant County, Texas. A physical address has not been assigned by the City of Fort Worth. Upon the issuance of the Bonds, the Development will be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Teresa Morales at the Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, TX 78711-3941; (512) 475-3344; and/or teresa.morales@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Teresa Morales in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Teresa Morales prior to the date scheduled for the hearing. Individuals who require a language interpreter for the hearing should contact Teresa Morales at least three days prior to the hearing date. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200602212
William Dally
Executive Director
Texas Department of Housing and Community Affairs
Filed: April 17, 2006

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Houston-Galveston Area Council

Request for Proposals

The Houston-Galveston Area Council (H-GAC)--as the administrative agent for the Gulf Coast Workforce Board and its operating affiliate, The WorkSource--announces the availability of a request for proposals to serve primarily hurricane evacuees who are living in the Houston area. We are soliciting an organization to design and deliver assessment; counseling and short-term training that helps individuals who have never worked or who have poor work histories go to work. Prospective bidders may download the proposal package from H-GAC's web site at http://h-gac.com or The WorkSource website at http://theworksource.org beginning at noon Central Daylight Time on Tuesday, April 18, 2006. H-GAC will also fill requests for hard copies of the proposal package beginning at that time. We will not hold a bidder's conference for this request. Proposals are due in H-GAC offices by 12:00 noon Central Daylight Time on Thursday, April 27, 2006. We will not accept late proposals; and we will not make exceptions. Questions about obtaining a request for proposal package may be directed to Carol Kimmick at (713) 627-3200 or ckimmick@theworksource.org.

TRD-200602215
Jack Steele
Executive Director
Houston-Galveston Area Council
Filed: April 18, 2006

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by UNITRIN DIRECT INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Chicago, Illinois.

Application for incorporation to the State of Texas by MDOW INSURANCE COMPANY, a domestic fire and/or casualty company. The home office is in Houston, Texas.

Application for admission to the State of Texas by AMERICAN CONTINENTAL INSURANCE COMPANY, a foreign life, accident and/or health company. The home office is in Brentwood, Tennessee.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200602238
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: April 19, 2006

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of HIGGINBOTHAM SINGLE SOURCE ADMINISTRATORS, INC. (using the assumed name of HIGGINBOTHAM SINGLE SOURCE ADMINISTRATION), a domestic third party administrator. The home office is FORT WORTH, TEXAS.

Application for admission to Texas of EDS ADMINISTRATIVE SERVICES, LLC a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Application for incorporation in Texas of RISK ADMINISTRATION RESOURCES, LTD, a domestic third party administrator. The home office is ADDISON, TEXAS.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200602246
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: April 19, 2006

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Texas Lottery Commission

Instant Game Number 656 "Harley-Davidson Bucks & Trucks"

1.0 Name and Style of Game.

A. The name of Instant Game No. 656 is "HARLEY-DAVIDSON BUCKS & TRUCKS". The play style for Game 1 is "key number match ". The play style for Game 2 is "yours beats theirs"

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 656 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 656.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, $1.00, $2.00, $4.00, $5.00, $10.00, $15.00, $20.00, $25.00, $40.00, $50.00, $100, $500, $1,000, $50,000, MERCH SYMBOL, HARLEY SYMBOL and F150 SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 656 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
40	40MPH
41	41MPH
42	42MPH
43	43MPH
44	44MPH
45	45MPH

46	46MPH
47	47MPH
48	48MPH
49	49MPH
50	50MPH
51	51MPH
52	52MPH
53	53MPH
54	54MPH
55	55MPH
56	56MPH
57	57MPH
58	58MPH
59	59MPH
60	60MPH
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$25.00	TWY FIV
$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 THOU
MERCH	PACK
HARLEY	FATBOY
F150	TRUCK

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 656 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅ which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, $500 or Pack.

I. High-Tier Prize - A prize of $1,000, $5,000, BIKE, TRUCK or $50,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (656), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 656-0000001-001.

L. Pack - A pack of "HARLEY-DAVIDSON BUCKS & TRUCKS" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "HARLEY-DAVIDSON BUCKS & TRUCKS" Instant Game No. 656 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "HARLEY-DAVIDSON BUCKS & TRUCKS" Instant Game is determined once the latex on the ticket is scratched off to expose 50 (fifty) Play Symbols. Game 1: If a player matches any of YOUR NUMBERS play symbols to either WINNING NUMBER play symbol the player wins the prize shown for that number. Game 2: If a player's YOUR SPEED play symbol beats THEIR SPEED play symbol within a row the player wins the prize shown for that row. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 50 (fifty) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 50 (fifty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 50 (fifty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 50 (fifty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another un-

played ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No more than one of the three merchandise prize symbols may appear on a ticket.

C. Game 1: No more than two pair of non-winning cash prize symbols may appear in this game.

D. Game1: No duplicate non-winning Your Numbers.

E. Game 1: No duplicate Winning Numbers.

F. Game 1: No prize amount in a non-winning spot will correspond with the Your Number play symbol (i.e. 5 and $5).

G. Game 1: Non-winning prize symbols will never be the same as the winning prize symbol(s).

H. Game 2: No duplicate rows in any order.

I. Game 2: No ties between Your Speed and Their Speed.

J. Game 2: No duplicate non-winning prize symbols.

K. Game 2: The difference between Your Speed and Their Speed within a row will never exceed 10.

2.3 Procedure for Claiming Prizes.

A. To claim a "HARLEY-DAVIDSON BUCKS & TRUCKS" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100, $500 or Pack, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, $500 or Pack ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "HARLEY-DAVIDSON BUCKS & TRUCKS" Instant Game prize of $1,000, 5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. To claim a Harley-Davidson Fat Boy Motorcycle or Ford F-150 Harley-Davidson Pickup vehicle, the claimant must sign the winning ticket, thoroughly complete a claim form, and present both at any Texas Lottery Claim Center. The claimant must also present a valid driver's license and proof of automobile liability insurance. Any costs incurred to take possession of the vehicle shall be responsibility of the prizewinner. When awarding the top non-cash prize, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall pay the federal income tax at a rate set by the IRS for withholding, if required.

D. As an alternative method of claiming a "Harley-Davidson Bucks & Trucks" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

E. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "HARLEY-DAVIDSON BUCKS & TRUCKS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "HARLEY-DAVIDSON BUCKS & TRUCKS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not

claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 656. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 656 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	960,000	6.25
$10	320,000	18.75
$15	160,000	37.50
$20	120,000	50.00
$50	62,000	96.77
$100	13,650	439.56
$500	1,200	5,000.00
Pack	2,860	2,097.90
$1,000	250	24,000.00
$5,000	25	240,000.00
Bike	3	2,000,000.00
Truck	3	2,000,000.00
$50,000	7	857,142.86

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.66. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 656 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 656, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200602218

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: April 18, 2006

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North Central Texas Council of Governments

Contract Extension

The North Central Texas Council of Governments has extended its County Facility Siting and Services Needs Study contract with R.W. Beck to May 31, 2007, with an increase of $20,000 in additional funds. Questions regarding this study should be directed to Patricia Redfearn at (817) 608-2360, or via email at predfearn@nctcog.org.

TRD-200602123

Mike Eastland
Executive Director
North Central Texas Council of Governments
Filed: April 12, 2006

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for Amendment to State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on April 14, 2006, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Project Title and Number: Application of Texas and Kansas City Cable Partners, L.P. d/b/a Time Warner Cable to Amend its State-Issued Certificate of Franchise Authority, Project Number 32616 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 32616.

TRD-200602221
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 18, 2006

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Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on April 12, 2006, with the Public Utility Commission of Texas, for an amendment to a certificated service area boundary in Bexar County, Texas.

Docket Style and Number: Application of AT&T Texas to Amend Certificate of Convenience and Necessity to Modify the Service Area Boundaries of Elm Creek Zone of the San Antonio Metropolitan Exchange (AT&T) and the Bulverde Exchange (GVTC). Docket Number 32614.

The Application: The minor boundary amendment is being filed to realign the boundary between AT&T's Elm Creek Zone of the San Antonio metropolitan exchange and the Bulverde exchange of Guadalupe Valley Telephone Cooperative, Inc. (GVTC) to allow AT&T Texas to provide local exchange telephone service to a new planned development (JW Marriott Hotel and Resort) located north of San Antonio. GVTC has provided a letter of concurrence endorsing this proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by May 5, 2006, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) at 1-800-735-2989. All comments should reference Docket Number 32614.

TRD-200602167
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 14, 2006

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Notice of Application for Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on April 11, 2006, for a certificate of operating authority (COA), pursuant to §§54.101 - 54.105 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Sugar Land Telephone Company for a Certificate of Operating Authority, Docket Number 32606 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, and wireline competitive local exchange services.

Applicant's requested COA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than May 3, 2006. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 32606.

TRD-200602220
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 18, 2006

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Notice of Petition for Rulemaking

Notice is given to the public of the filing with the Public Utility Commission of Texas of a petition for rulemaking filed on April 14, 2006.

Docket Style and Number: Petition of Chaparral Steel Co., Structural Metals, Inc. and Nucor Steel-Texas for Adoption of a Rule to Implement a Tiered Frequency Response Service; Project Number 32615.

The Petition: Chaparral Steel Company, Structural Metals, Inc. and Nucor Steel-Texas (collectively, the Steel Mills) petitioned the commission to adopt a rule to implement a tiered frequency response service. Steel Mills stated that if the rule is adopted it will ensure implementation of a new reliability service of substantial benefit to the ERCOT system. Steel Mills explained that its proposed Tiered Frequency Response (TFR) rule is designed to provide ERCOT with the program elements for, and the necessary directives to implement, a one year pilot program establishing a new reliability service within the ERCOT region to be entitled Tiered Frequency Response Service. Steel Mills noted that during the pilot period, the worth and efficacy of the new service can be evaluated, with the goal of maximizing its value to the ERCOT system and to consumers. Steel Mills explained that the major purpose of the rule is to recapture the reliability, reserve margin and energy conservation benefits associated with loads equipped, prior to market deregulation, with continuously operating under-frequency relays (UFR), that do not wish to or cannot presently participate effectively as a Load acting as a Resource (LaaR) in the provision of Responsive Reserve Service.

Pursuant to Administrative Procedure Act §2001.021, the commission shall either deny the petition in writing, stating its reasons for denial, or initiate a rulemaking proceeding not later than the 60th day after the date the petition is filed.

Comments on the petition may be filed no later than Friday, May 19, 2006. Sixteen copies shall be delivered to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. All comments should reference Project Number 32615. Persons wishing to contact the Public Utility Commission of Texas by phone can call (512) 936-7120 or (toll free) 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989.

TRD-200602223
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 18, 2006

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Notice of Petition for Waiver of Denial of Request for Number Block

Notice is given to the public of the filing with the Public Utility Commission of Texas of a petition on April 11, 2006, for waiver of denial by the North American Numbering Plan Administration (NANPA) Pooling Administrator (PA) of 1stel, Inc.'s (1stel) request for a 1,000 number block for Cleburne, Texas.

Docket Title and Number: Petition of 1stel, Inc. for 1,000 Block of Numbers--Cleburne, Texas. Docket Number 32605.

The Application: 1stel requested a 1,000 number block for Cleburne, Texas. 1stel is opening a new switch in the area and needs a local routing number.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than May 2, 2006. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 32605.

TRD-200602147
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 13, 2006

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Public Notice of Workshop and Request for Comment Regarding Distance Learning Discounts and Private Network Services

The Public Utility Commission of Texas (commission) will hold a workshop regarding a review and evaluation of Distance Learning Discounts and Private Network Services for Certain Entities pursuant to PURA §56.032, on Wednesday, June 28, 2006 at 9:30 a.m. in Hearing Room Gee, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 31925, *Commission Review and Evaluation of Distance Learning Discounts and Private Network Services for Certain Entities*, has been established for this proceeding.

Prior to the workshop, the commission requests that interested persons file comments to and be prepared to discuss the following questions:

I. Existing Funding Mechanisms

1. What private network services and discounts are available today to the entities identified in Chapter 57 - Subchapter B, Chapter 58 - Subchapter G and Chapter 59 - Subchapter D? In providing your response, please identify:

a. private network services and discounts available at the state level, the price of each service and/or amount of each discount, and the corresponding entity or entities eligible to receive the service and/or discount; and

b. private network services and discounts available at the federal level, the price of each service and/or amount of each discount, and the corresponding entity or entities eligible to receive the service and/or discount;

c. how are each of the private network services and discounts funded today? (In providing your response, please identify both state and federal funding sources);

d. if you are a telecommunications provider, please provide an annual total per year for 1998 through 2005 of:

i. the number of entities that purchased private network services and/or received discounts; and

ii. the number of services and dollar amount of discounts that were received; and

e. if you are an entity receiving private network services and/or discounts, please provide an annual total per year for 1998 through 2005 of:

i. the private networks services and dollar amount of discounts that were received; and

ii. the number of services and dollar amount of discounts required on a forward-going basis.

II. Future Funding Mechanisms

2. On a forward-going basis, how should the private network services and discounts identified in response to Question No. 1 above be funded? In providing your response, please also provide information regarding:

a. a detailed description of your proposed funding mechanism, the entities that would receive support amounts and how the support amounts would be calculated;

b. alternative sources of funding (e.g., federal E-rate) that could be used to support these services and discounts;

c. the amount needed to support the funding mechanism;

d. the cost of the funding mechanism to telecommunications utilities;

e. how the cost of the funding mechanism could be estimated; and

f. the benefit of establishing the funding mechanism.

3. How would the funding mechanism discussed in response to Question No. 2 above result in support being made available to all telecommunications utilities on a nondiscriminatory and technology-neutral basis in exchange for providing services at rates comparable to those preferred rates being paid by the entities identified under Chapter 57 - Subchapter B, Chapter 58 - Subchapter G and Chapter 59 - Subchapter D?

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Con-

gress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 by Wednesday, May 31, 2006. Reply comments may be submitted by June 14, 2006. All responses should reference Project Number 31925. The commission requests that responses be limited to 20 pages (including attachments). The commission requests that parties identify the question for which a response is being provided, and respond to the questions in sequential order. Parties are urged to include everything they wish to discuss in their comments and reply comments; if a party wishes to make a presentation at the workshop, it must be included in the comments submitted on May 31, 2006.

Prior to the workshop, the commission may make available in Central Records under Project Number 31925 an agenda for the workshop.

Questions concerning the workshop or this notice should be referred to Marshall Adair, Communications Industry Oversight Division at (512) 936-7214 or Rosemary McMahill, Communications Industry Oversight Division at (512) 936-7244. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200602224
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 18, 2006

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Office of the Secretary of State

Notice of Funding Availability for Compatibility with the Texas Election Administration Management "TEAM" System

Introduction:

The Texas Secretary of State (SOS) announces the availability of federal funds for counties to acquire the necessary equipment, software, supplies, services, and training to be compatible with the HAVA-mandated voter registration system (the Texas Election Administration Management "TEAM" system).

Authority:

The availability of funds is authorized by Title 1, Section 101 of the Help America Vote Act (HAVA), Public Law 107-252, October 29, 2002; 42 U.S.C. 15301.

Eligible Applicants:

All Texas counties.

Use of Funds:

Counties may use the funding to acquire equipment, software, supplies, and contractual services, such as Internet service provider fees, to integrate with the TEAM system. The following are the basic system requirements:

Broadband connection to the Internet.

The baseline PC configuration for TEAM is:

PC--512MB RAM, 40GB disk,

Medium resolution monitor,

Acrobat Reader 6.0 or better,

Microsoft Internet Explorer 6.x web browser,

Windows 2000, Windows XP Professional or more recent operating system.

Laser printers are recommended; however, all files will be output in a PDF format so the county can configure the setup. Printer recommendation is:

Low-volume printer (A larger county might want to obtain a high-volume printer). Printers must be able to handle 8.5 x 11 or 8.5 x 14 paper size.

Certificates, notices and several reports will have the option to print a bar code for easier retrieval of the voter information in TEAM. The following is the bar code reader specification:

Bar code readers must be able to process the bar code font of: IDAutomationC39XS (72, 48, 36, 28, 26, 24, 22, 20, 18, 16, 14, 12, 11, 10, 9 and 8 pt available).

Counties may also use the funding to attend TEAM Training; however, counties are encouraged to first utilize the County Education Fund that has already been awarded to the county.

Available Funding:

Using voter registration statistics for the 2006 March Primary, a county may apply for funding not to exceed the following amounts:

a) $8,000 for counties with registered voters of 100,000 or less;

b) $11,000 for counties with registered voters of 250,000 or less; and

c) $15,000 for counties with registered voters of more than 250,000.

Funding Period:

Obligations for eligible expenditures must be incurred during the following time period: January 1, 2006 through December 31, 2007.

Funding Requirements:

Effective January 1, 2006, all Texas counties must use the state maintained voter registration database "TEAM" as its official voter registration list.

All Texas counties must be in compliance with all applicable federal and state laws and regulations, including the terms and conditions set forth in the acceptance of the grant. The terms and conditions can be viewed at http://www.sos.state.tx.us/elections/hava/funding.shtml under the bullet labeled TEAM Compatibility Terms and Conditions of Grant Funding.

Requesting the Application:

The county judge, as chief executive officer for the county, must submit a budget via the Texas HAVA online grant system (http://hava.tamu.edu/) and be approved by the Secretary of State's Office. The county judge will use the same user ID and password that was used for previous HAVA funding requests (e.g., voting system acquisition funding). For inquiries, contact Dan Glotzer or Jennifer Holliman toll-free at 1-800-252-8683 or e-mail dglotzer@sos.state.tx.us or jholliman@sos.state.tx.us.

Budget Submission Deadline:

Budgets may be submitted via the Texas HAVA online grant system effective immediately and will be accepted through the grant period; however, the SOS reserves the right to impose deadlines if deemed necessary.

TRD-200602180
Ann McGeehan
Director of Elections
Office of the Secretary of State
Filed: April 14, 2006

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State Office of Administrative Hearings

Notice of Public Hearing

The State Office of Administrative Hearings (SOAH) will conduct a public hearing on Friday, May 19, 2006, at 10:00 a.m. in Room 404 of the William P. Clements Building, 300 West 15th Street (15th and Lavaca), Austin, Texas.

SOAH will hear public comment on proposed rules and rules proposed to be repealed at 1 Texas Administrative Code Chapter 159 (concerning the rules of procedure for administrative license suspension hearings). The proposed rules were published in the *Texas Register* on April 14, 2006 (31 TexReg 3127); *see also* http://www.sos.state.tx.us/texreg/pdf/backview/0414/index.shtml), and may be viewed on SOAH's website at http://www.soah.state.tx.us. The comment period for the rules will close on May 15, 2006, but additional comments will be accepted at the hearing.

SOAH offers reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require special accommodations, please contact SOAH's Docketing office at (512) 475-3445 a minimum of two days prior to the hearing date.

For further information regarding this notice, you may contact Cathleen Parsley, General Counsel, at (512) 475-4993.

TRD-200602222
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
Filed: April 18, 2006

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Bay City, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below:

Airport Sponsor: City of Bay City, Bay City Municipal. TxDOT CSJ No.: 0612BAYCY. Scope: Provide engineering/design services for a paved access road and drainage for a new self-serve fuel facility, associated concrete pad for fuel facility and secondary containment structures as indicated when EPA final action is implemented on proposed revisions to the July 17, 2002 SPCC Rule.

The **DBE** goal is set at **0%.** TxDOT Project Manager is Megan Caffall.

To assist in your proposal preparation the most recent Airport Layout Plan, 5010 drawing, and project narrative are available online at **www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm** by selecting "Bay City Municipal Airport".

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site, URL address **http://www.dot.state.tx.us/avn/avn550.doc.** The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT. ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is an MS Word Template.

Please note:

Four completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 E. Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than May 23, 2006, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Anna Saldaña.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at **www.dot.state.tx.us/business/avnconsultinfo.htm.** All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews of the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following the interviews.

If there are any procedural questions, please contact Anna Saldaña, Grant Manager, or Megan Caffall, Project Manager, for technical questions at 1-800-68-PILOT (74568).

TRD-200602231
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: April 19, 2006

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Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Gilmer, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below:

Airport Sponsor: The City of Gilmer, Gilmer Municipal Airport. TxDOT CSJ No. 0519GLMER. Scope: Provide engineering/design services to expand apron, rehabilitate apron, hangar access taxiways and Runway 18-36, and partial parallel & stub taxiway. Mark Runway 18-36 and partial parallel & stub taxiway, and install security fence at the Gilmer Municipal Airport.

The **HUB** goal is set at **7%.** TxDOT Project Manager is John Wepryk, P.E.

To assist in your proposal preparation the most recent Airport Layout Plan, 5010 drawing, and project narrative are available online at **www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm** by selecting "Gilmer Municipal Airport".

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 E. 11th Street, Austin, Texas

78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site, URL address **http://www.dot.state.tx.us/avn/avn550.doc.** The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is an MS Word Template.

Please note:

Five completed, unfolded copies of Form AVN-551 **must be received** by TxDOT, Aviation at 150 E. Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than May 23, 2006, 4:00 p.m.

Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating planning proposals can be found at **www.dot.state.tx.us/business/avnconsultinfo.htm.** All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Sheri Quinlan, Grant Manager, or John Wepryk, Project Manager for technical questions at 1-800-68-PILOT (74568).

TRD-200602233
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: April 19, 2006

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Aviation Division - Request for Proposal for Professional Services

The City of Marfa, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional services firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional services as described below:

Airport Sponsor: The City of Marfa, Marfa Municipal Airport. TxDOT CSJ No.0624MARFA. Scope: Engineering and design services for the reconstruction of a portion of Taxiway B and to create a Terminal Area Layout Update. Future work in the next five years may include construction of a hangar access taxiway and other elements as needed for the Marfa Municipal Airport.

The HUB goal is set at 0%. TxDOT Project Manager is Sandra Gaither.

Interested firms shall utilize the Form AVN-551, titled "Aviation Planning Services Proposal". The form may be requested from TxDOT Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site, URL address **http://www.dot.state.tx.us/avn/avn551.doc.** The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-551, firms are encouraged to download Form AVN-551 from the TxDOT website as addressed above. Utilization of Form AVN-551 from a previous download may not be the exact same format. Form AVN-551 is an MS Word Template.

Please note:

Five completed, unfolded copies of Form AVN-551 **must be received** by TxDOT, Aviation at 150 E. Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than May 23, 2006, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of Aviation Division staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each.

The criteria for evaluating planning proposals can be found at **www.dot.state.tx.us/business/avnconsultinfo.htm.** All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Sheri Quinlan, Grant Manager, or Sandra Gaither, Project Manager for technical questions at 1-800-68-PILOT (74568).

TRD-200602234
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: April 19, 2006

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Aviation Division - Request for Proposal for Professional Services

The County of Rusk, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional services firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional services as described below:

Airport Sponsor: The County of Rusk, Rusk County Airport. TxDOT CSJ No.06EAHENDR. Scope: Provide an Environmental Assessment at the Rusk County Airport.

The HUB goal is set at 0%. TxDOT Project Manager is Sandra Gaither.

Interested firms shall utilize the Form AVN-551, titled "Aviation Planning Services Proposal". The form may be requested from TxDOT Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483,

phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site, URL address **http://www.dot.state.tx.us/avn/avn551.doc.** The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-551, firms are encouraged to download Form AVN-551 from the TxDOT website as addressed above. Utilization of Form AVN-551 from a previous download may not be the exact same format. Form AVN-551 is an MS Word Template.

Please note:

Five completed, unfolded copies of Form AVN-551 **must be received** by TxDOT, Aviation at 150 E. Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than May 23, 2006, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of Aviation Division staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating planning proposals can be found at **www.dot.state.tx.us/business/avnconsultinfo.htm.** All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Sheri Quinlan, Grant Manager, or Sandra Gaither, Project Manager for technical questions at 1-800-68-PILOT (74568).

TRD-200602232
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: April 19, 2006

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affecte***d. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).