

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 rule (Government Code, §2001.036). If a rule is adopted without change to the text of 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 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 353. MEDICAID MANAGED CARE SUBCHAPTER G. STAR+PLUS

1 TAC §353.608

The Texas Health and Human Services Commission (HHSC) adopts amendments to §353.608, concerning Minimum Payment Amounts to Qualified Nursing Facilities, with changes to the proposed text as published in the March 4, 2016, issue of the *Texas Register* (41 TexReg 1553). The text of the rule will be republished.

BACKGROUND AND JUSTIFICATION

During its 84th Session, the Texas Legislature, through the 2016-2017 General Appropriations Act (Article II, House Bill 1, 84th Legislature, Regular Session, 2015, Rider 97), directed HHSC to transition the Nursing Facility Minimum Payment Amounts Program (MPAP) from a program solely based on enhanced payment rates to publically owned nursing facilities to a Quality Incentive Payment Program (QIPP) for all nursing facilities that have a source of public funding for the non-federal share. The additional payments to nursing facilities through the QIPP were to be based on improvements in quality and innovation in the provision of nursing facility services.

Proposed new §353.609 (41 TexReg 11), concerning Quality Incentive Payment Program for Nursing Facilities, described the QIPP.

The proposed amendments to §353.608 allowed a transition period for existing MPAP participants to make the shift to QIPP. In this transition period, current MPAP participants would be allowed to receive MPAP payments at approximately 50 percent of their current MPAP payment level. Facilities not currently enrolled in MPAP would not be eligible for transition MPAP payments.

The proposed amendment added a new eligibility period; described eligibility requirements for the new eligibility period; and indicated that, for the new eligibility period, the MPAP payment was to be equal to that calculated as per the existing MPAP methodology divided by two. Additionally, this proposed amendment changed the time period in which reconciliations would occur, added the option for HHSC to perform interim reconciliations for the new eligibility period only, and updated the consequences to participants that do not timely provide the non-federal share of the MPAP payment.

HHSC submitted a QIPP concept paper to the Centers for Medicare and Medicaid Services (CMS) for review and comment on October 30, 2015. In February and March of 2016, HHSC began to receive feedback from CMS regarding the concept paper.

HHSC was unable to resolve CMS concerns to allow for implementation of QIPP on September 1, 2016. HHSC is continuing to work with CMS with a goal of resolving their concerns in time to enable a March 1, 2017, rollout of QIPP. In the interim, the initiation of a transition period for QIPP is no longer necessary. As a result, the proposed amendments to §353.608 are being adopted with the following changes to the proposed text.

Proposed subsection (b)(9) is amended to indicate that Eligibility Period Three will end February 28, 2017, rather than August 31, 2017.

Proposed subsection (d)(4) is deleted. This paragraph indicated that the MPAP payment for Eligibility Period Three would be equal to the MPAP payment calculated under the existing methodology divided by two. MPAP participants will instead be eligible for the entire amount available under the existing methodology. Therefore, MPAP participants will receive roughly the same amount in the six-month extension as they would receive under the original proposal.

Proposed subsection (g)(4)(B) is amended to indicate that HHSC may complete interim reconciliations for Eligibility Period Three between February 28, 2017, and February 28, 2019, rather than between August 31, 2017, and August 31, 2019.

Proposed subsection (j) is amended to indicate that the MPAP program will expire on February 28, 2017.

The end result of these changes upon adoption will be to extend the existing MPAP program for current participants who chose to re-enroll for Eligibility Period Three through February 28, 2017, allowing MPAP payments to continue flowing to these participants while HHSC continues negotiations with CMS regarding QIPP. In effect, the status quo with regard to the MPAP program will be maintained for six more months.

COMMENTS

The 30-day comment period ended April 4, 2016. During this period, HHSC received no comments regarding the proposed amendments to this rule.

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the

agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance (Medicaid) payments under Texas Human Resources Code Chapter 32.

§355.608. *Minimum Payment Amounts to Qualified Nursing Facilities.*

(a) Introduction. This section establishes minimum payment amounts for certain non-state government-owned nursing facility providers participating in the STAR+PLUS Program, or other Medicaid managed care programs offering nursing facility services, and the conditions for receipt of these amounts.

(b) Definitions.

(1) Calculation Period--A month used to calculate the Minimum Payment Amount. There are six calculation periods in Eligibility Period One and twelve calculation periods in Eligibility Period Two.

(2) CHOW Application--An application filed with the Department of Aging and Disability Services for a nursing facility change of ownership.

(3) Clean Claim--A claim submitted by a provider for health care services rendered to an enrollee with the data necessary for the managed care organization to adjudicate and accurately report the claim. Claims for Nursing Facility Unit Rate services that meet the Department of Aging and Disability Services' criteria for clean claims submission are considered Clean Claims. Additional information regarding Department of Aging and Disability Services' criteria for clean claims submission is included in HHSC's Uniform Managed Care Manual, which is available on HHSC's website.

(4) DADS--The Texas Department of Aging and Disability Services.

(5) Eligibility Period--A period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section.

(6) Eligibility Period One--The first period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section, covering dates of service from the later of March 1, 2015, or the date on which nursing facility services become managed care services, to August 31, 2015.

(7) Eligibility Period Two--The second period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section, covering dates of service from September 1, 2015, to August 31, 2016.

(8) Eligibility Period Two-A--The third period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section, covering dates of service from December 1, 2015, to August 31, 2016.

(9) Eligibility Period Three--The fourth period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section, covering dates of service from September 1, 2016, to February 28, 2017.

(10) First Payment--The payment made in the ordinary course of business by MCOs to Qualified Nursing Facilities for the provision of covered services to Medicaid recipients.

(11) HHSC--The Texas Health and Human Services Commission or its designee.

(12) Intergovernmental transfer (IGT)--A transfer of public funds from a non-state governmental entity to HHSC.

(13) IGT Responsibility--The IGT owed by a non-state governmental entity, as determined by HHSC, for funding the non-federal share of the increase in the payments to the MCOs due to the Minimum Payment Amount program.

(14) MCO--A Medicaid managed care organization contracted with HHSC to provide nursing facility services to Medicaid recipients.

(15) Minimum Payment Amount--The minimum payment amount for a Qualified Nursing Facility, as calculated under subsection (d) of this section.

(16) Network Nursing Facility--A nursing facility that has a contract with an MCO for the delivery of Medicaid covered benefits to the MCO's enrollees.

(17) Non-state Governmental Entity--A hospital authority, hospital district, health district, city or county.

(18) Non-state Government-owned Nursing Facility--A network nursing facility where a non-state governmental entity holds the license and is a party to the nursing facility's Medicaid provider enrollment agreement with the state.

(19) Nursing Facility Add-on Services--The types of services that are provided in the nursing facility setting by a provider, but are not included in the Nursing Facility Unit Rate, including but not limited to emergency dental services, physician-ordered rehabilitative services, customized power wheel chairs, and augmentative communication devices.

(20) Nursing Facility Unit Rate--The types of services included in the DADS daily rate for nursing facility providers, such as room and board, medical supplies and equipment, personal needs items, social services, and over-the-counter drugs. The Nursing Facility Unit Rate also includes applicable nursing facility rate enhancements as described in §355.308 of this title (relating to Direct Care Staff Rate Component), and professional and general liability insurance. Nursing Facility Unit Rates exclude Nursing Facility Add-on Services.

(21) Qualified Nursing Facility--A Non-state Government-Owned Network Nursing Facility that meets the eligibility requirements described in subsection (e) of this section.

(22) Public Funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a non-state governmental entity that holds the license and is party to the Medicaid provider enrollment agreement with the state. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(23) Regional Healthcare Partnership (RHP)--A collaboration of interested participants that work collectively to develop and submit to the state a regional plan for health care delivery system reform as defined and established under Chapter 354, Subchapter D of this title (relating to Texas Healthcare Transformation and Quality Improvement Program).

(24) RUG--For the purpose of calculations described in subsection (d)(1) of this section, a resource utilization group under Medicare Part A as established by the Centers for Medicare & Medicaid Services (CMS). For the purpose of calculations described in subsection (d)(2) of this section, a resource utilization group under the RUG-III 34 group classification system, Version 5.20, index maximizing, as established by the state and CMS.

(25) Second Payment--The amount a Qualified Nursing Facility can receive that is equal to the Minimum Payment Amount less adjustments to that amount, as described in subsection (d) of this section.

(c) Payment of Minimum Payment Amount to Qualified Nursing Facilities.

(1) An MCO must pay a Qualified Nursing Facility at or above the Minimum Payment Amount in two installment payments for a Calculation Period, using the calculation methodology described in subsection (d) of this section.

(A) The MCO must make the First Payment no later than ten calendar days after a Qualified Nursing Facility or its agent submits a Clean Claim for a Nursing Facility Unit Rate to the HHSC-designated portal or the MCO's portal, whichever occurs first. The MCO will make the First Payment for the Nursing Facility Unit Rate at or above the prevailing rate established by HHSC for the date of service. HHSC's website includes information concerning HHSC's prevailing rates. The MCO must make the Second Payment no later than 10 calendar days after being notified of the Second Payment amount by HHSC. The Second Payment will be the difference between the Minimum Payment Amount and the adjustment to the Minimum Payment Amount, as calculated by HHSC and described in subsection (d) of this section.

(B) For purposes of illustration only, if a Qualified Nursing Facility provider files a Clean Claim for a Nursing Facility Unit Rate on March 6, 2015, the MCO must make the First Payment no later than March 16, 2015, and the Second Payment no later than 10 calendar days after being notified of the Second Payment amount by HHSC.

(2) HHSC will provide each MCO with a list of its Qualified Nursing Facilities for each Calculation Period as well as the Second Payment amount, as calculated by HHSC and described in subsection (d) of this section, associated with the MCO's members for each of its Qualified Nursing Facilities.

(d) Calculation of the Second Payment. HHSC will calculate the Second Payment for each Qualified Nursing Facility using the methodology detailed in this subsection. If a Qualified Nursing Facility is contracted with more than one MCO, HHSC will calculate a separate Second Payment for each MCO with which the Qualified Nursing Facility is contracted.

(1) Calculate the Minimum Payment Amount. The Minimum Payment Amount is made up of multiple subsidiary amounts. There is a subsidiary amount for each RUG.

(A) To determine the subsidiary amount for a particular RUG, use the formula: $\text{Subsidiary Amount} = \text{Days of Service} \times \text{Medicare Rate}$, where:

(i) "Days of Service" is the total Medicaid days of service for a particular RUG for clean claims for services that were provided during the Calculation Period; and

(ii) "Medicare Rate" is the Medicare skilled nursing facility payment rate for the RUG in effect on the date of service.

(B) The Minimum Payment Amount is equal to the sum of all subsidiary amounts calculated in accordance with subparagraph (A) of this paragraph.

(2) Calculate the Adjustment to the Minimum Payment Amount. The adjustment to the Minimum Payment Amount is equal to the sum of all adjustments for each RUG. The adjustment to the Minimum Payment Amount is determined as follows:

(A) First, determine the amount of the First Payment to the nursing facility using the formula: $\text{First Payment} = \text{Days of Service} \times \text{MCO Rate}$, where:

(i) "Days of Service" is the total Medicaid days of service for a particular RUG for clean claims for services that were provided during the Calculation Period; and

(ii) "MCO Rate" is the rate paid by the MCO for the particular RUG.

(B) Second, sum the result in subparagraph (A) of this paragraph for each RUG.

(C) Third, add or subtract, as necessary, the amount of payment adjustments to Nursing Facility Unit Rate claims for services that were provided during the Calculation Period from the result in subparagraph (B) of this paragraph.

(D) Fourth, determine the amount related to the Nursing Facility Add-on Services using the formula: $\text{Nursing Facility Add-on Amount} = \text{Days of Service} \times \text{Per Diem}$, where:

(i) "Days of Service" equals the number used in subparagraph (A)(i) of this paragraph; and

(ii) "Per Diem" is an estimate, as determined by HHSC, of the weighted average per diem payment amount for Nursing Facility Add-on Services provided to Medicaid recipients in Qualified Nursing Facilities.

(I) For Eligibility Period One, the per diem will equal \$3.48.

(II) For Eligibility Period Two, the per diem will equal \$3.48 plus medical inflation between the mid-point of Eligibility Period One and the mid-point of Eligibility Period Two, as determined by HHSC.

(III) For Eligibility Period Two-A, the per diem will equal \$3.48 plus medical inflation between the mid-point of Eligibility Period One and the mid-point of Eligibility Period Two-A, as determined by HHSC.

(IV) For Eligibility Period Three, the per diem will equal \$3.48 plus medical inflation between the mid-point of Eligibility Period One and the mid-point of Eligibility Period Three, as determined by HHSC.

(E) Fifth, sum the result in subparagraph (D) of this paragraph for each RUG.

(F) Sixth, determine the adjustment to the Minimum Payment Amount by subtracting the result from subparagraph (E) of this paragraph from the result from subparagraph (C) of this paragraph.

(3) Calculate the Second Payment. To determine the Second Payment, subtract the adjustment to the Minimum Payment Amount described in paragraph (2)(F) of this subsection from the Minimum Payment Amount described in paragraph (1) of this subsection.

(e) Eligibility for Receipt of Minimum Payment Amounts.

(1) A nursing facility is eligible to receive the Minimum Payment Amounts described in this section if it complies with the requirements described in this subsection for each Eligibility Period.

(2) Eligibility Period One. A nursing facility is eligible to receive Minimum Payment Amounts for Eligibility Period One if it meets the following requirements:

(A) The nursing facility must be a Non-state Government-owned Nursing Facility with a Medicaid contract effective date

of October 1, 2014, or earlier. HHSC will finalize its list of eligible facilities on November 1, 2014. A facility may only be eligible if its contract is assigned by DADS to a non-state government entity by October 31, 2014, with an effective date of October 1, 2014, or earlier.

(B) The Non-state Governmental Entity that owns the nursing facility must have entered into an IGT Responsibility agreement with HHSC by November 3, 2014. The IGT Responsibility agreement will cover the estimated IGT Responsibility for the nursing facility for the Eligibility Period.

(C) The Non-state Governmental Entity that owns the nursing facility must certify the following facts on a form prescribed by HHSC and the form must be received by HHSC by November 3, 2014.

(i) That it is a Non-state Government-owned Nursing Facility where a Non-state Governmental Entity holds the license and is party to the facility's Medicaid contract.

(ii) That all funds transferred to HHSC via IGT for use as the state share of payments are Public Funds.

(iii) That no part of any payment made under the Minimum Payment Amount program under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds.

(3) Eligibility Period Two. A nursing facility is eligible to receive the Minimum Payment Amounts for Eligibility Period Two if it has met the following requirements:

(A) The nursing facility must be a Non-state Government-owned Nursing Facility with a Medicaid contract effective date of March 1, 2015, or earlier. HHSC will finalize its list of eligible facilities on March 1, 2015. A facility may only be eligible if its contract is assigned by DADS to a non-state government entity by February 28, 2015, with an effective date of March 1, 2015, or earlier.

(B) The Non-state Governmental Entity that owns the nursing facility must have entered into an IGT Responsibility agreement with HHSC by February 28, 2015. The IGT Responsibility agreement will cover the estimated IGT Responsibility for the nursing facility for the Eligibility Period.

(C) The Non-state Governmental Entity that owns the nursing facility must certify the following facts on a form prescribed by HHSC and the form must be received by HHSC by February 28, 2014.

(i) That it is a Non-state Government-owned Nursing Facility where a Non-state Governmental Entity holds the license and is party to the facility's Medicaid contract.

(ii) That all funds transferred to HHSC via IGT for use as the state share of payments are Public Funds.

(iii) That no part of any payment made under the Minimum Payment Amount program under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds.

(D) The Non-state Governmental Entity that owns the nursing facility must submit to HHSC, upon demand, copies of any contracts it has with third parties that reference the administration of, or payments from, the Minimum Payment Amount program.

(4) Eligibility Period Two-A. A nursing facility is eligible to receive the Minimum Payment Amounts for Eligibility Period Two-A if it has met the following requirements:

(A) The nursing facility must not be eligible to receive the Minimum Payment Amounts for Eligibility Period Two.

(B) The nursing facility must be a Non-state Government-owned Nursing Facility with a Medicaid contract effective date of June 1, 2015, or earlier. HHSC will finalize its list of eligible facilities on June 1, 2015. A facility may only be eligible if its contract is assigned by DADS to a non-state government entity by May 31, 2015, with an effective date of June 1, 2015, or earlier.

(C) The nursing facility must have given DADS written notice of the change of ownership on or before February 1, 2015, but have not qualified for Eligibility Period Two because its contract was not assigned by DADS to a non-state government entity by February 28, 2015.

(D) DADS must have received all required documents pertaining to the change of ownership (i.e., DADS must have a complete application for a change of ownership license as described under 40 TAC §19.201(b) (relating to Criteria for Licensing)) by April 15, 2015.

(E) The Non-state Governmental Entity that owns the nursing facility must have entered into an IGT Responsibility agreement with HHSC by May 31, 2015. The IGT Responsibility agreement must cover the estimated IGT Responsibility for the nursing facility for the Eligibility Period.

(F) The Non-state Governmental Entity that owns the nursing facility must certify the following facts on a form prescribed by HHSC and the form must be received by HHSC by May 31, 2015:

(i) that it is a Non-state Government-owned Nursing Facility where a Non-state Governmental Entity holds the license and is party to the facility's Medicaid contract;

(ii) that all funds transferred to HHSC via IGT for use as the state share of payments are Public Funds; and

(iii) that no part of any payment made under the Minimum Payment Amount program under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds.

(G) The Non-state Governmental Entity that owns the nursing facility must submit to HHSC, upon demand, copies of any contracts it has with third parties that reference the administration of, or payments from, the Minimum Payment Amount program.

(5) Eligibility Period Three. A nursing facility is eligible to receive the Minimum Payment Amounts for Eligibility Period Three if it has met the following requirements:

(A) The nursing facility was eligible to receive the Minimum Payment Amounts for Eligibility Period Two or Eligibility Period Two-A.

(B) The Non-state Governmental Entity that owns the nursing facility must have entered into an IGT Responsibility agreement with HHSC by a date determined by HHSC. The IGT Responsibility agreement must cover the estimated IGT Responsibility for the nursing facility for the Eligibility Period.

(C) The Non-state Governmental Entity that owns the nursing facility must certify the following facts on a form prescribed by HHSC and the form must be received by HHSC by a date determined by HHSC:

(i) that it is a Non-state Government-owned Nursing Facility where a Non-state Governmental Entity holds the license and is party to the facility's Medicaid contract;

(ii) that all funds transferred to HHSC via IGT for use as the state share of payments are Public Funds; and

(iii) that no part of any payment made under the Minimum Payment Amount program under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds.

(D) The Non-state Governmental Entity that owns the nursing facility must submit to HHSC, upon demand, copies of any contracts it has with third parties that reference the administration of, or payments from, the Minimum Payment Amount program.

(6) Geographic Proximity to Nursing Facility.

(A) For eligibility period one, any nursing facility with a CHOW Application approved by DADS with an effective date on or after October 1, 2014, must be located in the same Regional Healthcare Partnership (RHP) as the Non-state Governmental Entity taking ownership of the nursing facility.

(B) For eligibility periods two, two-A, and three, any nursing facility with a CHOW Application approved by DADS with an effective date on or after October 1, 2014, must be located in the same RHP as, or within 150 miles of, the Non-state Governmental Entity taking ownership of the nursing facility.

(f) Claims Filing Deadline. A Qualified Nursing Facility must file a Clean Claim for a Nursing Facility Unit Rate no later than 60 calendar days after the end of the Calculation Period within which the service is provided for the claim to qualify for the Minimum Payment Amount described in this section. The MCO must pay a Clean Claim that is filed after this deadline but within 365 calendar days of the date of service, at the standard rate established in the network provider agreement for Nursing Facility Unit Services; however, claims filed after the 60 deadline will not be incorporated in the calculation of the Minimum Payment Amount.

(g) IGT Responsibility.

(1) Timing. HHSC will determine IGT responsibilities prior to the first day of the Eligibility Period.

(2) Aggregate IGT Responsibility. The aggregate IGT responsibility for all Qualified Nursing Facilities for an Eligibility Period will be equal to the non-federal share of the increase in the MCOs' capitation rates due to the Minimum Payment Amount program multiplied by the estimated number of member months for which the MCOs will receive the capitation rate during the eligibility period multiplied by 1.1.

(3) Allocation of Aggregate IGT Responsibility to Individual Nursing Facilities. HHSC will allocate the aggregate IGT responsibility to each qualified nursing facility based on the percentage of the total increase in the MCOs' capitation rates due to the Minimum Payment Amount program associated with the nursing facility in the base period data used to develop the capitation rates.

(4) Reconciliation. HHSC will complete the reconciliation in two parts.

(A) The first reconciliation will occur no later than 120 days after the end of the eligibility period.

(i) HHSC will compare the amount transferred by the Non-state Governmental Entity to HHSC for the eligibility period to the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity.

(ii) The calculation of the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity will be the same as the calculation of allocated aggregate IGT responsibility to all Qualified Nursing Facilities owned by the Non-state Governmental Entity as described in paragraphs (2) and (3) of this subsection with two exceptions:

(I) "Member months" will be revised to reflect actual known member months for the eligibility period. The revision will be conducted no sooner than the day after the last day of the eligibility period and no later than 120 days after the end of the eligibility period.

(II) The "Aggregate IGT Responsibility" described in paragraph (2) of this subsection will be equal to the non-federal share of the increase in the MCO's capitation rates due to the Minimum Payment Amount program multiplied by the revised member months. The calculation will not include the additional ten percent included in the calculation of the original aggregate IGT responsibility.

(III) No other changes will be made to the calculation of the allocated aggregate IGT responsibility and no other data points included in the calculation will be updated for purposes of this reconciliation.

(iii) If the amount transferred by the Non-state Governmental Entity exceeds the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity, HHSC will refund the excess amount to the Non-state Governmental Entity, less two percent of the amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity.

(iv) If the amount transferred by the Non-state Governmental Entity is less than the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity, HHSC will notify the Non-state Governmental Entity of the amount of the shortfall and of a deadline for the Non-state Governmental Entity to transfer the shortfall plus two percent of the amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity.

(B) For Eligibility Period Three only, HHSC may complete interim reconciliations between February 28, 2017, and February 28, 2019, as updated enrollment data for the Program Period, as reflected in adjusted member months, becomes available. HHSC will follow the process described in subparagraph (A) of this paragraph for such interim reconciliations.

(C) The second reconciliation will occur no later than 25 months after the end of the eligibility period.

(i) HHSC will compare the amount transferred by the Non-state Governmental Entity to HHSC for the eligibility period to the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity.

(ii) The calculation of the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity will be the same as the calculation of allocated aggregate IGT responsibility to all Qualified Nursing Facilities owned by the Non-state Governmental Entity as described in subparagraph (A) of this paragraph except that member months will be revised to reflect updated actual known mem-

ber months for the eligibility period. The revision will be conducted sometime during the 25th month after the end of the eligibility period.

(iii) If the amount transferred by the Non-state Governmental Entity exceeds the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity, HHSC will refund the excess amount to the Non-state Governmental Entity.

(iv) If the amount transferred by the Non-state Governmental Entity is less than the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity, HHSC will notify the Non-state Governmental Entity of the amount of the shortfall and of a deadline for the Non-state Governmental Entity to transfer the shortfall.

(D) If the Non-state Governmental Entity does not timely complete the transfer described in subparagraph (A), (B), or (C) of this paragraph, HHSC may:

(i) determine that all nursing facilities owned by the Non-state Governmental Entity are ineligible to receive the Minimum Payment Amount for future eligibility periods;

(ii) withhold any or all future Medicaid payments from the Non-state Governmental Entity until HHSC has recovered an amount equal to the shortfall; and

(iii) retain any funds that would normally be returned to the Non-state Governmental Entity as part of the reconciliation process.

(5) All IGT calculations are solely at the discretion of HHSC and are not open to desk review or appeal.

(h) Changes of Ownership. If a Qualified Nursing Facility changes ownership to another non-state government entity during either of the eligibility periods described in subsection (e) of this section, then the data used for the calculations described in subsection (d) of this section will include data from the facility for the entire Calculation Period, including data relating to payments for days of service provided under the prior owner.

(i) Recoupment.

(1) If payments under this section result in an overpayment to a nursing facility, or in the event of a disallowance by CMS of federal participation related to a nursing facility's receipt of or use of payment amounts authorized under subsection (d) of this section, the MCO(s) may recoup an amount equivalent to the amount of the second payment amount that was overpaid or disallowed.

(2) Second payment amount payments under this section may be subject to any adjustments for payments made in error, including, without limitation, adjustments made under the Texas Administrative Code, the Code of Federal Regulations and state and federal statutes. The MCO(s) may recoup an amount equivalent to any such adjustment from the nursing facility in question.

(3) If HHSC determines that part of any payment made under the Minimum Payment Amount program was used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds, the MCO(s) may recoup an amount equal to the second payment amount from the nursing facility in question.

(4) If HHSC determines that an ownership change to a Non-state Governmental Entity was based on fraudulent or misleading statements on a nursing facility CHOW application or during the CHOW process, the MCO(s) may recoup an amount equal to the

second payment amount from the nursing facility in question for any eligibility period affected by the fraudulent or misleading statement.

(j) Dates the Minimum Payment Amount is available. The minimum payment requirements described in this section will only cover dates of service from the later of March 1, 2015, or the date on which nursing facility services become managed care services, to February 28, 2017.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER BB. COMMISSIONER'S

RULES ON REPORTING REQUIREMENTS

19 TAC §61.1027

The Texas Education Agency adopts an amendment to §61.1027, concerning reporting requirements. The amendment is adopted without changes to the proposed text as published in the January 1, 2016 issue of the *Texas Register* (41 TexReg 73) and will not be republished. The section addresses the report on the number of disadvantaged students. The adopted amendment modifies the rule to reflect changes in statute made by House Bill (HB) 1305, 84th Texas Legislature, 2015.

REASONED JUSTIFICATION. The Texas Education Code (TEC), §33.901, provides requirements for certain school districts and open-enrollment charter schools to provide a free or reduced-price breakfast program for eligible students. HB 1305, 84th Texas Legislature, 2015, amended the TEC, §33.901, to allow a school district or charter school that would otherwise be required to participate in the national School Breakfast Program (SBP) to instead develop and implement a locally funded program to provide free or reduced-price meals to all students in the school(s) who are eligible for the national program.

The TEC, §42.152, establishes the state compensatory education (SCE) allotment and provides the methods for determining the number of educationally disadvantaged students in a district. Before amendment by HB 1305, the TEC, §42.152(b), allowed school districts and open-enrollment charter schools to use the alternative reporting method only if no campuses participated in the NSLP or SBP. HB 1305 amended the statute to permit districts and open-enrollment charter schools to generate SCE funding both for students who participate in the NSLP or SBP at one or more campuses in the district and for students who participate in a locally funded program at one or more campuses in the district.

HB 1305 also amended the TEC, §42.152, to change the calculation of the number of educationally disadvantaged students for purposes of calculating the SCE allotment within the Foundation School Program (FSP) from averaging the best six months' enrollment in the NSLP for the preceding school year to averaging the best six months' number of students eligible for enrollment in the NSLP.

Finally, the TEC, §42.152, was changed by HB 1305 to allow a student receiving a full-time virtual education to be included in the determination of the number of educationally disadvantaged students in a district if the school district submits a plan to the commissioner detailing the enhanced services that will be provided to the students and the plan is approved by the commissioner.

The adopted amendment to 19 TAC §61.1027 reflects the changes made by HB 1305. Subsection (a) was amended to clarify which school districts and open-enrollment charter schools may use the alternative method of calculating the number of disadvantaged students. In addition, language was added to subsection (b) to specify the requirements school districts and charter schools must follow in order to count students receiving a full-time virtual education in the number of disadvantaged students.

SUMMARY OF COMMENTS AND AGENCY RESPONSES. The public comment period on the proposal began January 1, 2016, and ended February 1, 2016. Following is a summary of the comment received and the corresponding agency response regarding the proposed amendment to 19 TAC Chapter 61, School Districts, Subchapter BB, Commissioner's Rules on Reporting Requirements, §61.1027, Report on the Number of Disadvantaged Students.

Comment: Texas State Senator Larry Taylor and State Representative Greg Bonnen proposed using August 2015 and September 2015 local data for districts with one or more campuses that discontinued participation in the NSLP or SBP in anticipation of the bill's implementation when calculating fiscal year (FY) 2016 SCE funding.

Agency Response: The agency agrees. Using the FSP payment system's existing SCE module, the agency will coordinate the collection and submission of local SCE data for August 2015 and September 2015 for the school districts and open-enrollment charter schools that discontinued participation in the NSLP or SBP in anticipation of the bill's implementation. The data will be captured in the SCE module's Alternative Basic Monthly Claims reporting mechanism, and FY 2016 SCE funding will be adjusted accordingly on the summary of finances. Since this comment relates to agency processes rather than the rule itself, no changes to the proposed amendment are necessary.

STATUTORY AUTHORITY. The amendment is adopted under the Texas Education Code, §42.152, as amended by House Bill 1305, 84th Texas Legislature, 2015, which authorizes the commissioner to adopt rules to provide a method other than participation in the National School Lunch Program for school districts to count their educationally disadvantaged students in order to qualify for compensatory education program funding.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §42.152, as amended by House Bill 1305, 84th Texas Legislature, 2015.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 27, 2016.

TRD-201602004

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: May 17, 2016

Proposal publication date: January 1, 2016

For further information, please call: (512) 475-1497



TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 13. MISCELLANEOUS INSURERS AND OTHER REGULATED ENTITIES

SUBCHAPTER F. PROFESSIONAL EMPLOYER ORGANIZATIONS SPONSORING SELF-FUNDED EMPLOYEE HEALTH BENEFIT PLANS

The Texas Department of Insurance adopts new 28 TAC Subchapter F, §§13.510 - 13.513, 13.520 - 13.524, 13.530 - 13.534, 13.540 - 13.545, 13.550 - 13.557, 13.560 - 13.568, 13.570 - 13.573, and 13.580 - 13.583 concerning the regulation of self-funded employee health benefit plans (plans) sponsored by professional employer organizations (PEOs) under Labor Code Chapter 91, concerning Professional Employer Associations. The commissioner also adopts by reference the Statutory Deposit Transaction Form, Form No. FIN407; the Declaration of Trust Form, Form No. FIN453; the Texas PEO Annual Report, Form No. FIN410, and the Texas PEO Quarterly Report, Form No. FIN409, including all instructions and requirements included on those forms. These new sections are adopted with changes to the proposed text published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9460). The changes from the proposal are nonsubstantive and reflect the TDI style guidelines.

A nonsubstantive change is made to §13.523 removing subsection (a)(4) which references Insurance Code Chapter 38, Subchapter C, concerning Data Collection and Reporting Relating to HIV and AIDS. This statute was repealed by SB 784, 84th Leg., Regular Session (2015), Effective September 1, 2015. All paragraphs from (5) to (107) were renumbered to reflect the removal of the provision citing the repealed statute.

Nonsubstantive changes are made to §§13.523(a)(38); 13.523(a)(83); 13.523(a)(101); 13.524(a), and (a)(8), (21), and (43); 13.534(f); 13.561; 13.572; 13.573(b); 13.580(d); and §13.582(a) and (c) as adopted to correct errors in the headings of statutes and rules that are cited in these provisions. A nonsubstantive edit is made to §13.552(a) to update the new title of the TDI section responsible for a plan amendment filing.

A nonsubstantive change is made to §13.532(a)(10) to add a parenthetical reference to the heading of a section the provision cites, and another nonsubstantive edit is made to §13.532(b)(1)

to clarify that a reference in the paragraph is to Division 6 of 28 TAC Chapter 13, Subchapter F.

Nonsubstantive changes are made to §13.542 and §13.582(e) to correct punctuation.

A nonsubstantive change is made to §13.553(d) to correct the use of section symbols in a citation.

REASONED JUSTIFICATION. The adopted sections are necessary to augment and implement the regulation of plans that are not fully insured and are sponsored by PEOs licensed by the Texas Department of Licensing and Regulation (TDLR), as required by Labor Code §91.0411, enacted under Senate Bill 1286, 83rd Legislature, Regular Session (2013), effective September 1, 2013.

Division 1 - Purpose and Definitions

This division addresses the purpose and application of the rule and provides definitions.

Section 13.510 states that the purpose of the new subchapter is to augment and implement the regulation of a PEO-sponsored self-funded employee health benefit plan, in compliance with Labor Code Chapter 91.

Section 13.511 identifies the PEO's sponsoring benefit plans that are and are not subject to the subchapter, and specifies that a PEO subject to the subchapter must be licensed by both TDLR and the department before offering a self-funded employee health benefit plan.

Section 13.512 states that the subchapter applies to a PEO and its plan and trust to the extent permitted by ERISA, and the section includes a severability provision.

Section 13.513 defines terms relevant to the subchapter. Where appropriate, definitions are drawn from Labor Code Chapter 91, from the Insurance Code, and from ERISA.

Division 2 - Applicability of Insurance Code and Administrative Code Provisions

This division provides a list of Insurance Code and Administrative Code provisions regulating a self-funded PEO-sponsored plan.

Section 13.521 establishes that the department will consider an approved PEO to be a large employer and will regulate its plan as a large employer health benefit plan for purposes of applying the Insurance and Administrative Codes.

Section 13.522 authorizes an approved PEO to delegate by contract to other entities regulated by the department (such as a third party administrator (TPA)) the performance of the PEO's or trust's statutory and regulatory requirements. The PEO or trust and the contracting regulated entity may be held jointly and severally liable by the department for noncompliance with respect to the delegated responsibilities. A PEO or trust must give the department notice of its intent to enter into, terminate, or replace a delegated contract. Notice must include pertinent information about the proposed contracting regulated entity, or other relevant information, such as whether on contract termination the functions performed under that contract will be performed by the PEO or trust, or by another contracted regulated entity. The section also includes procedures to be followed when a contracting regulated entity is terminated for cause. Day-to-day operations of the plan and trust must be performed by a TPA.

The balance of Division 2, §13.522 and §13.523, lists the sections of the Insurance Code and Administrative Code with which

an approved PEO must comply. These are provisions which apply, almost without exception, to a fully insured large employer health benefit plan regulated by the department. Section 13.522 and §13.523 each include subsections to clarify whether the approved PEO is considered an issuer or an employer for purposes of applicable Insurance Code and Administrative Code provisions where both entities are referenced.

Division 3 - Certificate of Approval

Division 3 sets out the certificate of approval requirements.

Section 13.530 requires a PEO to receive a certificate of approval from the department before sponsoring a plan in Texas. A PEO sponsoring a plan without approval will be considered an unauthorized insurer. This requirement, and the balance of the application requirements, are similar to those applied to risk-bearing entities seeking to do the business of health insurance in Texas.

Section 13.531 establishes that a PEO must apply for a certificate of approval by providing the information required by the division and must include an application fee of \$5,050.

Section 13.532 lists the information to be provided by an applicant seeking a certificate of approval.

Section 13.533 requires that an applicant include an independent actuarial opinion that describes the extent to which projected plan contributions are:

- * not excessive or discriminatory;
- * adequate to pay all plan benefits and expenses; and
- * sufficient to maintain adequate plan reserves and surplus.

The independent actuarial opinion will also show the expected allocation of client employers' contributions to fund the plan's administrative expenses, reserves, and other expenses.

Section 13.534 provides for the commissioner's review and approval or denial of a PEO's application for a certificate of approval, and the process to appeal a denial.

Division 4 - Conduct of Approved PEO

Division 4 sets out the requirements for management of the PEO and administration of the plan and trust.

Section 13.540 addresses the qualifications of the individuals responsible for the management of the PEO and the administration of the plan and trust. The section permits the PEO to maintain its books and records outside the state as permitted by Insurance Code Chapter 803, concerning Location of Books, Records, Accounts, and Offices Outside of This State.

Section 13.541 requires an approved PEO plan sponsor to contract for stop-loss insurance covering the plan and trust until a board of trustees has been established to manage the plan and trust.

Section 13.542 requires an approved PEO to maintain a fidelity bond or a zero-deductible crime policy to cover all individuals responsible for handling or administering plan funds or servicing the plan. This requirement remains in effect even after a board of trustees has been established to administer the plan and trust, because the PEO will be responsible for collecting and remitting contributions to the trust.

Section 13.543 regulates the approved PEO's conduct with respect to the plan and trust, including the establishment of plan contribution amounts, payments to the trust from PEO assets

and accounts, and reimbursement to the PEO from plan assets for its costs to establish and initially administer the plan and to comply with the subchapter's requirements. The section prohibits PEO transactions affecting the plan and trust and its assets that would violate state or federal law.

Section 13.544 regulates an approved PEO's marketing materials and offers of enrollment, and it requires guaranteed renewability in compliance with applicable state and federal law. Only employees of the PEO's clients and their dependents are eligible to enroll in an approved PEO's plan.

Section 13.545 governs an approved PEO's representations to clients and plan participants about pricing, billing, and notices of increased contributions. The section also requires the PEO to accept sole responsibility, without obligating its clients, for funding any asset amount needed to equal the liabilities owed by the plan should there be a shortfall in trust assets, and it renders unenforceable any client services agreement provision in conflict with the subchapter. Finally, the section prescribes certain language to be included in the summary plan description provided to plan participants.

Division 5 - Formation, Governance and Operation of Plan and Trust

Division 5 addresses the administration of an approved PEO's plan and trust.

Section 13.550 requires an approved PEO's plan to be established in compliance with ERISA and to contain specified provisions. The section authorizes an approved PEO to amend its plan without approval by the plan's trustees. All plan amendments must be submitted to the department for review and approval by the commissioner as described by §13.552 before becoming effective.

Section 13.551 requires an approved PEO's plan trust, in which all funds used to administer and pay claims are to be held, be established in compliance with the Trust Code and with ERISA. The trust must be governed by a board of trustees under a trust agreement, terms of which are set out in the subchapter. The trustees are authorized to amend the trust agreement without the approval of the approved PEO. All trust amendments must be submitted to the department for review and approval by the commissioner as described by §13.552 before becoming effective.

Section 13.552 specifies that the approved PEO must submit for approval by the commissioner to designated TDI offices all amendments to the documents of both the plan and the trust. The approved PEO must certify that the approved PEO and the plan will remain in compliance with the subchapter and with ERISA if a proposed plan amendment is approved and adopted. The trustees must certify that the trust will remain in compliance with the subchapter and with ERISA if a proposed trust amendment is approved and adopted. Transactions between affiliated parties are subject to Insurance Code Chapter 823, Subchapters B and C.

Section 13.553 establishes a plan fiduciary's duty, consistent with a fiduciary's duty under ERISA, and provides that the standard may change if the federal standard is modified. The section provides standards of conduct for a plan fiduciary involved in a transaction involving the plan or trust, and it requires that all plan and trust expenses be paid from plan assets. Finally, the section establishes the requirements for a voluntary trust termination, including a requirement that assets remaining in the trust

may not be distributed until the commissioner has cancelled the approved PEO's certificate of approval.

Section 13.554 regulates the appointment and number of plan trustees by the approved PEO, and it specifies that a person who is receiving or has received compensation from the trust is ineligible to serve as a board member.

Section 13.555 establishes the trustees' responsibilities and authority, including the duty of prudence, the responsibility for all operations of the plan, and the safeguarding of plan assets. Within 12 months of the board's formation, the trustees, either directly or through an appointed agent, must contract with a TPA and with a stop-loss carrier. Members of the board serve without compensation.

Section 13.556 requires that the trustees protect the plan's assets by buying fidelity coverage for those responsible for handling or administering plan assets, by buying errors and omissions insurance for the trustees' performance of their duties, and by annually reviewing documentation that the approved PEO has maintained and is maintaining its own fidelity coverage required under this subchapter.

Section 13.557 provides that all claims or other disputes arising under an approved PEO's plan are subject to the Insurance Code and other relevant state law, to the extent the Insurance Code and state law are not inconsistent with ERISA.

Division 6 - Financial Solvency Requirements for PEO Plans

Division 6 provides for financial requirements for approved PEO plans.

Section 13.560 establishes the methodology to be used to calculate claim reserves maintained in the plan's trust.

Section 13.561 requires that the trust invest its assets in compliance with Insurance Code Chapter 425, Subchapter C.

Section 13.562 requires an approved PEO to establish a deposit or letter of credit that represents at least 25 percent of the aggregate limit attachment point in the plan and trust's stop-loss agreement before beginning to enroll participants. The deposit or letter of credit must be maintained continually, and any deposit or letter of credit must be held for TDI's control.

In §13.562 TDI adopts by reference the Statutory Deposit Transaction Form, Form No. FIN407. This form requires information necessary for the department to record the deposit, substitution, or withdrawal of securities, including: the name and address of the PEO establishing the deposit; whether the transaction establishes, substitutes, or withdraws securities; the authority under which the deposited securities are held; the name of the designated custodian; security specific information, including the identification number, description, interest rate, par value amount, maturity date, and rating information; the total deposit or withdrawal amount for the transaction; a dated signature of an authorized officer of the entity establishing the deposit; and the total deposit, total withdrawal, and net balance after the transaction.

In §13.562 TDI also adopts by reference the Declaration of Trust Form, Form No. FIN453, which affirms that securities are unencumbered assets of the person or entity making a deposit and are pledged to the commissioner by reasons of law. This form requires information necessary to identify: the entity or person making a deposit, its principal place of business, its custodian or bank, and security specific information including the CUSIP number; interest rate; maturity date; and par value amount.

Section 13.563 specifies the form of the required deposit.

Section 13.564 requires that the amount of the deposit be recalculated annually, and it prescribes how changes to the deposit are to be made.

Section 13.565 provides the requirements for a letter of credit that can be used to replace or supplement a deposit to meet financial responsibility standards.

Section 13.566 requires that the amount of the letter of credit be recalculated annually, and discusses the consequences if a letter of credit is replaced, is not renewed, or is suspended.

Section 13.567 addresses the requirements for the stop-loss insurance that the plan trustees, or the approved PEO acting on the trustees' behalf, must maintain in the name of and for the benefit of the trust. The section regulates the issuer's qualifications and directs that certain terms be included in the stop-loss contract. It also establishes the trust's maximum retention of expected claims. The section permits the trustees to request from the commissioner a waiver or reduction in coverage amount. The commissioner will grant a waiver if the commissioner determines that the interests of the PEO's clients and the plan participants are adequately protected.

Section 13.568 provides the requirements for the fidelity bond or crime policy required under §13.542 and §13.556, which direct an approved PEO and a plan's board of trustees to maintain fidelity coverage for each person responsible for handling or administering plan assets. The requirements are consistent with similar requirements included in ERISA.

Division 7 - Quarterly and Annual Filings; Examinations; Hazardous Conditions

Division 7 addresses financial reporting, examination by TDI, and hazardous condition regulation. Section 13.570 describes both the quarterly and annual filings of the plan and trust's financial statement to be submitted by an approved PEO using generally accepted accounting principles of the United States as modified by the subchapter. The section states that the PEO must submit quarterly a certified unaudited financial statement, and annually both a certified unaudited financial statement for the previous four financial quarters and by June 1 of each year an audited financial statement meeting requirements set out in Insurance Code Chapter 401.

In §13.570 TDI adopts by reference the Texas PEO Annual Report, Form No. FIN410, and the Texas PEO Quarterly Report, Form No. FIN409, which are spreadsheets the PEO will file with information for TDI to assess facts about the PEO's financial condition. These forms may be requested by emailing PEO@tdi.texas.gov, and they are also available for inspection on TDI's website at www.tdi.texas.gov/rules/2015/index.html. The PEO must also file an annual actuarial opinion completed by a qualified actuary which includes a description of the actuarial soundness of the plan, a calculation of reserves as required by §13.560, and a recommendation on the level of specific and aggregate stop-loss insurance the trust should maintain.

Section 13.571 requires the PEO submit a fee with its annual statement filings.

Section 13.572 addresses the commissioner's examination of the affairs of an approved PEO and the plan and trust to the same extent that the commissioner can examine the affairs of a licensed domestic insurer.

Section 13.573 outlines what will be considered hazardous conditions for the plan and trust, and it identifies the regulatory actions the commissioner will order to correct or address those hazardous conditions.

Division 8 - Market Exit

Division 8 provides the requirements for approved PEO plans to exit the market.

Section 13.580 requires an approved PEO to file a withdrawal plan for review by the commissioner if it wants to voluntarily terminate its plan or is directed by the department to terminate its plan. The section details the contents of a withdrawal plan, and establishes conditions that must be met before the commissioner will approve such a plan. These requirements and conditions are designed to ensure the benefit plan's participants are protected from disruption by its dissolution. The commissioner has authority to modify or deny the withdrawal plan and take actions authorized under the Insurance Code if the approved PEO is unable to meet its contractual and financial obligations. The section also provides for the appeal of a commissioner's denial of a withdrawal plan.

Section 13.581 provides that the commissioner will limit, suspend, or cancel an approved PEO's certificate of approval in response to notice that TDLR has taken action against its license to operate in Texas. An approved PEO must notify the department within 10 days of receiving notice that TDLR is contemplating taking action against its license. While its license is suspended, an approved PEO cannot contract with a new client to allow the enrollment of new plan participants. If TDLR terminates a PEO's license, the PEO must file a withdrawal plan under §13.580 within 30 days; when the PEO has fulfilled its withdrawal plan, the commissioner will cancel the PEO's license. If TDLR reinstates a PEO's license or grants a new license, the PEO may reapply to TDI for a license.

Section 13.582 provides that the commissioner will limit, suspend, or cancel an approved PEO's certificate of approval if the commissioner finds that the approved PEO or its plan or trust do not meet the requirements of applicable Insurance Code provisions or of the subchapter. The section also provides for the appeal of an action by the commissioner.

Section 13.583 requires that an approved PEO must file a withdrawal plan within 30 days of receiving a notice of suspension. If the commissioner determines an approved PEO's certificate should be canceled, the PEO must file a withdrawal plan under §13.580, and upon the plan's completion, the commissioner will cancel the PEO's certificate of approval.

TDI adopts by reference the Statutory Deposit Transaction Form, Form No. FIN407; the Declaration of Trust Form, Form No. FIN453; the Texas PEO Annual Report, Form No. FIN410; and the Texas PEO Quarterly Report, Form No. FIN409, including all instructions and requirements included in those forms. These forms are available on TDI's website.

SUMMARY OF COMMENTS AND AGENCY RESPONSE. TDI received oral comments from two people. TDI did not receive any written comments. Commenters in support of the proposal were: Employer Flexible and the National Association of Professional Employer Organizations. TDI did not receive any comments in opposition to the proposal.

Two commenters provided general comments supportive of the rule and commended TDI staff's efforts on the rule. TDI is appreciative of the supportive comments.

One commenter requested that TDI continue to be willing to work with the industry as unexpected issues can arise out of the most well intentioned rules. TDI acknowledges the request.

DIVISION 1. PURPOSE AND DEFINITIONS

28 TAC §§13.510 - 13.513

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.510. Purpose.

The purpose of this subchapter is to augment and implement the regulation of an employee health benefit plan that is not fully insured and is sponsored by a PEO as permitted by Texas Labor Code Chapter 91, concerning Professional Employer Organizations.

§13.511. Regulated PEOs; Approval Required.

(a) PEOs subject to this subchapter. This subchapter applies to a PEO sponsoring a self-funded employee health benefit plan if:

- (1) its primary business location is in this state; or
- (2) a majority of the eligible employees of at least one of its clients are employed in this state; or
- (3) the primary business location of at least one of its clients is in this state, where no other state contains a majority of that employer's eligible employees.

(b) PEOs not subject to this subchapter. This subchapter does not apply to a PEO sponsoring an employee health benefit plan that consists only of benefits provided through a group insurance policy or evidence of coverage that guarantees the payment of claims for all eligible benefits issued by a carrier authorized to do business in this state.

(c) License and certificate of approval required. A PEO to which this subchapter applies may not offer a self-funded employee health benefit plan unless the PEO is:

- (1) licensed and in good standing with TDLR; and
- (2) has a certificate of approval from TDI issued under this subchapter.

(d) Insurance Code Chapter 846. Insurance Code Chapter 846, concerning Multiple Employer Welfare Arrangements, does not apply to a plan sponsored by a PEO unless:

(1) a PEO that does not have a certificate of approval to sponsor a PEO plan under this subchapter performs activities that require a certificate of authority under Chapter 846; or

(2) an approved PEO files a withdrawal plan that is approved by the commissioner, and relinquishes its certificate of approval as a PEO plan sponsor under this subchapter.

§13.512. ERISA's Applicability; Severability of Subchapter's Provisions.

(a) This subchapter applies to an approved PEO and its plan and trust to the extent permitted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001-1191c.

(b) If a court of competent jurisdiction holds that any provision of this subchapter or its application to any person or circumstance is invalid for any reason, the invalidity does not affect other provisions or applications of this subchapter that can be given effect without the invalid provision or application. To this end, the provisions of this subchapter are severable.

§13.513. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Affiliate--A person is defined as an affiliate under §7.202(a)(2) of this title (relating to Definitions).

(2) Approved PEO--A PEO that has received a certificate of approval from TDI to sponsor a plan.

(3) Cash--Currency and demand deposits with banks and other financial institutions.

(4) Client--A person who enters into a professional employer services agreement with a licensed PEO.

(5) Coemployment relationship--A contractual relationship between a client and a PEO that involves the sharing of employment responsibilities with or allocation of employment responsibilities to covered employees in compliance with the professional employer services agreement and Labor Code Chapter 91, concerning Professional Employment Organizations.

(6) Commissioner--The commissioner of insurance.

(7) Contracting regulated entity--An entity regulated by TDI that has contracted with an approved PEO to accept responsibility for the performance of any requirement of this subchapter.

(8) Controlling person--A person that directly or indirectly and alone or under an agreement with one or more other persons, exercises such a controlling influence over the management or policies of the PEO that it is necessary or appropriate in the public interest or for the protection of the PEO's covered employees that the person be considered to control the PEO. A person is presumed to be a controlling person if:

(A) the person or a person and members of the person's immediate family directly or indirectly, own, control, or hold with the power to vote 10 percent or more of the voting securities or authority of the PEO; or

(B) the person holds proxies representing 10 percent or more of the voting securities or authority of the PEO, but is not a corporate officer or director of the PEO.

(9) Covered employee--An individual having a coemployment relationship with a PEO and a client.

(10) Dependent--A person eligible to enroll in a plan because of the person's relationship to a covered employee.

(11) Fiduciary--To the extent not inconsistent with the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1002, concerning Definitions, a person is a plan fiduciary to the extent that the person:

(A) exercises any discretionary authority or discretionary control with respect to management of the plan, or exercises any authority or control with respect to management or disposition of plan assets; or

(B) has any discretionary authority or discretionary responsibility in the administration of the plan.

(12) Health status-related factor--Health status; medical condition, including both physical and mental illnesses; claims experience; receipt of health care; medical history; genetic information; evidence of insurability, including conditions arising out of acts of domestic violence; and disability, to the extent not inconsistent with ERISA, 29 U.S.C. §1182, concerning Prohibiting Discrimination Against Individual Participants and Beneficiaries Based on Health Status.

(13) Organizational documents--With respect to the plan and trust, the contracts, articles, bylaws, agreements, plan documents, trust agreements, or other documents or instruments describing the rights and obligations of:

(A) the PEO, its clients and coemployees; and

(B) the plan sponsor, its plan, plan trustees, administrators, and participants.

(14) Participant--A covered employee or dependent enrolled in a plan, to the extent not inconsistent with ERISA, 29 U.S.C. §1002 and §1144, concerning Other Laws.

(15) Person--An individual, corporation, partnership, association, joint stock company, trust, or unincorporated organization, or a similar entity or a combination of the listed entities acting in concert. The term does not include a securities broker while performing no more than a function that is usual and customary for a securities broker.

(16) Professional employer organization or PEO--A business entity that offers professional employer services, as defined in Labor Code Chapter 91.

(17) Plan--A self-funded employee health benefit plan established under Labor Code Chapter 91.

(18) Qualified financial institution--An institution that:

(A) is organized or, in the case of a United States branch or agency office of a foreign banking organization, licensed under the laws of the United States or any state of the United States; and

(B) is regulated, supervised, and examined by a federal or state authority that has regulatory authority over banks and trust companies.

(19) Reserves--A liability representing plan benefit obligations that have been incurred, whether known or unknown.

(20) TDI--The Texas Department of Insurance.

(21) TDLR--The Texas Department of Licensing and Regulation.

(22) Third party administrator--A person that holds a certificate of authority under Insurance Code Chapter 4151, Third Party Administrators.

(23) Trust--A trust established under Texas Property Code Title 9, Subtitle B, and ERISA, 29 U.S.C. §1103, concerning Establishment of Trust.

(24) Trustee--A person defined as a trustee under Texas Property Code Title 9, Subtitle B, to the extent not inconsistent with ERISA as provided in ERISA, 29 U.S.C. §1144, concerning Other Laws.

(25) Ultimate controlling person--A person that is not controlled by another person.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 27, 2016.

TRD-201601985

Norma Garcia

General Counsel

Texas Department of Insurance

Effective date: May 17, 2016

Proposal publication date: December 25, 2015

For further information, please call: (512) 676-6584



DIVISION 2. APPLICABILITY OF INSURANCE CODE AND ADMINISTRATIVE CODE PROVISIONS

28 TAC §§13.520 - 13.524

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.520. *Applicability of Insurance Code Provisions to an Approved PEO, Plan, or Trust.*

Under Labor Code §91.0411, this division lists Insurance Code and Administrative Code provisions that are necessary to augment and implement the regulation of a plan that is not fully insured.

§13.521. Applicable Insurance Code and Administrative Code Terms.

For purposes of this subchapter and for purposes of regulation by TDI:

(1) PEO as large employer. An approved PEO is a large employer as defined in Insurance Code Chapter 1501, concerning the Health Insurance Portability and Availability Act, unless a provision in this subchapter clearly indicates otherwise.

(2) PEO plan as large employer health benefit plan. An approved PEO's plan is a large employer health benefit plan as defined in Insurance Code Chapter 1501 unless a provision in this subchapter clearly indicates otherwise.

(3) Provisions applicable to both small and large employer plans. An Insurance Code or Administrative Code provision that refers to both small and large employer health benefit plans or their issuers applies to an approved PEO as a large employer health benefit plan issuer and to its plan as a large employer health benefit plan unless a provision in this subchapter clearly indicates otherwise.

(4) Plan document is group policy. An approved PEO's plan document is a group policy unless a provision in this subchapter clearly indicates otherwise.

(5) Certificate of coverage is certificate of insurance. An approved PEO's certificate of coverage is a certificate of insurance. An approved PEO's certificate of coverage must comply with ERISA, 29 U.S.C. §1022 (Summary plan description).

§13.522. Delegation of Functions to a Contracting Regulated Entity.

(a) Delegation to regulated entity. An approved PEO or the plan trustees may delegate to a contracting regulated entity the responsibility to perform any requirement of this subchapter that the contracting regulated entity is authorized by law to perform.

(b) Joint and several liability. If an approved PEO or the plan trustees delegate responsibility to perform any requirement of this subchapter, TDI in its sole discretion may hold the PEO, the plan trustees, and the contracting regulated entity jointly or severally liable for non-compliance with respect to the responsibilities delegated.

(c) Notice of contract with regulated entities. An approved PEO or the plan trustees must give the commissioner a written notice of intent to enter into a contract with a regulated entity at least 30 days before the effective date of that contract. A notice of intent must include the information about the contracting regulated entity required by §13.532(b)(6) of this title (relating to Application Requirements).

(d) Notice of termination of contract with regulated entity. Except as provided in subsection (g) of this section, an approved PEO or the plan trustees must give the commissioner a written notice of intent to terminate a contract with a regulated entity at least 30 days before the effective date of that termination.

(e) Third party administrator. An approved PEO or the plan trustees may not terminate under any circumstances a contract with the plan's third party administrator unless they have contracted with a replacement third party administrator to perform the day-to-day operations of the plan with no lapse in administrative services to the plan.

(f) Notice of replacement contracting regulated entity. Except as provided in subsection (h) of this section, if an approved PEO or the plan trustees intend to enter into a contract with a regulated entity to perform the functions for which a terminating contracting regulated entity was responsible, the approved PEO or the plan trustees must

provide the commissioner notice that complies with subsection (c) of this section.

(g) Notice of contract termination for cause. If an approved PEO or the plan trustees terminate a contract with a regulated entity for cause as permitted by the terms of that contract, the approved PEO or the plan trustees must give the commissioner written notice of the contract's termination not later than five days after the effective date of that termination, including a statement explaining whether the functions for which the terminating contracting regulated entity is responsible will be performed by the approved PEO or by another contracting regulated entity.

(h) Notice of intent to contract with replacement regulated entity. After a termination under subsection (g) of this section, if the plan and trust functions will be performed by another contracting regulated entity, the approved PEO or the plan trustees must give the commissioner written notice of intent to enter into a contract with that new regulated entity as soon as is practicable, but not later than 10 days after the effective date of that contract. The notice of intent must include the information about the contracting regulated entity required by §13.532(b)(6) of this title.

§13.523. Applicable Insurance Code Provisions.

(a) The following provisions of the Insurance Code are applicable to an approved PEO to the same extent as the provisions apply to any entity TDI regulates under those provisions:

(1) Insurance Code Chapter 36, Subchapter C, concerning General Subpoena Powers; Witnesses and Production of Records;

(2) Insurance Code Chapter 36, Subchapter D, concerning Judicial Review;

(3) Insurance Code §38.001, concerning Inquiries;

(4) Insurance Code Chapter 38, Subchapter F, concerning Data Collecting and Reporting Relating to Mandated Health Benefits and Mandated Offers of Coverage;

(5) Insurance Code Chapter 38, Subchapter H, concerning Health Care Reimbursement Rate Information;

(6) Insurance Code Chapter 40, concerning Duties of State Office of Administrative Hearings and Commissioner in Certain Proceedings; Rate Setting Proceedings;

(7) Insurance Code Chapters 82, concerning Sanctions;

(8) Insurance Code Chapter 83, concerning Emergency Cease and Desist Orders;

(9) Insurance Code Chapter 84, concerning Administrative Penalties;

(10) Insurance Code Chapter 101, concerning Unauthorized Insurance;

(11) Insurance Code Chapter 461, concerning General Provisions;

(12) Insurance Code §521.005, concerning Notice to Accompany Policy;

(13) Insurance Code Chapter 541, Subchapter A, concerning General Provisions;

(14) Insurance Code Chapter 541, Subchapter B, concerning Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Defined;

(15) Insurance Code Chapter 541, Subchapter B-1, concerning Advertising Requirements;

- (16) Insurance Code Chapter 542, concerning Processing and Settlement of Claims;
- (17) Insurance Code Chapter 543, concerning Prohibited Practices Related to Policy or Certificate of Membership;
- (18) Insurance Code Chapter 544, Subchapter A, concerning General Prohibitions Against Discrimination by an Insurer or Health Maintenance Organization;
- (19) Insurance Code Chapter 544, Subchapter B, concerning Other General Prohibitions Against Discrimination by Insurers;
- (20) Insurance Code Chapter 544, Subchapter C, concerning English Fluency;
- (21) Insurance Code Chapter 544, Subchapter D, concerning Family Violence;
- (22) Insurance Code Chapter 544, Subchapter E, concerning Fibrocystic Breast Condition;
- (23) Insurance Code Chapter 545, concerning HIV Testing;
- (24) Insurance Code Chapter 546, concerning Use of Genetic Testing Information;
- (25) Insurance Code §550.002, concerning Increase in Certain Premium Payments;
- (26) Insurance Code Chapter 558, concerning Refund of Unearned Premium;
- (27) Insurance Code Chapter 560, concerning Prohibited Rates;
- (28) Insurance Code Chapter 601, concerning Privacy;
- (29) Insurance Code Chapter 602, concerning Privacy of Health Information;
- (30) Insurance Code Chapter 701, concerning Insurance Fraud Investigations;
- (31) Insurance Code Chapter 705, concerning Misrepresentations by Policyholders;
- (32) Insurance Code Chapter 801, concerning Certificate of Authority;
- (33) Insurance Code Chapter 803, concerning Location of Books, Records, Accounts, and Offices Outside of this State;
- (34) Insurance Code Chapter 804, concerning Service of Process;
- (35) Insurance Code Chapter 823, Subchapter B, concerning Registration;
- (36) Insurance Code Chapter 823, Subchapter C, concerning Transactions of Registered Insurer;
- (37) Insurance Code Chapter 823, Subchapter D, concerning Control of Domestic Insurer; Acquisition or Merger;
- (38) Insurance Code §1201.013, concerning Programs Promoting Disease Prevention, Wellness, and Health;
- (39) Insurance Code §1201.059, concerning Termination of Coverage Based on Age of Child in Individual, Blanket, or Group Policy;
- (40) Insurance Code §1201.062, concerning Coverage for Certain Children in Individual or Group Policy or in Plan or Program;
- (41) Insurance Code §1201.063, concerning Prohibition of Certain Criteria Relating to a Child's Coverage in Individual or Group Policy;
- (42) Insurance Code §1201.064, concerning Coverage for Child of Spouse in Individual or Group Policy;
- (43) Insurance Code Chapter 1203, concerning Coordination of Benefits Provisions;
- (44) Insurance Code Chapter 1204, Subchapter A, concerning Payments to Certain Public Hospitals;
- (45) Insurance Code Chapter 1204, Subchapter B, concerning Assignment of Benefit Payments;
- (46) Insurance Code Chapter 1204, Subchapter D, concerning Payments for Certain Publicly Provided Services;
- (47) Insurance Code Chapter 1204, Subchapter E, concerning Exclusionary Clauses;
- (48) Insurance Code Chapter 1204, Subchapter F, concerning Payment of Benefits to Conservator of Minor;
- (49) Insurance Code Chapter 1205, concerning Certificate of Creditable Coverage;
- (50) Insurance Code Chapter 1206, concerning Denial of Health Benefit Plan Enrollment Based on Existing Coverage Prohibited;
- (51) Insurance Code Chapter 1207, concerning Enrollment of Medical Assistance Recipients and Children Eligible for State Child Health Plan;
- (52) Insurance Code Chapter 1208, concerning Identity of Available Employee of Health Benefit Plan Issuer;
- (53) Insurance Code Chapter 1210, concerning Notice of Certain Policy Provisions;
- (54) Insurance Code Chapter 1213, concerning Electronic Health Care Transactions;
- (55) Insurance Code Chapter 1214, concerning Advertising for Certain Health Benefits;
- (56) Insurance Code Chapter 1215, concerning Reporting of Claims Information;
- (57) Insurance Code Chapter 1216, concerning Out-of-Country Coverage Prohibited;
- (58) Insurance Code Chapter 1251, Subchapter C, concerning Group Accident and Health Insurance: Required Provisions;
- (59) Insurance Code Chapter 1251, Subchapter D, concerning Group Accident and Health Insurance: Coverage for Dependents;
- (60) Insurance Code Chapter 1251, Subchapter E, concerning Group Accident and Health Insurance: General Provisions;
- (61) Insurance Code Chapter 1251, Subchapter F, concerning Continuation or Conversion Privilege on Termination of Coverage under Group Policy, except that an approved PEO may not offer a conversion policy under Insurance Code §1251.256, concerning Conversion of Group Policy;
- (62) Insurance Code Chapter 1251, Subchapter G, concerning Continuation of Group Coverage for Certain Family Members and Dependents;

- (63) Insurance Code Chapter 1252, concerning Discontinuation and Replacement of Group and Group-Type Health Benefit Plan Coverage;
- (64) Insurance Code Chapter 1274, concerning Electronic Transmission of Eligibility and Payment Status;
- (65) Insurance Code Chapter 1301, concerning Preferred Provider Benefit Plans, except that a small PEO plan is not subject to §1301.009, concerning Annual Report;
- (66) Insurance Code Chapter 1351, concerning Home Health Services;
- (67) Insurance Code Chapter 1352, concerning Brain Injury;
- (68) Insurance Code Chapter 1355, concerning Benefits for Certain Mental Disorders;
- (69) Insurance Code Chapter 1356, concerning Low-Dose Mammography;
- (70) Insurance Code Chapter 1357, concerning Mastectomy;
- (71) Insurance Code Chapter 1358, concerning Diabetes;
- (72) Insurance Code Chapter 1359, concerning Formulas for Individuals with Phenylketonuria or Other Heritable Diseases;
- (73) Insurance Code Chapter 1360, concerning Diagnosis and Treatment Affecting Temporomandibular Joint;
- (74) Insurance Code Chapter 1361, concerning Detection and Prevention of Osteoporosis;
- (75) Insurance Code Chapter 1362, concerning Certain Tests for Detection of Prostate Cancer;
- (76) Insurance Code Chapter 1363, concerning Certain Tests for Detection of Colorectal Cancer;
- (77) Insurance Code Chapter 1364, concerning Coverage Provisions Relating to HIV, Aids, or HIV-Related Illnesses;
- (78) Insurance Code Chapter 1365, concerning Loss or Impairment of Speech or Hearing;
- (79) Insurance Code Chapter 1366, concerning Benefits Related to Fertility and Childbirth;
- (80) Insurance Code Chapter 1367, concerning Coverage of Children;
- (81) Insurance Code Chapter 1368, concerning Availability of Chemical Dependency Coverage;
- (82) Insurance Code Chapter 1369, concerning Benefits Related to Prescription Drugs and Devices and Related Services;
- (83) Insurance Code Chapter 1370, concerning Certain Tests for Detection of Human Papillomavirus, Ovarian Cancer, and Cervical Cancer;
- (84) Insurance Code Chapter 1371, concerning Coverage for Certain Prosthetic Devices, Orthotic Devices, and Related Services;
- (85) Insurance Code Chapter 1376, concerning Certain Tests for Early Detection of Cardiovascular Disease;
- (86) Insurance Code Chapter 1377, concerning Coverage for Certain Amino Acid-Based Elemental Formulas;
- (87) Insurance Code Chapter 1379, concerning Coverage for Routine Patient Care Costs for Enrollees Participating in Certain Medical Trials;
- (88) Insurance Code Chapter 1451, concerning Access to Certain Practitioners and Facilities;
- (89) Insurance Code Chapter 1453, concerning Disclosure of Reimbursement Guidelines under Managed Care Plan;
- (90) Insurance Code Chapter 1454, concerning Equal Health Care for Women;
- (91) Insurance Code Chapter 1455, concerning Telemedicine and Telehealth;
- (92) Insurance Code Chapter 1456, concerning Disclosure of Provider Status;
- (93) Insurance Code Chapter 1460, concerning Standards Required Regarding Certain Physician Rankings by Health Benefit Plans;
- (94) Insurance Code Chapter 1467, concerning Out-of-Network Claim Dispute Resolution;
- (95) Insurance Code Chapter 1501, Subchapter A, concerning General Provisions;
- (96) Insurance Code Chapter 1501, Subchapter C, concerning Provision of Coverage;
- (97) Insurance Code Chapter 1501, Subchapter M, concerning Large Employer Health Benefit Plans;
- (98) Insurance Code Chapter 1502, concerning Health Benefit Plans for Children;
- (99) Insurance Code Chapter 1503, concerning Coverage of Certain Students;
- (100) Insurance Code Chapter 1504, concerning Medical Child Support;
- (101) Insurance Code Chapter 1507, Subchapter A, concerning Consumer Choice of Benefits Health Insurance Plans;
- (102) Insurance Code Chapter 1653, concerning High Deductible Health Plan;
- (103) Insurance Code Chapter 1661, concerning Information Technology;
- (104) Insurance Code Chapter 1701, concerning Policy Forms;
- (105) Insurance Code Chapter 4201, concerning Utilization Review Agents; and
- (106) Insurance Code Chapter 4202, concerning Independent Review Organizations.
- (b) Approved PEO as insurer; client as policyholder. For purposes of applying provisions addressing refunds of unearned premiums in Insurance Code Chapter 558, an approved PEO is the equivalent of an insurer, and the approved PEO's client is the equivalent of a policyholder.
- (c) Client as plan sponsor. For purposes of applying Insurance Code Chapter 1215, a client is the equivalent of a plan sponsor as defined by Insurance Code §1215.001, concerning Definitions.
- (d) Approved PEO as insurer and employer. For purposes of applying Insurance Code Chapter 1251, Subchapters E, F, and G, an approved PEO is the equivalent of both an insurer and an employer.

(e) Approved PEO as insurer; client as group policyholder. For purposes of applying Insurance Code §1301.0061, an approved PEO is the equivalent of an insurer, and the approved PEO's client is the equivalent of a group policyholder.

(f) Approved PEO as employer. For purposes of applying provisions addressing required offers of coverage in Insurance Code Title 8, Subtitle E, concerning Benefits Payable under Health Coverages, an approved PEO is the equivalent of an employer entitled to elect or decline an offer of coverage required by the Insurance Code.

(g) Approved PEO as carrier; client as policyholder. For purposes of applying Insurance Code Chapter 1501, Subchapter A, an approved PEO is the equivalent of a health insurance carrier, and the approved PEO's client is the equivalent of a policyholder.

(h) Approved PEO as large employer issuer; client as employer. For purposes of applying Insurance Code Chapter 1501, Subchapter C, an approved PEO is the equivalent of a large employer health benefit plan issuer, and the approved PEO's client is the equivalent of an employer.

(i) Approved PEO as issuer; client as group contract holder. For purposes of applying provisions in Insurance Code Chapter 1365 addressing required offers of coverage, an approved PEO is the equivalent of a group health benefit plan issuer, and the approved PEO's client is the equivalent of a group contract holder.

§13.524. Applicability of Administrative Code Provisions to an Approved PEO, Plan, or Trust.

(a) Applicable Administrative Code provisions. The following provisions of this title are applicable to an approved PEO, or to its plan and trust, as appropriate, to the same extent as the provisions apply to any entity TDI regulates under those provisions:

- (1) Chapter 1 of this title (relating to General Administration);
- (2) Chapter 3, Subchapter A of this title (relating to Submission Requirements for Filings and Departmental Actions Related to Such Filings);
- (3) Chapter 3, Subchapter E of this title (relating to Group Life, and/or Accident and Health Insurance Policies and Certificates);
- (4) Chapter 3, Subchapter G of this title (relating to Plain Language Requirements for Health Benefit Policies);
- (5) Chapter 3, Subchapter M of this title (relating to Discretionary Clauses);
- (6) Chapter 3, Subchapter U of this title (relating to Newborn Children Coverage);
- (7) Section 3.3601 of this title (relating to Orthodontic Coverages);
- (8) Chapter 3, Subchapter V of this title (relating to Coordination of Benefits);
- (9) Chapter 3, Subchapter X of this title (relating to Preferred and Exclusive Provider Plans);
- (10) Chapter 3, Subchapter BB of this title (relating to Pharmaceutical Services);
- (11) Chapter 3, Subchapter HH of this title (relating to Standards for Reasonable Cost Control and Utilization Review for Chemical Dependency Treatment Centers);
- (12) Chapter 7, Subchapter B of this title (relating to Insurance Holding Company Systems);

(13) Chapter 12 of this title (relating to Independent Review Organizations);

(14) Chapter 19, Subchapter R of this title (relating to Utilization Review for Health Care Provided Under a Health Benefit Plan or Health Insurance Policy);

(15) Chapter 21, Subchapter A of this title (relating to Unfair Competition and Unfair Practices of Insurers, and Misrepresentation of Policies);

(16) Chapter 21, Subchapter B of this title (relating to Advertising, Certain Trade Practices, and Solicitation);

(17) Chapter 21, Subchapter C of this title (relating to Unfair Claims Settlement Practices);

(18) Chapter 21, Subchapter E of this title (relating to Unfair Discrimination Based on Sex or Marital Status);

(19) Chapter 21, Subchapter H of this title (relating to Unfair Discrimination);

(20) Chapter 21, Subchapter K of this title (relating to Certification of Creditable Coverage);

(21) Chapter 21, Subchapter L of this title (relating to Medical Child Support, Unfair Practices);

(22) Chapter 21, Subchapter M of this title (relating to Mandatory Benefit Notice Requirements);

(23) Chapter 21, Subchapter P of this title (relating to Mental Health Parity);

(24) Chapter 21, Subchapter Q of this title (relating to Complaint Records to be Maintained);

(25) Chapter 21, Subchapter R of this title (relating to Diabetes);

(26) Chapter 21, Subchapter T of this title (relating to Submission of Clean Claims);

(27) Chapter 21, Subchapter V of this title (relating to Pharmacy Benefits);

(28) Chapter 21, Subchapter W of this title (relating to Coverage for Acquired Brain Injury);

(29) Chapter 21, Subchapter Y of this title (relating to Unfair Discrimination in Compensation for Women's Healthcare);

(30) Chapter 21, Subchapter Z of this title (relating to Data Collecting and Reporting Relating to Mandated Health Benefits and Mandated Offers of Coverage);

(31) Chapter 21, Subchapter AA of this title (relating to Consumer Choice Health Benefit Plans);

(32) Chapter 21, Subchapter BB of this title (relating to Dental Care Benefits);

(33) Chapter 21, Subchapter CC of this title (relating to Electronic Health Care Transactions);

(34) Chapter 21, Subchapter DD of this title (relating to Eligibility Statements);

(35) Chapter 21, Subchapter EE of this title (relating to High Deductible Health Plans);

(36) Chapter 21, Subchapter FF of this title (relating to Obligation to Continue Premium Payment and Coverage After Notice of Lost Group Eligibility);

(37) Chapter 21, Subchapter II of this title (relating to Recognition of National Certifying Organizations for Noninvasive Screening of Cardiovascular Disease);

(38) Chapter 21, Subchapter JJ of this title (relating to Autism Spectrum Disorder Coverage);

(39) Chapter 21, Subchapter KK of this title (relating to Health Care Reimbursement Rate Information);

(40) Chapter 21, Subchapter MM of this title (relating to Wellness Programs);

(41) Chapter 21, Subchapter NN of this title (relating to Noninsurance Benefits and Features);

(42) Chapter 21, Subchapter PP of this title (relating to Out-Of-Network Claim Dispute Resolution);

(43) Chapter 21, Subchapter RR of this title (relating to Standard Proof of Health Insurance for Medical Benefits for Injuries Incurred as a Result of a Motorcycle Accident);

(44) Chapter 21, Subchapter SS of this title (relating to Continuation and Conversion Provisions);

(45) Chapter 22 of this title (relating to Privacy); and

(46) Chapter 26 of this title (relating to Small Employer Health Insurance Regulations).

(b) Plan as large employer plan. For purposes of applying Chapter 21, Subchapter P or W of this title, a plan sponsored by an approved PEO is the equivalent of a large employer health benefit plan, regardless of the size of any of the approved PEO's clients.

(c) Approved PEO as insurer; client as group policyholder. For purposes of applying Chapter 21, Subchapter FF of this title, an approved PEO is the equivalent of a health insurer, and the approved PEO's client is the equivalent of a group policyholder.

(d) Approved PEO as large employer carrier and large employer. Except as provided in subsection (e) of this section, for purposes of applying Chapter 26 of this title, an approved PEO is the equivalent of both a large employer carrier and a large employer.

(e) Approved PEO as large employer carrier; client as large employer. For purposes of applying §§26.303 and §§26.307 - 26.309 of this title, (relating to Coverage Requirements, Fair Marketing, Renewability of Coverage and Cancellation, and Refusal to Renew and Application to Reenter Large Employer Market), an approved PEO is the equivalent of a large employer carrier, and the approved PEO's client is the equivalent of a large employer.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Norma Garcia

General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



DIVISION 3. CERTIFICATE OF APPROVAL

28 TAC §§13.530 - 13.534

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.530. Certificate of Approval Required.

A PEO may not sponsor a plan in Texas unless the PEO has received a certificate of approval issued under this subchapter and is operating its plan and trust as required by this subchapter. If a PEO receives and maintains a certificate of approval under this subchapter, it will not be considered an unauthorized insurer for purposes of Insurance Code Chapter 101, concerning Unauthorized Insurance.

§13.531. Forms and Fees.

(a) Form of application. A PEO must apply for a certificate of approval by providing the information required by this division.

(b) Application fee. Each application for a certificate of approval must be accompanied by a nonrefundable application fee of \$5,050.

§13.532. Application Requirements.

(a) Organizational information. An applicant must provide the following information and documentation about its structure and operations:

(1) its name, federal employer identification number, location, and a means for contacting its representative for purposes of the application;

(2) the physical location of the plan and trust's books and records, and its means of maintaining the books and records;

(3) the name of the applicant's ultimate controlling person or persons;

(4) the documents or instruments describing the rights and obligations between the applicant and its clients, including but not limited to all forms of its professional employer services agreement;

(5) a description of the applicant's basic organizational structure, including organizational charts or lists that show:

(A) the relationships and contracts between the applicant and any affiliates of the applicant that affect the plan; and

(B) the internal organizational structure of the applicant's management and administrative staff;

(6) disclosure of any suit or judgment filed in a matter involving dishonesty, breach of trust, or a financial dispute within the last 10 years against the applicant, an ultimate controlling person, or any other persons from whom biographical information is provided under paragraph (10) of this subsection;

(7) a copy of its most recent TDLR license;

(8) a financial statement of the applicant covering a period ending not more than 180 days prior to the date of the application, that is prepared using generally accepted accounting principles of the United States and includes:

(A) a balance sheet that reflects a solvent financial position;

(B) an income statement;

(C) a cash flow statement; and

(D) the sources and uses of all funds;

(9) evidence that the applicant has engaged or will engage a sufficient number of competent persons to:

(A) administer the plan; and

(B) provide claims adjusting and underwriting services to the plan;

(10) evidence of the PEO's fidelity coverage that complies with §13.542 of this title (relating to PEO's Fidelity Coverage); and

(11) for all plans sponsored by the applicant, whether operating in Texas or in any other state, a list of and access to all reports for the last three years created and filed with the United States Department of Labor in compliance with Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1021(g), concerning Reporting by Certain Arrangements; 1023, concerning Annual Reports; and 1024, concerning Filing and Furnishing of Information.

(b) Plan and trust information and documentation. An applicant must provide the following information and documentation about its plan and trust:

(1) proof of deposit or letter of credit satisfying the financial solvency requirements of Division 6 of this subchapter;

(2) financial projections of the trust covering three full years of operation that are prepared using generally accepted accounting principles of the United States and include:

(A) a balance sheet that reflects a solvent financial position;

(B) an income statement;

(C) a cash flow statement; and

(D) the sources and uses of all funds;

(3) a written investment plan in compliance with Insurance Code §425.105, concerning Written Investment Plan;

(4) an actuarial opinion supporting the structure of the plan meeting the requirements of §13.533 of this title (relating to Actuarial Opinion Requirements);

(5) a description of the applicant's plan to service plan billings, claims, and underwriting;

(6) the name and Texas license number of each contracted regulated entity the trust proposes to engage to service the plan, and

a copy of each agreement or proposed agreement with a contracted regulated entity;

(7) each organizational document of the plan and trust, including:

(A) the plan document;

(B) the plan's summary plan description, created in compliance with ERISA, 29 U.S.C. §1022, concerning Summary Plan Description; and

(C) the trust agreement;

(8) the name of the named fiduciary or fiduciaries who jointly or severally will have authority to control and manage the operation and administration of the plan, as required by ERISA, 29 U.S.C. §1102(a), concerning Establishment of Plan;

(9) the name of the administrator designated by the terms of the instrument under which the plan is operated, as defined by ERISA, 29 U.S.C. §1002(16)(A);

(10) biographical information about each person who governs or manages the affairs of the applicant or the plan and trust, accompanied by information sufficient to allow the commissioner to determine the competence, fitness, and reputation of each officer or director of the applicant or other controlling person, and including disclosure of whether the person is prohibited from serving in any capacity under ERISA, 29 U.S.C. §1111, (concerning Persons Prohibited from Holding Certain Positions). An applicant must provide the required biographical information on TDI form number FIN311, Biographical Affidavit, available on TDI's website, and must list the full name and address of the PEO where the form requires "Full Name and Address of Company/HMO;"

(11) a complete set of fingerprints for the individuals described in paragraph (10) of this subsection using the procedures set out in Chapter 1, Subchapter D of this title (relating to Effect of Criminal Conduct), unless the individual meets the exemption in that subchapter or provides evidence that the individual has successfully completed the fingerprinting process conducted during the applicant's licensing or license renewal process through TDLR;

(12) evidence of the trustees' fidelity coverage and errors and omissions policy that comply with §13.556 of this title (relating to Protection of Plan and Trust Assets); and

(13) an attestation that the plan and trust have been established in compliance with §13.550 and §13.551 of this title (relating to Plan Formation and Trust Formation).

(c) Officers' attestation. An applicant must provide a written attestation signed by two principal officers of the applicant who have submitted biographical affidavits that the information and documentation provided in compliance with subsections (a) and (b) of this section is true and correct and complies with applicable federal and state laws and regulations, including this subchapter, to the best of their knowledge and belief.

(d) Service of Process. An applicant must appoint the commissioner as its resident agent for purposes of service of process as provided in Insurance Code Chapter 804, concerning Service of Process, in the same manner as a domestic company.

§13.533. Actuarial Opinion Requirements.

The independent actuarial opinion submitted with the application must:

(1) describe the extent to which projected plan contributions:

(A) are not excessive;

- (B) are not unfairly discriminatory;
 - (C) are adequate to pay all of the plan's:
 - (i) benefit payments;
 - (ii) administrative expenses;
 - (iii) other operational expenses; and
 - (D) are sufficient to maintain the required reserves and surplus to be held in trust for the plan's participants; and
- (2) include a statement allocating the projected plan contributions to be charged to clients for plan coverage for:
- (A) the plan's administrative expenses;
 - (B) plan reserves; and
 - (C) all other expenses associated with operation of the applicant's plan.

§13.534. Application Review, Approval, and Denial.

(a) Commissioner's review. The commissioner will review the applicant's submission and other pertinent information, including information from TDLR, to ensure the applicant's compliance with applicable statutes and regulations, and:

- (1) conduct any investigation that the commissioner considers necessary to determine whether the applicant has obtained an appropriate license or has delegated to contracting regulated entities, adequate facilities, resources, and competent personnel, as determined by the commissioner, to administer the plan and trust;
- (2) examine under oath any person interested in or connected with the applicant or its plan or trust; or
- (3) perform an examination to confirm compliance with applicable Texas statutes and rules, including funding of the trust.

(b) Application approval. After completing the review, the commissioner will approve an application for a certificate of approval if the commissioner has determined there is no cause for denial as listed in subsection (d) of this section and if the application for certificate of approval meets the requirements of §13.532 of this title (relating to Application Requirements).

(c) Term of certificate of approval. A certificate of approval remains in effect until terminated at the request of the approved PEO or canceled by the commissioner.

(d) Application denial. The commissioner will deny the application in writing in the following circumstances:

- (1) if the applicant does not meet the requirements of §13.532 of this title; or
- (2) if the applicant, any person representing the applicant, a member of the board of trustees, or any person that has a fiduciary relationship with the trust:
 - (A) makes a material misstatement or omission in the application for a certificate of approval;
 - (B) obtains or attempts to obtain at any time a certificate of approval or license for an insurance entity through intentional misrepresentation or fraud;
 - (C) misappropriates or converts to the person's own use or improperly withholds money under any fiduciary relationship;
 - (D) is prohibited from serving in any capacity under Employee Retirement Income Security Act of 1974, 29 U.S.C. §1111;

(E) without reasonable cause or excuse, fails to appear in response to a subpoena, examination, or any other order lawfully issued by the commissioner;

(F) has previously been subject to a determination by the commissioner resulting in:

- (i) suspension or revocation of a certificate of approval or license; or
- (ii) denial of a certificate of approval or license on grounds that would be sufficient for suspension or revocation; or

(G) is not eligible for licensure under Chapter 1, Subchapter D of this title (relating to Effect of Criminal Conduct).

(e) Notice of denial. If the commissioner denies the application, the commissioner will issue a written notice of denial to the applicant. The notice will state the basis for the denial.

(f) Hearing on denial. If, within 30 days of receiving a notice under subsection (e) of this section, the applicant submits a written request for a hearing, the commissioner will file a request to set a hearing at the State Office of Administrative Hearings, at which the applicant will be given an opportunity to show compliance with the related Insurance Code provisions and regulations. Hearings described in this subchapter will be conducted as required by Government Code Chapter 2001, concerning Administrative Procedure; Insurance Code Chapter 40, concerning Duties of State Office of Administrative Hearings and Commissioner in Certain Proceedings; Rate Setting Proceedings; TDI's and State Office of Administrative Hearing's rules of procedure; and any other applicable law and regulations.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 4. CONDUCT OF APPROVED PEO

28 TAC §§13.540 - 13.545

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount

of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.540. Governance and Operation of Approved PEO.

(a) Management of approved PEO. An approved PEO must be managed by competent and trustworthy individuals. An individual responsible for risk management, financial reporting, underwriting, claims, or investment functions of the plan and trust must be eligible for licensure based on the guidelines established in Chapter 1, Subchapter D of this title (relating to Effect of Criminal Conduct) and hold any necessary licenses as required by the Insurance Code.

(b) Initial plan administration. An approved PEO must contract with a third party administrator to perform the day-to-day operations of the plan until the plan's trustees have contracted with a third party administrator to perform the day-to-day operations of the plan as provided in §13.555 of this title (relating to Trustees' Responsibility and Authority).

(c) Location of books and records. An approved PEO may request to maintain the plan and trust's books and records outside this state in compliance with Insurance Code Chapter 803.

§13.541. Stop-Loss Insurance.

An approved PEO must contract for stop-loss insurance in the name of and on behalf of the plan and trust that complies with §13.567 of this title (relating to Stop-Loss Insurance), until the trustees have contracted for stop-loss insurance as provided in §13.555 of this subchapter.

§13.542. PEO's Fidelity Coverage.

An approved PEO must maintain a fidelity bond or a zero-deductible crime policy that complies with the requirements of §13.568 of this title (relating to Standards for Fidelity Coverage). The fidelity bond or zero-deductible crime policy must cover each person responsible for handling or administering plan assets, including: the approved PEO; its directors, officers, and employees; or any other individual responsible for servicing the plan.

§13.543. Approved PEO's Conduct with Respect to the Plan and Trust.

(a) Assessed contributions. Contributions assessed by the approved PEO from clients for coverage for their participants must be sufficient to fund at least 100 percent of the plan and trust's aggregate stop-loss retention, as provided in Division 6 of this subchapter, plus all other expenses of the plan and trust.

(b) Payments to the trust. An approved PEO must transfer to the trust all payments from clients or participants that represent or that are intended as contributions to the trust as soon as those amounts can reasonably be segregated from the approved PEO's general assets, but no later than 15 days after receipt. These payments are plan assets.

(c) Reimbursement from plan assets. An approved PEO may be reimbursed by the trust for its reasonable expenses incurred to:

- (1) establish and initially administer the plan and trust; and
- (2) comply with this subchapter, including contracting for stop-loss insurance and fidelity coverage.

(d) Transactions with respect to plan and trust. An approved PEO in its transactions with respect to the plan and trust must not:

(1) deal with plan assets in its own interest or for its own account;

(2) act on behalf of or represent a person whose interests are adverse to the interests of the plan or the interests of its participants; or

(3) receive any consideration from any person dealing with the plan and trust in connection with a transaction involving plan assets.

(e) Conduct with respect to plan and trust. An approved PEO's conduct with respect to the plan and trust must remain in compliance with applicable federal and state laws.

§13.544. Marketing Materials; Offers of Enrollment.

(a) Marketing material. An approved PEO's marketing material discussing the plan and trust must be fair and accurate, and must not represent the plan or a prospective client's projected contributions to be assessed for coverage under the plan in a way that is materially inaccurate or misleading.

(b) Offer of enrollment. An approved PEO must offer enrollment in the plan to the covered employees of any client that agrees to meet the terms and conditions of the PEO's professional employer services agreement and elects to enroll its covered employees in the plan.

(c) Guaranteed renewability. A PEO may not deny a client whose employees are covered under the plan continued access to coverage under the terms of the plan, other than:

- (1) for nonpayment of contributions;
- (2) for fraud or other intentional misrepresentation of material fact by the client;
- (3) for noncompliance with material plan provisions;
- (4) because the plan is ceasing to offer any coverage in a geographic area;
- (5) in the case of a plan that offers benefits through a network plan, there is no longer any individual enrolled through the client who lives, resides, or works in the service area of the network plan and the plan applies this paragraph uniformly without regard to the claims experience of clients or any health status-related factor in relation to such individuals or their dependents; or

(6) for failure to meet the terms of an applicable collective bargaining agreement, to renew a collective bargaining or other agreement requiring or authorizing contributions to the plan, or to employ employees covered by such an agreement.

§13.545. Representations to Clients and Participants.

(a) Pricing and billing. An approved PEO must be fair and accurate in its pricing and billings with respect to the plan, and may not make any materially inaccurate, knowingly or recklessly misleading, or fraudulent misrepresentations of the projected contributions to be assessed for plan coverage for a client's covered employees or participants.

(b) Notice of increased contribution. An approved PEO may not increase a client's contribution amount without giving the client at least 60 days' advance notice of the amount of the increase.

(c) PEO solely responsible if trust assets insufficient. An approved PEO's professional employer services agreement must provide that the PEO, and not the client, will be responsible for funding any additional asset amount needed to equal the liabilities owed by the plan. An approved PEO may not contractually obligate its clients to make up any shortfall in trust assets.

(d) Agreement in conflict with this subchapter. An approved PEO's professional employer services agreement is unenforceable to the extent that it conflicts with the requirements of this subchapter.

(e) Summary plan description. An approved PEO must provide each participant an evidence of coverage and a summary plan description specific to the participant's plan. The summary plan description must contain the following statement: "The benefits and coverages described in this document are provided through a self-funded health benefit plan and trust fund established and funded by your employers, {insert the name of the covered employer and the approved PEO}. The plan and trust are established in compliance with Chapter 91 of the Texas Labor Code and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1191c. This is not an insurance contract, and you are not protected by an insurance guarantee fund or other protective governmental program."

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DIVISION 5. FORMATION, GOVERNANCE, AND OPERATION OF PLAN AND TRUST

28 TAC §§13.550 - 13.557

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.550. *Plan Formation.*

(a) Establishing the plan. A PEO applying for a certificate of approval must establish its plan in compliance with the Employee Re-

irement Income Security Act of 1974, 29 U.S.C. §1102, concerning Establishment of Plan.

(b) Required plan provisions. The plan:

(1) must be a nonprofit entity;

(2) must hold all plan assets in a trust as established under §13.551 of this title (relating to Trust Formation);

(3) must accept as participants the covered employees or dependents of covered employees of every client that elects to allow its covered employees to participate in the plan; and

(4) may not condition participation on a client's claims history or its covered employees' health status-related factors.

(c) Plan amendment. An approved PEO may amend the terms of its plan without the approval of the plan's trustees; the trustees may not amend the terms of the plan.

(d) Approval of plan amendment. A plan amendment must be submitted to TDI as provided in §13.552 of this title (relating to Required Filings) for review and approval by the commissioner before becoming effective.

§13.551. *Trust Formation.*

(a) Establishing the trust. A PEO applying for a certificate of approval must establish a trust in compliance with both Texas Property Code Title 9, Subtitle B, concerning Texas Trust Code: Creation, Operation, and Termination of Trusts; and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1103, concerning Establishment of Trust, in which all funds used to administer and pay claims and expenses arising from the plan must be held.

(b) Powers of the trust. Except as otherwise provided in the trust document, the powers of the trust must be exercised by a board of trustees elected to carry out the purposes established by the organizational documents of the trust.

(c) Trust agreement. The trust agreement or other document establishing the trust must:

(1) include the names of the persons creating the trust and the names and signatures of each of the initial trustees;

(2) state that all plan assets will be kept continuously in a qualified financial institution;

(3) outline the powers and duties of the board of trustees;

(4) provide that board decisions must be made by at least a simple majority;

(5) give the trustees exclusive authority and discretion to manage and control plan assets;

(6) provide that the trustees will not be subject to the direction of a named fiduciary; and

(7) provide that plan assets will never inure to the benefit of any employer and will be held for the exclusive purposes of providing benefits to plan participants and defraying reasonable expenses of administering the plan.

(d) Trust amendment. The trust agreement or other document establishing the trust must provide that:

(1) only the plan's trustees may amend the terms of the trust, and may do so without the approval of the approved PEO;

(2) an amendment to the trust document must be approved by at least a simple majority of the trustees; and

(3) a trust amendment must be submitted to TDI as provided in §13.552 of this title (relating to Required Filings) for review and approval by the commissioner before becoming effective.

§13.552. *Required Filings.*

(a) Plan amendment. An approved PEO must file each plan amendment with the Life and Health Lines Office of TDI for prior approval by the commissioner. An amendment will not be effective until approved by the commissioner. The approved PEO's filing must include a statement by the approved PEO certifying that, to the best of the signer's knowledge and belief, in adopting the plan amendment, the approved PEO and the plan will remain in compliance with this subchapter and all applicable provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001-1191c.

(b) Trust amendment. An approved PEO must file each amendment to the trust agreement or any other organizational document of the trust with the Company Licensing and Registration Office of TDI for prior approval by the commissioner. An amendment will not be effective until approved by the commissioner. The approved PEO's filing must include a statement by the plan's trustees certifying that, to the best of the trustees' knowledge and belief, in adopting the trust amendment the plan and the trust will remain in compliance with this subchapter and all applicable provisions of ERISA, 29 U.S.C. §§1001-1191c.

(c) Transactions between parties. Agreements and transactions between or among the approved PEO, an affiliate, and the trust are subject to Insurance Code Chapter 823, Subchapters B and C, including the filing requirements of these subchapters. For the purposes of this subchapter, an affiliate and a trust are each considered members of an insurance holding company system as described in Insurance Code §823.006, concerning Description of Insurance Holding Company System.

§13.553. *Plan and Trust Governance and Operation.*

(a) Fiduciary duty. A fiduciary must discharge his or her duties with respect to a plan solely in the interest of the participants, and:

(1) for the exclusive purposes of:

(A) providing benefits to participants; and

(B) defraying reasonable expenses of administering the

plan;

(2) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; and

(3) in compliance with the documents and instruments governing the plan so long as those documents and instruments are consistent with this subchapter and with all other applicable state and federal laws.

(b) Transactions between fiduciary and plan. A fiduciary in its transactions with respect to the plan and trust must not:

(1) deal with plan assets in its own interest or for its own account;

(2) act on behalf of or represent a person whose interests are adverse to the interests of the plan or the interests of its participants; or

(3) receive any consideration from any party dealing with the plan and trust in connection with a transaction involving plan assets.

(c) Plan and trust expenses. All expenses of the plan and trust must be paid from plan assets. Expenses include but are not limited to:

(1) administration of the plan and trust; and

(2) the plan and trust's reasonable expenses incurred to comply with this subchapter, including contracting for stop-loss insurance, fidelity coverage, and errors and omissions insurance.

(d) Voluntary termination of trust. The trust agreement must provide for the distribution of plan assets on dissolution of the trust. The distribution of assets must be consistent with of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1103 and §1104, concerning Fiduciary Duties, and related guidance by the U.S. Department of Labor. The trust's assets may not be distributed until the commissioner has canceled the approved PEO's certificate of approval under Division 8 of this title (relating to Market Exit).

§13.554. *Board of Trustees.*

(a) Appointment. An approved PEO may appoint members of the board of trustees.

(b) Number of members. The board of trustees must have no fewer than three members.

(c) Ineligible individuals. An owner, officer, or employee of a third party administrator or contracted regulated entity that provides services to the approved PEO, or any other person that has received compensation from the plan or trust may not serve as a board member.

§13.555. *Trustees' Responsibility and Authority.*

(a) Responsible for operations and assets. Members of the board of trustees are responsible for all operations of the trust and must take all necessary precautions to safeguard plan assets.

(b) Contract for plan administration. Within 12 months of the establishment of the initial board of trustees, the board of trustees must contract with a third party administrator to perform the day-to-day operations of the plan.

(c) Insure payment of claims. Within 12 months of the establishment of the initial board of trustees, the board of trustees, or an approved PEO acting as their agent, will contract for, and pay for with plan assets, a stop-loss insurance agreement in the name of and for the benefit of the plan and trust that complies with the requirements of §13.567 of this title (relating to Stop-Loss Insurance) to insure payment of all claims arising under the terms of the plan.

(d) Appointment of agents. The trustees may appoint agents for the trust as necessary to meet the obligations of the plan and trust. Each agent may only exercise the authority and perform the duties required in the management of the trust and the affairs of the plan that is delegated to them by the board of trustees.

(e) Service without compensation. A member of the board of trustees serves without compensation except for actual and necessary expenses.

§13.556. *Protection of Plan and Trust Assets.*

(a) Trustees' fidelity coverage. The board of trustees must maintain a fidelity bond or a zero-deductible crime policy that complies with the requirements of §13.568 of this title (relating to Standards for Fidelity Coverage). The fidelity bond or zero-deductible crime policy must cover each person responsible for handling or administering plan assets, including the board of trustees, the approved PEO, its directors, officers, agents and employees, or any other individual responsible for servicing the plan.

(b) Errors and omissions insurance. The board of trustees must purchase an errors and omissions policy in the amount of \$500,000 to cover the performance of their duties to the plan and trust. The policy must be purchased from a company that satisfies the requirements of §13.568(a)(2) of this title.

(c) Ensuring existence of PEO's fidelity coverage. The trustees must annually require that the approved PEO provide them with documentation that it has maintained and is maintaining in effect fidelity coverage that complies with §13.542 of this title (relating to PEO's Fidelity Coverage).

§13.557. Disputes Arising Under the Plan or Trust.

Benefit claims or other disputes arising under an approved PEO's plan are subject to the Insurance Code, including utilization review and independent review under Insurance Code Title 14, concerning Utilization Review and Independent Review, and to resolution under state law in the same manner as are benefit claims or disputes arising under a large employer health benefit plan issued under Insurance Code Chapter 1501, concerning the Health Insurance Portability and Availability Act, to the extent not inconsistent with the Employee Retirement Income Security Act of 1974 (ERISA) as provided in ERISA, 29 U.S.C. §1144.

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DIVISION 6. FINANCIAL SOLVENCY REQUIREMENTS FOR PEO PLANS

28 TAC §§13.560 - 13.568

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.560. Annual and Quarterly Reserves.

The financial statements filed by an approved PEO under §13.570 of this title (relating to Financial Filing Requirements) must report the trust's reserves as described below:

(1) the trust's year-end reserves must be calculated as the difference between the trust's total claim distributions and the aggregate limit attachment point of its stop-loss insurance agreement for each plan year;

(2) the total claim distributions number used in paragraph (1) of this section must be the amount of paid claims reduced by any amount either received or recoverable by the trust associated with the specific attachment point included in its stop-loss insurance agreement;

(3) the trust's quarterly reserves must equal the total amount of its known unpaid claims as the end of the respective calendar quarter; and

(4) the known unpaid claims number used in paragraph (3) of this section is the amount of reserve established for a claim when it is received, reduced by any amount recoverable by the trust associated with the specific attachment point included in its stop-loss insurance agreement.

§13.561. Authorized Investments.

The trust must invest its assets in compliance with Insurance Code Chapter 425, Subchapter C, concerning Authorized Investments and Transactions for Capital Stock, Life, Health, and Accident Insurers.

§13.562. Deposit or Letter of Credit Required.

(a) Initial deposit or letter of credit. Before receiving a certificate of approval, a PEO applying for a certificate of approval must establish a deposit of at least 25 percent of the attachment point of the aggregate limit included in the plan's stop-loss insurance agreement or establish a letter of credit for that amount.

(b) Proof of deposit. The commissioner adopts by reference both Statutory Deposit Transaction Form, Form No. FIN407 (rev.1115), and Declaration of Trust Form, Form No. FIN453 (rev.1115). Both forms are available on TDI's website. An applicant must give proof of its deposit on both TDI's Statutory Deposit Transaction Form and TDI's Declaration of Trust Form.

(c) Continuing deposit or letter of credit. An approved PEO sponsoring a plan must maintain a deposit or letter of credit of at least 25 percent of the attachment point of the aggregate limit included in the plan's stop-loss insurance agreement.

(d) Deposit to be held for TDI's control. Any deposit must be held for TDI's control and may not be withdrawn or substituted without the commissioner's approval.

§13.563. Form of Deposit.

A deposit must consist of funds in the form of:

(1) money of the United States including certificates of deposit issued by a qualified financial institution, but the amount of total deposits by the approved PEO in the qualified financial institution may not exceed the greater of:

(A) the limits of federal insurance coverage for the deposits; or

(B) ten percent of the issuing qualified financial institution's net worth, provided that its net worth is in excess of \$25 million;

(2) bonds of Texas;

(3) bonds or other evidences of indebtedness of the United States that are guaranteed as to principal and interest by the United States government; or

(4) bonds or other interest-bearing evidences of indebtedness of a county or municipality of this state.

§13.564. *Annual Recalculation; Changes to Deposit.*

(a) Annual recalculation. An approved PEO must recalculate its deposit required every year, not later than 60 days after negotiating the plan's stop-loss insurance agreement for the current plan year, using the formula stated in §13.562(b) of this title (relating to Deposit or Letter of Credit Required).

(b) Changes to deposit.

(1) An approved PEO may request to change its deposit by submitting both the Statutory Deposit Transaction Form, Form No. FIN407 (rev.1115), and the Declaration of Trust Form, Form No. FIN453 (rev.1115), and must submit a safekeeping receipt showing that the securities are pledged to TDI.

(2) If the commissioner approves the release of any portion of a deposit, TDI's bond and securities officer will execute a release of any pledge, and the funds will be returned to the approved PEO.

(3) An approved PEO that requests a release of any part of its deposit because the deposit amount exceeds the amount calculated under §13.562(b) of this title must provide supporting documentation that justifies the release, including:

(A) the reasons for the release; and

(B) evidence satisfactory to the commissioner that its deposit exceeds the amount required in §13.562(b) of this title.

(4) All interest income due on its deposit funds may be paid directly to the approved PEO by the bank.

§13.565. *Letter of Credit.*

(a) Requirements. Instead of a deposit, an approved PEO may maintain a letter of credit. A letter of credit must comply with the following requirements:

(1) the letter of credit cannot be supported or collateralized by a guaranty;

(2) the letter of credit and all amendments to the letter of credit must be filed with TDI; and

(A) be clean, irrevocable, unconditional, and issued by a qualified financial institution;

(B) contain an issue date;

(C) stipulate that the beneficiary is the commissioner, that the commissioner need only draw a draft under the letter of credit and present it to obtain funds, and that no other document need be presented;

(D) show only one amount on the letter of credit;

(E) state that the letter of credit is not subject to any conditions or qualifications outside of the letter of credit and must not contain reference to any other agreements, documents, or entities;

(F) contain a statement to the effect that the obligation of the qualified financial institution under the letter of credit is in no way contingent on reimbursement; and

(G) state that the letter of credit is subject to and governed by either the laws of this state or the laws of the state in which the issuing qualified financial institution is domiciled, and that all drafts

drawn on the letter of credit will be presentable at any office in the United States of the issuing qualified financial institution.

(b) Conditions not permitted. The letter of credit must not:

(1) have a schedule of periodic payments;

(2) name any beneficiary other than the commissioner; and

(3) in aggregate of all letters of credit issued to the approved PEO by one qualified financial institution, exceed 10 percent of the financial institution's total equity capital, as shown in the qualified financial institution's most recent report of condition as filed with the appropriate federal or state financial institution regulatory agency.

(c) Term of letter of credit. The term of the letter of credit must be for at least one year and must contain an evergreen clause that prevents the expiration of the letter of credit without written notice from the issuer. The evergreen clause must provide for a period of no less than 30 days' written notice to the commissioner prior to the expiration date or nonrenewal.

§13.566. *Annual Recalculation; Changes to Letter of Credit.*

(a) Annual recalculation. An approved PEO must recalculate the required amount of its letter of credit every year, not later than 60 days after negotiating the plan's stop-loss insurance agreement for the current plan year, using the formula stated in §13.562(b) of this title (relating to Deposit or Letter of Credit Required).

(b) Changes to letter of credit.

(1) If a letter of credit is not renewed or replaced, the commissioner must not be prevented from withdrawing the balance of the letter of credit and placing that sum in trust to secure continuing obligations until the commissioner has received a renewal letter of credit or an acceptable substitute.

(2) If a letter of credit is not renewed or replaced, or if it is suspended, the approved PEO and the issuing qualified financial institution must give the commissioner immediate notice of the nonrenewal, replacement, or suspension.

§13.567. *Stop-Loss Insurance.*

(a) Minimum specific and aggregate coverage. The plan and trust must maintain specific and aggregate stop-loss insurance that is not less than the recommended minimum level included in the annual actuarial opinion required by §13.570(c)(2) of this title (relating to Financial Filing Requirements).

(b) Terms of contract for stop-loss insurance. The trustees, or an approved PEO acting on behalf of the trustees, must contract for stop-loss insurance in the name of and for the benefit of the plan and trust, as evidenced by a written commitment, binder, or policy for stop-loss insurance issued by an unaffiliated insurer authorized to do business in this state, which must include the following:

(1) no less than 30 days' notice to the commissioner of any amendment, cancellation, or nonrenewal of coverage;

(2) provide both specific and aggregate coverage with an aggregate retention of no more than 125 percent of the amount of expected claims for the subsequent plan year and the specific retention amount as determined by the actuarial opinion required by §13.570(c)(2) of this title;

(3) both the specific and aggregate coverage must require all claims to be submitted within 90 days after the claim is reported; and

(4) a requirement that the stop-loss carrier provide the trustees and the PEO any renewal quote at least 90 days before the expiration of the current policy.

(c) Request for waiver. The trustees, or an approved PEO acting on behalf of the trustees, may request in writing, including supporting documentation, that the commissioner waive or reduce the requirement for aggregate stop-loss insurance. The commissioner, after reviewing the request and documentation, and any additional information requested by and provided to TDI, will approve the request if the commissioner determines that the interests of the clients and participants are adequately protected.

§13.568. Standards for Fidelity Coverage.

(a) Fidelity bond or crime policy. A fidelity bond or crime policy required by any section of this rule must be for an amount of at least \$500,000. The commissioner will consider information of all interested parties and determine any amount required in excess of \$500,000. The bond or policy must:

(1) obligate the surety to pay any loss of money or other property the plan or trust sustains because of an act of fraud or dishonesty by a person covered by the bond or policy, acting alone or in concert with others; and

(2) be issued by an unaffiliated insurer that holds a certificate of authority in this state, and that is a corporate surety company that is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury under 31 U.S. Code Chapter 93. If the commissioner determines, after reviewing information from the approved PEO or the plan and trust's board of trustees, that a fidelity bond or a zero-deductible crime policy is not available from a qualified unaffiliated insurer that holds a certificate of authority in this state, the approved PEO or board of trustees may obtain a fidelity bond or a zero-deductible crime policy from a surplus lines agent in this state in compliance with Insurance Code Chapter 981, concerning Surplus Lines Insurance, or from a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury under 31 U.S. Code Chapter 93.

(b) Cash deposit. Instead of a fidelity bond or zero-deductible crime policy, the approved PEO or board of trustees may place on deposit with a qualified financial institution securities meeting the requirements of §13.564 of this title (relating to Annual Recalculation; Changes to Deposit) for the benefit of the commissioner. The deposit must be maintained in the amount and is subject to the same conditions required for fidelity coverage under this section. The deposit must be held for TDI's control and may not be withdrawn or substituted without the commissioner's approval.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Norma Garcia

General Counsel

Texas Department of Insurance

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**DIVISION 7. QUARTERLY AND ANNUAL
FILINGS; EXAMINATIONS; HAZARDOUS
CONDITIONS**

28 TAC §§13.570 - 13.573

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.570. Financial Filing Requirements.

(a) Approved quarterly filing form. TDI adopts by reference PEO Quarterly Report, Form No. FIN409 (rev. 1115). The form is available on TDI's website. An approved PEO must submit its quarterly filings as described in subsection (c) of this section on PEO Quarterly Report, Form No. FIN409, using generally accepted accounting principles of the United States as modified by this subchapter.

(b) Approved annual filing form. TDI adopts by reference PEO Annual Report, Form No. FIN410 (rev. 1115). The form is available on TDI's website. An approved PEO must submit its annual filings as described in subsection (d)(1) of this section on PEO Annual Report, Form No. FIN410, using generally accepted accounting principles of the United States as modified by this subchapter.

(c) Quarterly filings. An approved PEO must file electronically with the commissioner within 45 days of the end of each calendar quarter an unaudited quarterly financial statement of the plan and trust, certified by an appropriate officer or agent of:

- (1) the trustees; or
- (2) the approved PEO.

(d) Annual filings. An approved PEO must file electronically with the commissioner by March 1 of each year:

(1) an unaudited financial statement of the plan and trust reflecting the financial transactions and results of the four previous quarters, certified by an appropriate officer or agent of:

- (A) the trustees; or
- (B) the approved PEO; and

(2) an annual actuarial opinion prepared and certified by an actuary who is not an employee of the approved PEO, and who is a fellow of the Society of Actuaries, a member of the American Academy of Actuaries, or an enrolled actuary approved by the Joint Board for the Enrollment of Actuaries to perform actuarial services required under ERISA, 29 U.S.C. §§1001-1191c. The annual actuarial opinion must include:

(A) a description of the actuarial soundness of the plan and trust, including any recommended actions that the approved PEO should take to improve the plan and trust's actuarial soundness;

(B) a calculation of reserves as required by §13.560 of this title (relating to Annual and Quarterly Reserves); and

(C) a recommended minimum level of specific and aggregate stop-loss insurance the plan and trust should maintain.

(3) Audited financial statements for the plan and trust must be filed annually by June 1 of each year and meet the requirements of Insurance Code Chapter 401, Subchapter A, concerning Independent Audit of Financial Statements, and §7.88 of this title (relating to Independent Audits of Insurer and HMO Financial Statements and Insurer and HMO Internal Control Over Financial Reporting) using generally accepted accounting principles of the United States as modified by this subchapter.

§13.571. Annual Fee.

With its annual filings an approved PEO must pay to TDI an annual statement filing fee of \$500. This fee does not include the form filing fees required under §13.521 of this title (relating to Applicable Insurance Code and Administrative Code Terms).

§13.572. Examination of Approved PEO, Plan, and Trust.

The commissioner or any person appointed by the commissioner has the power to examine the affairs of the approved PEO and the plan and trust as set forth in Insurance Code Chapter 401, concerning Audits and Examinations and §7.83 and §7.84 of this title (relating to Appeal of Examination Reports and Examination Frequency), as those provisions apply to domestic insurers licensed to transact the business of insurance in this state.

§13.573. Hazardous Condition; Violations of Statute.

(a) Hazardous conditions. An approved PEO's plan and trust are considered to be in hazardous condition if any of the following conditions exist with respect to the plan and trust:

- (1) assets to liability ratio less than 1:1;
- (2) negative financial position;
- (3) negative net income combined with negative retained earnings;
- (4) negative cash flow;
- (5) failing to maintain minimum reserves;
- (6) the trust failing to receive all monthly contributions paid by clients to the approved PEO;
- (7) transfers of funds between the trust and the approved PEO not authorized under the trust agreement; or
- (8) mismanagement by the third party administrator, trustees, or approved PEO that endanger the solvency or operations of the plan and trust.

(b) Regulation of solvency. An approved PEO and its plan and trust are subject to Insurance Code Chapters 404, concerning Financial Condition; 406, concerning Special Deposits Required Under Potentially Hazardous Conditions; 441, concerning Supervision and Conservatorship; and 443, concerning the Insurer Receivership Act.

(c) Order of actuarial review. On finding of good cause, the commissioner will order an actuarial review of an approved PEO in addition to the actuarial opinion. The approved PEO must pay the cost of any additional actuarial review ordered by the commissioner.

(d) Order to correct deficiencies. If the commissioner determines that the approved PEO's plan and trust do not comply with this

section or are found to be in hazardous condition, the commissioner will order the approved PEO to correct the deficiencies. The commissioner will take action authorized by the Insurance Code and other applicable laws against the approved PEO and its plan and trust if the approved PEO does not initiate immediate corrective action.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 8. MARKET EXIT

28 TAC §§13.580 - 13.583

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.580. Withdrawal from Market.

(a) Withdrawal plan. An approved PEO that undertakes of its own initiative or is required by §13.581 or §13.582 of this title (relating to Limitation, Suspension, or Cancellation of Certificate of Approval in Response to TDLR Action and Limitation, Suspension, or Cancellation of Certificate of Approval in Response to TDI Action) to terminate its health benefit plan must file a withdrawal plan for review by the commissioner prior to terminating the plan. The withdrawal plan must include:

- (1) the approved PEO's reasons for the withdrawal;
- (2) a timeline for withdrawal, including the date on which the approved PEO intends to complete the withdrawal process;

(3) a copy of the proposed notice to be sent to client employers and plan participants giving them at least 180 days' notice of the plan's termination;

(4) the number and names of clients and the number of plan participants affected by the proposed withdrawal;

(5) a procedure for handling plan participants' claims for benefits;

(6) a procedure for identifying plan participants with special circumstances, as defined in Insurance Code §1301.153, concerning Continuity of Care;

(7) provisions for meeting all contractual obligations of the approved PEO;

(8) provisions for meeting any applicable statutory obligations; and

(9) verification of reserves to complete a solvent resolution of the plan's obligations.

(b) Novation and resolution of plan claim obligations. The commissioner will not grant the request of an approved PEO to cancel its certificate of approval unless the approved PEO novates its remaining plan obligations with an unaffiliated authorized insurer or satisfies its remaining plan obligations under an agreement filed with and approved in writing by the commissioner. For purposes of this subsection, those obligations are:

(1) known claims and expenses associated with those claims; and

(2) incurred but not reported claims and expenses associated with those claims.

(c) Approval of withdrawal plan. Except as provided by subsection (d) of this section, the commissioner will approve a withdrawal plan that satisfies the requirements of subsections (a) and (b) of this section.

(d) Modification or denial of withdrawal plan. If the approved PEO is unable to meet its contractual and financial obligations in a solvent and compliant manner, the commissioner will modify or deny an approved PEO's filed withdrawal plan, and take action authorized under Insurance Code Chapters 404, Financial Condition; 406, concerning Special Deposits Required Under Potentially Hazardous Conditions; 441, concerning Supervision and Conservatorship; 443, concerning the Insurer Receivership Act; or all other applicable law.

(e) Notice of modification. The commissioner will issue a written notice to an approved PEO stating the basis for a modification under subsection (d) of this section. If within 30 days of receiving a notice of modification the approved PEO submits a written request for review by the commissioner and submits additional information that its withdrawal plan satisfies the requirements of subsections (a) and (b) of this section, the commissioner will reconsider the modification and give the PEO written notice of his decision.

(f) Notice of denial; State Office of Administrative Hearings hearing request. The commissioner will issue a written notice of denial to an approved PEO stating the basis for a denial under subsection (d) of this section. If within 30 days of receiving the commissioner's notice the approved PEO submits a written request for a hearing on denial of withdrawal plan, the commissioner will file a request to set a hearing at the State Office of Administrative Hearings under Government Code Chapter 2001, concerning Administrative Procedure; and Insurance Code Chapter 40, concerning Duties of State Office of Administrative Hearings and Commissioner in Certain Proceedings; Rate

Setting Proceedings. At the hearing the approved PEO will be given an opportunity to show compliance with this section.

§13.581. Limitation, Suspension, or Cancellation of Certificate of Approval in Response to TDLR Action.

(a) Notice of TDLR action against approved PEO's license. The commissioner will limit, suspend, or cancel an approved PEO's certificate of approval in response to an action by TDLR against the approved PEO's license.

(b) Notice of TDLR's contemplated action. An approved PEO must notify the commissioner through TDI's licensing section within 10 business days of first receiving notice that TDLR is contemplating taking action against its license. The approved PEO's notice to the commissioner must include a copy of TDLR's notice.

(c) Limitation or suspension of certificate of approval. If the commissioner receives notice that TDLR is contemplating taking action against an approved PEO's license, at the commissioner's discretion the approved PEO's certificate of approval may be limited or suspended. While an approved PEO's certificate of approval is suspended, the approved PEO cannot contract with a new client to allow enrollment of new plan participants. When the commissioner receives satisfactory notice that all outstanding issues between TDLR and the approved PEO are resolved to TDLR's satisfaction, TDI will remove the limitation or suspension of the approved PEO's certificate of approval.

(d) Notice of TDLR action terminating license. If TDLR revokes an approved PEO's license, the approved PEO must terminate its health benefit plan in compliance with §13.580 of this title (relating to Withdrawal from Market). An approved PEO must notify the commissioner through TDI's licensing section within 10 business days of receiving notice that TDLR has revoked its license. The approved PEO's notice to the commissioner must include:

(1) a copy of TDLR's notice of termination; and

(2) confirmation that the approved PEO will file its withdrawal plan within 30 days.

(e) Cancellation. When an approved PEO has fulfilled all requirements of its withdrawal plan, the commissioner will cancel the approved PEO's certificate of approval.

(f) Reapplication. If TDLR later reinstates the PEO's license or grants the PEO a new license in good standing, the PEO may reapply to TDI for a certificate of approval in order to sponsor another plan under this subchapter.

§13.582. Limitation, Suspension, or Cancellation of Certificate of Approval in Response to TDI Action.

(a) Commissioner's authority. Nothing in this section limits the commissioner's authority under Insurance Code Chapters 404, Financial Condition; 406, Special Deposits Required Under Potentially Hazardous Conditions; 441, Supervision and Conservatorship; or 443, the Insurer Receivership Act.

(b) Limitation, suspension, or cancellation of certificate. The commissioner will limit, suspend, or cancel an approved PEO's certificate of approval if the commissioner finds that the approved PEO or its plan or trust do not meet the requirements of applicable Insurance Code provisions or this subchapter.

(c) Notice of limitation; commissioner's hearing. The commissioner will issue a written notice to an approved PEO stating the basis for a limitation under subsection (b) of this section. If within 30 days of receiving a notice of limitation the approved PEO submits a written request for review by the commissioner, the commissioner will schedule a hearing under Insurance Code Chapter 40, at which the approved PEO will be given an opportunity to show compliance with this

subchapter. Hearings described in this subchapter will be conducted as required by Government Code Chapter 2001, concerning Administrative Procedure; Insurance Code Chapter 40, concerning Duties of State Office of Administrative Hearings and Commissioner in Certain Proceedings; Rate Setting Proceedings; TDI's and State Office of Administrative Hearing's rules of procedure; and any other applicable law and regulations.

(d) Notice of suspension or cancellation. The commissioner will issue a written notice of suspension or of intent to cancel to an approved PEO stating the basis for the suspension or cancellation under subsection (b) of this section.

(e) Hearing request in contested case. An approved PEO may submit a written request to the commissioner for a hearing at the State Office of Administrative Hearings under Government Code Chapter 2001, Administrative Procedure, within 30 days of receiving notice that its certificate of approval:

(1) remains limited after a commissioner's hearing under subsection (c) of this section,

(2) is suspended under subsection (d) of this section, or

(3) will be canceled under subsection (d) of this section.

(f) At that hearing the approved PEO will be given an opportunity to show compliance with this subchapter.

§13.583. Cancellation of Certificate of Approval.

(a) Plan termination. If the commissioner determines that an approved PEO's certificate of approval should be canceled, the approved PEO must terminate its health benefit plan in compliance with §13.580 of this title (relating to Withdrawal from Market). The approved PEO must file its withdrawal plan within 30 days of receiving the commissioner's written notice of suspension.

(b) Cancellation of certificate of approval. When an approved PEO has fulfilled all requirements of its approved withdrawal plan, the commissioner will cancel the approved PEO's certificate of approval.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Texas Department of Insurance

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 39. PUBLIC NOTICE

SUBCHAPTER L. PUBLIC NOTICE OF INJECTION WELL AND OTHER SPECIFIC APPLICATIONS

30 TAC §39.651

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §39.651, *with change* to the proposed text as published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9487).

Background and Summary of the Factual Basis for the Adopted Rule

This rulemaking implements House Bill (HB) 655, 84th Texas Legislature, 2015, addressing the commission's regulation of aquifer storage and recovery (ASR) projects in Texas. ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. The adopted amendment to §39.651 implements the requirements of HB 655 for providing public notice for an individual injection well permit application for an ASR injection well. There are no requirements for providing individual public notice on ASR injection wells that are authorized by rule.

In corresponding rulemaking published in this issue of the *Texas Register*, the commission also adopts revisions to 30 TAC Chapter 295, Water Rights, Procedural; 30 TAC Chapter 297, Water Rights, Substantive; and 30 TAC Chapter 331, Underground Injection Control.

Section Discussion

The commission adopts the amendment of §39.651 to implement the public notice requirements in Texas Water Code (TWC), §27.153(d). Section 39.651(d)(6) is amended to add "Class V" to establish a 30-day comment period for Class V injection well permit applications in the requirements for the Notice of Application and Preliminary Decision. In response to comments, §39.651(h) is added to address the specific notice of application requirements for an application for an individual permit for an injection well for an ASR project as required in HB 655 and as required to maintain requirements for an authorized Underground Injection Control (UIC) program under the federal Safe Drinking Water Act.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "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 action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects. The adoption does not meet the definition of "major environmental rule" because the rulemaking does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment or public health and safety of the state or a sector of the state. The adopted rule implements public notice requirements for certain injection well permit applications associated with ASR projects, consistent with the requirements of HB 655 and Texas statutes.

Furthermore, the adopted rule does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The adopted rule does not exceed a standard set by federal law, because the adopted rule is consistent with applicable federal standards regarding public notice required for injection well permit applications. The adopted rule does not exceed an express requirement of state law because it is consistent with the express requirements of HB 655 and TWC, Chapter 27, Subchapter G. The adopted rule does not exceed requirements set out in the commission's UIC program authorized for the state of Texas under the federal Safe Drinking Water Act. The rulemaking is not adopted under the general powers of the agency and is adopted under the express requirements of HB 655 and TWC, §§27.019, 27.153, and 27.154.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did receive comments on the Draft Regulatory Impact Analysis Determination from Benbrook Water Authority (Benbrook) and Prairielands Groundwater Conservation District (Prairielands GWCD).

Comment

Benbrook and Prairielands GWCD refer to Texas Government Code, §2001.0225 to claim that state regulations may exceed federal requirements as long as the additional requirements are authorized by state law. Prairielands GWCD contends that the amendments to §39.651 exceed federal requirements and the notice requirements in HB 655.

Response

The commission stands by its determination that the amendment to public notice requirements in §39.651 is not a "major environmental rule" as defined in Texas Government Code, §2001.0225. The public notice requirements are procedural rules and do not protect the environment or reduce risks to human health from environmental exposure. A state agency is required to perform a regulatory analysis of rulemaking under Texas Government Code, §2001.0225 only for a major environmental rule. Further, under Texas Government Code, §2001.0225(a)(1), the state agency is required to perform the regulatory analysis of a major environmental rule with the result to exceed a standard set by federal law, unless the rule is specifically required by state law. However, as discussed in the Response to Comments section of this preamble, the adopted rule has been revised to include the public notice requirements for an application for an individual Class V injection well permit in adopted §39.651(h) consistent with the requirements of HB 655 and requirements to maintain an authorized UIC program under the federal Safe Drinking Water Act.

Comment

Benbrook questions statements from the commission's draft regulatory impact analysis that the proposed rule regarding public notice requirements do not exceed a standard set by federal law. Benbrook contends that the proposed rule appears to exceed federal standards as set out in 40 Code of Federal Regulations (CFR) §124.10. Prairielands GWCD contends that the amendments to §39.651 exceed federal requirements and the notice requirements in HB 655.

Response

The amendment to §39.651 establishes requirements for providing public notice for individual permit applications to authorize Class V injection wells associated with ASR projects. These in-

clude requirements for the method of providing notice and the designated recipients of the notice. These provisions do not exceed any numerical or measured standard set by federal law because they are procedural requirements and not environmental protection standards. The permitting requirements for a state UIC program, including the provision of public notice, are identified in 40 CFR §145.11. TCEQ is not required to implement identical provisions to the United States Environmental Protection Agency's public notice requirements in 40 CFR Part 124. The public notice requirements in adopted §39.651(h) for applications for individual Class V injection well permits for ASR projects are consistent with the public notice requirements in HB 655 and requirements to maintain an authorized UIC program under the federal Safe Drinking Water Act. Therefore, the public notice requirements in §39.651 do not exceed a standard established by federal law and are specifically required by state law as provided in Texas Government Code, §2001.0225(a)(1).

Takings Impact Assessment

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The adopted action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects.

The adopted rule would be neither a statutory nor a constitutional taking of private real property. The adopted rule is procedural and would establish public notice requirements for certain injection well permit applications associated with ASR projects, consistent with the requirements of HB 655 and Texas statutes. The adopted rule does not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP.

Public Comment

The commission held a public hearing on January 22, 2016. The comment period closed on February 8, 2016. The commission received comments from Benbrook; Brazos Valley Groundwater Conservation District (Brazos Valley GWCD); Clearwater Underground Water Conservation District (Clearwater Underground WCD); Hemphill Underground Water Conservation District (Hemphill Underground WCD); High Plains Underground Water Conservation District (High Plains Underground WCD); the Honorable Lyle Larson, Texas State Representative, District 122, who authored HB 655 (Representative Larson); Llano Estacado Underground Water Conservation District (Llano Estacado Underground WCD); Lone Star Groundwater Conservation District (Lone Star GWCD); Mesa Underground Water Conservation District (Mesa Underground WCD); Permian Basin Un-

derground Water Conservation District (Permian Basin Underground WCD); Prairielands GWCD; Sandy Land Underground Water Conservation District (Sandy Land Underground WCD); Sledge Law and Public Strategies (Sledge Law); South Plains Underground Water Conservation District (South Plains Underground WCD); Texas Alliance of Groundwater Districts; Texas Farm Bureau; and the Upper Trinity Groundwater Conservation District (Upper Trinity GWCD).

All commenters generally were in support of the proposed rules, although a common comment was that certain rules were not consistent with HB 655.

Response to Comments

Comment

Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD supports the proposed language added to §39.651(c)(4); (d)(4) and (6); and (f)(3)(B) with respect to Notice of Receipt of Application and Intent to Obtain a Permit, Notice of Application and Preliminary Decision, and Notice of Contested Case Hearing.

Response

The commission acknowledges the support for the rule as proposed. However, in consideration of comments submitted on the proposed rule as discussed later in this Response to Comments section, the commission is amending §39.651 and adding subsection (h) to specify the public notice requirements for an application for an individual permit for an injection well for an ASR project, consistent with the public notice requirements specified in HB 655 and requirements to maintain an authorized UIC program under the federal Safe Drinking Water Act.

Comment

Prairielands GWCD and Benbrook commented that the proposed notice requirements for ASR projects authorized by individual permits exceed both federal requirements and TWC, §27.153(d) as provided in HB 655. Prairielands GWCD and Benbrook also commented that the notice requirements for individual permits should be revised to exclude requirements that are not mandated by federal requirements or HB 655. Prairielands GWCD commented that requirements for public notice that are more expansive than what is required by the legislature are illogical. Benbrook commented that the proposed notice requirements for individual permit applications are burdensome and not consistent with HB 655. Texas Alliance of Groundwater Districts and Clearwater Underground WCD commented that the notice requirements for an ASR project under an individual permit exceed the requirements established in TWC, §27.153(d) of HB 655. Lone Star GWCD commented that the notice requirements for ASR projects seeking an individual permit are not consistent with the notice requirements in HB 655. Sledge Law commented that requiring mailed notice to individual landowners and mineral interest owners can be onerous and also that the commission should use the specific notice requirements established in HB 655. Texas Alliance of Groundwater Districts and Clearwater Underground WCD questioned whether the cost and extent to which a permit applicant must provide notice under the proposed rule is reasonable. The Upper Trinity GWCD and Representative Larson commented that the proposed notice requirements for ASR projects autho-

ized by an individual permit are inconsistent with the notice requirements provided in HB 655.

Response

The commission regrets any confusion regarding the proposed rule on public notice requirements for ASR projects authorized by an individual permit. The commission had proposed that the requirements for public notice for ASR projects to be authorized by an individual permit in §39.651 be consistent with state statutory requirements, including specific public notice requirements in HB 655 and general requirements applicable to other injection well permit applications. Upon consideration of these comments and as discussed later in this Response to Comments section, the commission is revising §39.651 by creating new subsection (h) to apply the specific public notice requirements for an individual Class V injection well permit application for an ASR project as provided in HB 655 and as required as part of the TCEQ's authorized UIC program under 40 CFR §145.11. The adopted rule will require only one notice of the application, the Notice of Application and Preliminary Decision, which will be mailed after technical review is complete to the groundwater conservation district (GWCD) in which the injection wells will be located, as required by HB 655, and to the persons listed in §39.413(7) - (9), which are the local, state and federal governmental entities for which notice is required under 40 CFR §124.10(c), persons who have requested to be on a mailing list developed and maintained in accordance with 40 CFR §124.10(c)(1)(ix), and the applicant.

Under the Code Construction Act a later enacted statute generally prevails over an earlier enacted statute that conflicts, and specific statute generally prevails over a general statute that conflicts. Therefore, although there are general notice requirements for an application for an individual UIC permit in TWC, Chapters 5 and 27 that were previously enacted, it is reasonable to interpret HB 655, which specifically addresses notice requirements for ASR projects, as providing the exclusive state notice of application requirements for an individual UIC permit for an ASR project. In addition, a statute should be interpreted so that all words are given effect and meaning. If the general notice requirements for UIC individual permits were applicable, there would have been no need for HB 655 to require that notice be given by first class mail to a GWCD in which the wells will be located, because such notice would have already been required under the general requirements for notice of UIC individual permits in TWC, Chapter 27. Furthermore, if the general statutory requirements for notice were applicable, the requirement in HB 655 that notice be published in a newspaper of general circulation in the county in which the wells are located would be superfluous, because the general requirements for notice of UIC individual permits, as implemented in commission rule, already require that notice be published in the largest newspaper of general circulation in the county. While HB 655 provides the exclusive state notice of application requirements for an individual UIC permit for an ASR project, additional federal notice requirements must be met in order to meet requirements to maintain an authorized UIC program under the federal Safe Drinking Water Act.

Comment

Brazos Valley GWCD commented that public notice should be provided to GWCDs and adjacent landowners, when the ASR project is authorized under a general permit, individual permit, or by rule. Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD commented

that the proposed rule violates the intent of HB 655 because there is no public notice requirement for ASR projects that are authorized by rule. Texas Farm Bureau commented that it expected that all ASR projects would be subject to public notice.

Response

HB 655 does not specify that notice must be provided to adjacent landowners and does not establish any public notice requirements for ASR projects authorized by rule. Authorization by rule is fulfilled by complying with the requirements of the applicable rules in Chapter 331. Class V injection wells may be authorized by rule under the requirements of the federal Safe Drinking Water Act. ASR projects may be authorized by rule as established in HB 655. There are no public notice requirements in the federal regulations or in state statutes that are applicable to ASR projects authorized by rule. No changes were made directly in response to these comments. However, as noted later in this Response to Comments section, the commission is revising 30 TAC §331.7(h) to require that the executive director inform a GWCD of any ASR project proposed to be authorized by rule for a project that is located within that district. Although the executive director will inform GWCDs of such projects as provided in §331.7, the public notice requirements in §39.651 will not be revised.

Comment

Texas Alliance of Groundwater Districts, Clearwater Underground WCD, Lone Star GWCD, Upper Trinity GWCD, and Representative Larson requested that the rule be amended to require that TCEQ's executive director forward notice to a GWCD for a proposed ASR project authorized by rule that is located within the jurisdiction of the district. Brazos Valley GWCD commented that the rule should be amended to require TCEQ's executive director to notify GWCDs of any pending ASR project within the district's boundaries. Brazos Valley GWCD and Representative Larson commented that the rule fails to require notice to GWCDs for ASR projects authorized by rule.

Response

The commission expects that ASR project operators will work closely with GWCDs, landowners, and local authorities *before* seeking any requisite approvals from TCEQ. The commission believes that ASR project operators will benefit from information sharing and the coordination in the planning of their projects with these local interests. While HB 655, other state laws, and federal UIC program requirements do not require the provision of public notice for injection wells that are authorized by rule, the commission is revising §331.7(h) to require that the executive director inform a GWCD of any ASR project proposed to be authorized by rule for a project that is located within that district. Although the executive director will inform GWCDs of such projects as provided in §331.7, the public notice requirements in §39.651 will not be revised.

Comment

Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD commented that all ASR projects should be required to obtain an individual permit and that authorization by rule should only be used in a dire emergency, such as declared disaster area or systematic drought. Texas Farm Bureau commented that all ASR projects should be

authorized by an individual permit so that property owners can participate in the permit process.

Response

HB 655 provided that the commission may authorize the use of a Class V injection well as an ASR injection well by rule, under an individual permit, or under a general permit. Class V injection wells are typically authorized by rule as allowed under federal UIC program requirements and state statute. The commission is not going to require all ASR projects to be authorized by an individual permit at this time. The executive director has the authority in 30 TAC §331.9 to require any operator of an injection well authorized by rule to apply for and obtain an injection well permit. The commission expects that the executive director will exercise this discretion carefully. The commission may decide to re-evaluate the suitability of the authorization by rule process for ASR projects at some future point. No changes were made in response to the comments.

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and TWC, §27.153, which requires the commission to adopt rules for authorization of aquifer storage and recovery injection wells by rule or by permit.

The adopted amendment implements House Bill 655, 84th Texas Legislature, 2015, and TWC, Chapter 27, Subchapter G.

§39.651. Application for Injection Well Permit.

(a) *Applicability.* This subchapter applies to applications for injection well permits that are declared administratively complete on or after September 1, 1999.

(b) *Preapplication local review committee process.* If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant shall submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. In addition, if the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice must be mailed to the mayor of the municipality.

(c) *Notice of Receipt of Application and Intent to Obtain Permit.*

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete, notice must be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit). This notice must contain the text as required by §39.411(b)(1) - (9) and (11) of this title (relating to Text of Public Notice). Notice under §39.418 of this title will satisfy the notice of receipt of application required by §281.17(d) of this title (relating

to Notice of Receipt of Application and Declaration of Administrative Completeness).

(3) After the executive director determines that the application is administratively complete, in addition to the requirements of §39.418 of this title, notice must be given to the School Land Board, if the application will affect lands dedicated to the permanent school fund. The notice must be in the form required by Texas Water Code, §5.115(c).

(4) For Notice of Receipt of Application and Intent to Obtain a Permit concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility;

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(E) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(5) The chief clerk or executive director shall also mail a copy of the application or a summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located and to the county judge and the health authority of the county in which the facility is located.

(6) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) must be published once under §39.405(f)(2) of this title (relating to General Notice Provisions) after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(c)(1) - (6) of this title. In addition to the requirements of §39.405(h) and §39.419 of this title, the following requirements apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county that is adjacent or contiguous to each county in which the proposed facility is located. One notice may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice) and to local governments located in the county of the facility. "Local governments" have the meaning as defined in Texas Water Code, Chapter 26.

(4) For Notice of Application and Preliminary Decision concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility;

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(E) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(5) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title (relating to Application for Industrial or Hazardous Waste Facility Permit).

(6) The deadline for public comments on industrial solid waste, Class III, or Class V injection well permit applications will be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) If an application for a new hazardous waste facility is filed:

(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is proposed to be located to receive public comment concerning the application; or

(B) on or after September 1, 2005, the agency:

(i) may hold a public meeting under §55.154 of this title (relating to Public Meetings) in the county in which the facility is proposed to be located to receive public comment concerning the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is proposed to be located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is proposed to be located; or

(II) if the executive director determines that there is substantial public interest in the proposed facility.

(2) If an application for a major amendment to or a Class 3 modification of an existing hazardous waste facility permit is filed:

(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is located to receive public comment on the application if a person affected files with the chief clerk a request for a public meeting concerning the application before the deadline to file public comment or to file requests for reconsideration or hearing; or

(B) on or after September 1, 2005, the agency:

(i) may hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment on the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is located; or

(II) if the executive director determines that there is substantial public interest in the facility.

(3) For purposes of this subsection, "substantial public interest" is demonstrated if a request for a public meeting is filed by:

(A) a local governmental entity with jurisdiction over the location in which the facility is located or proposed to be located by formal resolution of the entity's governing body;

(B) a council of governments with jurisdiction over the location in which the facility is located or proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board;

(C) a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is located or proposed to be located; or

(D) a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is located or proposed to be located.

(4) A public meeting is not a contested case proceeding under the Administrative Procedure Act. A public meeting held as part of a local review committee process under subsection (b) of this section meets the requirements of this subsection if public notice is provided in accordance with this subsection.

(5) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters).

(6) The chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of contested case hearing.

(1) Applicability. This subsection applies if an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Newspaper notice.

(A) If the application concerns a facility other than a hazardous waste facility, the applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area that is adjacent or contiguous to each county in which the proposed facility is located.

(B) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(C) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice must be at least 15

square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters). The notice must appear in the section of the newspaper containing state or local news items. The text of the notice must include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) For all applications concerning underground injection wells, the chief clerk shall mail notice to persons listed in §39.413 of this title.

(B) For notice of hearings concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(i) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(ii) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(iii) persons who own mineral rights underlying the existing or proposed injection well facility;

(iv) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(v) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(C) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address, not listed under subparagraph (A) of this paragraph, located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice must be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the contested case hearing. Within 30 days after the date of mailing, the applicant shall file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(4) Radio broadcast. If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title.

(5) Deadline. Notice under paragraphs (2)(A), (3), and (4) of this subsection must be completed at least 30 days before the contested case hearing.

(g) Approval. All published notices required by this section must be in a form approved by the executive director prior to publication.

(h) Applications for individual Class V injection well permits for aquifer storage and recovery (ASR) projects. Notwithstanding the requirements of subsections (c) and (d) of this section, this subsection establishes the public notice requirements for an application for an individual Class V injection well permit for an ASR project. Issuance of the Notice of Receipt of Application and Intent to Obtain a Permit is not required for an application for an individual Class V injection well permit for an ASR project. The notice required by §39.419 of this title must be published by the applicant once in a newspaper of general cir-

ulation in the county in which the injection well will be located after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. The chief clerk shall provide notice by first class mail to any groundwater conservation district in which the wells associated with the ASR project will be located. The chief clerk shall also mail notice to the persons listed in §39.413(7) - (9) of this title. This notice must contain the text as required by §39.411(c)(1) - (6) of this title.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 29, 2016.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-6812



CHAPTER 293. WATER DISTRICTS

SUBCHAPTER C. SPECIAL REQUIREMENTS FOR GROUNDWATER CONSERVATION DISTRICTS

30 TAC §§293.17, 293.20, 293.22, 293.23

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§293.17, 293.20, 293.22, and 293.23 *without change* to the proposed text as published in the November 20, 2015, issue of the *Texas Register* (40 TexReg 8172), and therefore, these amendments will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2015, the 84th Texas Legislature passed House Bill (HB or bill) 2767, relating to the powers, duties, and administration of groundwater conservation districts (GCDs) and amending provisions that authorize fees. HB 2767 makes non-substantive, conforming, or clarification language changes throughout Texas Water Code (TWC), Chapter 36. Some of the changes made by HB 2767 do not affect the agency's rules. However, the commission has chosen to include all of the changes made by the bill in the Background and Summary of the Factual Basis for the Adopted Rules section of this preamble to provide context to the changes that HB 2767 does require.

Specifically, HB 2767 adds a definition to TWC, §36.001, for "operating permit" to mean any type of GCD permit for operation of or production from a water well including a permit to drill or complete a water well if a district does not require a separate permit for those actions. The bill adds a provision in TWC, §36.058, for GCD directors to be subject to Local Government Code, Chapter 176, relating to disclosure of conflicts. HB 2767 strikes language in TWC, §36.061, related to audit reporting standards and adds language in TWC, §36.153, consistent with TWC, Chapter 49, audit requirements and reporting standards. The bill amends TWC, §36.157(a), to add that a county or counties where the district is to be located may pay all costs and expenses incurred

in the creation and organization of the district. HB 2767 also amends TWC, §36.251, by providing that only a GCD, an applicant, and parties to a contested case may participate in an appeal that was the subject of the contested case. The commission does not have rules governing the items listed in this paragraph; therefore, there are no changes for the commission to make to its rules to accommodate these amendments made by the bill.

Additionally, HB 2767 repeals TWC, §36.1082, Petition for Inquiry, and moves the repealed language to amended TWC, §36.3011, Commission Inquiry and Action Regarding District Duties. This move also included amendments to the newly placed language. The commission has rules governing these items; therefore, the commission amended the rule language in 30 TAC Chapter 293, Water Districts, to ensure the TWC citations included in the chapter are current and conform language to the TWC as amended.

HB 2767 closely follows bill language that was developed by the Texas Water Conservation Association over the interim. HB 2767 was authored by Representative Jim Keffer, sponsored by Senator Charles Perry, and became effective June 10, 2015.

Section by Section Discussion

§293.17, *Purpose*

The commission adopts the amendment to §293.17(3) by adding the word "and" to introduce the §293.17(4) provision. The commission adopts the amendment to §293.17(4) by inserting language to note that HB 2767 moved the petitions for inquiry to TWC, Chapter 36, Subchapter I. Additionally, the commission adopts the deletion of §293.17(5) because the rule language is not needed for commission inquiry or action regarding GCD duties. These changes are required by the amendments HB 2767 made to TWC, §36.3011.

§293.20, *Records and Reporting*

The commission adopts the amendment to §293.20(d) by changing the TWC citation from §36.1082 to §36.3011. HB 2767 repealed TWC, §36.1082, and moved the repealed language to amended TWC, §36.3011. This change brings the citations within the agency's rules into agreement with the TWC.

§293.22, *Noncompliance Review and Commission Action*

The commission adopts the amendment to §293.22(a)(5) and (e) by changing the TWC citation from §36.1082 to §36.3011. HB 2767 repealed TWC, §36.1082, and moved the repealed language to amended TWC, §36.3011. These changes bring the citations within the agency's rules into agreement with the TWC.

§293.23, *Petition Requesting Commission Inquiry*

The commission adopts the amendment to §293.23(a) by changing the definition of "affected person" to match the definition of "affected person" as defined in TWC, §36.3011, added by the bill. Additionally, the commission adopts removing the citation to TWC, §36.1082 that was repealed. These changes bring the agency's rules into agreement with the TWC.

The commission adopts the amendment to §293.23(b) by editing paragraphs (4) - (7) to include conforming changes made to TWC, §36.3011(b).

The commission adopts the amendment to §293.23(g)(4) by changing the TWC citation from §36.1082 to §36.3011. HB 2767 repealed TWC, §36.1082, and moved the repealed language to amended TWC, §36.3011. This change brings the citations within the agency's rules into agreement with the TWC.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended 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.

This rulemaking does not meet the statutory definition of a "major environmental rule" because the specific intent of the rule is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to implement legislative changes enacted by HB 2767. HB 2767 repeals TWC, §36.1082, and moves the repealed language to amended TWC, §36.3011.

Further, the rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted amendments do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The cost of complying with the adopted rulemaking is not expected to be significant with respect to the economy as a whole or a sector of the economy; therefore, the adopted rulemaking does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

Furthermore, the adopted rulemaking does not meet the statutory definition of a "major environmental rule" because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) only applies 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. The adopted rulemaking does not meet the four applicability requirements, because the adopted amendments: 1) do not exceed a standard set by federal law; 2) do not exceed an express requirement of state law; 3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program as no such federal delegation agreement exists with regard to the adopted rules; and 4) are not an adoption of a rule solely under the general powers of the commission as the adopted rules are required by HB 2767.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did not receive any comments regarding this section of the preamble.

Takings Impact Assessment

The commission evaluated this adopted rulemaking and performed an assessment of whether the adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission adopted this rulemaking for the specific pur-

pose of implementing legislation enacted by the 84th Texas Legislature in 2015. The commission's analysis revealed that the rulemaking would achieve consistency with TWC, §36.3011, as amended by HB 2767. The adopted rulemaking amends the rule sections to ensure the TWC citations included in Chapter 293 are current and conform to the language as amended by HB 2767.

A "taking" under Texas Government Code, Chapter 2007, means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%. Because no taking of private real property would occur by ensuring the TWC citations included within Chapter 293 are current and conform to the language as amended, the commission has determined that promulgation and enforcement of this adopted rulemaking is neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rules because the adopted rulemaking neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rulemaking. Therefore, the adopted rulemaking does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adopted rulemaking is identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas Coastal Management Program (CMP), and, therefore, requires that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is administrative in nature and does not have a substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission did not receive any comments on the CMP section of the preamble.

Public Comment

The commission held a public hearing on December 15, 2015. The comment period closed on January 4, 2016. The commission received comments from the High Plains Underground Water Conservation District (High Plains UWCD). High Plains UWCD suggested changes to the proposed rule as discussed in the Response to Comments section of this preamble.

Response to Comments

Comment

High Plains UWCD commented that the acronym GCD was misspelled in §293.23(a)(2). High Plains UWCD also commented that using the term "GDC district" in §293.23(a)(2) is duplicative and unnecessary since the term district includes a groundwater conservation district under §293.17. High Plains UWCD recommends striking GCD from the proposed rules.

Response

The commission acknowledges this comment. The proposed version of the rule published on November 20, 2015, in the *Texas Register* (40 TexReg 8172) does not contain a misspelled acronym or include the duplicative term of "GCD district" in §293.23(a)(2). The proposed rule language published in the *Texas Register* states "a GCD or subsidence district in or adjacent to the management area." No changes were made in response to this comment.

Statutory Authority

These amendments are adopted under Texas Water Code (TWC), §5.102, General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, Rules, which establishes the commission's general authority to adopt rules; TWC §5.105, General Policy, which establishes the commission's authority to set policy by rule; and TWC, §36.3011, Commission Inquiry and Action Regarding District Duties, which allows an affected person to file a petition for inquiry.

The adopted amendments implement House Bill 2767.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Texas Commission on Environmental Quality

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For further information, please call: (512) 239-2141



CHAPTER 295. WATER RIGHTS, PROCEDURAL

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §295.21 and §295.22; new §295.21; and an amendment to §295.202.

New §295.21 is adopted *with change* to the proposed text as published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9496). The repeal of §295.21 and §295.22 and the amendment to §295.202 are adopted *without change* to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking implements House Bill (HB) 655, 84th Texas Legislature, 2015, addressing the commission's regulation of aquifer storage and recovery (ASR) projects in Texas. ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. The adopted revisions to Chapter 295 implement amendments to Texas Water Code (TWC), §11.153 and the repeal of TWC, §11.154 under HB 655. HB 655 eliminated the requirement that ASR projects using appropriated water must first develop a pilot project. The adopted revisions in this chapter implement HB 655 by removing the requirements that an ASR project using surface water

under a water right develop the project in separate phases. HB 655 states that a water right holder or a person who has contracted for the use of water under a contract that does not prohibit the use of the water in an ASR project may undertake an ASR project without obtaining any additional authorization under the water rights program. An ASR project must comply with applicable requirements under TWC, Chapters 27 and 36.

In corresponding rulemaking published in this issue of the *Texas Register*, the commission also adopts amendments to 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 297, Water Rights, Substantive; and 30 TAC Chapter 331, Underground Injection Control.

Section by Section Discussion

§295.21, *Aquifer Storage and Retrieval Projects*

The commission adopts the repeal of §295.21. Existing §295.21 includes the requirements for water rights permitting from TWC, §11.153(d) and (e). HB 655 amended TWC, §11.153, to remove subsections (d) and (e); therefore, the commission adopts the repeal of the corresponding requirements in §295.21.

§295.21, *Aquifer Storage and Recovery Projects*

HB 655 also amended TWC, §11.153(a) - (c), to allow a water right holder or a person who has contracted for the use of water under a contract that does not prohibit the use of the water in an ASR project to undertake an ASR project without obtaining any additional authorization under TWC, Chapter 11. However, TWC, §11.153, as amended by HB 655, requires the applicant to obtain any necessary authorizations for an ASR project under TWC, Chapter 27, Subchapter G, and TWC, Chapter 36, Subchapter N. The commission adopts new §295.21 to incorporate these changes to the TWC.

Adopted new §295.21 allows a water right holder or contractee to undertake an ASR project without obtaining any additional authorization under TWC, Chapter 11, for the project. In addition, adopted new §295.21 specifies that a person undertaking an ASR project must obtain any required authorizations under TWC, Chapter 27, Subchapter G, and TWC, Chapter 36, Subchapter N and comply with the terms of the applicable water right.

Current TCEQ rules in 30 TAC §297.42(d) allow the commission to consider water availability on a case-by-case basis for projects, including ASR projects, that are not based on continuous availability of historical streamflow. Water for these projects could be available on a variable or non-constant basis and the commission could consider lower water availability for a water right application that includes an ASR project if the proposed project is viable for the intended purpose and the water can be beneficially used without waste. Adopted new §295.21(b) is included to allow TCEQ to continue to consider the storage made available through an ASR project in its water availability determination under §297.42(d) even though the ASR project does not require a water rights permit.

§295.22, *Additional Requirements for the Underground Storage of Surface Water for Subsequent Retrieval and Beneficial Use*

The commission adopts the repeal of §295.22. This section contains additional requirements for the underground storage of surface water for subsequent retrieval and beneficial use associated with Phase I and II ASR projects. These requirements are from TWC, §11.154. HB 655 repealed TWC, §11.154; therefore, the commission adopts the repeal of this corresponding rule section.

§295.202, *Reports*

Section 295.202(e) contains requirements for operations reports for ASR projects. HB 655 amended TWC, §11.153(a) - (c), to allow a water right holder or contractee to undertake an ASR project without obtaining any additional authorization under TWC, Chapter 11, for the project. In addition, HB 655 repealed TWC, §11.153(d) and (e), and §11.154, which pertained to ASR projects; therefore, the commission adopts the deletion of subsection (e).

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "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 action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects and associated water rights. The adoption does not meet the definition of "major environmental rule" because the rulemaking does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment or public health and safety of the state or a sector of the state. The adopted rules implement the statutory repeal of the requirement to establish a pilot project for an ASR project under HB 655.

Furthermore, the adopted rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The adopted rules do not exceed a standard set by federal law, because there are no federal standards regarding Texas water rights. The adopted rules do not exceed an express requirement of state law because the rules are consistent with the express requirements of HB 655 and TWC, §11.153. The adopted rules do not exceed requirements of a federal delegation agreement or contract because there is no federal delegation or contract for the Texas Water Rights program. The rulemaking is not adopted under the general powers of the agency and is adopted under the express requirements of HB 655, Section 6.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did not receive comments on the regulatory impact analysis determination for the Chapter 295 rules.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The adopted action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of water rights associated with ASR projects.

The adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules eliminate a requirement that ASR projects first establish a pilot project and develop the project in phases consistent with the requirements of HB 655. The adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not

burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission did not receive comments on the CMP.

Public Comment

The commission held a public hearing on January 22, 2016. The comment period closed on February 8, 2016. The commission received comments from the Benbrook Water Authority (Benbrook), Hemphill Underground Water Conservation District (Hemphill Underground WCD), High Plains Underground Water Conservation District (High Plains Underground WCD), Llano Estacado Underground Water Conservation District (Llano Estacado Underground WCD), Mesa Underground Water Conservation District (Mesa Underground WCD), Permian Basin Underground Water Conservation District (Permian Basin Underground WCD), Sandy Land Underground Water Conservation District (Sandy Land Underground WCD), Sledge Law and Public Strategies (Sledge Law), and South Plains Underground Water Conservation District (South Plains Underground WCD).

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD supported the rulemaking. Benbrook and Sledge Law suggested changes as discussed in the Response to Comments section of this preamble.

Response to Comments

Section by Section Discussion of §295.21, Aquifer Storage and Recovery Projects

Comment

Benbrook and Sledge Law requested that the commission include additional preamble language to explain what the commission means by the words: "...not based on continuous availability of historical streamflow" in the preamble discussion of new §295.21. Benbrook commented that they believe these words were meant as a clarification that an applicant for a water right could use ASR to help prove up a water right that qualifies a firm yield demonstration through storage (i.e. municipal use right).

Response

The commission responds that adopted §295.21(b) implements TWC, §11.053(c). Water for ASR projects could be available on a variable or non-constant basis. Under adopted new §295.21(b) the commission could consider lower water availability for a wa-

ter right application that includes an ASR project if the proposed project is viable for the intended purpose and the water can be beneficially used without waste. Adopted new §295.21(b) allows TCEQ to continue to consider the storage made available through an ASR project in its water availability determinations under §297.42(d), even though the ASR component of the project does not require a water rights permit. The commission clarified the Section by Section discussion of adopted §295.21 in response to this comment.

Subchapter A: Requirements of Water Rights Applications General Provisions

Division 2: Additional Requirements for the Storage of Appropriated Surface Water in Aquifers

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD commented that they support the repeal of existing §295.21 and §295.22 and the new rule language in §295.21.

Response

The commission acknowledges this comment. No changes were made in response to this comment.

Comment

Benbrook and Sledge Law commented that the commission should add the words, "as defined in §297.1 of this title (relating to Definitions)" after the words, "aquifer storage and recovery project" in §295.21(b). The commenters stated that the suggested language is in repealed §295.21 and that without the language there is no definition for an ASR project in Chapter 295.

Response

The commission agrees with the commenters. Section §295.21(b) was changed in response to this comment.

Subchapter F: Miscellaneous

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD commented that they support the amendment of §295.202.

Response

The commission acknowledges this comment. No changes were made in response to this comment.

SUBCHAPTER A. REQUIREMENTS OF WATER RIGHTS APPLICATIONS GENERAL PROVISIONS

DIVISION 2. ADDITIONAL REQUIREMENTS FOR THE STORAGE OF APPROPRIATED SURFACE WATER IN AQUIFERS

30 TAC §295.21, §295.22

Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted repeal implements HB 655; TWC, §11.153; and the repeal of TWC, §11.154.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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30 TAC §295.21

Statutory Authority

The new section is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted new section implements HB 655; TWC, §11.153; and the repeal of TWC, §11.154.

§295.21. Aquifer Storage and Recovery Projects.

(a) A water right holder or a person who has contracted for the use of water under a contract that does not prohibit the use of the water in an aquifer storage and recovery project may undertake an aquifer storage and recovery project without obtaining any additional authorization under Texas Water Code (TWC), Chapter 11, for the project. A person, as described in this section, undertaking an aquifer storage and recovery project must:

(1) obtain any required authorizations under TWC, Chapter 27, Subchapter G, and TWC, Chapter 36, Subchapter N; and

(2) comply with the terms of the applicable water right.

(b) This section does not preclude the commission from considering an aquifer storage and recovery project, as defined in §297.1 of this title (relating to Definitions), to be a component of a project permitted under TWC, Chapter 11, that is not required to be based on the continuous availability of historic, normal stream flow.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. MISCELLANEOUS

30 TAC §295.202

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted amendment implements HB 655; TWC, §11.153; and the repeal of TWC, §11.154.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 297. WATER RIGHTS, SUBSTANTIVE

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§297.1, 297.13, and 297.19 *without changes* to the proposed text as published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9500) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking implements House Bill (HB) 655, 84th Texas Legislature, 2015, addressing the commission's regulation of aquifer storage and recovery (ASR) projects in Texas. ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation,

or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. The adopted amendments to Chapter 297 implement amendments to Texas Water Code (TWC), §11.153 and the repeal of TWC, §11.154 under HB 655 regarding the storage of appropriated water in ASR projects.

The 84th Texas Legislature also passed HB 2031. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 2031 created TWC, Chapter 18, to address marine seawater desalination projects. New TWC, §18.001, added a definition for "Marine seawater." The commission intends to implement statutory requirements for desalination in a separate rulemaking project (Rule Project Number 2015-029-295-OW). Because the commission is adopting changes to definitions in §297.1 to implement HB 655, the commission is also adopting changes to this section to include a definition from HB 2031 to avoid open section conflicts under *Texas Register* publication requirements when the rest of HB 2031 is implemented in the separate rulemaking project.

In corresponding rulemaking published in this issue of the *Texas Register*, the commission also adopts revisions to 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 295, Water Rights, Procedural; and 30 TAC Chapter 331, Underground Injection Control.

Section by Section Discussion

In addition to adopting amendments to implement HB 655 and HB 2031, the commission adopts grammatical, stylistic, and various other non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, and establish consistency in the rules. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§297.1, Definitions

The commission adopts the amendment to §297.1(5) and adds §297.1(30). The commission amends the definition of "Aquifer Storage and Retrieval Project" in §297.1(5). HB 655 created new TWC, Chapter 27, Subchapter G, which contains a definition of "Aquifer storage and recovery project." The commission amends the existing term and definition in §297.1(5) to bring it into agreement with "Aquifer storage and recovery project" as defined in the amendments to the TWC made by HB 655.

The commission also adds a definition for "Marine seawater" as §297.1(30). HB 2031 created TWC, Chapter 18, to address marine seawater desalination projects. New TWC, §18.001, added a definition for "Marine seawater." Because the commission has opened §297.1 to amend the definition of "Aquifer Storage and Retrieval Project," the commission also simultaneously adopts the addition of the definition of "Marine seawater" to avoid a potential open section conflict with another agency rulemaking.

Additionally, the commission adopts the renumbering of the existing definitions to accommodate the addition of §297.1(30).

§297.13, Temporary Permit under the Texas Water Code, §11.138

The adopted amendment to §297.13 revises the title to remove the TWC reference to TWC, §§11.153 - 11.155, because a temporary permit is no longer required for an ASR project under TWC, Chapter 11. HB 655 amended TWC, §11.153(a) - (c), to allow a water right holder or a person who has contracted

for the use of water under a contract that does not prohibit the use of the water in an ASR project to undertake an ASR project without obtaining any additional authorization under TWC, Chapter 11. However, TWC, §11.153, as amended by HB 655, requires the applicant to obtain any necessary authorizations for an ASR project under TWC, Chapter 27, Subchapter G, and TWC, Chapter 36, Subchapter N. In addition, HB 655 repealed TWC, §11.153(d) and (e), and §11.154, which included the repeal of Phase I ASR projects. The commission amends §297.13(a), which includes a description of the types of projects a temporary permit is designed for, by deleting, "evaluation of Phase I of an aquifer storage and retrieval project" since HB 655 repealed Phase I ASR projects.

§297.19, Term Permit under Texas Water Code, §11.1381

The adopted amendment to §297.19 revises the title to remove the TWC reference to TWC, §§11.153 - 11.155, and deletes §297.19(d) because the term permit is no longer required for an ASR project under TWC, Chapter 11, as amended by HB 655.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "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 action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects and associated water rights; and implements HB 2031, by adding a definition of "Marine seawater." The adoption does not meet the definition of "major environmental rule" because the rulemaking does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment or public health and safety of the state or a sector of the state. The adopted rules implement the statutory repeal of the requirement to establish a pilot project for an ASR project under HB 655 by removing rule requirements for temporary and term permits for ASR projects and amends definitions consistent with HB 655 and HB 2031.

Furthermore, the adopted rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The adopted rules do not exceed a standard set by federal law, because there are no federal standards regarding Texas water rights. The adopted rules do not exceed an express requirement of state law because the rules are consistent with the express requirements of HB 655; TWC, §11.153; the repeal of TWC, §11.154; and TWC, §18.001, as established in HB 2031. The adopted rules do not exceed requirements of a federal delegation agreement or contract because there is no federal delegation or contract for the Texas Water Rights program. The rulemaking is not adopted under the general powers of the agency and is adopted under the express requirements of HB 655, Section 6.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did not receive comments

on the regulatory impact analysis determination for the Chapter 297 rules.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The adopted action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of water rights associated with ASR projects; and implements HB 2031 by adding a definition of "Marine seawater."

The adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules eliminate requirements for temporary or term permits because ASR projects do not have to establish a pilot project or develop the project in phases under the requirements of HB 655. The adopted rules also amend definitions to implement HB 655 and HB 2031. The adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission did not receive comments regarding the consistency with the CMP.

Public Comment

The commission held a public hearing on January 22, 2016. The comment period closed on February 8, 2016. The commission received comments from the Hemphill Underground Water Conservation District (Hemphill Underground WCD), High Plains Underground Water Conservation District (High Plains Underground WCD), Llano Estacado Underground Water Conservation District (Llano Estacado Underground WCD), Mesa Underground Water Conservation District (Mesa Underground WCD), Permian Basin Underground Water Conservation District (Permian Basin Underground WCD), Sandy Land Underground Water Conservation District (Sandy Land Underground WCD), and South Plains Underground Water Conservation District (South Plains Underground WCD).

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD supported the rulemaking.

Response to Comments

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD commented that they support the amendment of §§297.1, 297.13, and 297.19.

Response

The commission acknowledges this comment. No changes were made in response to this comment.

SUBCHAPTER A. DEFINITIONS AND APPLICABILITY

30 TAC §297.1

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted amendment implements HB 655, TWC, §11.153, and the repeal of TWC, §11.154; and HB 2031, 84th Texas Legislature, 2015, and TWC, §18.001.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. CLASSES OF WATER RIGHTS

30 TAC §297.13, §297.19

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted amendments implement HB 655; TWC, §11.153; and the repeal of TWC, §11.154.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 331. UNDERGROUND INJECTION CONTROL

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §§331.2, 331.7, 331.11, and 331.181 - 331.186.

The amendments to §331.7 and §§331.182 - 331.186 are adopted *with changes* to the proposed text as published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9552). The amendments to §§331.2, 331.11, and 331.181 are adopted *without changes* to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking implements House Bill (HB) 655, 84th Texas Legislature, 2015, addressing the commission's regulation of aquifer storage and recovery (ASR) projects in Texas. ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. ASR allows the operator to utilize an existing aquifer as a storage reservoir rather than using aboveground storage options. The stored water can be available for public or private drinking water supplies, agriculture, or industrial uses. The operator must assure that the aquifer formation receiving the injected water has appropriate geologic and hydrologic properties that are amenable to injection and will allow the control or containment of the injected water. The operator must assure that injection will not endanger any drinking water source that supplies or can reasonably be expected to supply any public water system. Such a drinking water source is endangered if injection may result in the presence of any contaminant that may result in the system not being compliant with any national primary drinking water regulation, or if injection may otherwise adversely affect the health of persons. TCEQ's Underground Injection Control (UIC) program regulates the authorization, construction, operation, and closure of the injection wells used for ASR projects. Because ASR injection wells inject fluids into a formation that is considered an underground source of drinking water, ASR injection wells are classified as Class V injection wells. Other TCEQ regulatory programs, such as the Water Rights program or the Public Drinking Water program, may also be involved with ASR projects, depending on the original source of the injected water or the final use of the recovered water. Projects situated

within a groundwater conservation district may be subject to the requirements of that district as provided in HB 655.

HB 655 amended Texas Water Code (TWC) to revise the requirements that apply to authorization for ASR projects. TWC, §11.153 was amended to allow the injection of appropriated water for an ASR project without obtaining any additional authorizations under TWC, Chapter 11, and to specify that commission approval of an ASR project is not contingent on the continuous availability of historic, normal stream flow. TWC, §11.155 was amended to remove the requirement for a pilot project prior to approval of an ASR project. TWC, Chapter 27 was amended to add TWC, Chapter 27, Subchapter G, Aquifer Storage and Recovery Projects, §§27.151 - 27.157. Under new TWC, §27.151, definitions were provided for the following terms: "Aquifer storage and recovery project," "ASR injection well," "ASR recovery well," "Native groundwater," and "Project operator." Under new TWC, §27.152, the commission is granted exclusive jurisdiction over the regulation and permitting of ASR injection wells. Under new TWC, §27.153, the commission may authorize the use of a Class V ASR injection well by rule, individual permit, or under a general permit. Under new TWC, §27.153(b), in adopting rules or when issuing a permit for an ASR injection well, the commission shall consider if the injection of water will comply with the standards of the federal Safe Drinking Water Act, the amount of injected water that can be recovered, the effect of the ASR project on existing water wells, and the effect of the injected water on the physical, chemical, or biological quality of the native groundwater that would render the water produced harmful or detrimental to people, vegetation, or property. All wells associated with a single ASR project must be located within a continuous perimeter boundary. The commission is required to provide for public notice and comment on a proposed general permit, and the applicant for an individual permit is required to provide first class mailed notice to any groundwater conservation district in which the ASR wells will be located, and is required to publish notice in a newspaper of general circulation in the county in which the well will be located. Under new TWC, §27.154, the commission is directed to adopt technical standards governing the approval of the use of a Class V injection well as an ASR injection well. For an ASR project located within the jurisdiction of a groundwater conservation district or other special purpose district with authority to regulate groundwater withdrawal, the volume of groundwater recovered at an ASR project is limited to the volume of water injected. If the commission determines that a loss of injected water or loss of native water will occur, the commission shall impose additional restrictions on the amount of water that may be recovered to account for the loss. The commission may not deny a permit based on a determination that such a loss will occur. The commission shall prescribe by rule construction and completion standards, metering, and reporting requirements for ASR injection and recovery wells. The commission may not adopt or enforce groundwater protection standards for the quality of water injected that are more stringent than federal standards. New TWC, §27.155 requires an ASR project operator to install a meter on each ASR injection and recovery well associated with the ASR project. The project operator also must provide monthly reports to the commission on the volume of water injected, and the volume of water recovered for beneficial use. New TWC, §27.156 requires an ASR operator to perform annual water quality testing on water to be injected and on recovered water, and to provide testing results to the commission. New TWC, §27.157 provides that new TWC, Chapter 27, Subchapter G does not affect the ability to regulate an ASR project under specific legislation applicable to the Edwards Aquifer Authority,

the Harris-Galveston Subsidence District, the Fort Bend Subsidence District, the Barton Springs Edwards Aquifer Conservation District, or the Corpus Christi Aquifer Storage and Recovery Conservation District. New TWC, Chapter 27, Subchapter G, does not affect the commission's authority regarding recharge projects in certain portions of the Edwards underground reservoir under TWC, §11.023 or injection wells that transect or terminate in certain portions of the Edwards Aquifer under TWC, §27.0516.

In corresponding rulemaking published in this issue of the *Texas Register*, the commission also adopts revisions to 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 295, Water Rights, Procedural; and 30 TAC Chapter 297, Water Rights, Substantive.

Section by Section Discussion

In addition to adopting amendments to implement HB 655, the commission adopts grammatical, stylistic, and various other non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, and establish consistency in the rules. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§331.2, Definitions

The commission adopts an amendment to §331.2 to implement HB 655 new definitions established in TWC, §27.151. Section 331.2 is amended to add definitions for the following terms: "Aquifer storage and recovery injection well," "Aquifer storage and recovery production well," "Aquifer storage and recovery project," "Native groundwater," and "Project operator." The existing definition for the term "Aquifer storage well" is amended to "Aquifer storage and recovery," as the amended definitions for the terms "Aquifer storage and recovery injection well" and "Aquifer storage and recovery production well" now supersede the existing definition for "Aquifer storage well." Existing definitions in this section are renumbered accordingly.

§331.7, Permit Required

The commission adopts the amendment to §331.7 to add subsection (h), under which a Class V injection well associated with an ASR project may be authorized by permit, general permit, or authorization by rule. Adopted §331.7(h) implements TWC, §27.153(a). The commission expects that most ASR projects can be authorized by rule as provided in HB 655 and as allowed for Class V injection wells under the commission's UIC program approved by the United States Environmental Protection Agency (EPA) under the federal Safe Drinking Water Act. Under existing authority in §331.9(c), the executive director may require the owner or operator of an injection well otherwise authorized by rule to apply for and obtain an injection well permit. The executive director may use this authority, on a case-by-case basis, to require that an owner or operator of ASR project seek authorization under a permit rather than by rule. Because the commission expects that most ASR projects can be authorized by rule, the commission does not plan to develop a general permit for ASR at this time.

Based on comments received, the proposed rule is amended to refer to "individual permit" in the adopted rule, as the term "individual permit" is consistent with TWC, §27.153(a)(2). Additionally, based on comments received, adopted §331.7(h) includes the requirements that the executive director inform a groundwater conservation district of any ASR project proposed to be au-

thorized by rule for a project that is located within that district. Lastly, proposed §331.7(h) was amended at adoption to state that Class V injection well associated with an ASR project may be "authorized by individual permit, general permit, or by rule" rather than "authorized by permit, general permit, or by permit-by-rule." "Permit-by-rule" is not a term used to describe authorizations under Chapter 331. This change will make the adopted rule consistent with TWC, §27.153(a)(1).

§331.11, Classification of Injection Wells

The commission adopts the amendment to §331.11(a)(4)(L) to refer to wells used for the injection of water for storage and subsequent retrieval for beneficial use as part of an ASR project. Revision of the description of this type of Class V well addresses the adopted definition for the term "Aquifer storage and recovery injection well" at §331.2(9).

Subchapter K, Additional Requirements for Class V Injection Wells Associated with Aquifer Storage and Recovery Projects

The commission adopts amending the title of Subchapter K from "Additional Requirements for Class V Aquifer Storage Wells" to "Additional Requirements for Class V Injection Wells Associated with Aquifer Storage and Recovery Projects." This adopted amendment is necessary for consistency with the adopted definition for the term "Aquifer storage and recovery injection well."

§331.181, Applicability

The commission adopts the amendment to §331.181 to refer to "Class V aquifer storage and recovery injection wells" instead of "aquifer storage wells" to be consistent with the adopted definition for "Aquifer storage and recovery injection well" at §331.2(9) and with the adopted amendment to §331.11(a)(4)(L) regarding the classification of Class V wells used for ASR.

§331.182, Area of Review

The commission adopts the amendment of §331.182 to remove the area of review determination for a Phase I Class V aquifer storage well, as the requirement for a pilot project (Phase I) was repealed from TWC, §11.153(b) and (c) under HB 655. The area of review requirements that applied to the Phase II aquifer storage well is retained and will apply to an ASR project. The commission adopts §331.182(4) to require an applicant for an authorization to provide all of the information to the executive director that is required under adopted §331.186(a) to implement TWC, §27.153(b), as amended by HB 655.

Based on comments received, the commission revised the rule to specify that the area of review for an ASR project is the area determined by a radius of 1/2 mile from the proposed ASR injection well. For an ASR project that includes more than one proposed injection well, the area of review in the adopted rule is the area determined by a radius of 1/2 mile from the centroid of the injection well field. In a case where the extent of the underground stored water of the ASR project will exceed the area determined by the 1/2 mile radius, the adopted rule includes the requirement that the area of review is the area determined by the projected extent of the underground stored water as calculated by using site-specific hydrogeologic information. Additionally, based on comments received, the adopted rule refers to "water" rather than "state water."

§331.183, Construction and Closure Standards

The commission adopts the amendment to §331.183 to refer to "aquifer storage and recovery injection wells" rather than

"aquifer storage wells" to be consistent with the adopted definition for "Aquifer storage and recovery injection wells" at §331.2(9) and with the adopted amendment to §331.11(a)(4)(L) regarding the classification of Class V injection wells used for ASR. The commission also adopts an amendment to this section to revise the term "operator" to "project operator" to be consistent with the latter term as it is defined in adopted §331.2(92). Lastly, the commission adopts §331.183(4) and (5). Under adopted §331.183(4), an ASR injection well may be used as an ASR production well, as specified in TWC, §27.154(c), as added by HB 655. To maintain consistency with existing 30 TAC §290.41, which applies to water wells that are used to supply water to a public water system, adopted paragraph (4) includes the requirement that an ASR injection well that also is used as an ASR production well must be constructed and operated in accordance with the requirements in §290.41 if the recovered water will serve a public water system.

Adopted §331.183(5) addresses TWC, §27.153(c), as added by HB 655, under which all wells associated with an ASR project must be within a continuous perimeter boundary of one parcel of land, or within two or more adjacent parcels of land under the common ownership, lease, joint operating agreement, or contract.

Based on comments received, proposed §331.183(4) was amended to apply to all ASR production wells, not just those that serve as both an ASR injection well and an ASR production well.

§331.184, Operating Requirements

The commission adopts the amendment of §331.184 to refer to "aquifer storage and recovery injection wells" rather than "aquifer storage wells" to be consistent with the adopted definition for "Aquifer storage and recovery injection wells" at §331.2(9) and with the adopted amendment to §331.11(a)(4)(L) regarding the classification of Class V wells used for ASR. The commission adopts the amendment of §331.184(e) to remove the requirement that water injected for storage and subsequent recovery for beneficial use must meet the water quality standards in 30 TAC Chapter 290, Public Drinking Water.

The commission adds §331.184(f), under which all ASR injection and production wells must be installed with a flow meter for measuring the volume of water injected and the volume of the water recovered or produced. Section 331.184(f) implements TWC, §27.155(a), as added by HB 655.

The commission adds §331.184(g) to address the requirements of TWC, §27.154(b), as added by HB 655. Under adopted §331.184(g), the requirements of TWC, Chapter 36, Subchapter N apply to an ASR project that is within the jurisdiction of a groundwater conservation district or other special-purpose district with the authority to regulate the withdrawal of groundwater. For ASR projects located within the jurisdiction of a district, the commission will not authorize the recovery of a volume of water that exceeds the volume of water injected as provided in TWC, §27.154(b). Under TWC, Chapter 36, Subchapter N, an ASR operator is subject to a district's requirements for registration and reporting of ASR production wells; reporting of injection and production volumes; reporting of volume of water produced that exceeds the volume injected; district permitting, spacing, and production requirements for volume of produced water that exceeds the volume of water injected; and the district's requirements regarding fees and surcharges, as they apply to

the volume of water produced that exceed the volume of water injected.

Based on comments received, several revisions were made to this section. Section 331.184(a) was revised to remove the reference to pollution. In adopted §331.184(a), all Class V ASR injection wells must be operated in a manner to assure that injection will not endanger drinking water sources if it may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons. This change makes §331.184(a) consistent with HB 655, as the revised language is consistent with the federal Safe Drinking Water Act, §1421(d)(2). Second, §331.184(e) was revised to remove the requirements regarding treatment of water prior to injection when such treatment was considered to be necessary to avoid pollution of native groundwater. Section 331.184(e) was revised in the adopted rule to reference the requirements of §331.186(a)(1). As discussed in the Response to Comments section of this preamble, this change was made to make the adopted rule consistent with HB 655. The requirement of subsection (e) that water that will be recovered from an ASR and provided to a public water system be subject to applicable requirements of Chapter 290 is retained in the adopted rule. Section 331.184(g)(1) was revised at adoption to specify that an authorization or permit issued under Chapter 331 may not authorize a volume of water to be recovered that exceeds the volume of water that is injected, or the volume of injected water that the commission determines can be recovered, whichever is less. Section 331.184(g)(2) was revised also to specify that the requirements of TWC, Chapter 36, Subchapter N apply to the volume of water recovered from an ASR project that exceeds the volume of water the commission determines can be recovered, and otherwise as applicable. Section 331.184(g)(3) was deleted.

§331.185, Monitoring and Reporting Requirements

The commission adopts the amendment of §331.185(a) to replace the requirement for quarterly reporting to the TCEQ with monthly reporting. The commission amends subsection (a) to include requirements for reporting of the volume of water injected for storage, and for the reporting of the volume of water produced for beneficial use, as required under TWC, §27.155, as added by HB 655. Reporting of monthly average injection pressures and reporting of other information, as required by the executive director, necessary for protection of underground sources of drinking water are retained. The commission adopts amendments to remove the existing requirement in §331.185(a)(4) for monthly reporting of water quality analyses of injected water. TWC, §27.156, added by HB 655, requires water quality testing on an annual basis, which is now required under the adopted amendment to §331.185(b), discussed in this Section by Section Discussion.

The commission adopts the amendment to §331.185(b) to remove reference to the report required for Phase I of an ASR project, as this requirement has been removed from TWC, §11.153(b) and (c). The commission also amends §331.185(b) to require annual water quality testing and reporting as required under TWC, §27.156, as added by HB 655.

Based on comments received, the proposed rule is amended to refer to "individual permit" in the adopted rule, as the term "individual permit" is consistent with TWC, §27.153(a)(2).

§331.186, Additional Requirements

Existing requirements for regulating an ASR project in two phases (initial and final) was removed from TWC, §11.153(b) and (c) under HB 655. TCEQ now can authorize by rule, or issue individual or general permit for an ASR project without requiring a pilot project (Phase I). For this reason, the commission amends the title of §331.186 and deletes the requirement in §331.186 for submission of the information obtained during the first phase of an ASR project. The commission also adopts the amendment of §331.186 to refer to "aquifer storage and recovery injection wells" rather than "aquifer storage wells" to be consistent with the adopted definition for "Aquifer storage and recovery injection wells" at §331.2(9) and with the adopted amendment to §331.11(a)(4)(L) regarding the classification of Class V injection wells used for ASR. The commission adopts amendments to reorganize the sequence of existing §331.186 so that the information that was previously required to be provided after Phase I is now provided to the executive director after the completion of the injection well in adopted §331.186(b).

The commission amends §331.186 by creating a subsection (a) to include factors the TCEQ (either the executive director when considering applications for individual, general permit, or authorizations by rule; or the commission when considering contested applications) shall consider when issuing a new permit for an ASR project. TCEQ must consider whether the injection of the water will comply with the standards set forth in the federal Safe Drinking Water Act; the extent to which the cumulative volume of water injected for storage can be recovered; the effect of the ASR project on existing water wells; and whether the introduction of water in the subsurface will alter the physical, chemical or biological quality of the native groundwater to a degree that would render produced water harmful or detrimental, or would require an unreasonable higher level of treatment to render the produced water suitable for beneficial use. Section 331.186(a) was revised to include the executive director's consideration of the factors specified in TWC, §27.153(a) and (b). Adopted §331.186(a) implements TWC, §27.153(a) and (b), as added by HB 655.

Based on comments received, the proposed rule is amended to refer to "individual permit" in the adopted rule, as the term "individual permit" is consistent with TWC, §27.153(a)(2).

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "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 action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects. The adoption does not meet the definition of "major environmental rule" because the rulemaking does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment or public health and safety of the state or a sector of the state. Prior to the enactment of HB 655, the commission had previously authorized only two ASR projects and does not expect a great number of new projects. The adopted

rules implement the legislative directives of HB 655 and do not impose additional regulatory burdens that would affect the economy or a sector of the economy in a material way.

Furthermore, the adopted rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The adopted rules do not exceed a standard set by federal law, because the adopted rules are consistent with applicable federal standards for Class V ASR injection wells. The adopted rules do not exceed an express requirement of state law because the adopted rules are consistent with the express requirements of HB 655 and TWC, Chapter 27, Subchapter G. The adopted rules do not exceed requirements set out in the commission's UIC program authorized for the state of Texas under the federal Safe Drinking Water Act. The rulemaking is not adopted under the general powers of the agency, but is adopted under the express requirements of HB 655 and TWC, §§27.019, 27.153, and 27.154.

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 Determination for the Chapter 331 rules.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The adopted action implements legislative requirements of HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects.

The adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules would establish conditions and requirement for certain injection activities associated with ASR projects, consistent with the requirements of HB 655. The adopted rulemaking does not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in 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). Therefore, the adopted rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP during the public comment period.

Public Comment

The commission held a public hearing on January 22, 2016. The comment period closed on February 8, 2016. The commission received comments from Benbrook Water Authority (Benbrook); Brazos Valley Groundwater Conservation District (Brazos Valley GWCD); Clearwater Underground Water Conservation District (Clearwater Underground WCD); Hemphill Underground Water Conservation District (Hemphill Under-

ground WCD); High Plains Underground Water Conservation District (High Plains Underground WCD); the Honorable Lyle Larson, Texas State Representative, District 122, who authored HB 655 (Representative Larson); Llano Estacado Underground Water Conservation District (Llano Estacado Underground WCD); Lone Star Groundwater Conservation District (Lone Star GWCD); Mesa Underground Water Conservation District (Mesa Underground WCD); Permian Basin Underground Water Conservation District (Permian Basin Underground WCD); Prairielands Groundwater Conservation District (Prairielands GWCD); Sandy Land Underground Water Conservation District (Sandy Land Underground WCD); Sledge Law and Public Strategies (Sledge Law); South Plains Underground Water Conservation District (South Plains Underground WCD); Texas Alliance of Groundwater Districts; Texas Farm Bureau; and the Upper Trinity Groundwater Conservation District (Upper Trinity GWCD).

All commenters generally were in support of the proposed rules, although there were numerous suggested changes, as detailed in the Response to Comments section of this preamble. A common comment was that certain rules were not consistent with HB 655.

Response to Comments

General

Comment

Representative Larson, Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, South Plains Underground WCD, Upper Trinity GWCD, Texas Farm Bureau, Prairielands GWCD, Upper Trinity GWCD, Sledge Law, Benbrook, Texas Alliance of Groundwater Districts, and Lone Star GWCD commented that the proposed rules should be revised to ensure consistency with HB 655.

Response

The commission agrees that the adopted rules should be consistent with the provisions of HB 655. To ensure that these rules are consistent with HB 655, all comments were carefully reviewed, and, as detailed in the responses, changes to the proposed rules were made, as appropriate, to maintain consistency with HB 655.

Comment

Sledge Law commented that the preamble to this rulemaking did not include the Corpus Christi Aquifer Storage and Recovery Conservation District as an entity that new TWC, Chapter 27, Subchapter G does not affect regarding that districts ability to regulate groundwater.

Response

The commission agrees with this comment, as this entity was included in TWC, §27.157. The preamble to the adopted rules has been amended to include the Corpus Christi Aquifer Storage and Recovery Conservation District.

Subchapter A: General Provisions

§331.2, Definitions

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Un-

derground WCD, South Plains Underground WCD, and Upper Trinity GWCD commented that the commission did not use the exact terms in TWC, §27.151(2) and (3), as amended by HB 655, for the new definitions at §331.2(9) and (10), respectively, for the terms "ASR recovery well" and "ASR production well." Commenters suggested that to be consistent with HB 655, the commission use the terms in TWC, §27.151(2) and (3) in the new definitions, and that the terms in TWC, §27.151(2) and (3) be used throughout the Chapter 331 adopted rules.

Response

The commission acknowledges that the terms defined at §331.2(9) and (10) are not the exact terms used at TWC, §27.151(2) and (3), respectively, although the rule definition for each term is identical to the respective definition in TWC, §27.151(2) and (3). The proposed rule defined the term "Aquifer storage and recovery injection well" instead of the term "ASR injection well," used in TWC, §27.151(2). Similarly, the proposed rule defined the term "Aquifer storage and recovery production well" instead of the term "ASR recovery well," used in TWC, §27.151(3). The commission made these modifications to avoid a possible reference to an "aquifer storage and recovery recovery well." The double "recovery" in this term could create confusion when the ASR acronym is stated in full. This modification does not deviate from the intent of the definitions at TWC, §27.151(2) and (3), as the actual definitions in the rules are identical to the respective definitions in TWC, §27.151(2) and (3). No changes were made in response to this comment.

§331.7, Permit Required

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and the South Plains Underground WCD commented that proposed §331.7(h) be revised to refer to "individual permit" rather than to "permit."

Response

The commission agrees with this comment, as the term "individual permit" is used in TWC, §27.153(a)(2). Adopted §331.7(h) is amended to refer to "individual permit" rather than to "permit." Additionally, as discussed in corresponding rulemaking for 30 TAC Chapter 39 published in this issue of the *Texas Register*, proposed §331.7(h) was amended at adoption to require that the executive director inform a groundwater conservation district of any ASR project proposed to be authorized by rule for a project that is located within that district. Lastly, proposed §331.7(h) was amended at adoption to state that the commission may authorize an ASR project by individual permit, general permit, or by rule, rather than by individual permit, general permit, or permit-by-rule. This change will make the adopted rule consistent with TWC, §27.153(a), under which the commission may authorize the use of a Class V injection well as an ASR injection well under an individual permit, under a general permit, or by rule.

Subchapter K: Additional Requirements for Class V Injection Wells Associated With Aquifer Storage and Recovery Projects

§331.182, Area of Review

Comment

The Prairielands GWCD, Upper Trinity GWCD, Benbrook, Lone Star GWCD, and Sledge Law commented that proposed §331.182 should refer simply to "water" rather than to "state wa-

ter," as management of water at an ASR project is not restricted to state water.

Response

The commission agrees with this comment. At TWC, §27.151(1), the term "aquifer storage and recovery project" is defined as a project involving the injection of *water* (emphasis added) into a geologic formation for the purpose of subsequent recovery and beneficial use by the project operator. As discussed in the following response to comments, proposed §331.182 has been revised to address how the area of review is determined. Based on those comments, the reference to "state water" is amended to "water."

Comment

Benbrook commented that the proposed rule language at §331.182 regarding the area of review was unclear, and suggested the proposed rule be amended to adopt a default area of review, which they described as "a circle of a 1/2 mile radius." Benbrook commented that a typical ASR project has a radius of 200 feet. Benbrook further commented that if information submitted in the application indicated the extent of stored water was greater than the area described by a radius of 1/2 mile, the area of review could be extended. Benbrook stated that this recommendation is based on the difficulty and costs associated with determining the location of the "buffer zone" in order to establish a 1/4 mile area of review from the buffer zone.

Response

Prior to amendment of TWC by HB 655, the area of review was described in §331.182 as the area determined by a radius of 1/4 mile from the perimeter of a buffer zone as described under 30 TAC §295.22(e)(5). Under §295.22(e)(5), an application for an ASR project had to include "the location of a buffer zone surrounding the land surface area under which the underground storage of state water will occur and beyond which pumpage by other wells will not interfere or significantly affect the movement or storage of the state water." In a corresponding rulemaking for 30 TAC Chapter 295, published in this issue of the *Texas Register*, the commission repeals §295.22. Although §295.22 was repealed, HB 655 did not remove the requirements that are in §331.182 regarding information in §331.182(1) - (3), which pertain to the area of review. That is to say, HB 655 did not remove the requirement for an area of review under existing §331.182. Additionally, an area of review is required to address the requirement at TWC, §27.153(b)(3), under which the commission shall consider the effect of the ASR project on existing water wells. In their comments, Benbrook stated that at a typical ASR project, the extent of the stored water is within an area with a radius of about 200 feet. Benbrook also stated that determination of a buffer zone is difficult and expensive, and that the area of review should be a circle of 1/2 mile radius (presumably centered on an ASR well or wells). The commission agrees that the area of review should be based on a distance from an identifiable feature; in this case, an ASR injection well, or, in the case of an ASR project for which there will be more than one injection well, the centroid of the injection well field. Benbrook also stated that the radius of a typical ASR project is approximately 200 feet. In consideration of this fact, the adopted rule identifies an area of review, defined as the area described by a radius of 1/2 mile from either the ASR injection well or from the centroid of the injection well field, as applicable. This requirement will address the existing requirements in §331.182, as well as the requirements in TWC, §27.153(b)(3). Based on comments from Benbrook, the

adopted rule also is amended to specify that should the area of injected water exceed an area determined by a radius of 1/2 mile from the ASR injection well or the well field centroid, the area of review will be determined by the projected extent of the underground stored water as calculated by using site-specific hydrogeologic information.

§331.183, Construction and Closure Standards

Comment

The Texas Farm Bureau commented that although the proposed rules adequately address injection of water, they do not address issues associated with production of water, and asked what mechanism will be used for monitoring production of water at an ASR project to ensure that native groundwater is not withdrawn. Prairielands GWCD commented that the proposed rules did not address regulation of ASR production wells, and that the adopted rules should include requirements for such wells. Upper Trinity GWCD commented that under HB 655, the commission was granted authority to regulate both ASR injection wells and ASR production wells. Benbrook and Lone Star GWCD commented that although the proposed rules address regulation of a well that serves as both an injection and production ASR well, they do not address requirements for wells that are only for production. The Brazos Valley GWCD commented that the commission now has authority over both ASR injection and production wells, and that this authority should be addressed in the rules.

Response

Standards for water wells are found in existing §290.41, and include construction and operating requirements. Under proposed §331.183(4), an ASR injection well that also serves as an ASR production well must comply with the applicable requirements in §290.41. To address this comment, adopted §331.183(4) has been revised to apply the requirements in §290.41 to all ASR production wells.

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and the South Plains Underground WCD commented that the qualifier "within" in proposed §331.183(5)(A) and (B) be removed and placed at the beginning of §331.183(5).

Response

Section 331.183(5)(A) and (B) is adopted to address the requirement at TWC, §27.153(c) that "all wells associated with a single aquifer storage and recovery project must be located within a continuous perimeter boundary of one parcel of land, or two or more adjacent parcels of land under common ownership, lease, joint operating agreement, or contract." The commission responds that the placement of the qualifier "within" at §331.183(5) adequately conveys the intent of TWC, §27.153(c). No changes were made in response to this comment.

Comment

Brazos Valley GWCD commented that the proposed rules do not address a method to determine the amount of land required to be owned or controlled by an ASR operator. Brazos Valley GWCD commented that the proposed rules should include a definitive method to address this issue, including determination of a buffer zone. Otherwise, according to Brazos Valley GWCD, the commission may have a situation involving "underground trespass."

Lastly, Brazos Valley GWCD commented that ASR project operators need assurance that their injected water is protected from extraction by adjacent landowners.

Response

In accordance with proposed §331.183(5)(A) and (B), all ASR injection wells and all ASR production wells must be located within a continuous boundary of one parcel of land, or two or more adjacent parcels of land under common ownership, lease, joint operating agreement, or contract. An applicant for an ASR project will have to provide proof that this requirement is satisfied. Such information will be required in an ASR project application form. It is the responsibility of the applicant to ensure he or she has control of an adequate amount of property such that the planned ASR project is contained within that parcel of land. Given the importance of the injected water to an ASR operator, it is in the interest of the ASR project manager to limit loss of any injected water and to acquire sufficient acreage for the ASR project to ensure, to the greatest extent possible, that his or her injected water does not migrate out of the ASR project, or that the injected water is not captured by an adjacent landowner. The commission notes that the purpose of the area of review requirements at amended §331.182 is to address issues related to operation of an ASR project. No change was made in response to this comment.

§331.184, Operating Requirements

Comment

Representative Larson commented that with respect to TWC, §27.153(b) and §27.154(d) regarding assessment of water quality impacts, the commission rules should allow for consideration of natural processes that occur in an aquifer, as such a consideration is consistent with EPA policy and reasonable interpretations of federal law. Representative Larson further commented that the rules should provide flexibility to evaluate drinking water standards at a logical distance from an ASR injection well. Representative Larson stated that an ASR project manager should be allowed to propose monitoring and testing to evaluate the effects injected water may have on groundwater. Such testing and monitoring would enable the operator to consider microbial, geochemical, and physical processes that occur in the aquifer when assessing whether or not injection will cause a violation of TWC, §27.153(b)(4). Prairielands GWCD commented that proposed §331.184(e) should be amended to be consistent with the statutory test regarding commission consideration of water quality impacts established in TWC, §27.153(b). Sledge Law, Benbrook, Clearwater Underground WCD, and the Upper Trinity GWCD commented that proposed §331.184(a) and (e) are inconsistent with the statutory test set forth in HB 655, and that the terms "pollution" and "pathogens and other organisms" are not used in HB 655. Upper Trinity GWCD, Texas Alliance of Groundwater Districts, and Clearwater Underground WCD commented that proposed §331.184(a) and (e) should be amended to be consistent with the statutory test established in TWC, §27.153(b)(4) and §27.154(d). Sledge Law commented that there have been recent public written interpretations by the EPA regarding standards for ASR projects, and that these comments were carefully considered by the Texas Water Conservation Association Committee and the Texas Legislature in development of HB 655. Sledge Law further commented that the demonstration an applicant for an ASR project must make is in TWC, §27.154(d). Benbrook commented that the rules should allow applicants for an ASR project the flexibility to propose monitoring and testing of water quality impacts, with consideration of natural processes,

including microbial, geochemical, and geophysical processes that occur underground that provide treatment of injected water. Benbrook commented that this approach is consistent with current EPA policy and also is a reasonable interpretation of federal laws that apply to UIC. Additionally, Benbrook commented that state rules regarding regulation of ASR projects should not be more stringent than federal requirements regarding water quality testing for ASR projects. Benbrook commented that the commission should allow, as does EPA, for situations to be addressed on a case-by-case basis to allow for ASR project operations that may cause a violation of primary drinking water regulations under 40 Code of Federal Regulations (CFR) Part 142 on the ASR site, but that are managed in such a manner as to prevent any off-site endangerment as described in the federal Safe Drinking Water Act at §1421(d)(2). Lone Star GWCD commented that proposed §331.184(e) be amended to be consistent with HB 655 regarding water quality impacts.

Response

The commission acknowledges that the term "pollution" is not used in HB 655. In response to this comment, the commission revised the language in §331.184(a) to mirror the language in the federal Safe Drinking Water Act §1421(d)(2). Section 331.184(e) has also been revised.

With regards to the comment that the commission should allow, as does the EPA, for situations to be addressed on a case-by-case basis to allow for ASR project operations that may cause a violation of primary drinking water regulations under 40 CFR Part 142 on the ASR site, but that are managed in such a manner as to prevent any off-site endangerment as described in the federal Safe Drinking Water Act at §1421(d)(2), the commission accepts the findings in the September 27, 2013, letter to Mr. Mark Thomasson, Director of the Division of Water Resource Management of the Florida Department of Environmental Protection from Dr. Peter Grevatt, Director of the EPA's Office of Ground Water and Drinking Water. This letter addresses the situation in Florida where injection of treated drinking water at ASR facilities has resulted in leaching of arsenic from the formation material of the aquifer in which the water was injected. In this letter, Dr. Grevatt states that this situation, which technically is a violation of a primary drinking water standard, is allowed under federal regulations provided the ASR operator institutes controls to restrict the occurrence and migration of the arsenic. As noted by Dr. Grevatt in this letter, this situation should be addressed by issuance of a Class V UIC permit for the Class V UIC wells associated with the ASR project.

The commission accepts the findings in Dr. Grevatt's letter, and notes in his conclusion he states that the purpose of the letter is to explain how Safe Drinking Water Act and UIC regulations allow states to address water shortages and at the same time protect the quality of future water supplies. Further, although this letter does not address the specific case presented by the commenter regarding reliance of natural attenuation and geochemical processes in the subsurface to control certain constituents in the injected water, the commission agrees that these processes may be considered in authorizing an ASR project. On a case-by-case basis, the commission may consider the effects of natural processes including microbial, geochemical, and geophysical process in the subsurface. To evaluate the effects of these processes, the commission may require controls such as monitoring and testing of the injected water. To provide maximum flexibility to operators regarding consideration of these processes, the commission will rely on adopted §331.186(a)(1). The com-

mission, before issuing an individual permit, general permit, or authorization by rule for an ASR project, will consider whether the injection of water will comply with the standards set forth under the federal Safe Drinking Water Act (42 United States Code, §§300f, *et seq.*). This approach allows flexibility in the ASR authorization process to consider the factors presented by commenters, and to consider other factors that may be appropriate on a case-by-case basis. Finally, the adopted rule is consistent with TWC, §27.153(b) and §27.154(d), as amended by HB 655.

The commission is amending §331.184(e) in the adopted rule to remove reference to "pathogens," and to include the requirements in TWC, §27.153(b), in which the federal Safe Drinking Water Act (42 USC, §§300f *et seq.*); is specifically referenced. By doing this, the commission may, on a case-by-case basis, consider proposed ASR projects with respect to determinations of how the requirements of §331.5 and 40 CFR §144.12(a) are met. In making such a determination, the commission may rely on EPA policy memoranda, EPA guidance, or case law.

Comment

The Texas Farm Bureau commented that for an ASR project located within the jurisdiction of a groundwater conservation district, that district should receive all water quality data required by the commission. Additionally, the Texas Farm Bureau commented that any adjacent district also should receive these data. Benbrook commented that local authority (presumably the groundwater conservation district) should receive monthly water quantity and water quality reports.

Response

In accordance with TWC, §36.453(b), for an ASR project within the jurisdiction of a groundwater conservation district, if an ASR project operator produces more water than was authorized by TCEQ, that operator must report to the district the volume of water produced that exceeds the volume authorized to be recovered. The ASR operator also must provide a monthly report that includes the information required under TWC, §27.155. These requirements are addressed in adopted §331.184(g), under which an ASR project is subject to TWC, Chapter 36, Subchapter N. With regards to reporting of water data to an adjacent groundwater conservation district, no such requirement is included in HB 655. No changes were made in response to this comment.

Comment

The Texas Farm Bureau and Upper Trinity GWCD commented that all ASR production wells within the jurisdiction of a groundwater conservation district, not just those that produce a volume of water in excess of the volume of water injected, must comply with the requirements of TWC, Chapter 36, Subchapter N.

Response

Enforcement of the specific requirements in TWC, Chapter 36, Subchapter N (or any provisions in TWC, Chapter 36, for that matter) is the responsibility of the individual groundwater conservation districts, not the commission. The commission does not have the authority to compel an ASR project operator to pay fees imposed by a district, for example. With regards to application of TWC, Chapter 36, Subchapter N, the commission cannot prohibit the production of native groundwater by an ASR project if the production complies with TWC, Chapter 36, Subchapter N. To address this consideration, the commission proposed §331.184(g). No changes were made in response to this comment.

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and the South Plains Underground WCD commented that proposed §331.184(g)(3) be amended to specify that a project manager of an ASR project "shall," rather than "may" be subject to registration, reporting, fee or other requirements of a groundwater conservation district or other special-purpose district with the authority to regulate the withdrawal of water. Lone Star GWCD commented that §331.184(g) should be clarified that an ASR project in the jurisdiction of a groundwater conservation district or other special-purpose district with authority to regulate withdrawal of groundwater is subject to the requirements of TWC, Chapter 36, Subchapter N.

Response

Section 331.184(g)(3) was proposed to address the requirement in TWC, §27.154(b), under which an ASR project located within the jurisdiction of a groundwater conservation district or other special-purpose district with authority to regulate the withdrawal of water is subject to the requirements of TWC, Chapter 36, Subchapter N. The proposed rule was intended to summarize certain TWC, Chapter 36, Subchapter N requirements. However, based on this comment, the commission has revisited this rule, and finds it does not adequately capture the intent of TWC, Chapter 36, Subchapter N. Therefore, in the adopted rule, §331.184(g)(3) is removed, and §331.184(g)(2) references TWC, Chapter 36, Subchapter N. Additionally, §331.184(g)(2) is revised to apply to the volume of water recovered that exceeds the volume of water the commission determines can be recovered. These revisions will remove any ambiguity regarding the requirements for an ASR project located within the jurisdiction of a groundwater conservation district or other special-purpose district with authority to regulate the withdrawal of water.

§331.185, Monitoring and Reporting Requirements

Comment

The Texas Farm Bureau commented by asking what is the mechanism for monitoring withdrawals from ASR projects to ensure that injected water and not native groundwater is being withdrawn. The Farm Bureau further commented that this is a critical question because withdrawal of native groundwater subject to the rules of a groundwater conservation district or other special-purpose district with authority to regulate withdrawal of groundwater. Lastly, the Texas Farm Bureau commented that monitor wells, operated by local groundwater districts, should be required within a buffer zone of an ASR project. Clearwater Underground WCD and Texas Alliance of Groundwater Districts commented that a mechanism or protocol by which a groundwater conservation district's groundwater monitoring network might be leveraged to detect injected water migration should be strongly considered by the commission

Response

The monitoring of the amount of water produced in association with an ASR project is addressed in proposed §331.185(a)(1) and (2). Under these rules, an ASR operator must report to the commission the volume of water injected for storage and the volume of water recovered for beneficial use. Also, under §331.184(g)(2), an operator of an ASR project that is within the jurisdiction of an groundwater conservation district is subject to TWC, Chapter 36, Subchapter N for the amount of water pro-

duced that exceeds the volume of water that the commission determines can be recovered. With regards to monitor wells completed on the periphery of an ASR project, with the purpose of detecting movement of injected water that may migrate offsite, the commission could require such monitor wells as part of an ASR project in cases where such monitoring may be needed. However, the requirement for an ASR operator to install and operate such wells would be determined on a case-by-case basis, depending on local geology and hydrogeology. Any monitor wells installed as part of an ASR project would be operated by the ASR operator, not a groundwater conservation district. No changes were made in response to this comment.

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and the South Plains Underground WCD commented that proposed §331.185(b) should refer to an "individual permit" rather than to a "permit," and also should refer to an "authorization by rule" rather than to an "authorization."

Response

The commission agrees with these suggested changes, and the adopted rule was revised to refer to an "individual permit" rather than to a "permit," and to an "authorization by rule" rather than to an "authorization."

§331.186, Additional Requirements

Comment

Upper Trinity GWCD, Sledge Law, and Brazos Valley GWCD commented that proposed §331.186 (regarding the factors the commission shall consider before authorizing an ASR project) applied to applications for individual permits and for authorization under a general permit, but not to an application for authorization of an ASR project by rule. These entities commented that the requirements of §331.186 should also apply to an application for authorization of an ASR project by rule.

Response

The commission agrees with this comment. The factors the commission or executive director must consider regarding authorization of an ASR project apply to permits (individual and general) and to an authorization by rule (TWC, §27.153(b)). Based on this comment, adopted §331.186(a) is amended to apply to an application for an individual permit, a general permit, or an authorization by rule and includes the executive director's consideration.

Comment

Prairielands GWCD, Lone Star GWCD, and Upper Trinity GWCD commented that the proposed rules in Chapter 331 should be revised to require the commission to make a determination of how much of the injected water can be recovered by an ASR project operator to account for any loss of injected water. Prairieland GWCD commented that this accounting by the commission is important to ensure that native groundwater is not produced without complying with local district restriction, and that such an accounting should be consistently reflected in the rules.

Response

As discussed subsequently in this Response to Comments, proposed §331.186(a) has been revised to require the commission, prior to authorizing an ASR project by individual permit, gen-

eral permit, or by rule, shall consider the extent to which the cumulative volume of water injected for storage in the receiving geologic formation can be successfully recovered from the geologic formation for beneficial use, taking into account that the injected water may be commingled to some degree with native groundwater. The commission responds that in considering these factors, it is in fact making the determination required in TWC, §27.154(b). The commission notes that this determination will be made on information provided by the applicant, and that no determination will be made until sufficient information is provided by the applicant. For projects within the jurisdiction of a groundwater conservation district, §331.184(g)(1) was revised to provide that an authorization or permit may not authorize a volume of water to be recovered that exceeds the volume of water that is injected or the volume of injected water that the commission determines can be recovered.

Comment

Upper Trinity GWCD commented that the proposed rules require that ASR production wells be included in an ASR project permit or authorization by rule.

Response

At TWC, §27.154(c), the commission is directed to adopt rules for the construction and completion standards and metering and reporting requirements for ASR injection wells and ASR recovery wells, including an ASR injection well that also serves as an ASR production well. Construction and completion of an ASR injection well are addressed in existing Chapter 331, Subchapter H (Standards for Class V Wells). Standards for construction and completion of an ASR production well are addressed in existing §290.41, and are referenced in adopted §331.183(4), as are ASR injection wells that also serve as an ASR production well. The commission notes that ASR injection wells will be authorized under a Class V UIC individual permit, general permit, or by rule. While TCEQ has exclusive jurisdiction over ASR injection wells under TWC, §27.152, other regulatory entities, such as the Texas Department of Licensing and Regulation, may be involved with the regulation of water wells. ASR production wells associated with a Class V ASR permit or authorization by rule will be identified in that permit or authorization. No changes were made in response to this comment.

Comment

Clearwater Underground WCD and Texas Alliance of Groundwater Districts commented that regular water quality monitoring that includes geochemical analysis and project evaluation should be required. Clearwater Underground WCD also commented that sufficient water quality testing should be considered for the receiving aquifer prior to ASR project authorization.

Response

In accordance with TWC, §27.156, an ASR project manager shall perform annual water quality testing on water to be injected and on produced water. This requirement is included in adopted §331.185(b). The commission agrees that the quality of the groundwater in the receiving aquifer should be adequately characterized prior to any injection. No changes were made in response to this comment.

Comment

Clearwater Underground WCD and Texas Alliance of Groundwater Districts commented that regular monitoring and modeling of water migration is necessary in order to define jurisdictional

boundaries between ASR recovery and neighboring groundwater production.

Response

TCEQ has exclusive jurisdiction over the regulation and permitting of ASR injection wells. Well location requirements for an ASR project are established under adopted §331.183(5). A project operator will be required to demonstrate the extent to which the cumulative volume of water injected for storage in the receiving formation can be successfully recovered, taking into account that injected water may be commingled to some degree with native groundwater. If that ASR project is within the jurisdiction of a groundwater conservation district or other special-purpose district with authority to regulate withdrawal of water, then the applicable requirements of TWC, Chapter 36, Subchapter N apply. No changes were made in response to this comment.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§331.2, 331.7, 331.11

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; TWC, §27.153, which requires the commission to adopt rules for authorization of aquifer storage and recovery injection wells by rule or by permit; and TWC, §27.154, which requires the commission to adopt technical standards for aquifer storage and recovery injection wells.

The adopted amendments implement House Bill 655, 84th Texas Legislature, 2015, and TWC, Chapter 27, Subchapter G, which confers commission jurisdiction and establishes requirements for injection wells associated with aquifer storage and recovery projects.

§331.7. *Permit Required.*

(a) Except as provided in §331.9 of this title (relating to Injection Authorized by Rule) and by subsections (d) - (f) of this section, all injection wells and activities must be authorized by an individual permit.

(b) For Class III in situ uranium solution mining wells, Frasch sulfur wells, and other Class III operations under commission jurisdiction, an area permit authorizing more than one well may be issued for a defined permit area in which wells of similar design and operation are proposed. The wells must be operated by a single owner or operator. Before commencing operation of those wells, the permittee may be required to obtain a production area authorization for separate production or mining areas within the permit area.

(c) The owner or operator of a large capacity septic system, a septic system which accepts industrial waste, or a subsurface area drip dispersal system, as defined in §222.5 of this title (relating to Definitions) must obtain a wastewater discharge permit in accordance with Texas Water Code, Chapter 26 or Chapters 26 and 32, and Chapter 305 of this title (relating to Consolidated Permits), and must submit the inventory information required under §331.10 of this title (relating to Inventory of Wells Authorized by Rule).

(d) Pre-injection units for Class I nonhazardous, noncommercial injection wells and Class V injection wells permitted for the disposal of nonhazardous waste must be either authorized by a permit issued by the commission or registered in accordance with §331.17 of this title (relating to Pre-Injection Units Registration). The option of registration provided by this subsection shall not apply to pre-injection units for Class I injection wells used for the disposal of byproduct material, as that term is defined in Chapter 336 of this title (relating to Radioactive Substance Rules). Pre-injection units for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals are not subject to authorization by registration but are subject to authorization by an individual permit or under the general permit issued under Subchapter L of this chapter (relating to General Permit Authorizing Use of a Class I Injection Well to Inject Nonhazardous Desalination Concentrate or Nonhazardous Drinking Water Treatment Residuals).

(e) The commission may issue a general permit under Subchapter L of this chapter. The commission may determine that an injection well and the injection activities are more appropriately regulated under an individual permit than under a general permit based on findings that the general permit will not protect ground and surface fresh water from pollution due to site-specific conditions.

(f) Notwithstanding subsection (a) of this section, an injection well authorized by the Railroad Commission of Texas to use nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes does not require a permit from the commission. The use or disposal of radioactive material under this subsection is subject to the applicable requirements of Chapter 336 of this title.

(g) Permits issued before September 1, 2007 for Class III wells for uranium mining will expire on September 1, 2012 unless the permit holder submits an application for permit renewal under §305.65 of this title (relating to Renewal) before September 1, 2012. Any holders of permits for Class III wells for uranium mining issued before September 1, 2007 who allow those permits to expire by not submitting a permit renewal application by September 1, 2012 are not relieved from the obligations under the expired permit or applicable rules, including obligations to restore groundwater and to plug and abandon wells in accordance with the requirements of the permit and applicable rules.

(h) Class V injection wells associated with an aquifer storage and recovery (ASR) project may be authorized by individual permit, general permit, or by rule. The executive director will notify a groundwater conservation district of an ASR project proposed to be authorized by rule that is located within the jurisdictional boundary of that groundwater conservation district.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 29, 2016.

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For further information, please call: (512) 239-6812



SUBCHAPTER K. ADDITIONAL REQUIREMENTS FOR CLASS V INJECTION WELLS ASSOCIATED WITH AQUIFER STORAGE AND RECOVERY PROJECTS

30 TAC §§331.181 - 331.186

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; TWC, §27.153, which requires the commission to adopt rules for authorization of aquifer storage and recovery injection wells by rule or by permit; and TWC, §27.154, which requires the commission to adopt technical standards for aquifer storage and recovery injection wells.

The adopted amendments implement House Bill 655, 84th Texas Legislature, 2015, and TWC, Chapter 27, Subchapter G, which confers commission jurisdiction and establishes requirements for injection wells associated with aquifer storage and recovery projects.

§331.182. *Area of Review.*

The area of review for an aquifer storage and recovery (ASR) project is the area determined by a radius of 1/2 mile from the proposed ASR injection well. For an ASR project that includes more than one proposed injection well, the area of review is the area determined by a radius of 1/2 mile from the centroid of the injection well field. If the extent of the underground stored water of the ASR project will exceed the area determined by the 1/2 mile radius as described in this section, the area of review is the area determined by the projected extent of the underground stored water as calculated by using site-specific hydrogeologic information. In the application for authorization, the applicant shall provide information on the activities within the area of review including the following factors and their adverse impacts, if any, on the injection operation:

(1) location of all artificial penetrations that penetrate the interval to be used for aquifer storage and recovery, including but not limited to: water wells and abandoned water wells from commission well files or ground water district files; oil and gas wells and saltwater injection wells from the Railroad Commission of Texas files; and waste disposal wells/other injection wells from the commission disposal well files;

(2) completion and construction information, where available, for identified artificial penetrations;

(3) site specific, significant geologic features, such as faults and fractures; and

(4) all information required for the consideration of an aquifer storage and recovery injection well under §331.186(a) of this title (relating to Additional Requirements).

§331.183. *Construction and Closure Standards.*

All Class V aquifer storage and recovery (ASR) injection wells shall be designed, constructed, completed, and closed to prevent commingling, through the wellbore and casing, of injection waters with other fluids

outside of the authorized injection zone; mixing through the wellbore and casing of fluids from aquifers of substantively different water quality; and infiltration through the wellbore and casing of water from the surface into ground water zones.

(1) Plans and specifications. Except as specifically required in the terms of the Class V injection well authorization, the drilling and completion of a Class V ASR injection well shall be done in accordance with the requirements of §331.132 of this title (relating to Construction Standards) and the closure of a Class V ASR injection well shall be done in accordance with the requirements of §331.133 of this title (relating to Closure Standards for Injection Wells).

(A) If the project operator proposes to change the injection interval to one not reviewed during the authorization process, the project operator shall notify the executive director immediately. The project operator may not inject into any unauthorized zone.

(B) The executive director shall be notified immediately of any other changes, including but not limited to, changes in the completion of the well, changes in the setting of screens, and changes in the injection intervals within the authorized injection zone.

(2) Construction materials. Casing materials for Class V ASR injection wells shall be constructed of materials resistant to corrosion.

(3) Construction and workover supervision. All phases of any ASR injection well construction, workover or closure shall be supervised by qualified individuals who are knowledgeable and experienced in practical drilling engineering and who are familiar with the special conditions and requirements of injection well and water well construction.

(4) An ASR production well, or an ASR injection well that is also serving as an ASR production well, and is providing water to a public water system must comply with the applicable requirements for groundwater sources in §290.41 of this title (relating to Water Sources).

(5) All ASR injection wells and all ASR production wells associated with a single ASR project must be located:

(A) within a continuous perimeter boundary of one parcel of land; or

(B) within two or more adjacent parcels of land under the common ownership, lease, joint operating agreement, or contract.

§331.184. *Operating Requirements.*

(a) All Class V aquifer storage and recovery (ASR) injection wells shall be operated in such a manner that injection will not endanger drinking water sources. Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.

(b) Injection pressure at the wellhead shall not exceed a maximum which shall be calculated so as to assure the pressure in the injection zone does not cause movement of fluid out of the injection zone.

(c) The owner or operator of an ASR injection well that has ceased operations for more than two years shall notify the executive director 30 days prior to resuming operation of the well.

(d) The owner or operator shall maintain the mechanical integrity of all wells operated under this section.

(e) The quality of the water injected at an ASR project must meet the requirements in §331.186(a)(1) of this title (relating to Additional Requirements). Water recovered from an ASR project that is provided to a public water system is subject to all applicable requirements, maximum contaminant levels, and treatment techniques under Chapter 290 of this title (relating to Public Drinking Water).

(f) All ASR injection and ASR production wells must be installed with a flow meter for measuring the volume of water injected and the volume of the water recovered.

(g) This subsection only applies to an ASR project that is located within the jurisdiction of a groundwater conservation district or other special-purpose district with the authority to regulate the withdrawal of groundwater.

(1) An authorization or permit issued under this chapter may not authorize a volume of water to be recovered that exceeds the volume of water that is injected or the volume of injected water that the commission determines can be recovered, whichever is less; and

(2) The requirements of Texas Water Code, Chapter 36, Subchapter N apply to the volume of water recovered from an ASR project that exceeds the volume of water the commission determines can be recovered, and otherwise as applicable.

§331.185. *Monitoring and Reporting Requirements.*

(a) An aquifer storage and recovery (ASR) project operator shall monitor each ASR injection well and each ASR production well associated with an ASR project. Each calendar month the project operator shall provide the executive director either a written or electronic report of the following information for the previous month:

(1) the volume of water injected for storage;

(2) the volume of water recovered for beneficial use;

(3) monthly average injection pressures; and

(4) other information as determined by the executive director as necessary for the protection of underground sources of drinking water.

(b) On an annual basis, an ASR project operator shall perform water quality testing on water to be injected at an ASR project and on water that is recovered from that project. The ASR project operator shall provide the executive director either a written or electronic report of the results of this testing. The report shall include the test results for all water quality parameters identified in the individual permit, general permit, or authorization by rule.

§331.186. *Additional Requirements.*

(a) The executive director or commission shall consider the following before issuing an individual permit, a general permit, or an authorization by rule for an aquifer storage and recovery (ASR) injection well:

(1) whether the injection of water will comply with the standards set forth under the federal Safe Drinking Water Act (42 United States Code, §§300f, *et seq.*);

(2) the extent to which the cumulative volume of water injected for storage in the receiving geologic formation can be successfully recovered from the geologic formation for beneficial use, taking into account that the injected water may be comingled to some degree with native groundwater;

(3) the effect of the ASR project on existing water wells; and

(4) whether the introduction of water into the receiving geologic formation will alter the physical, chemical, or biological quality of the native groundwater to a degree that would:

(A) render the groundwater produced from the receiving formation harmful or detrimental to people, animals, vegetation, or property; or

(B) require an unreasonably higher level of treatment of the groundwater produced from the receiving geologic formation than is necessary for the native groundwater in order to render the groundwater suitable for beneficial use.

(b) Upon completion of an ASR injection well, the following information shall be submitted to the executive director within 30 days of receipt of the results of all analyses and test results:

- (1) as-built drilling and completion data on the well;
- (2) all logging and testing data on the well;
- (3) formation fluid analyses;
- (4) injection fluid analyses;
- (5) injectivity and pumping tests determining well capacity and reservoir characteristics;
- (6) hydrogeologic modeling, with supporting data, predicting mixing zone characteristics and injection fluid movement and quality; and
- (7) other information as determined by the executive director as necessary for the protection of underground sources of drinking water.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 239-6812



TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.320

The Comptroller of Public Accounts adopts amendments to §3.320, concerning Texas emissions reduction plan surcharge; off-road, heavy-duty diesel equipment, with changes to the proposed text as published in the November 6, 2015, issue of the *Texas Register* (40 TexReg 7796). This section is amended to implement House Bill 7 (HB 7), 84th Legislature, 2015. Effective September 1, 2015, Tax Code, §151.0515(b) (Texas Emissions

Reduction Plan Surcharge) is amended to reduce the off-road, heavy-duty diesel Texas Emissions Reduction Plan Surcharge to 1.5%.

Subsection (a) contains definitions. Paragraph (3) is changed from the proposed rule to correct a typographical error by replacing the term "sale price" with the term "sales price."

Subsection (b) addresses the imposition of the surcharge. Subsection (b) is changed from the proposed rule. Proposed new paragraph (4) is deleted and existing paragraphs (4) and (5) are not renumbered. The proposed language is incorporated into existing paragraphs.

Paragraph (1) now provides both the new rate of 1.5% and the previous rate of 2.0% for applicable periods for sales.

Paragraph (2) now provides both the new rate of 1.5% and the previous rate of 2.0% for applicable periods for financing leases.

Paragraph (3) now provides both the new rate of 1.5% and the previous rate of 2.0% for applicable periods for operating leases.

Paragraph (4) now provides both the new rate of 1.5% and the previous rate of 2.0% for applicable periods on equipment purchased, leased, or rented out of state and brought into Texas for use.

Paragraph (5) is amended to make the paragraph easier to read.

Subsection (c) is amended to correct the name of §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules).

Additional minor revisions are adopted in subsection (e) to make the subsection easier to read.

We received one comment from Ms. Pam Bushnell with Equipment Depot in Waco. The comment recommended amending the definition of "sales price" in subsection (a)(3) to exclude charges for transportation and other expenses connected to the sale, lease, or rental of new or used off-road, heavy-duty diesel equipment. In her comment, Ms. Bushnell also requested that Texas rental companies be allowed to collect the reduced surcharge rate on existing leases executed prior to September 1, 2015, similar to subsection (b)(4), which applies the reduced rate to off-road, heavy-duty diesel equipment brought into Texas on or after September 1, 2015, regardless of when the lease took effect.

After carefully considering Ms. Bushnell's comments, we determined the suggestions to amend the definition of "sales price" and to apply the reduced surcharge rate on leases executed prior to September 1, 2015, were beyond the scope of HB 7. However, based on Ms. Bushnell's comments, we amended subsection (b) to clarify the imposition of the surcharge on off-road, heavy-duty diesel equipment sold, leased, or rented in Texas. Paragraphs (1) - (3) notify sellers and purchasers the rate is imposed on Texas sales, leases, or rentals when the purchaser takes possession or title of the equipment. In contrast, the surcharge for off-road, heavy-duty diesel equipment purchased, leased, or rented outside the state and brought into Texas for use, is imposed at the time the equipment is brought into this state for use.

This amendment is adopted under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce

rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, Chapter 151, §151.0515 (Texas Emissions Reduction Plan Surcharge).

§3.320. *Texas Emissions Reduction Plan Surcharge; Off-Road, Heavy-Duty Diesel Equipment.*

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

(1) Off-road, heavy-duty diesel equipment--Diesel-powered equipment of 50 horsepower or greater, other than motor vehicles and equipment used directly in oil and gas exploration and production at an oil or gas well site. See §3.96 of this title (relating to Imposition and Collection of a Surcharge on Certain Diesel Powered Motor Vehicles) for information about the imposition of the surcharge on motor vehicles. Off-road, heavy-duty diesel equipment includes accessories and attachments sold with the equipment. Off-road, heavy-duty diesel equipment includes, but is not limited to, the following diesel-powered equipment:

- (A) backhoes;
- (B) bore equipment and drilling rigs, except drilling rigs used to drill oil and gas wells;
- (C) bulldozers;
- (D) compactors (plate compactors, etc.);
- (E) cranes;
- (F) crushing and processing equipment (rock and gravel crushers, etc.);
- (G) dumpsters and tenders;
- (H) excavators;
- (I) forklifts (rough terrain forklifts, etc.);
- (J) graders;
- (K) light plants (generators) and signal boards;
- (L) loaders;
- (M) mining equipment;
- (N) mixers (cement mixers, mortar mixers, etc.);
- (O) off-highway vehicles and other moveable specialized equipment (equipment, such as a motorized crane, that does not meet the definition of a motor vehicle because it is designed to perform a specialized function rather than designed to transport property or persons other than the driver);
- (P) paving equipment (asphalt pavers, concrete pavers, etc.);
- (Q) rammers and tampers;
- (R) rollers;
- (S) saws (concrete saws, industrial saws, etc.);
- (T) scrapers;
- (U) surfacing equipment;
- (V) tractors; and
- (W) trenchers.

(2) Surcharge--A fee imposed on the sale, lease, or rental in Texas of new or used off-road, heavy-duty diesel equipment and on

the storage, use, or other consumption of such equipment subject to use tax as provided for in §3.346 of this title (relating to Use Tax). This surcharge is in addition to state and local sales and use taxes that are due on the equipment and is for the benefit of the Texas Emissions Reduction Fund, which is administered by the Texas Commission on Environmental Quality.

(3) Sales price--The total amount a purchaser pays a seller for the purchase, lease, or rental of off-road, heavy-duty diesel equipment as set out in Tax Code, §151.007. The sales price includes charges for accessories, transportation, installation, services, and other expenses that are connected to the sale.

(b) Imposition of Surcharge.

(1) A surcharge is due on the sales price of off-road, heavy-duty diesel equipment sold in Texas. If the purchaser takes possession of or title to the equipment on or after September 1, 2015, the surcharge is 1.5% of the sales price. If the purchaser took possession of or title to the equipment on or after July 1, 2003, and before September 1, 2015, the surcharge is 2.0% of the sales price.

(2) A surcharge is due on the sales price, excluding separately stated interest charges, of off-road, heavy-duty diesel equipment leased under a financing lease, as defined in §3.294 of this title (relating to Rental and Lease of Tangible Personal Property). If the lessee takes possession of the equipment on or after September 1, 2015, the surcharge is 1.5% of the sales price. If the lessee took possession of the equipment on or after July 1, 2003, and before September 1, 2015, the surcharge is 2.0% of the sales price.

(3) A surcharge is due on the lease payments for off-road, heavy-duty diesel equipment that is leased under an operating lease, as defined in §3.294 of this title. If the lessee takes possession of the equipment on or after September 1, 2015, the surcharge is 1.5% of the lease payments. If the lessee took possession of the equipment on or after July 1, 2003, and before September 1, 2015, the surcharge is 2.0% of the lease payments.

(4) A surcharge is due on the sales price of off-road, heavy-duty diesel equipment purchased, leased, or rented out of state and brought into Texas for use. If the purchaser brings the equipment into Texas for use on or after September 1, 2015, the surcharge is 1.5% of the sales price. If the purchaser brought the equipment into Texas for use on or after July 1, 2003, and before September 1, 2015, the surcharge is 2.0% of the sales price. See §3.346 of this title.

(5) A 1.0% surcharge is due on off-road, heavy-duty diesel construction equipment sold, leased, or rented if the purchaser took possession of or title to the equipment on or after August 31, 2001 and before July 1, 2003. No surcharge is due on equipment sold, leased, or rented during this time period if the equipment is subject to use tax or is used in non-construction activities.

(c) Collection of surcharge. A seller must collect the surcharge from the purchaser on the sales price of each sale, lease, or rental in Texas of off-road, heavy-duty diesel equipment that is not exempt from sales tax. The surcharge is collected at the same time and in the same manner as sales or use tax. See §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules) for information on the collection and remittance of sales or use tax. The surcharge is collected in addition to state and local sales or use taxes but is not collected on the amount of the sales or use tax.

(d) Exemptions. No surcharge is collected on the sale, lease, or rental of off-road, heavy-duty diesel equipment that is exempt from sales and use tax. A seller who accepts a valid and properly completed resale or exemption certificate, direct payment exemption certificate,

or other acceptable proof of exemption from sales and use tax is not required to collect the surcharge. For example, a seller may accept an exemption certificate in lieu of collecting sales tax and the surcharge from a farmer who purchases a bulldozer to be used exclusively in the construction or maintenance of roads and water facilities on a farm that produces agricultural products that are sold in the regular course of business.

(e) Reports and payments.

(1) A seller or purchaser with a surcharge account, including a direct payment holder, must report and pay the surcharge in the same manner as sales or use tax, but separate reports and payments for the surcharge are required.

(A) A seller's or purchaser's reporting period (i.e., monthly, quarterly, or yearly) and due date for the surcharge are determined by the amount of surcharge that the seller collects or purchaser owes. See §3.286 of this title.

(B) A purchaser who does not hold a surcharge account must report and pay the surcharge by the 20th day of the month following the month in which the purchaser acquired off-road, heavy-duty diesel powered equipment on which the seller did not collect the surcharge.

(2) A seller or purchaser must report and pay the surcharge to the comptroller on forms prescribed by the comptroller for the surcharge. A seller or purchaser is not relieved of the responsibility for filing a surcharge report and paying the surcharge by the due date because the seller or purchaser fails to receive the correct form from the comptroller.

(3) The penalties and interest imposed for failure to timely file and pay the surcharge are the same as those imposed for failure to timely file and pay sales or use tax. Likewise, the 0.5% discount for timely filing and payment is applicable to surcharge reports and payments. No prepayment discount will be paid a seller or purchaser for prepayment of the surcharges.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 27, 2016.

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Lita Gonzalez

General Counsel

Comptroller of Public Accounts

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Proposal publication date: November 6, 2015

For further information, please call: (512) 475-0387



PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 31. EMPLOYMENT AFTER RETIREMENT

SUBCHAPTER A. GENERAL PROVISIONS

34 TAC §31.1

The Teacher Retirement System of Texas (TRS) adopts amendments to §31.1, which provides definitions to certain terms ap-

licable to Chapter 31, including school year, substitute, and third-party entity for purposes of employment after retirement. The amended rule is adopted without changes to the proposed rule text as published in the March 4, 2016, issue of the *Texas Register* (41 TexReg 1662).

The amended rule modifies §31.1(b) regarding the definition of a substitute to include work in a vacant position, provided the retiree does not serve more than 20 days in a vacant position or positions. The 20-day cap on working in a vacant position will allow ample time for a retiree to discover that the position is vacant and/or for the employer to make other arrangements for the assignment without jeopardizing the retiree's annuity. Limiting the number of days the retiree may serve in a vacant position is also in keeping with the concept of a substitute being a person who serves on a "temporary basis." The amended rule also clarifies that a retiree will not be considered a substitute while serving in a vacant position that was last held by that retiree. The amendments also incorporate the requirement in §824.602(a)(1) that a retiree may work without limit as a substitute only if the pay is not more than the daily rate of substitute pay established by the employer.

No comments were received on the rule proposal.

Statutory Authority: The amended rule is adopted under §824.601 of the Government Code, which authorizes TRS to adopt rules necessary for administering Chapter 824, Subchapter G, of the Government Code concerning loss of benefits on resumption of service, and §825.102 of the Government Code, which authorizes the board to adopt rules for the administration of the funds of the retirement system.

Cross-Reference to Statute: The adopted amendments affect Government Code, §824.601, which provides for loss of annuity by any service or disability retiree who works for a TRS-covered employer unless such employment is exempted by law from forfeiture of annuity; Government Code; §824.602, which sets forth the exceptions to the loss of monthly annuities of retirees employed in Texas public educational institutions; §824.6022, which requires employers to file a monthly certified statement of employment of retirees and makes it an offense for an administrator who is responsible for filing such a statement to knowingly fail to do so; §825.4092, which provides for a pension surcharge for re-employed retirees; and Insurance Code, §1575.204, which provides for a retiree health benefit (TRS-Care) surcharge for re-employed retirees.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 26, 2016.

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Brian K. Guthrie

Executive Director

Teacher Retirement System of Texas

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

SUBCHAPTER P. SERVICES AND BENEFITS FOR TRANSITION PLANNING TO A SUCCESSFUL ADULTHOOD

DIVISION 3. TEXAS TUITION AND FEE WAIVER FOR YOUTH RETURNING TO A PARENT

40 TAC §700.1630

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), new §700.1630 without changes to the proposed text published in the March 4, 2016, issue of the *Texas Register* (41 TexReg 1664). Current law allows youth who exit foster care prior to their 18th birthday to a non-parent managing conservator to potentially qualify for the Texas Tuition and Fee waiver. However, youth who exit foster care to a parent's permanent managing conservatorship do not. Since the Texas Tuition and Fee Waiver is a valuable benefit there is a disincentive for youth to exit foster care to a parent's care prior to turning 18 because if the youth ages out of DFPS conservatorship he or she can potentially qualify for the waiver. Senate Bill (SB) 206, Section 3, 84th Legislature, Regular Session, was enacted to help alleviate this issue and promote permanency by allowing youth who return to a parent whether parental rights have been terminated or not to qualify for the Texas Tuition and Fee Waiver. The rules were drafted in consultation with the Texas Higher Education Coordinating Board as required by SB 206, Section 3.

New §700.1630 specifies the eligibility criteria for the Texas Tuition and Fee Waiver when the youth is returned to a parent, including the starting age for youth. DFPS proposes: (1) the starting age of 14 for those in permanent managing conservatorship of DFPS as this is a pivotal age for youth; and (2) the

starting age of 16 or older for those in temporary managing conservatorship (TMC) as the potential length of a TMC case could be close to 24 months (when a monitored return occurs) until the case is either dismissed or the department is named permanent managing conservator. Also the title to Subchapter P is changed to "Services and Benefits for Transition Planning to a Successful Adulthood."

The section will function so that more former foster care youth will attend college which will assist youth in building an independent and successful life.

No comments were received regarding adoption of the section.

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements Senate Bill 206, Section 3, as codified at Texas Education Code §54.366(c).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 2, 2016.

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Department of Family and Protective Services

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For further information, please call: (512) 438-2611

