

# 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 3. OFFICE OF THE ATTORNEY GENERAL

#### CHAPTER 61. CRIME VICTIMS' COMPENSATION

The Office of the Attorney General, Crime victims Services Division, adopts amendments to Chapter 61, Subchapter E, §§61.402, 61.403, 61.405, and 61.407, and Subchapter I, §61.801, concerning the administration of the OAG's Crime Victims' Compensation Program. The amended sections are adopted without changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3361) and will not be republished.

The amendments are adopted in order to increase the limits on compensation for loss of earnings, loss of support, child care, funeral and burial, the costs of cleaning a crime scene and to increase the limit for reimbursement amounts to law enforcement agencies for forensic assault medical examinations.

No comments were received regarding adoption of the amendments during the comment period.

#### SUBCHAPTER E. PECUNIARY LOSS

##### 1 TAC §§61.402, 61.403, 61.405, 61.407

The amendments are adopted in accordance with Texas Code of Criminal Procedure, Articles 56.33 and 56.42 which requires the OAG to adopt rules governing the administration of its crime victims' compensation program.

No other code, article, or statute is affected by this adoption.

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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Amanda Crawford

General Counsel

Office of the Attorney General

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#### SUBCHAPTER I. REIMBURSEMENT TO LAW ENFORCEMENT AGENCIES FOR

### FORENSIC SEXUAL ASSAULT MEDICAL EXAMINATIONS

#### 1 TAC §61.801

The amendments are adopted in accordance with Texas Code of Criminal Procedure, Articles 56.33 and 56.42 which requires the OAG to adopt rules governing the administration of its crime victims' compensation program.

No other code, article, or statute is affected by this adoption.

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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### PART 5. TEXAS FACILITIES COMMISSION

#### CHAPTER 111. ADMINISTRATION

##### Introduction and Background

The Texas Facilities Commission (Commission) adopts amendments to §§111.24, 111.32, 111.40, and 111.41; the repeal of §111.30; and new §111.27 and §111.30 without changes to the proposed text as published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2635).

During its rule review, published in the December 11, 2015, issue of the *Texas Register* (40 TexReg 8915), the Commission reviewed and considered Texas Administrative Code, Title 1, Chapter 111 for re-adoption, revision, or repeal in accordance with the Texas Government Code §2001.039 (West 2008). The Commission determined that the reasons for originally adopting Chapter 111 continued to exist. In addition, the Commission reviewed the rules to determine whether the rules were obsolete, reflected current legal and policy considerations, reflected current procedures and practices of the Commission, and were in compliance with the Texas Administrative Procedure Act, Texas Government Code Chapter 2001. The Commission determined that Chapter 111 required amendment as well as a new rule that was required due to the passage of Senate Bill 20 by the 84th

Legislature. Accordingly, the Commission proposed the following changes: in Subchapter B, amendment to §111.24 and new §111.27; in Subchapter C, the repeal of §111.30, a new §111.30, and amendment to §111.32; and in Subchapter D, amendments to §111.40 and §111.41. The proposed changes were published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2635).

#### Justification for the Rules

Section 111.24 concerning the training and education of Commission employees is amended to comply with Texas Government Code §656.048(b) which requires state agencies to adopt rules providing that before an administrator or employee of the agency may be reimbursed under Texas Government Code §656.047(b), the executive head of the agency must authorize the tuition reimbursement payment. The Commission does not currently participate in tuition reimbursement; however, the rule amendment is adopted in accordance with the statutory requirement in case the agency were to ever receive funding to participate in the future.

Section 111.27, a new rule, is adopted in accordance with Texas Government Code §2261.253(c) which states that each state agency, by rule, shall establish a procedure to identify each contract that requires enhanced contract or performance monitoring and submit information on the contract to the agency's governing body. It also requires that staff immediately notify the agency's governing body of any serious issue or risk that is identified with respect to a contract monitored under this subsection.

The Commission adopts the repeal of §111.30 as it was determined during the rule review that the rule does not reflect the current process of the Commission nor does it provide the information required by Texas Government Code §2152.060. New §111.30 is adopted under Texas Government Code §2152.060(a) to establish methods by which consumers, service recipients and persons contracting with the state may file complaints with the Commission.

The Commission adopts amendments to §111.32, Protests/Dispute Resolution/Hearing, §111.40, Fleet Management, and §111.41, Assignment and Use of Pooled Vehicles, to make clerical changes that will enhance the clarity of the rules.

The Commission received no comments concerning the proposal.

## SUBCHAPTER B. GENERAL PROVISIONS

### 1 TAC §111.24, §111.27

#### Statutory Authority

The amendment and new rule are adopted under Texas Government Code §656.048, which requires a state agency to adopt rules related to training and education of its employees; Texas Government Code §2261.253(c), which requires a state agency to adopt rules related to enhanced contract monitoring; and Texas Government Code §2001.004(1), which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

#### Cross Reference to Statute

The statutory provisions affected by the adopted amendment and new rule are Texas Government Code §656.048 and §2261.253.

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 Facilities Commission

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For further information, please call: (512) 475-2400

## SUBCHAPTER C. COMPLAINTS AND DISPUTE RESOLUTION

### 1 TAC §111.30

#### Statutory Authority

The repeal is adopted under Texas Government Code §§2001.004(1), 2001.039(c), and 2152.060(a).

#### Cross Reference to Statute

The statutory provision affected by the adopted repeal is Texas Government Code §2152.060.

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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### 1 TAC §111.30, §111.32

#### Statutory Authority

The new rule and amendment are adopted under Texas Government Code §2152.060(a), which requires the Commission to establish complaint procedures by rule; Texas Government Code §2155.076, which requires state agencies to promulgate by rule vendor protest procedures; and Texas Government Code §2001.004(1), which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

#### Cross Reference to Statute

The statutory provisions affected by the adopted new rule and amendment are Texas Government Code §2152.060 and §2155.076.

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 D. VEHICLES

### 1 TAC §111.40, §111.41

#### Statutory Authority

The amendments are adopted under Texas Government Code §2171.1045, which requires state agencies to adopt rules addressing the assignment and use of agency vehicles, and Texas Government Code §2001.004(1), which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

#### Cross Reference to Statute

The statutory provisions affected by the adopted amendments are Texas Government Code §2171.1045.

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 16. ECONOMIC REGULATION

### PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

#### CHAPTER 22. PROCEDURAL RULES

#### SUBCHAPTER P. EMERGENCY ORDERS FOR WATER UTILITIES

The Public Utility Commission of Texas (commission) adopts amendments to §22.291, relating to Purpose and Applicability; §22.292, relating to Definitions; §22.293, relating to Notification of Emergency Order; §22.295, relating to Request for Emergency Order; §22.296, relating to Additional Requirements for Emergency Rate Increases; §22.297, relating to Notice and Opportunity for Hearing; §22.298, relating to Contents of Emergency Order; and §22.299, relating to Hearing Required to Affirm, Modify, or Set Aside, and the repeal of §22.294, relating to Emergency Orders and Emergency Rates. The amendments to §§22.291 - 22.293 and 22.295 - 22.299 are adopted with changes to the proposed text as published in

the March 18, 2016, issue of the *Texas Register* (41 TexReg 2050). The amendments and repeal will allow the commission's procedural rules relating to emergency orders to conform to §§2, 3, 5, 6, and 8 - 10 of Senate Bill 1148 (SB 1148) of the 84th Legislature, Regular Session, which amended Chapters 5 and 13 of the Texas Water Code Annotated (West 2008 & Supp. 2015) (TWC). These amendments and repeal are adopted under Project Number 45115. Consistent with 1 TAC §91.36(e), the commission also adopts amendments to Chapter 24 of the commission's rules in a separate order as part of this project.

The commission received comments on the proposed amendments and repeal from the Office of Public Utility Counsel (OPUC).

OPUC proposed deletion of the language in §22.297(d) regarding requesting a hearing to affirm, modify, or set aside an emergency order issued pursuant to §22.299. OPUC commented that TWC §13.454 appears to require a hearing, regardless of whether one is requested, and a hearing can only be avoided if it is waived. OPUC stated that, as a result, the language regarding requesting a hearing is surplusage and possibly confusing.

OPUC also commented on the language in §22.297(d)(2) that states an affected person may, consistent with the Administrative Procedure Act, Tex. Gov't Code Ann. (Vernon 2008 & Supp. 2015) (APA), request an evidentiary hearing or waive the right to a hearing. OPUC commented that the proposed language may be confusing. OPUC proposed that the rule should state that a hearing must be conducted in accordance with the APA because the proposed language could be read to state that a request for or a waiver of a hearing must be consistent with the APA.

Based on the above comments, OPUC proposed that §22.297(d) be modified to read as follows: If the commission's executive director issues an emergency order without a hearing, a hearing must be held, consistent with the APA, to affirm, modify, or set aside the emergency order, unless the person affected by the order waives the right to a hearing. The commission shall provide notice of a hearing to affirm, modify, or set aside an emergency order pursuant to §22.299 of this title (relating to Hearing Required to Affirm, Modify, or Set Aside) not later than the tenth day before the date set for the hearing, except as otherwise provided by this subchapter. The notice shall provide that an affected person may waive his or her right to a hearing, if applicable. The notice shall explain how such waiver may occur.

#### *Commission response*

The commission agrees with the concerns expressed by OPUC but declines to adopt OPUC's proposed version of §22.297(d). In particular, OPUC's proposed language states that the commission's executive director will issue an emergency order without a prior hearing, but does not acknowledge that such authority can be exercised by the commission itself. The commission finds that the adopted wording better expresses the commission's intent in adopting the amended section.

To address OPUC's concerns and better express the commission's intent, the commission makes the following modifications to the proposed §22.297 as published in the *Texas Register*. The commission amends subsection (d) to remove discussion of a person's request for a hearing. The commission also declines to adopt the proposed subsection (e) from the commission's proposed rule text as published in the *Texas Register*. These modifications reflect the fact that, regardless of whether a hearing is requested, the commission will schedule and hold a hearing to

affirm, modify, or set aside an emergency order issued without a prior hearing.

In addition, as proposed by OPUC, the commission removes "consistent with the APA" from subsection (d). Instead, the commission rearranges subsection (d)(1) and (2) to more clearly indicate when the APA does and does not apply and inserts a sentence in subsection (d)(2) stating that a hearing will be conducted in accordance with the APA. This change adopts the clarification proposed by OPUC.

Consistent with these modifications, §22.297(d), as adopted, states:

(d) If notice and opportunity for a hearing is not practicable, an emergency order may be issued under this section without a hearing.

(1) An emergency order issued without a hearing under this section is not subject to the requirements of the APA.

(2) If an emergency order is issued without a hearing under this section, the commission shall schedule a hearing to affirm, modify, or set aside the emergency order pursuant to §22.299 of this title (relating to Hearing Required to Affirm, Modify, or Set Aside). Such a hearing will be conducted in accordance with the APA. Notice of such a hearing shall be given no later than the tenth day before the date of the hearing and shall provide that an affected person may:

(A) participate in an evidentiary hearing to affirm, modify, or set aside the emergency order; and

(B) waive the right to a hearing. The notice shall explain how such waiver may occur.

The commission also adopts modifications to §22.298(6) - (7) that conform to the above discussion and reflect that waiver of a hearing to affirm, modify, or set aside an emergency order is only an issue if an emergency order is issued without a prior hearing.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting these sections, the commission makes nonsubstantive changes to the wording of §22.296(d) and makes other minor modifications for the purpose of clarifying its intent.

#### **16 TAC §§22.291 - 22.293, 22.295 - 22.299**

The amendments are adopted under TWC §13.041(b), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, TWC §13.451(f), which grants the commission the authority to adopt rules necessary to administer subchapter K-1 of the TWC, and SB 1148.

Cross Reference to Statutes: TWC §13.041 and §13.451 and SB 1148.

#### *§22.291. Purpose and Applicability.*

(a) The purpose of this subchapter is to prescribe procedures to implement the commission's authority under the Texas Water Code to issue emergency orders or to authorize emergency rates.

(b) This subchapter applies to any request under the Texas Water Code for an emergency order or emergency rates.

#### *§22.292. Definitions.*

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

(1) Emergency order--An order which must be issued immediately for one of the reasons provided in §24.14(a) of this title (relating to Emergency Orders and Emergency Rates).

(2) TCEQ--Texas Commission on Environmental Quality.

#### *§22.293. Notification of Emergency Order.*

(a) A retail public utility that requests, obtains, or is subject to an emergency order issued by the TCEQ shall notify the commission and all regulatory authorities having original jurisdiction over the retail public utility's rates and service policies as soon as reasonably possible by:

(1) filing with the commission and all regulatory authorities having original jurisdiction over the retail public utility's rates and service policies a copy of the request or order; or

(2) if the request or order is not available to the retail public utility, filing with the commission and all regulatory authorities having original jurisdiction over the retail public utility's rates and service policies a letter describing the facts and circumstances relating to the request or order.

(b) A retail public utility may comply with subsection (a) of this section by providing the information required by subsection (a) of this section as part of a request for an emergency order under §22.295 of this title (relating to Request for Emergency Order) and by providing notice, if applicable, to all other regulatory authorities having original jurisdiction over the retail public utility's rates and service policies.

(c) Upon issuance of an emergency order by the commission, the commission shall provide notice of issuance of the order to the affected retail public utility as soon as practicable. Notice of the commission's action under this subchapter is adequate if the notice or emergency order is delivered by registered or certified mail, return receipt requested, or hand-delivered, to the last known address of the retail public utility's headquarters.

(d) After a retail public utility receives notice of the issuance of an emergency order by the commission under this subchapter, the retail public utility shall provide notice of issuance of the emergency order to all affected ratepayers, the TCEQ, and all regulatory authorities having original jurisdiction over the retail public utility's rates and service policies. If the emergency order is for a rate change pursuant to §24.14(a)(4) of this title (relating to Emergency Orders and Emergency Rates), the retail public utility will provide the notice within ten days of the issuance of the emergency order or before the next billing cycle in which the new rate will be imposed, whichever is first. Otherwise, the retail public utility will provide the notice within ten days of the issuance of the emergency order. A copy of the notice shall also be filed with the commission along with a signed affidavit as proof that the notice was provided. The notice shall include:

(1) The name of the retail public utility for which the emergency order was issued, its corresponding certificate of public convenience and necessity number(s), and all relevant TCEQ issued public water system name(s) and identification number(s) and wastewater discharge permit name and identification number(s), if applicable;

(2) The address of the office for the retail public utility identified in paragraph (1) of this subsection;

(3) An emergency contact name and phone number(s) for the retail public utility identified in paragraph (1) of this subsection;

(4) The start and end date of the emergency order; and

(5) A brief statement explaining how the customers of the retail public utility identified in paragraph (1) of this subsection will be affected by the issuance of the emergency order.

(e) If a retail public utility required to provide notice pursuant to subsection (d) of this section has abandoned operation of its facilities or the owner of such a retail public utility has abandoned the system, as described in Texas Water Code §13.412(a)(1) - (2) and (f), then the retail public utility's receiver appointed pursuant to Texas Water Code §13.412 or temporary manager authorized pursuant to Texas Water Code §13.4132 shall provide notice as required by subsection (d) of this section. If no receiver or temporary manager has been appointed or authorized, commission staff shall take reasonable efforts to ensure that customers are provided the notice required by subsection (d) of this section or other reasonable notice.

§22.295. *Request for Emergency Order.*

(a) A person seeking an emergency order under this subchapter shall submit a written request to the commission.

(b) For a requesting person other than commission staff, the request must:

- (1) be sworn;
- (2) state whether the requesting person is also seeking or has obtained an emergency order from the TCEQ;
- (3) state the name, address, and telephone number of the requesting person, the person submitting the request on the requesting person's behalf, and the person signing the request on the requesting person's behalf;
- (4) state the name of the retail public utility, its corresponding certificate of public convenience and necessity number(s), and its corresponding TCEQ issued public water system name(s) and identification number(s) and wastewater discharge permit name and identification number(s), if applicable;
- (5) contain information sufficient to identify the facility(ies) and location(s) to be affected by the order;
- (6) describe the condition(s) of emergency or other condition(s) justifying the issuance of the order;
- (7) allege facts to support any findings required under this subchapter;
- (8) estimate the dates on which the proposed order should begin and end and the dates on which the activity proposed to be allowed, mandated, or prohibited should begin and end;
- (9) describe the action sought and the activity proposed to be allowed, mandated, or prohibited;
- (10) include any other statement or information required by this subchapter; and
- (11) shall be signed as follows:
  - (A) For a corporation, the request shall be signed by an executive officer or by a corporate official who has been delegated appropriate authority by an executive officer.
  - (B) For a partnership or sole proprietorship, the request shall be signed by a general partner or the proprietor, respectively.
  - (C) For a municipality, state, federal, or other public agency, the request shall be signed by a person authorized to make the representation(s) contained in the request on behalf of the municipality or agency.
  - (D) A person signing a request shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my

inquiry of the person or persons who manage the retail water or sewer system(s) or the retail public utility, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(c) For a request by commission staff, the request must:

- (1) contain the items specified in subsection (b)(2) - (10) of this section; and
- (2) be signed by commission staff.

§22.296. *Additional Requirements for Emergency Rate Increases.*

(a) If an emergency rate increase is granted pursuant to §24.14(a)(4) of this title (relating to Emergency Orders and Emergency Rates), the commission shall schedule a hearing and establish a final rate prior to the expiration of the emergency rate order. The final rate must be established and implemented no more than 15 months after the emergency rate increase takes effect.

(b) A utility is required to provide notice of the hearing to establish a final rate set pursuant to subsection (a) of this section to all customers at least ten days before the date of the hearing. A copy of the notice shall also be filed with the commission along with a signed affidavit as proof that the notice was provided.

(c) A request for an emergency rate increase must be filed by the utility in accordance with, and must contain the information required by §22.295 of this title (relating to Request for Emergency Order) and must also contain the following:

- (1) the effective date of the rate increase;
- (2) sufficient information to support the computation of the proposed rates; and
- (3) any other information requested by the commission.

(d) A utility receiving authorization for an emergency rate increase shall provide notice of the increase to each ratepayer within ten days of issuance of the order, or before the next billing cycle in which the rate will be in effect, whichever is first. The notice shall comply with the notice requirements set forth in §22.293(d) of this title (relating to Notification of Emergency Order) and shall also contain the following:

(1) the utility's name and address, the previous rates, the emergency rates, the effective date of the rate increase, and the classes of utility customers affected; and

(2) this statement: "This emergency rate increase has been approved by the Public Utility Commission of Texas under authority granted by the Texas Water Code §13.4133 to ensure the provision of continuous and adequate service to the utility's customers. The commission is also required to schedule a hearing to establish a final rate within 15 months after the date on which the emergency rates take effect. The utility is required to provide notice of the hearing to all customers at least ten days before the date of the hearing. The additional revenues collected under this emergency rate increase are subject to refund if the commission finds that the rate increase was larger than necessary to ensure continuous and adequate service."

§22.297. *Notice and Opportunity for Hearing.*

(a) An emergency order under this subchapter may be issued with or without notice and an opportunity for hearing in accordance with this subchapter.

(b) A law under which the commission acts that requires notice of hearing or that prescribes procedures for the issuance of emergency orders does not apply to a hearing on an emergency order issued pursuant to the Texas Water Code, Chapter 13, Subchapter K-1 unless the law specifically requires notice for an emergency order. The commission shall give notice of the hearing as it determines is practicable under the circumstances.

(c) If notice and opportunity for a hearing is practicable, the commission shall provide the notice not later than the tenth day before the date set for the hearing.

(d) If notice and opportunity for a hearing is not practicable, an emergency order may be issued under this section without a hearing.

(1) An emergency order issued without a hearing under this section is not subject to the requirements of the APA.

(2) If an emergency order is issued without a hearing under this section, the commission shall schedule a hearing to affirm, modify, or set aside the emergency order pursuant to §22.299 of this title (relating to Hearing Required to Affirm, Modify, or Set Aside). Such a hearing will be conducted in accordance with the APA. Notice of such a hearing shall be given no later than the tenth day before the date of the hearing and shall provide that an affected person may:

(A) participate in an evidentiary hearing to affirm, modify, or set aside the emergency order; and

(B) waive the right to a hearing. The notice shall explain how such waiver may occur.

#### §22.298. *Contents of Emergency Order.*

An emergency order issued under this subchapter shall contain at least the following:

(1) the name and address of the requesting person, if any, and information sufficient to identify the facility(ies) or location(s) affected by the order;

(2) a description of the condition(s) justifying the issuance of the order;

(3) any finding(s) of fact(s) required under this subchapter;

(4) a statement of the term of the order, including the dates on which it shall begin and end, in accordance with §24.14 of this title (relating to Emergency Orders and Emergency Rates);

(5) a description of the action sought;

(6) if the order was issued without a hearing, a statement to that effect and the procedure by which a person waives a right to a hearing, and if the emergency order was issued pursuant to §24.14(a)(2) - (3) of this title, a provision setting a time and place for a hearing before the commission or SOAH; and

(7) any other statement or information required by this subchapter.

#### §22.299. *Hearing Required to Affirm, Modify, or Set Aside.*

(a) A hearing shall be held either before or after the issuance of each emergency order, unless all persons affected by the order waive the right to a hearing. Notice of a hearing to affirm, modify, or set aside an emergency order shall be given in accordance with §22.297(d) of this title (relating to Notice and Opportunity for Hearing).

(b) A hearing to affirm, modify, or set aside an emergency order under this subchapter is subject to the APA.

(c) In a hearing to affirm, modify, or set aside an emergency order under this subchapter, the applicant shall be given the opportunity to:

(1) present evidence under oath;

(2) present rebuttal evidence under oath; and

(3) cross-examine witnesses under oath.

(d) If no hearing is held before the issuance of an emergency order, the commission or the executive director shall set a time and place for a hearing to be held before the commission or SOAH to affirm, modify, or set aside the order as soon as practicable after the order is issued. For emergency orders issued pursuant to §24.14(a)(2) or §24.14(a)(3) of this title (relating to Emergency Orders and Emergency Rates) without a hearing, the order shall set a time and place for a hearing before the commission or SOAH to affirm, modify, or set aside the order as soon as practicable after the order is issued.

(e) At a hearing required under this section, or within a reasonable time after the hearing, the commission shall affirm, modify, or set aside the emergency order.

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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#### 16 TAC §22.294

The repeal is adopted under TWC §13.041(b), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, TWC §13.451(f), which grants the commission the authority to adopt rules necessary to administer subchapter K-1 of the TWC, and SB 1148.

Cross Reference to Statutes: TWC §13.041 and §13.451 and SB 1148.

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 24. SUBSTANTIVE RULES APPLICABLE TO WATER AND SEWER SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts amendments to §24.14, relating to Emergency Orders and Emergency Rates, and §24.22, relating to Notice of Intent and Application to Change Rates Pursuant to Texas Water Code §13.187 or §13.1871, with changes to the proposed text as published in the March 18, 2016, issue of the *Texas Register* (41 TexReg 2054). The amendments will allow the commission's procedural rules relating to emergency orders to conform to §§2, 3, 5, 6, and 8 - 10 of Senate Bill 1148 (SB 1148) of the 84th Legislature, Regular Session, which amended chapters 5 and 13 of the Texas Water Code Annotated (West 2008 & Supp. 2015) (TWC). The amendments will also allow provisions relating to notice of ratemaking proceedings in §24.22 to implement §5 and §6 of SB 1148, which grant the commission the authority to delegate to the State Office of Administrative Hearings (SOAH) the responsibility and authority to give reasonable notice of hearings in Class A and Class B rate cases. These amendments are adopted under Project Number 45115. Consistent with 1 TAC §91.36(e), the commission also adopts amendments to Chapter 22 of the commission's rules in a separate order as part of this project.

The commission did not receive comments on the proposed amendments.

In adopting this section, the commission makes minor modifications for the purpose of clarifying its intent.

## SUBCHAPTER A. GENERAL PROVISIONS

### 16 TAC §24.14

The amendments are adopted under TWC §13.041(b), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, TWC §13.451(f), which grants the commission the authority to adopt rules necessary to administer subchapter K-1 of the TWC, and SB 1148.

Cross Reference to Statutes: TWC §13.041 and §13.451 and SB 1148.

#### §24.14. *Emergency Orders and Emergency Rates.*

(a) The commission may issue emergency orders in accordance with the Texas Water Code Chapter 13, Subchapter K-1 under Chapter 22, Subchapter P of this title (relating to Emergency Orders for Water and Sewer Utilities), with or without a hearing:

(1) to appoint a person under §24.142 of this title (relating to Operation of Utility that Discontinues Operation or is Referred for Appointment of a Receiver), §24.143 of this title (relating to Operation of a Utility by a Temporary Manager), or Texas Water Code §13.4132 to temporarily manage and operate a utility that has discontinued or abandoned operations or that is being referred to the Office of the Texas Attorney General for the appointment of a receiver under Texas Water Code §13.412.

(2) to compel a water or sewer service provider that has obtained or is required to obtain a certificate of public convenience and necessity to provide continuous and adequate retail water service, sewer service, or both, if the discontinuance of the service is imminent or has occurred because of the service provider's actions or inactions.

(3) to compel a retail public utility to provide an emergency interconnection with a neighboring retail public utility for the provision of temporary water or sewer service, or both, for not more than 90 days if discontinuance of service or serious impairment in service is imminent or has occurred.

(4) to authorize an emergency rate increase if necessary to ensure the provision of continuous and adequate retail water or sewer service to the utility's customers pursuant to Texas Water Code §13.4133:

(A) for a utility for which a person has been appointed under Texas Water Code §13.4132 to temporarily manage and operate the utility; or

(B) for a utility for which a receiver has been appointed under Texas Water Code §13.412.

(5) to compel a retail public utility to make specified improvements and repairs to the water or sewer system(s) owned or operated by the utility pursuant to Texas Water Code §13.253(b):

(A) if the commission has reason to believe that improvements and repairs to a water or sewer service system are necessary to enable a retail public utility to provide continuous and adequate service in any portion of its service area;

(B) after providing a retail public utility notice and an opportunity to be heard at an open meeting of the commission; and

(C) if the retail public utility has provided financial assurance under Texas Health and Safety Code §341.0355 or Texas Water Code Chapter 13.

(6) to order an improvement in service or an interconnection pursuant to Texas Water Code §13.253(a)(1) - (3).

(b) The commission may establish reasonable compensation for temporary service ordered under subsection (a)(3) of this section and may allow the retail public utility receiving the service to make a temporary adjustment to its rate structure to ensure proper payment.

(c) For an emergency order issued pursuant to subsection (a)(4) of this section and in accordance with §22.296 of this title (relating to Additional Requirements for Emergency Rate Increases):

(1) the commission shall coordinate with the TCEQ as needed;

(2) an emergency rate increase may be granted for a period not to exceed 15 months from the date on which the increase takes effect;

(3) the additional revenues collected under an emergency rate increase are subject to refund if the commission finds that the rate increase was larger than necessary to ensure continuous and adequate service;

(4) the effective date of the emergency rates must be the first day of a billing cycle, unless otherwise authorized by the commission;

(5) any emergency rate increase related to charges for actual consumption will be for consumption after the effective date. An increase or the portion of an increase that is not related to consumption may be billed at the emergency rate on the effective date or the first billing cycle after approval by the commission;

(6) the utility shall maintain adequate books and records for a period not less than 12 months to allow for the determination of a cost of service as set forth in §24.31 of this title (relating to Cost of Service); and

(7) during the pendency of the emergency rate increase, the commission may require that the utility deposit all or part of the rate increase into an interest-bearing escrow account as set forth in §24.30 of this title (relating to Escrow of Proceeds Received under Rate Increase).

(d) The costs of any improvements ordered pursuant to subsection (a)(5) of this section may be paid by bond or other financial assurance in an amount determined by the commission not to exceed the amount of the bond or financial assurance. After notice and hearing, the commission may require a retail public utility to obligate additional money to replace the financial assurance used for the improvements.

(e) An emergency order issued under this subchapter does not vest any rights and expires in accordance with its terms or this subchapter.

(f) An emergency order issued under this subchapter must be limited to a reasonable time as specified in the order. Except as otherwise provided by this chapter, the term of an emergency order may not exceed 180 days.

(g) An emergency order may be renewed once for a period not to exceed 180 days, except an emergency order issued pursuant to subsection (a)(4) of this section.

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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Public Utility Commission of Texas

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## SUBCHAPTER B. RATES, RATE-MAKING, AND RATES/TARIFF CHANGES

### 16 TAC §24.22

The amendments are adopted under TWC §13.041(b), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, TWC §13.451(f), which grants the commission the authority to adopt rules necessary to administer subchapter K-1 of the TWC, and SB 1148.

Cross Reference to Statutes: TWC §13.041 and §13.451 and SB 1148.

§24.22. *Notice of Intent and Application to Change Rates Pursuant to Texas Water Code §13.187 or §13.1871.*

(a) Purpose. This section describes the requirements for the contents of an application to change rates and the requirements for the provision of notice pursuant to TWC §13.187 or §13.1871.

(b) Contents of the application. An application to change rates pursuant to TWC §13.187 or §13.1871 is initiated by the filing of a rate filing package, a statement of intent to change rates, and the proposed form and method of notice to customers and other affected entities pursuant to subsection (c) of this section.

(1) The application shall include the commission's rate filing package form and include all required schedules.

(2) The application shall be based on a test year as defined in §24.3(71) of this title (relating to Definitions of Terms).

(3) For an application filed pursuant to TWC §13.187, the rate filing package, including each schedule, shall be supported by pre-filed direct testimony. The pre-filed direct testimony shall be filed at the same time as the application to change rates.

(4) For an application filed pursuant to TWC §13.1871, the rate filing package, including each schedule, shall be supported by affidavit. The affidavit shall be filed at the same time as the application to change rates. The utility may file pre-filed direct testimony at the same time as the application to change rates. If the application is set for a hearing, the presiding officer may require the filing of pre-filed direct testimony at a later date.

(5) Proof of notice. Proof of notice in the form of an affidavit stating that proper notice was mailed, e-mailed, or delivered to customers and affected municipalities and stating the date(s) of such delivery shall be filed with the commission by the applicant utility as part of the rate change application.

(c) Notice requirements specific to applications filed pursuant to TWC §13.187.

(1) Notice of the application. In order to change rates pursuant to TWC §13.187, a utility must comply with the following requirements at least 35 days before the effective date of the proposed change.

(A) The utility must file a statement of intent (notice) with the commission and provide a copy of the notice to all customers of the utility affected by the proposed rate change, to the appropriate offices of each municipality affected by the proposed rate change, and to the Office of Public Utility Counsel.

(B) Notice shall be provided using the commission-approved form and shall include a description of the process by which a ratepayer may intervene in the proceeding.

(C) This notice shall state the docket number assigned to the rate application. Prior to the provision of notice, the utility shall file a request for the assignment of a docket number for the rate application.

(D) Notices to affected ratepayers may be mailed separately, e-mailed (if the customer has agreed to receive communications electronically), or may accompany customer billings.

(E) Notice is considered to be completed upon mailing, e-mailing (if the customer has agreed to receive communications electronically), or hand delivery.

(2) Notice of the hearing. After the rate application is set for a hearing, the commission shall give reasonable notice of the hearing, including notice to the governing body of each affected municipality and county. The commission may require the utility to complete this notice requirement. The commission may delegate to an administrative law judge of the State Office of Administrative Hearings the responsibility and authority to give reasonable notice of the hearing, including notice to the governing body of each affected municipality and county.

(d) Notice requirements specific to applications filed pursuant to TWC §13.1871.

(1) Notice of the application. In order to change rates pursuant to TWC §13.1871, a utility must comply with the following requirements at least 35 days before the effective date of the proposed change.

(A) The utility must file a notice with the commission and provide a copy of the notice to all customers of the utility affected by the proposed rate change and to the appropriate offices of each mu-

municipality affected by the proposed rate change, and to the Office of Public Utility Counsel.

(B) Notice shall be provided using the commission-approved form and shall include a description of the process by which a ratepayer may file a protest pursuant to TWC §13.1871(i).

(C) For Class B utilities, the notice shall state the docket number assigned to the rate application. Prior to providing notice, Class B utilities shall file a request for the assignment of a docket number for the rate application.

(D) Notices to affected ratepayers may be mailed separately, e-mailed (if the customer has agreed to receive communications electronically), or may accompany customer billings.

(E) Notice is considered to be completed upon mailing, e-mailing (if the customer has agreed to receive communications electronically), or hand delivery.

(2) Notice of the hearing. After the rate application is set for a hearing, the following notice requirements shall apply.

(A) The commission shall give reasonable notice of the hearing, including notice to the governing body of each affected municipality and county. The commission may require the utility to complete this notice requirement. The commission may delegate to an administrative law judge of the State Office of Administrative Hearings the responsibility and authority to give reasonable notice for the hearing, including notice to the governing body of each affected municipality and county.

(B) The utility shall mail notice of the hearing to each affected ratepayer at least 20 days before the hearing. The notice must include a description of the process by which a ratepayer may intervene in the proceeding.

(e) Line extension and construction policies. A request to approve or amend a utility's line extension and construction policy shall be filed in a rate change application under TWC §13.187 or §13.1871. The application filed under TWC §13.187 or §13.1871 must include the proposed tariff and other information requested by the commission. The request may be made with a request to change one or more of the utility's other rates.

(f) Capital improvements surcharge. In a rate proceeding pursuant to TWC §13.187 or TWC §13.1871, the commission may authorize collection of additional revenues from the customers pursuant to a surcharge to provide funds for capital improvements necessary to provide facilities capable of providing continuous and adequate utility service, and for the preparation of design and planning documents.

(g) Debt repayments surcharge. In a rate proceeding pursuant to TWC §13.187 or TWC §13.1871, the commission may authorize collection of additional revenues from customers pursuant to a surcharge to provide funds for debt repayments and associated costs, including funds necessary to establish contingency funds and reserve funds. Surcharge funds may be collected to meet all of the requirements of the Texas Water Development

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 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts amendments to 16 TAC §25.101, relating to Certification Criteria, §25.174, relating to Competitive Renewable Energy Zones, and §25.192, relating to Transmission Service Rates with changes to the proposed text as published in the February 26, 2016, issue of the *Texas Register* (41 TexReg 1312). The adopted amendments will implement Senate Bill 776, Senate Bill 933, and House Bill 1535 of the 84th Legislature (R.S.), as well as make modifications to the Competitive Renewable Energy Zones (CREZs) rule. These amendments are adopted under Project Number 45124.

The commission received comments on the proposed amendments from Apex Clean Energy Management, LLC (Apex), CPS Energy, EDF Renewable Energy, Inc., the Electric Reliability Council of Texas (ERCOT), Entergy Texas, Inc. (ETI), the Environmental Defense Fund (EDF), Golden Spread Electric Cooperative, Inc. (Golden Spread), the Lone Star Chapter of the Sierra Club (Sierra Club), Luminant Generation Company, LLC and Luminant Energy Company, LLC (collectively, Luminant), the Office of Public Utility Counsel (OPUC), the Solar Energy Industries Association (SEIA) jointly with the Texas Solar Power Association (TSPA), the Texas Competitive Power Advocates (TCPA), the Texas Industrial Energy Consumers (TIEC), and the Wind Coalition.

Reply comments were received from the Brownsville Public Utilities Board (BPUB), EDF Renewable Energy, ERCOT, Luminant, and TIEC, as well as AEP Texas Central Company, AEP Texas North Company, CenterPoint Energy Houston Electric, LLC, Cross Texas Transmission, LLC, Electric Transmission Texas, LLC, Lone Star Transmission, LLC, Oncor Electric Delivery Company LLC, Sharyland Utilities, L.P., and Texas-New Mexico Power Company jointly (collectively, ERCOT Utilities) and the City of Garland (Garland), Denton Municipal Electric (DME), and Texas Municipal Power Agency (TMPA) jointly.

§25.101 - Certification Criteria

§25.101 - *General Comments*

ETI proposed improving the efficiency of the transmission line certificate of convenience and necessity (CCN) review process by extending the provision giving weight to ERCOT conclusions regarding need in CCN cases to also give weight to similar findings by other regional transmission operators (RTOs). ETI also proposed adding an option to expedite CCN proceedings for certain customer-driven projects.

In reply comments, TIEC responded that recommendations regarding determinations on need for transmission facilities by RTOs under the jurisdiction of the Federal Energy Regulatory Commission (FERC) should not be given "great weight" because the commission does not have jurisdiction over these

RTOs and therefore cannot control their planning policies as it can for ERCOT. Therefore, TIEC argued that granting the same level of deference to such RTOs is not appropriate. However, TIEC agreed with ETI that expedited proceedings for facilities to interconnect a new retail customer or merchant generators (i.e. customer-driven projects) could be appropriate under certain circumstances.

#### *Commission Response*

The purpose of the commission's amendments to this rule is to conform the rule to statutory changes. ETI's proposed changes do not pertain to the statutory changes, and therefore, the commission declines to make the changes proposed by ETI. Furthermore, the commission would require additional information and evaluation of the proposed changes in order to reach a decision on their substantive merits.

#### *§25.101(a)(7) and (b)(4) - Tie Lines*

Golden Spread offered a modification to the proposed amendment aimed at maintaining the operational independence of ERCOT from FERC-jurisdictional regions by limiting the definition of a tie line to specifically direct current (DC). Golden Spread also recommended that merchant tie lines, which it asserted are capable of importing and exporting power from ERCOT, be subject to ongoing commission oversight similar to that of power generating companies that import power from outside the state to ERCOT. TIEC acknowledged the complicated nature of the DC tie issue, and recognized the potential for reliability concerns and impacts on market prices. In reply comments, TIEC disagreed with the suggestion by Golden Spread to modify the definition of a tie line, arguing that no changes to the definition of a tie line are necessary or appropriate because the language that the commission has proposed exactly tracks the language of Public Utility Regulatory Act (PURA) §37.051(c-1).

TCPA, Luminant, and ERCOT all proposed amendments to §25.101(b)(4). TCPA and Luminant stated that the physical flows associated with exporting wind may require a careful assessment of generation deliverability for all resources under a spectrum of system conditions, and that additional analyses will likely be needed to properly understand the impact of the proposed DC ties on ERCOT system reliability, economics, and priority dispatching. Luminant asserted that managing transmission congestion in connection with approval of a large tie line is critical and to address such issues proposed the use of Constraint Management Plans (CMPs), as set forth in ERCOT Nodal Operating Guide Section 11. ERCOT stated that it supports the proposed amendments to subsections (b)(3)(A) as well as (b)(4), but requested that the commission further revise subsection (b)(4) to provide additional details on the studies that ERCOT will be required to submit with DC tie CCN applications. ERCOT also made a distinction between the proposed criteria for DC ties and the existing economic and reliability criteria for transmission lines.

TIEC disagreed in its reply comments that a CMP is necessary or appropriate to prevent imports from displacing certain generators, as Luminant and TCPA proposed. ERCOT shared Luminant's concern that integrating DC ties with the security-constrained economic dispatch (SCED) would present a host of implementation challenges that would need to be addressed. However, in its reply comments, ERCOT stated that it would be worthwhile to first conduct an assessment of the costs and benefits of a SCED solution prior to considering other alternatives such as a CMP.

In reply comments, ERCOT reiterated that SB 933 appears to require a finding of need without regard to whether the proposed tie line would be privately or publicly funded, and therefore ERCOT's comments were more narrowly focused on the nature of such a need determination. ERCOT acknowledged that some of the comments implied an understanding that a tie line CCN applicant should be required to first obtain an ERCOT study with an analysis similar to the type of study conducted for the interconnection of new generation, rather than a study of need. ERCOT noted that such a study would be appropriate only if the statutory CCN requirement is understood not to apply to all new tie lines, with the exception of the proposed Southern Cross project which is exempted from the need requirement. However, if the statute does require new tie line developers to first obtain a CCN, as ERCOT assumes, then the analysis of the reliability implications should already be addressed as part of ERCOT's need assessment. ERCOT stated that it would not oppose any clarification that an ERCOT-approved reliability assessment should be required, if desired by the commission. ERCOT also stated that PURA §37.051(c-2) gives the commission authority to impose "reasonable conditions" on the interconnection of the Southern Cross project as part of any CCN proceeding. ERCOT offered a number of issues that should be addressed before the Southern Cross project is permitted to interconnect to the ERCOT system. However, ERCOT stated that it did not understand the statute to require that any or all of these issues must be addressed as part of the Garland CCN proceeding or in this rulemaking if the commission's primary purpose in this proceeding is to establish the general requirements for tie line projects that are subject to the need determination described in PURA §37.051(c-1).

Both Luminant and ERCOT asserted that Golden Spread's proposed changes to the definition of a tie line are unnecessary, but stated that they would have no concern with Golden Spread's alternative request seeking to clarify that the term "tie line" does not include grid-switchable generation. Additionally, ERCOT disagreed in its reply comments with Golden Spread's proposed substitution of the phrase "transfer power into or out of" in place of the proposed phrase "enable traditional power to be imported into or exported out of" ERCOT. ERCOT also recommended against explicitly restricting tie line requirements to direct current ties because DC ties are not the only devices capable of moving power between asynchronous regions. Luminant provided several examples of such non-DC asynchronous interconnections in its reply comments to Golden Spread.

In Luminant's reply comments, it agreed with Golden Spread that merchant owners and operators of tie facilities should be subject to ongoing oversight by the commission and suggested that the commission should open a separate rulemaking project to consider what requirements would be appropriate.

#### *Commission Response*

In response to ERCOT's request, the commission has clarified the amendment to subsection (b)(4) to state that the study of the tie line by the ERCOT independent system operator shall, at a minimum, include an ERCOT-approved reliability assessment. The commission has not made other changes in response to these comments regarding tie lines. The amendments appropriately track the language of PURA §37.051(c-1).

*§25.101(a) - (c) - Certificates of Convenience and Necessity for an Municipally-Owned Electric Utility (MOU) or Municipal Power Agency (MPA)*

Golden Spread offered comments arguing that the difference between municipal borders and service territory boundaries as it relates to the reporting requirements (§25.83) of new electric transmission lines is significant, pointing out that municipal boundaries change with regularity and are not relevant to a utility's service territory. Golden Spread therefore recommended that the commission revise the language to rely on service territories in lieu of municipal boundaries.

CPS Energy stated that affected MOUs and commission staff should work together during the CCN application process in order to avoid the duplication of efforts or conflicts between commission requirements and the MOUs' city governing bodies. CPS Energy also included an exhibit demonstrating its current siting and routing process.

BPUB's reply comments to Golden Spread asserted that the proposed amendments regarding the reporting requirements of new transmission lines outside municipal boundaries are unambiguously consistent with PURA §37.051(g), and that BPUB supports the commission's orderly monitoring of new transmission construction. Garland, DME, and TMPA replied in joint comments that Golden Spread's proposed revisions to subsection (b)(3) should be rejected, because they are contrary to the plain language of the statutory provisions enacted by the Legislature in SB 776.

#### *Commission Response*

The commission recognizes that there may be potential benefits in avoiding or mitigating duplicative or conflicting processes as raised in the comments of CPS Energy. However, those issues are not necessary to implement the statutory changes in this proceeding and therefore the commission has not made changes to the proposed amendments in response to these comments. The amendments to subsection (b)(3) appropriately track the language of PURA §37.051(g) and require that MOUs/MPAs adhere to the reporting requirements of §25.83 for certain types of new electric transmission lines, and therefore the commission has not made any changes in response to the comments of Golden Spread.

#### §25.174 - Competitive Renewable Energy Zones

##### *§25.174 - General Comments*

Several parties commented generally on aspects of proposed amendments to §25.174 relating to the commission's authority to designate new CREZs. Apex argued that the commission can refrain from implementing additional CREZ projects after 2007, but that it does not have the ability to repeal its legislatively bestowed CREZ authority. Apex argued that the power to repeal the commission's CREZ authority lies with the Legislature; the commission cannot repudiate statutory duties or accompanying powers delegated to implement those duties, and furthermore an agency rule must be consistent with the statute to be valid. Similarly, Sierra Club asserted that the commission lacks authority to declare through rulemakings that it cannot authorize further transmission projects. Sierra Club further averred that if the commission were to administratively declare that no CREZ can be designated in the future, it would be assuming a legislative function in contradiction of Texas law. Sierra Club, SEIC, EDF, and Apex all asserted that the commission lacks the authority to declare that it cannot authorize further transmission projects under PURA §39.904(g) by changing §25.174 in a rulemaking. Similarly, the Wind Coalition argued that the proposed amendments effectively repeal PURA §39.904.

In addition, several parties commented on SB 931 of the 84th Legislative Session, which proposed to repeal PURA §39.904. EDF Renewable Energy noted that the commission proposed changes to PURA §39.904(h) in its 2015 *Scope of Competition in Electric Markets* Report, but that the Legislature chose not to enact such changes. Sierra Club asserted that the Legislature chose not to act on SB 931, and therefore any attempt by the commission to declare that no future CREZ could be authorized is inappropriate.

Several parties discussed the benefits of retaining the commission's authority to designate future CREZs. Sierra Club argued that future CREZ areas could be beneficial, perhaps supporting the U.S. Environmental Protection Agency's Clean Power Plan regulations and accommodating the expected solar generation growth contemplated in ERCOT's Long Term System Assessment. Apex cited the potential benefits of future CREZ with respect to the large amount of untapped wind capacity, current operational issues with Panhandle wind projects, pending federal emissions regulations, large-scale development of solar in west Texas, shifting energy use, and the increasing pace of coal generation retirements alongside falling natural gas prices. EDF also argued that, in the absence of a repeal of PURA §39.904 by the Legislature, the commission should not amend the rule to conflict with continuing statutory requirements, especially when previous CREZ actions have provided significant benefits.

In reply comments, TIEC argued that CREZ was a one-time mandate, and that the commission has full authority to sunset the CREZ designation process by rule to thus require all future projects to existing CREZs to show need. TIEC argued that some commenters inaccurately contended that the commission lacks the authority to sunset the CREZ process by rule. TIEC further argued that PURA §39.904(g) only requires the commission to initially designate CREZ and develop a single plan to develop transmission capacity. TIEC asserted that this provision does not represent a continuing mandate to designate additional CREZs. EDF Renewable Energy responded that TIEC's argument constitutes too narrow a reading of the statute, and that the statute does not require that all CREZs be designated at the same time, nor is the commission's authority to develop a plan bounded in time.

EDF Renewable Energy asserted that, in the Order on Rehearing adopting the 2008 CREZ Order, potential expansion was identified as a benefit of the CREZ plan and further that the commission in Project No. 34560 anticipated that the CREZ process may also be used for areas outside of ERCOT. EDF Renewable Energy argued that the commission should not adopt TIEC's retroactive declaration, and should decline TIEC's alternative recommendation, which, like the proposed amendments, would remove the commission's discretion to require a need finding for a CREZ project. EDF Renewable Energy argued that the commission should instead preserve the option to apply the need exception only in the event any future CREZ transmission projects are approved.

##### *§25.174(a)*

Sierra Club stated that it was supportive of language in §25.174(a), which it stated was clear that the second circuit on the Panhandle is a continuation of CREZ and that the original CREZ projects from 2007 are now completed. Similarly, Apex argued that it may be appropriate to recognize that the first phase of the CREZ implementation is complete, but Apex further asserted the value in maintaining the policy for potential future use, even in modified form. In reply comments, EDF

Renewable Energy also argued that it was important to codify the commission's determination that the second circuit to the Sharyland line in the Panhandle is the last CREZ project under the CREZ plan approved in 2008.

SEIA, TSPA, and EDF argued that the proposed amendments to §25.174(a) would limit the commission's ability to establish a CREZ to those projects arising from the proceedings initiated in 2007. These commenters asserted that this would ignore the commission's continuing obligations pursuant to PURA §39.904(g) and would significantly limit the commission's authority in a time of continuing technological and cost changes in renewable energy.

#### §25.174(b)

Apex and Sierra Club stated that they opposed the proposed amendments that strike the phrase "and in subsequent years as deemed necessary by the commission" in subsection (b), arguing that this would end any future CREZ by removing the commission's CREZ authority altogether. Sierra Club argued that this change, together with the proposed language in §25.101(b)(3)(A)(i) eliminating the current exception to a requirement for an economic cost-benefit study for CREZ transmission, would eliminate a valuable policy tool and force all future CREZ projects to pass a narrow economic test.

TIEC argued that in order to implement the commission's intent to sunset the exemption from the need criteria for transmission projects intended to serve a CREZ, subsection (b) should be amended to affirmatively ensure that all future transmission projects will require a need finding. To accomplish this, TIEC recommended striking the entirety of the language that the "commission shall consider" CREZs, and instead add proposed language to establish that the designation of CREZs shall be completed by January 1, 2009.

TCPA asserted that CREZ is a complete project, and that all future transmission should be evaluated through the standard planning process, after passing all economic or reliability evaluations. TCPA asserted that the proposed amendment in subsection (b) that removes the language referencing years subsequent to 2007 is appropriate and adequately addresses the concerns and direction expressed by the commission.

#### §25.174(e)(2)

Several commenters offered alternate language which attempts to better clarify the phrase, "...transmission project intended to serve CREZ" rather than striking that language completely. The Wind Coalition argued that the commission should amend the rule to make clear that this phrase has a limited and specific meaning: only those projects intended by the commission to serve a CREZ, which would be indicated in an order approving a transmission plan under PURA §39.904(g)(2). The Wind Coalition argued that this would eliminate the concern that any project in a CREZ area or any project intended by a CCN applicant could be considered a project "to serve a CREZ."

SEIA and TSPA argued that the proposed amendments conflict with statutory requirements. SEIA and TSPA asserted that PURA §39.904(h) exempts a transmission line proposed to serve a CREZ from the requirements of PURA §37.056(c)(1) and (2), which require the commission to review the adequacy of existing transmission service and the need for additional transmission service before granting a CCN. SEIA and TSPA stated that, despite language that they believe is clear in the statute, the commission's proposed repeal of the exemption

of a proposed CREZ transmission line from the requirements of §25.101(b)(3)(A) and the proposed amendments in §25.174(e)(2) would require a transmission line proposed to serve a CREZ to comply with requirements of PURA §37.056(c)(1) and (2). Similarly, EDF argued that the proposed amendments would require a future applicant for a CREZ transmission line to meet the need criteria from which it should be exempt under PURA §39.904(h). EDF further asserted that the proposed amendments in §25.174(e)(2) are also inconsistent with the exemption provided by PURA §39.904(h). The Wind Coalition argued that the proposed language would erase all distinction between CREZ and non-CREZ projects in PURA §39.904(h) and that it would repeal the commission's authority to consider any future CREZ.

EDF Renewable Energy stated that it interprets the commission's objective to be that, after the Panhandle second circuit, all future CCN applications for transmission lines in a CREZ must address the need criteria in PURA §37.056(c)(1) and (2). To effectuate this, EDF Renewable Energy proposed alternative language in §25.174(e)(2) that a transmission project is intended to serve a CREZ only if it is part of a plan approved by the commission to develop transmission capacity. In its reply comments, EDF Renewable Energy noted that EDF, SEIA, and TSPA recommended that the commission take no action and simply reject the proposed amendments, seeing no need to repeal or significantly limit the current rules regarding CREZ. EDF Renewable Energy asserted that a "no action" approach is not unreasonable, but it also maintained that it is appropriate to amend §25.174(e)(2) to end any possible arguments that broadly worded language in PURA §39.904(h) confers an ongoing right to build CREZ without showing need under PURA §37.056(c)(1) and (2).

Apex argued that the proposed amendments in subsections (a) and (e)(2) are sufficient to achieve the commission's goal of affirming the completion of the projects arising from the 2008 CREZ Order. Apex asserted that going beyond this to remove the commission's CREZ authority would be an overreach of the commission's administrative authority and that such action conflicts with PURA.

SEIA, TSPA, and EDF recommended rejecting the proposed amendments to §25.101 and §25.174 that relate to the CREZ and the development of transmission projects to serve those regions.

TIEC argued that the proposed amendments could be read to allow for future designations of new CREZs without a firm end date. TIEC argued that the rule as amended leaves open the possibility that the commission could designate a new CREZ plan in a future proceeding, thus restarting the three-year window for exemptions from need contemplated in subsection (e)(1). TIEC proposed making clear that all future transmission investment demonstrate need, regardless of whether the project interconnects to a CREZ. TIEC asserted that it does not interpret PURA §39.904 as permitting any future CREZ proceedings, and that PURA §39.904(h) gives the commission permission to require a need finding for a CREZ project. TIEC argued that, in the alternative, the rule could be clarified to ensure that all projects filed outside the original three-year window from the prior CREZ designation docket be required to show need, and TIEC proposed language to this effect. In addition, TIEC noted a non-substantive typographical error in proposed subsection (e)(2).

In reply, EDF Renewable Energy argued that TIEC's recommendations are not necessary to fulfill the commission's stated intention and furthermore that to sunset CREZ affirmatively by rule is not appropriate.

#### *Commission Response*

The commission believes that its proposed amendments would appropriately affirm that the CREZ Order in Docket No. 33672 is complete, following the addition of the second circuit on the Sharyland Panhandle line, and indicate that all future transmission projects intended to serve a CREZ will be required to address the criteria in PURA §37.056(c)(1) and (2). The commission agrees with the comments of TIEC that by stating that, "the commission is not required to consider the factors provided by Sections 37.056(c)(1) and (2)," PURA §39.904(h) grants the commission discretion to require that projects intended to serve a CREZ demonstrate findings of adequacy and need. The proposed amendments to the rule exercise this discretion by requiring that these factors be demonstrated in future projects intended to serve a CREZ. In exercising this discretion, the commission has chosen not to adopt proposed alternatives that would perpetuate the exemption for projects intended to serve a CREZ from addressing PURA §37.056(c)(1) and (2). Because the commission will require that PURA §37.056(c)(1) and (2) be addressed in future transmission projects intended to serve a CREZ, the commission need not reach the issue of whether it has the legal authority to designate additional CREZs pursuant to PURA §39.904(g). In addition as recommended by TIEC, the commission has corrected a non-substantive typographical error in subsection (e)(2).

#### §25.192 - Transmission Service Rates

##### *§25.192(h) - Accumulated Deferred Federal Income Tax (ADFIT)*

OPUC and TIEC recommended that subsection (h) be amended to reflect an updated balance for accumulated deferred federal income tax (ADFIT), which are assets or liabilities that are characterized as the difference between book accounting and income tax accounting and represent a source of cost-free capital to the utility that also benefits shareholders. TIEC noted that the current rule requires utilities to reflect the impact of certain offsetting cost decreases or revenue increases that benefit customers when they update their rates to include new investments, and that commission staff accurately observed in its strawman that ADFIT adjustments are not included in the current transmission cost of service (TCOS) filing requirements. OPUC and TIEC argued that if the ADFIT balance is not updated, it could potentially overstate the interim transmission revenue requirement to be recovered in transmission rates, and thus result in artificially high customer rates. TIEC stated that reflecting changes to ADFIT will help to ensure that utilities do not over-earn in between full rate cases, which TIEC asserted has been a significant problem in recent years. OPUC provided language which would include ADFIT balances in subsection (h)(1).

ERCOT Utilities replied that including ADFIT inappropriately expands what is intended to be a limited proceeding to ensure timely recovery of transmission investment and could result in an increased cost of capital. They stated that the current rule has been well established for over fifteen years and that investors have come to rely on it as part of the regulatory scheme in Texas. In addition, ERCOT Utilities argued that requiring an update to ADFIT would ultimately have an adverse effect on the ability of utilities to acquire capital, and thus in the long run raise rates to end-use customers. ERCOT Utilities referenced Project Num-

ber 37519, in which they argued that the commission recognized the importance of interim TCOS to the cost of capital, explaining that the interim TCOS filings "enhance the ability of Transmission Service Providers (TSPs) to achieve their authorized rates of return and improve their cash ratios, thereby strengthening their financial positions and improving their access to capital at reasonable rates during a time of significant expansion in transmission infrastructure." They argued that for these reasons, utilities' ability to update TCOS on an interim basis has been viewed positively by the investment community, which have described the Texas regulatory environment as "supportive and constructive" and the interim TCOS mechanism as one that "enhances the predictability and stability of (a utility's) cash flows, a credit positive." ERCOT Utilities stated that the investment community has warned that a rating could be downgraded if a contentious regulatory environment were to develop in Texas over a prolonged period of time.

ERCOT Utilities stressed that each transmission and distribution service provider (TDSP) and TSP has had its rates set at least once through a full rate case since the provisions of §25.192 were adopted. Thus, the cost of equity in existing rates has been based upon a regulatory regime that has included the impact to utility revenue and finances of §25.192 as it currently exists. They argued that any significant change to the current calculation requirements reduces the revenue recovery amount and impacts the timely recovery of such revenues, increases risk, and makes it more difficult for the utilities to earn their authorized return. Furthermore, ERCOT Utilities asserted that such uncertainty would result in a total cost higher than the reduction in interim TCOS revenues due to the increased risk of recovery resulting from a higher cost of debt, raising cost for end-use customers. The ERCOT Utilities further stated that the commission has specifically provided in subsection (h)(3) that it will consider the effects of the interim updates when assessing the TSP's financial risk and rate of return in a rate case. They submitted that there is no reason to modify a robust interim TCOS mechanism, the evaluation of which is reflected in each utility's rate of return. They argued that this mechanism has allowed the utilities in Texas to fund necessary transmission projects for both traditional transmission projects during a period of increasing growth, as well as billions of dollars in CREZ transmission projects. The ERCOT Utilities concluded that, for these reasons, no change should be made to include ADFIT.

#### *Commission Response*

The purpose of the commission's amendments to this rule is to conform the rule to statutory changes. OPUC's and TIEC's proposed changes do not pertain to the statutory changes, and therefore the commission does not make any changes in response to these comments. Furthermore, the commission would require additional information and evaluation of the proposed changes in order to reach a decision on their substantive merits.

##### *§25.192(h) - Interim Transmission Cost of Service (TCOS) Update*

TIEC recommended that the commission amend subsection (h) to require that each TSP file an interim TCOS update once every 36 months. TIEC averred that TSPs currently have a unilateral discretion over the timing of filing a TCOS update, which allows TSPs to selectively file updates when they can justify a rate increase, but not when they expect a rate decrease. TIEC noted that some TSPs have continued to collect the same transmission rates from customers for decades while the underlying investments depreciate or are retired and no new investments

are made. As a result, TIEC stated that TCOS charges in Texas are likely significantly inflated relative to the utilities' actual cost of service, and this concern is particularly heightened given the recent large increases in transmission rates due to CREZ and several billion dollars of reliability upgrades in ERCOT. TIEC argued that requiring periodic TCOS updates would provide a check on these ever-increasing transmission rates. TIEC stated that a mandatory TCOS update would allow customers to realize some savings from depreciation, plant retirements, and other factors that increase utility revenues or decrease costs. TIEC noted that requiring periodic TCOS updates should not create a significant burden on either the utilities or the commission, as TCOS updates tend to be processed administratively with little or no controversy.

In reply comments, ERCOT Utilities asserted that such an amendment would increase filings made by TSPs when no adjustment to their rates is necessary. ERCOT Utilities argued that the purpose of the interim TCOS process is to reduce regulatory lag by allowing utilities to place capital expenditures into rates in a more timely manner after they become used and useful than would be possible if all rate changes needed to be processed through a full base rate case. ERCOT Utilities asserted that any rates established in an interim TCOS are subject to a prudence review, true-up, and possible refund when the utility files a full rate case. ERCOT Utilities argued that TIEC's proposal belies this process by requiring an arbitrary filing unrelated to the very purpose of the rule. They stated that the interim TCOS process is not intended to be a periodic review of a utility's transmission assets, as TIEC suggests with its proposed language. ERCOT Utilities questioned TIEC's rationale that three years is the appropriate amount of time between interim TCOS proceedings. They reasoned that while one utility could have a substantial investment during a 36-month period and file multiple interim TCOS cases, another utility could have no new transmission projects for a 36-month period. The ERCOT Utilities reasoned that including such an arbitrary requirement will needlessly increase the amount of filings made by utilities whose rates do not need to be updated, and ultimately will only increase costs to ratepayers.

ERCOT Utilities further asserted that TIEC's claim that TSP's have "unilateral discretion" over when to change rates is simply not true. They stated that each year utilities file an earnings-monitoring report, and furthermore that the commission has the authority to require a utility to file a rate case if the utility is overearning. The ERCOT Utilities added that TIEC's suggestion will increase uncertainty surrounding transmission rates. They reasserted that the interim TCOS mechanism is well established and currently viewed favorably by the capital markets, and TIEC's proposed requirement would be detrimental to the utilities and ratepayers.

#### *Commission Response*

The purpose of the commission's amendments to this rule is to conform the rule to statutory changes. TIEC's proposed changes do not pertain to the statutory changes, and therefore the commission does not make any changes in response to these comments. Furthermore, the commission would require additional information and evaluation of the proposed changes in order to reach a decision on their substantive merits.

#### *§25.192 - General Comments Regarding Strawman Proposals*

TIEC included in its comments certain changes that were proposed in the strawman but omitted from the proposed amend-

ments, including deleting an obsolete reference to the initial implementation of §25.193, and making clarifications regarding the transmission facilities and load growth revenues that must be included in the TCOS filings.

In reply comments, ERCOT Utilities noted that the proposals made by TIEC and OPUC regarding the interim TCOS mechanism, save one, were made during the strawman process and were ultimately not included by the commission in the proposal published in the *Texas Register*. They argued that the strawman process is designed to provide the commission with comments in order to, among other things, determine the scope of the rule-making and the issues that the commission believes should be part of the formal process. ERCOT Utilities referenced a filing in Project No. 30088 in which commission staff noted that it utilizes comments to the strawman to identify important issues and make necessary changes before a rule is formally proposed for publication. ERCOT Utilities argued that many parties commented on the Strawman's possible amendments to §25.192 and that based on those comments, the commission determined that the scope of this rulemaking should not include the proposed amendments suggested by OPUC and TIEC regarding ADFIT, ERCOT exports, filing frequency, or changes to FERC accounts. ERCOT Utilities stated that if the strawman process is to properly assist the commission in formulating the scope and content of a rulemaking, and if the commission's actions in response to that process are to be meaningful, then the commission should reject TIEC's and OPUC's comments as falling outside the scope of this rulemaking. ERCOT Utilities argued that to do otherwise would render the strawman process far less useful, greatly reduce administrative efficiency, and introduce uncertainty in developing the scope of the issues. They noted that the Texas Legislature adopted various amendments to PURA during the 84th Legislative Session, including those found in SB 933, SB 776, and HB 1535, the three bills that gave rise to the instant project, and the scope of the proposed amendments are appropriately limited to matters mandated by the Texas Legislature. ERCOT Utilities commented that more specifically, while the implementation of these amendments may require changes to the commission's rule on transmission rates found in §25.192, as that rule relates to municipally owned utilities, nothing in the referenced laws explicitly changed--or even implied that any changes were necessary - to the way the commission currently calculates interim transmission rates for other TDSPs and TSPs in ERCOT. They argued that OPUC's and TIEC's suggestions go beyond implementing the Legislature's changes to PURA, and burden an already complex rulemaking with issues not germane to the notice of these proposed rule amendments.

ERCOT Utilities added that the Legislature recently provided the commission guidance on alternative rate mechanisms through Senate Bill 744, which amended PURA §36.210 to continue periodic rate adjustments for electric utility distribution investments under PURA until 2019, and required the commission to study the gamut of alternative ratemaking mechanisms and report the results of the study to the Legislature. They argued that in view of this upcoming study, it is premature to make substantive changes to existing ratemaking mechanisms before the commission concludes its report. The ERCOT Utilities concluded that, because the Legislature has not directed proposed changes to the calculation of interim transmission rates, the commission should limit this proceeding to the statutory changes and wait until the referenced report is finalized.

The ERCOT Utilities argued additionally that OPUC's and TIEC's comments are clearly outside the scope of the proposed rule,

and modifying the rule could raise significant concerns under the notice requirements of the Texas Administrative Procedures Act (APA).

#### *Commission Response*

The purpose of the commission's amendments to this rule is to conform the rule to statutory changes. TIEC's proposed changes do not pertain to the statutory changes, and therefore the commission does not make any changes to the rule in response to these comments. Furthermore, the commission would require additional information and evaluation of the proposed changes in order to reach a decision on their substantive merits.

#### *§25.192(h)(1) - FERC Account Balances*

TIEC proposed adding language to describe the transmission facilities that are to be included in an interim update to transmission rates as those "properly recorded in FERC plant accounts 350-359." The ERCOT Utilities responded that current industry practice is to include all transmission plant that is functionalized to transmission in an interim TCOS. They pointed out that portions of FERC accounts 360-362 are functionalized to transmission and properly included in an interim TCOS, and, consistent with this practice, the interim TCOS Filing Instructions identify the FERC accounts to be included in the filing as FERC accounts 350-362 rather than only 350-359. The ERCOT Utilities stated that, additionally, transmission cost of service is described in subsection (c) as including the "commission-allowed rate of return based on FERC plant accounts 350-359 (or accounts with similar contents or amounts functionalized to the transmission function)." The ERCOT Utilities argued that if subsection (h)(1) is amended to specifically identify FERC plant accounts, it should be amended to identify FERC accounts 350-362 and include the parenthetical "(or accounts with similar contents or amounts functionalized to the transmission function)" for consistency and clarity.

TIEC additionally proposed language to require transmission revenues consistent with the proposed rates and properly recovered under subsection (e), which governs transmission rates for exports from ERCOT. In reply comments, the ERCOT Utilities commented that TIEC's proposed amendment would require revenue from the transmission of electricity out of the ERCOT region over the DC ties to be credited as a reduction in a TSP's TCOS. They argued that this change has no relation to the statutory changes and if changes to the manner in which the interim TCOS reflects revenues from ERCOT exports are necessary, the issue should be studied outside of this rulemaking. ERCOT Utilities stated that the relative costs of collection, compared to revenue received by each TDSP, may drive a collection mechanism different from the point-to-point billing that transmission and distribution providers use for other transmission charges. They commented that the ability of ERCOT to track the transaction may help to determine the manner of revenue collection, so alternatives should be explored prior to changing the way export revenues are treated in the interim TCOS filing.

#### *Commission Response*

The purpose of the commission's amendments to this rule is to conform the rule to statutory changes. TIEC's proposed changes do not pertain to the statutory changes, and therefore the commission does not make any changes to the rule in response to these comments. Furthermore, the commission would require additional information and evaluation of the proposed changes in order to reach a decision on their substantive merits.

All comments, including any not specifically referenced herein, were fully considered by the commission.

## SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION

### 16 TAC §25.101

The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2015) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §35.009, which entitles an MOU to recover payments in lieu of ad valorem taxes; PURA §37.051, which requires certificates of convenience and necessity (CCNs) for MOUs or MPAs constructing transmission facilities outside of their boundaries and for persons interconnecting tie line facilities to the ERCOT transmission grid; PURA §37.058, which requires CCNs for electric generating facilities of non-ERCOT utilities; and PURA §39.904, which authorizes the commission to designate CREZs.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 37.051, 37.058, and 39.904.

#### *§25.101. Certification Criteria.*

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise:

(1) Construction and/or extension--Shall not include the purchase or condemnation of real property for use as facility sites or right-of-way. Acquisition of right-of-way shall not be deemed to entitle an electric utility to the grant of a certificate of convenience and necessity without showing that the construction and/or extension is necessary for the service, accommodation, convenience, or safety of the public.

(2) Generating unit--Any electric generating facility. This section does not apply to any generating unit that is less than ten megawatts and is built for experimental purposes only.

(3) Habitable structures--Structures normally inhabited by humans or intended to be inhabited by humans on a daily or regular basis. Habitable structures include, but are not limited to: single-family and multi-family dwellings and related structures, mobile homes, apartment buildings, commercial structures, industrial structures, business structures, churches, hospitals, nursing homes, and schools.

(4) Municipal Power Agency (MPA)--Agency or group created under Texas Utilities Code, Chapter 163 - Joint Powers Agencies.

(5) Municipal Public Entity (MPE)--A municipally owned utility (MOU) or a municipal power agency.

(6) Prudent avoidance--The limiting of exposures to electric and magnetic fields that can be avoided with reasonable investments of money and effort.

(7) Tie line--A facility to be interconnected to the Electric Reliability Council of Texas (ERCOT) transmission grid by a person, including an electric utility or MPE, that would enable additional power to be imported into or exported out of the ERCOT power grid.

(b) Certificates of convenience and necessity for new service areas and facilities. Except for certificates granted under subsection (e) of this section, the commission may grant an application and issue a certificate only if it finds that the certificate is necessary for the service, accommodation, convenience, or safety of the public, and complies

with the statutory requirements in the Public Utility Regulatory Act (PURA) §37.056. The commission may issue a certificate as applied for, or refuse to issue it, or issue it for the construction of a portion of the contemplated system or facility or extension thereof, or for the partial exercise only of the right or privilege. The commission shall render a decision approving or denying an application for a certificate within one year of the date of filing of a complete application for such a certificate, unless good cause is shown for exceeding that period. A certificate, or certificate amendment, is required for the following:

(1) Change in service area. Any certificate granted under this section shall not be construed to vest exclusive service or property rights in and to the area certificated.

(A) Uncontested applications: An application for a certificate under this paragraph shall be approved administratively within 80 days from the date of filing a complete application if:

(i) no motion to intervene has been filed or the application is uncontested;

(ii) all owners of land that is affected by the change in service area and all customers in the service area being changed have been given direct mail notice of the application; and

(iii) commission staff has determined that the application is complete and meets all applicable statutory criteria and filing requirements, including, but not limited to, the provision of proper notice of the application.

(B) Minor boundary changes or service area exceptions: Applications for minor boundary changes or service area exceptions shall be approved administratively within 45 days of the filing of the application provided that:

(i) every utility whose certificated service area is affected agrees to the change;

(ii) all customers within the affected area have given prior consent; and

(iii) commission staff has determined that the application is complete and meets all applicable statutory criteria and filing requirements, including, but not limited to, the provision of proper notice of the application.

(2) Generation facility.

(A) In a proceeding involving the purchase of an existing electric generating facility by an electric utility that operates solely outside of ERCOT, the commission shall issue a final order on a certificate for the facility not later than the 181st day after the date a request for the certificate is filed with the commission under PURA §37.058(b).

(B) In a proceeding involving a newly constructed generating facility by an electric utility that operates solely outside of ERCOT, the commission shall issue a final order on a certificate for the facility not later than the 366th day after the date a request for the certificate is filed with the commission under PURA §37.058(b).

(3) Electric transmission line. All new electric transmission lines shall be reported to the commission in accordance with §25.83 of this title (relating to Transmission Construction Reports). This reporting requirement is also applicable to new electric transmission lines to be constructed by an MPE seeking to directly or indirectly construct, install, or extend a transmission facility outside of its applicable boundaries. For an MOU, the applicable boundaries are the municipal boundaries of the municipality that owns the MOU. For an MPA, the applicable boundaries are the municipal boundaries of the public entities participating in the MPA.

(A) Need:

(i) Except as stated below, the following must be met for a transmission line in the ERCOT power region. The applicant must present an economic cost-benefit study that includes an analysis that shows that the levelized ERCOT-wide annual production cost savings attributable to the proposed project are equal to or greater than the first-year annual revenue requirement of the proposed project of which the transmission line is a part. Indirect costs and benefits to the transmission system may be included in the cost-benefit study. The commission shall give great weight to such a study if it is conducted by the ERCOT independent system operator. This requirement also does not apply to an application for a transmission line that is necessary to meet state or federal reliability standards, including: a transmission line needed to interconnect a transmission service customer or end-use customer; or needed due to the requirements of any federal, state, county, or municipal government body or agency for purposes including, but not limited to, highway transportation, airport construction, public safety, or air or water quality.

(ii) For a transmission line not addressed by clause (i) of this subparagraph, the commission shall consider among other factors, the needs of the interconnected transmission systems to support a reliable and adequate network and to facilitate robust wholesale competition. The commission shall give great weight to:

(I) the recommendation of an organization that meets the requirement of PURA §39.151; and/or

(II) written documentation that the transmission line is needed to interconnect a transmission service customer or an end-use customer.

(B) Routing: An application for a new transmission line shall address the criteria in PURA §37.056(c) and considering those criteria, engineering constraints, and costs, the line shall be routed to the extent reasonable to moderate the impact on the affected community and landowners unless grid reliability and security dictate otherwise. The following factors shall be considered in the selection of the utility's alternative routes unless a route is agreed to by the utility, the landowners whose property is crossed by the proposed line, and owners of land that contains a habitable structure within 300 feet of the centerline of a transmission project of 230 kV or less, or within 500 feet of the centerline of a transmission project greater than 230 kV, and otherwise conforms to the criteria in PURA §37.056(c):

(i) whether the routes parallel or utilize existing compatible rights-of-way for electric facilities, including the use of vacant positions on existing multiple-circuit transmission lines;

(ii) whether the routes parallel or utilize other existing compatible rights-of-way, including roads, highways, railroads, or telephone utility rights-of-way;

(iii) whether the routes parallel property lines or other natural or cultural features; and

(iv) whether the routes conform with the policy of prudent avoidance.

(C) Uncontested transmission lines: An application for a certificate for a transmission line shall be approved administratively within 80 days from the date of filing a complete application if:

(i) no motion to intervene has been filed or the application is uncontested; and

(ii) commission staff has determined that the application is complete and meets all applicable statutory criteria and filing

requirements, including, but not limited to, the provision of proper notice of the application.

(D) Projects deemed critical to reliability. Applications for transmission lines which have been formally designated by a PURA §39.151 organization as critical to the reliability of the system shall be considered by the commission on an expedited basis. The commission shall render a decision approving or denying an application for a certificate under this subparagraph within 180 days of the date of filing a complete application for such a certificate unless good cause is shown for extending that period.

(4) Tie line. An application for a tie line must include a study of the tie line by the ERCOT independent system operator. The study shall include, at a minimum, an ERCOT-approved reliability assessment of the proposed tie line. If an independent system operator intends to conduct a study to evaluate a proposed tie line or intends to provide confidential information to another entity to permit the study of a proposed tie line, the independent system operator shall file notice with the commission at least 45 days prior to the commencement of such a study or the provision of such information. This paragraph does not apply to a facility that is in service on December 31, 2014.

(c) Projects or activities not requiring a certificate. A certificate, or certificate amendment, is not required for the following:

(1) A contiguous extension of those facilities described in PURA §37.052;

(2) A new electric high voltage switching station, or substation;

(3) The repair or reconstruction of a transmission facility due to emergencies. The repair or reconstruction of a transmission facility due to emergencies shall proceed without delay or prior approval of the commission and shall be reported to the commission in accordance with §25.83 of this title;

(4) The construction or upgrading of distribution facilities within the electric utility's service area;

(5) Routine activities associated with transmission facilities that are conducted by transmission service providers. Nothing contained in the following subparagraphs should be construed as a limitation of the commission's authority as set forth in PURA. Any activity described in the following subparagraphs shall be reported to the commission in accordance with §25.83 of this title. The commission may require additional facts or call a public hearing thereon to determine whether a certificate of convenience and necessity is required. Routine activities are defined as follows:

(A) The modification or extension of an existing transmission line solely to provide service to a substation or metering point provided that:

(i) an extension to a substation or metering point does not exceed one mile; and

(ii) all landowners whose property is crossed by the transmission facilities have given prior written consent.

(B) The rebuilding, replacement, or respacing of structures along an existing route of the transmission line; upgrading to a higher voltage not greater than 230 kV; bundling of conductors or re-conductoring of an existing transmission facility, provided that:

(i) no additional right-of-way is required; or

(ii) if additional right-of-way is required, all landowners of property crossed by the electric facilities have given prior written consent.

(C) The installation, on an existing transmission line, of an additional circuit not previously certificated, provided that:

(i) the additional circuit is not greater than 230 kV; and

(ii) all landowners whose property is crossed by the transmission facilities have given prior written consent.

(D) The relocation of all or part of an existing transmission facility due to a request for relocation, provided that:

(i) the relocation is to be done at the expense of the requesting party; and

(ii) the relocation is solely on a right-of-way provided by the requesting party.

(E) The relocation or alteration of all or part of an existing transmission facility to avoid or eliminate existing or impending encroachments, provided that all landowners of property crossed by the electric facilities have given prior written consent.

(F) The relocation, alteration, or reconstruction of a transmission facility due to the requirements of any federal, state, county, or municipal governmental body or agency for purposes including, but not limited to, highway transportation, airport construction, public safety, or air and water quality, provided that:

(i) all landowners of property crossed by the electric facilities have given prior written consent; and

(ii) the relocation, alteration, or reconstruction is responsive to the governmental request.

(6) Upgrades to an existing transmission line by an MPE that do not require any additional land, right-of-way, easement, or other property not owned by the MOU;

(7) The construction, installation, or extension of a transmission facility by an MPE that is entirely located not more than 10 miles outside of an MOU's certificated service area that occurs before September 1, 2021; or

(8) A transmission facility by an MOU placed in service after September 1, 2015, that is developed to interconnect a new natural gas generation facility to the ERCOT transmission grid and for which, on or before January 1, 2015, an MOU was contractually obligated to purchase at least 190 megawatts of capacity.

(d) Standards of construction and operation. In determining standard practice, the commission shall be guided by the provisions of the American National Standards Institute, Incorporated, the National Electrical Safety Code, and such other codes and standards that are generally accepted by the industry, except as modified by this commission or by municipal regulations within their jurisdiction. Each electric utility shall construct, install, operate, and maintain its plant, structures, equipment, and lines in accordance with these standards, and in such manner to best accommodate the public, and to prevent interference with service furnished by other public utilities insofar as practical.

(1) The standards of construction shall apply to, but are not limited to, the construction of any new electric transmission facilities, rebuilding, upgrading, or relocation of existing electric transmission facilities.

(2) For electric transmission line construction requiring the acquisition of new rights-of-way, electric utilities must include in the easement agreement, at a minimum, a provision prohibiting the new construction of any above-ground structures within the right-of-way. New construction of structures shall not include necessary repairs to existing structures, farm or livestock facilities, storage barns, hunting

structures, small personal storage sheds, or similar structures. Utilities may negotiate appropriate exceptions in instances where the electric utility is subject to a restrictive agreement being granted by a governmental agency or within the constraints of an industrial site. Any exception to this paragraph must meet all applicable requirements of the National Electrical Safety Code.

(3) Measures shall be applied when appropriate to mitigate the adverse impacts of the construction of any new electric transmission facilities, and the rebuilding, upgrading, or relocation of existing electric transmission facilities. Mitigation measures shall be adapted to the specifics of each project and may include such requirements as:

- (A) selective clearing of the right-of-way to minimize the amount of flora and fauna disturbed;
- (B) implementation of erosion control measures;
- (C) reclamation of construction sites with native species of grasses, forbs, and shrubs; and
- (D) returning site to its original contours and grades.

(e) Certificates of convenience and necessity for existing service areas and facilities. For purposes of granting these certificates for those facilities and areas in which an electric utility was providing service on September 1, 1975, or was actively engaged in the construction, installation, extension, improvement of, or addition to any facility actually used or to be used in providing electric utility service on September 1, 1975, unless found by the commission to be otherwise, the following provisions shall prevail for certification purposes:

(1) The electrical generation facilities and service area boundary of an electric utility having such facilities in place or being actively engaged in the construction, installation, extension, improvement of, or addition to such facilities or the electric utility's system as of September 1, 1975, shall be limited, unless otherwise provided, to the facilities and real property on which the facilities were actually located, used, or dedicated as of September 1, 1975.

(2) The transmission facilities and service area boundary of an electric utility having such facilities in place or being actively engaged in the construction, installation, extension, improvement of, or addition to such facilities or the electric utility's system as of September 1, 1975, shall be, unless otherwise provided, the facilities and a corridor extending 100 feet on either side of said transmission facilities in place, used or dedicated as of September 1, 1975.

(3) The facilities and service area boundary for the following types of electric utilities providing distribution or collection service to any area, or actively engaged in the construction, installation, extension, improvement of, or addition to such facilities or the electric utility's system as of September 1, 1975, shall be limited, unless otherwise found by the commission, to the facilities and the area which lie within 200 feet of any point along a distribution line, which is specifically deemed to include service drop lines, for electrical utilities.

(f) Transferability of certificates. Any certificate granted under this section is not transferable without approval of the commission and shall continue in force until further order of the commission.

(g) Certification forms. All applications for certificates of convenience and necessity shall be filed on commission-prescribed forms so that the granting of certificates, both contested and uncontested, may be expedited. Forms may be obtained from Central Records.

(h) Commission authority. Nothing in this section is intended to limit the commission's authority to recommend or direct the construction of transmission under PURA §§35.005, 36.008, or 39.203(e).

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) 936-7223



## SUBCHAPTER H. ELECTRICAL PLANNING DIVISION 1. RENEWABLE ENERGY RESOURCES AND USE OF NATURAL GAS

### 16 TAC §25.174

The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2014) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §35.009, which entitles an MOU to recover payments in lieu of ad valorem taxes; PURA §37.051, which requires certificates of convenience and necessity (CCNs) for MOUs or MPAs constructing transmission facilities outside of their boundaries and for persons interconnecting tie line facilities to the ERCOT transmission grid; PURA §37.058, which requires CCNs for electric generating facilities of non-ERCOT utilities; and PURA §39.904, which authorizes the commission to designate CREZs.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 37.051, 37.058, and 39.904.

§25.174. *Competitive Renewable Energy Zones.*

(a) Competitive Renewable Energy Zone Transmission Projects. In considering an application for a certificate of convenience and necessity (CCN) or CCN amendment for the addition of a second 345-kilovolt (kV) circuit on the Alibates-AJ Swope-Windmill-Ogalala-Tule Canyon transmission line, the commission is not required to consider the factors under Public Utility Regulatory Act (PURA) §37.056(c)(1) and (2).

(b) Designation of Competitive Renewable Energy Zones. The designation of Competitive Renewable Energy Zones (CREZs) pursuant to PURA §39.904(g) shall be made through one or more contested-case proceedings initiated by commission staff, for which the commission shall establish a procedural schedule. The commission shall consider the need for proceedings to determine CREZs in 2007.

(1) Commission staff shall initiate a contested case proceeding upon receiving the information required by paragraph (2) of this subsection. Any interested entity that participates in the contested case may nominate a region for CREZ designation. An entity may submit any evidence it deems appropriate in support of its nomination, but it shall include information prescribed in paragraph (2)(A) - (C) of this subsection.

(2) By December 1, 2006, the Electric Reliability Council of Texas (ERCOT) shall provide to the commission a study of the wind energy production potential statewide, and of the transmission constraints that are most likely to limit the deliverability of electricity from

wind energy resources. ERCOT shall consult with other regional transmission organizations, independent organizations, independent system operators, or utilities in its analysis of regions of Texas outside the ERCOT power region. At a minimum, the study submitted by ERCOT shall include:

(A) a map and geographic descriptions of regions that can reasonably accommodate at least 1,000 megawatts (MW) of new wind-powered generation resources;

(B) an estimate of the maximum generating capacity in MW that each zone can reasonably accommodate and an estimate of the zone's annual production potential;

(C) a description of the improvements necessary to provide transmission service to the region, a preliminary estimate of the cost, and identification of the transmission service provider (TSP) or TSPs whose existing transmission facilities would be directly affected;

(D) an analysis of any potential combinations of zones that, in ERCOT's estimation, would result in significantly greater efficiency if developed together; and

(E) the amount of generating capacity already in service in the zone, the amount not in service but for which interconnection agreements (IAs) have been executed, and the amount under study for.

(3) The Texas Department of Parks and Wildlife may provide an analysis of wildlife habitat that may be affected by renewable energy development in any candidate zone, and may submit recommendations for mitigating harmful impacts on wildlife and habitat.

(4) In determining whether to designate an area as a CREZ and the number of CREZs to designate, the commission shall consider:

(A) whether renewable energy resources and suitable land areas are sufficient to develop generating capacity from renewable energy technologies;

(B) the level of financial commitment by generators; and

(C) any other factors considered appropriate by the commission as provided by PURA, including, but not limited to, the estimated cost of constructing transmission capacity necessary to deliver to electric customers the electric output from renewable energy resources in the candidate zone, and the estimated benefits of renewable energy produced in the candidate zone.

(5) The commission shall issue a final order within six months of the initiation by commission staff of a CREZ proceeding, unless it finds good cause to extend the deadline. For each new CREZ it orders, the commission shall specify:

(A) the geographic extent of the CREZ;

(B) major transmission improvements necessary to deliver to customers the energy generated by renewable resources in the CREZ, in a manner that is most beneficial and cost-effective to the customers, including new and upgraded lines identified by voltage level and a general description of where any new lines will interconnect to the existing grid;

(C) an estimate of the maximum generating capacity that the commission expects the transmission ordered for the CREZ to accommodate; and

(D) any other requirement considered appropriate by the commission as provided by PURA.

(6) The commission may direct a utility outside of ERCOT to file a plan for the development of a CREZ in or adjacent to its ser-

vice area. The plan shall include the maximum generating capacity that each potential CREZ can reasonably accommodate; identify the transmission improvements needed to provide service to each CREZ; and include the cost of the improvements and a timetable for complying with all applicable federal transmission tariff requirements.

(c) Level of financial commitment by generators for designating a CREZ.

(1) A renewable energy developer's existing renewable energy resources, and pending or signed IAs for planned renewable energy resources, leasing agreements with landowners in a proposed CREZ, and letters of credit representing dollars per MW of proposed renewable generation resources, posted with ERCOT, that the developer intends to install and the area of interest are examples of financial commitment by developers to a CREZ. The commission may also consider projects for which a TSP, ERCOT, or another independent system operator is conducting an interconnection study; and any other factors for which parties have provided evidence as indications of financial commitment.

(2) A non-utility entity's commitment to build and own transmission facilities dedicated to delivering the output of renewable energy resources in a proposed CREZ to the transmission system of a TSP in Texas or a deposit or payment to secure or fund the construction of such transmission facilities by an electric utility or a transmission utility to deliver the output of a renewable generation project in Texas is an indication of the entity's financial commitment to a CREZ.

(d) Plan to develop transmission capacity.

(1) After the issuance of a final order in accordance with subsection (b)(5) of this section, entities interested in constructing the transmission improvements shall submit expressions of interest to the commission. The commission shall select the entity or entities responsible for constructing the transmission improvements, establish a schedule by which the improvements shall be completed, and specify any additional reporting requirements or other measures deemed appropriate by the commission to ensure that entities complete the ordered improvements in a timely manner.

(2) The commission shall develop a plan to construct transmission capacity necessary to deliver to electric customers, in a manner that is most beneficial and cost-effective to the customers, the electric output from renewable energy technologies in the CREZ.

(3) In developing the transmission capacity plan, the commission may consider:

(A) the estimated cost of constructing transmission capacity necessary to deliver to electric customers the electric output from renewable energy resources in the candidate zone;

(B) the estimated cost of additional ancillary services; and

(C) any other factors considered appropriate by the commission as provided by PURA.

(e) Certificates of convenience and necessity.

(1) Not later than three years after a commission final order designating a CREZ, each TSP selected to build and own transmission facilities for that CREZ shall file all required CREZ CCN applications. The commission may grant an extension to this deadline for good cause. The commission may establish a filing schedule for the CCN applications.

(2) A CCN application for a transmission project intended to serve a CREZ, except an application filed pursuant to paragraph (1) of this subsection or subsection (a) of this section, shall address

all the criteria in PURA §37.056, including the criteria in PURA §37.056(c)(1) and (2).

(3) In determining whether financial commitment for a CREZ is sufficient under PURA §39.904(g)(3) to grant CCNs for transmission facilities for the CREZ, the commission shall consider the following evidence of financial commitment by renewable generators:

(A) capacity represented by installed generation located in one or more of the counties that lie in whole or in part within the CREZ;

(B) capacity represented by generation projects under construction that are located in one or more of the counties that lie in whole or in part within the CREZ and that will be operational within six months of the final order in a financial commitment proceeding. Evidence that the project will be operational within six months may include documentation showing that a construction contractor has been hired, that preliminary site work has begun, that the project financing has closed, or similar indicators of the status of the project;

(C) capacity represented by planned generation projects that are located in one or more of the counties that lie in whole or in part within the CREZ and that have a signed IA with a TSP that has been defined in subsection (a)(2)(E) of this section designated to build and own transmission facilities for that CREZ; and

(D) capacity represented by collateral posted by generators for the CREZ that complies with paragraph (7) of this subsection.

(4) Financial commitment for a CREZ is sufficient under PURA §39.904(g)(3) to grant CCNs for transmission facilities for the CREZ if the sum of the renewable generating capacity under any combination of paragraph (3)(A), (B), (C), and (D) of this subsection is at least 50% of the designated generating capacity for the CREZ. Fifty percent of the designated generating capacity for the Panhandle A CREZ approved by the commission in Docket Number 33672 shall be considered to be 1,595.5 MW. Fifty percent of the designated generating capacity for the Panhandle B CREZ approved by the commission in Docket Number 33672 shall be considered to be 1,196.5 MW.

(5) Installed renewable generation, renewable generation projects under construction, and planned renewable generation projects with signed IAs in the McCamey, Central, and Central West CREZs approved by the commission in Docket Number 33672 satisfy the financial commitment test set forth in paragraph (4) of this subsection for those CREZs and therefore financial commitment by renewable generators for those CREZs is sufficient under PURA §39.904(g)(3) to grant CCNs for transmission facilities for those CREZs. This finding of sufficient financial commitment shall be recognized in the CCN proceedings for transmission facilities for those CREZs and shall not be addressed further in those proceedings.

(6) Commission staff shall initiate a single proceeding for the commission to determine whether there is sufficient financial commitment under PURA §39.904(g)(3) by renewable generators for the Panhandle A and Panhandle B CREZs approved by the commission in Docket Number 33672 to grant CCNs for transmission facilities for those CREZs. If the commission determines that there is sufficient financial commitment for one of those CREZs, that finding shall be recognized in the CCN proceedings for transmission facilities for that CREZ, as identified in the commission's order in the proceeding initiated pursuant to this paragraph, and shall not be addressed further in the CCN proceedings. If the commission determines that the Panhandle A or Panhandle B CREZ does not satisfy the financial commitment test in paragraph (4) of this subsection, the commission may:

(A) consider other evidence of financial commitment that the commission finds relevant under PURA §39.904(g)(3);

(B) find that the financial commitment requirement for that CREZ has been met if the commission determines that significant financial commitment exists in that CREZ and that the CREZ is sufficiently interrelated with a CREZ that has satisfied the financial commitment test;

(C) delay the filing of CREZ CCN applications for that CREZ until the commission conducts a subsequent proceeding in which it finds sufficient financial commitment for that CREZ in accordance with the financial commitment provisions of this subsection; or

(D) take other appropriate action.

(7) A renewable generator that elects to post collateral pursuant to paragraph (3)(D) of this subsection shall comply with the following requirements:

(A) The renewable generator shall provide a letter of intent to post collateral in a proceeding conducted pursuant to paragraph (6) of this subsection. The renewable generator shall then post the collateral no later than 30 days after the commission issues an interim order finding sufficient financial commitment by renewable generators for the CREZ. If the renewable generators post sufficient collateral, the commission may enter a final order with findings that reflect the adequacy of the financial commitment for the CREZ. If the renewable generators do not post sufficient collateral, the commission may enter a final order with findings that reflect the inadequacy of the financial commitments for the CREZ.

(B) A renewable generator shall post collateral equal to \$15,350 per MW of its planned project capacity, or \$10,000 per MW if the capacity is supported by leasing agreements with landowners that convey a right or option for a period of at least 20 years to develop and operate a renewable energy project based on a conversion factor of 60 acres per MW for a wind energy project.

(C) A renewable generator planning to build a project in a CREZ shall post collateral with the TSP with which it will interconnect in the CREZ or, if the TSP with which it will interconnect has not been determined, with any TSP that has been designated to build and own transmission facilities for that CREZ.

(D) A renewable generator may post collateral by providing a cash deposit, letter of credit, or guaranty agreement from an entity with an investment-grade credit rating. A TSP shall require a renewable generator that posts a guaranty agreement to provide another form of collateral if the guarantor loses its investment-grade credit rating or declares bankruptcy. If the renewable generator does not provide another form of collateral, the commission may take appropriate action including seeking administrative penalties.

(8) A TSP that receives collateral from a renewable generator pursuant to paragraph (7) of this subsection shall handle that collateral in accordance with the following provisions.

(A) If a renewable generator signs an IA with the TSP and posts any collateral required by the TSP to secure the construction of collection facilities, the TSP shall return to the generator all collateral received from that generator.

(B) If a renewable generator does not sign an IA with the TSP and post any collateral required by the TSP to secure the construction of collection facilities within 90 days after the TSP notifies it that the transmission system is capable of accommodating the renewable generator's renewable energy facility, the TSP shall retain the collateral received from the generator as an offset to the cost of the transmission facilities the TSP constructs for the CREZ and shall take all reasonable measures to execute any non-cash collateral.

(9) In a CREZ CCN application, a TSP may propose modifications to the transmission facilities described in a CREZ order if such improvements would reduce the cost of transmission or increase the amount of generating capacity that transmission improvements for the CREZ can accommodate. The commission may direct ERCOT to review modifications proposed by the TSP.

(10) Findings in Docket Numbers 33672, 35665, and 36146 and the commission's finding in paragraph (5) of this subsection establish that the level of financial commitment is sufficient under PURA §39.904(g)(3) to grant CCNs for transmission facilities designated as a Default Project in ordering paragraph 1 of the Order in Docket Number 36146 and for transmission facilities designated as a Priority Project in finding of fact 136 in the Order on Rehearing in Docket Number 33672. This finding of sufficient financial commitment shall be recognized in all pending and future CCN proceedings for Default and Priority Projects and shall not be addressed further in those proceedings.

(f) Excess development in a CREZ. If the aggregate level of renewable energy capacity for which transmission service is requested for a CREZ exceeds the maximum level of renewable capacity specified in the CREZ order, and if the commission determines that the security constrained economic dispatch mechanism used in the power region to establish a priority in the dispatch of CREZ resources is insufficient to resolve the congestion caused by excess development, the commission may initiate a proceeding and may consider limiting interconnection to and/or establishing dispatch priorities regarding the transmission system in the CREZ, and identifying the developers whose projects may interconnect to the transmission system in the CREZ under special protection schemes.

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 I. TRANSMISSION AND DISTRIBUTION

### DIVISION 1. OPEN-ACCESS COMPARABLE TRANSMISSION SERVICE FOR ELECTRIC UTILITIES IN THE ELECTRIC RELIABILITY COUNCIL OF TEXAS

#### 16 TAC §25.192

The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2014) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §35.009, which entitles an MOU to recover payments in lieu of ad valorem taxes; PURA §37.051, which requires certificates

of convenience and necessity (CCNs) for MOUs or MPAs constructing transmission facilities outside of their boundaries and for persons interconnecting tie line facilities to the ERCOT transmission grid; PURA §37.058, which requires CCNs for electric generating facilities of non-ERCOT utilities; and PURA §39.904, which authorizes the commission to designate CREZs.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 37.051, 37.058, and 39.904.

#### §25.192. Transmission Service Rates.

(a) Tariffs. Each transmission service provider (TSP) shall file a tariff for transmission service to establish its rates and other terms and conditions and shall apply its tariffs and rates on a non-discriminatory basis. The tariff shall apply to all distribution service providers (DSPs) and any entity scheduling the export of power from the Electric Reliability Council of Texas (ERCOT) region. The tariff shall not apply to any entity engaging in wholesale storage as described by §25.501(m) of this title (relating to Wholesale Market Design for the Electric Reliability Council of Texas) (storage entity).

(b) Charges for transmission service delivered within ERCOT. DSPs, excluding storage entities, shall incur transmission service charges pursuant to the tariffs of the TSP.

(1) A TSP's transmission rate shall be calculated as its commission-approved transmission cost of service divided by the average of ERCOT coincident peak demand for the months of June, July, August and September (4CP), excluding the portion of coincident peak demand attributable to wholesale storage load. A TSP's transmission rate shall remain in effect until the commission approves a new rate. The TSP's annual rate shall be converted to a monthly rate. The monthly transmission service charge to be paid by each DSP is the product of each TSP's monthly rate as specified in its tariff and the DSP's previous year's average of the 4CP demand that is coincident with the ERCOT 4CP.

(2) Payments for transmission services shall be consistent with commission orders, approved tariffs, and §25.202 of this title (relating to Commercial Terms for Transmission Service).

(c) Transmission cost of service. The transmission cost of service for each TSP shall be based on the expenses in Federal Energy Regulatory Commission (FERC) expense accounts 560-573 (or accounts with similar contents or amounts functionalized to the transmission function) plus the depreciation, federal income tax, and other associated taxes, and the commission-allowed rate of return based on FERC plant accounts 350-359 (or accounts with similar contents or amounts functionalized to the transmission function), less accumulated depreciation and accumulated deferred federal income taxes, as applicable.

(1) The following facilities are deemed to be transmission facilities:

(A) power lines, substations, reactive devices, and associated facilities, operated at 60 kilovolts or above, including radial lines operated at or above 60 kilovolts, except the step-up transformers and a protective device associated with the interconnection from a generating station to the transmission network;

(B) substation facilities on the high side of the transformer, in a substation where power is transformed from a voltage higher than 60 kilovolts to a voltage lower than 60 kilovolts;

(C) the portion of the direct-current interconnections with areas outside of the ERCOT region (DC ties) that are owned by a TSP in the ERCOT region, including those portions of the DC tie that operate at a voltage lower than 60 kilovolts; and

(D) capacitors and other reactive devices that are operated at a voltage below 60 kilovolts, if they are located in a distribution substation, the load at the substation has a power factor in excess of 0.95 as measured or calculated at the distribution voltage level without the reactive devices, and the reactive devices are controlled by an operator or automatically switched in response to transmission voltage.

(E) As used in subparagraphs (A) - (D) of this paragraph, reactive devices do not include generating facilities.

(2) For municipally owned utilities, river authorities, and electric cooperatives, the commission may permit the use of the cash flow method or other reasonable alternative methods of determining the annual transmission revenue requirement, including the return element of the revenue requirement, consistent with the rate actions of the rate-setting authority for a municipally owned utility.

(3) For municipally owned utilities, river authorities, and electric cooperatives, the return may be determined based on the TSP's actual debt service and a reasonable coverage ratio. In determining a reasonable coverage ratio, the commission will consider the coverage ratios required in the TSP's bond indentures or ordinances and the most recent rate action of the rate-setting authority for the TSP.

(4) A municipally owned utility that is required to apply for a certificate of public convenience and necessity to construct, install, or extend a transmission facility within ERCOT pursuant to §25.101 of this title (relating to Certification Criteria) is entitled to recover, through the utility's wholesale transmission rate, reasonable payments made to a taxing entity in lieu of ad valorem taxes on that transmission facility, provided that:

(A) The utility enters into a written agreement with the governing body of the taxing entity related to the payments;

(B) The amount paid is the same as the amount the utility would have to pay to the taxing entity on that transmission facility if the facility were subject to ad valorem taxation;

(C) The governing body of the taxing entity is not the governing body of the utility; and

(D) The utility provides the commission with a copy of the written agreement and any other information that the commission considers necessary in relation to the agreement.

(5) The commission may adopt rate-filing requirements that provide additional details concerning the costs that may be included in the transmission costs and how such costs should be reported in a proceeding to establish transmission rates.

(d) Billing units. No later than December 1 of each year, ERCOT shall determine and file with the commission the current year's average 4CP demand for each DSP, or the DSP's agent for transmission service billing purposes, as appropriate, excluding the portion of coincident peak demand attributable to wholesale storage load. This demand shall be used to bill transmission service for the next year. The ERCOT average 4CP demand shall be the sum of the coincident peak of all of the ERCOT DSPs, excluding the portion of coincident peak demand attributable to wholesale storage load, for the four intervals coincident with ERCOT system peak for the months of June, July, August, and September, divided by four. As used in this section, a DSP's average 4CP demand is determined from the total demand, coincident with the ERCOT 4CP, of all customers connected to a DSP, including load served at transmission voltage, but excluding the load of wholesale storage entities. The measurement of the coincident peak shall be in accordance with commission-approved ERCOT protocols.

(e) Transmission rates for exports from ERCOT. Transmission service charges for exports of power from ERCOT will be assessed

to transmission service customers for transmission service within the boundaries of the ERCOT region, in accordance with this section and the ERCOT protocols.

(1) A transmission service customer shall be assessed a transmission service charge for the use of the ERCOT transmission system in exporting power from ERCOT based on the megawatts that are actually exported, the duration of the transaction and the rates established under subsections (c) and (d) of this section. Billing intervals shall consist of a year, month, week, day, or hour.

(2) The monthly on-peak transmission rate will be one-fourth the TSP's annual rate, and the monthly off-peak transmission rate will be one-twelfth its annual rate. The peak period used to determine the applicable transmission rate for such transactions shall be the months of June, July, August, and September.

(3) The DSP or an entity scheduling the export of power over a DC tie is solely responsible to the TSP for payment of transmission service charges under this subsection.

(4) A transmission service customer's charges for use of the ERCOT transmission system for export purposes on a monthly basis shall not exceed the annual transmission charge for the transaction.

(f) Transmission revenue. Revenue from the transmission of electric energy out of the ERCOT region over the DC ties that is recovered under subsection (e) of this section shall be credited to all transmission service customers as a reduction in the transmission cost of service for TSPs that receive the revenue.

(g) Revision of transmission rates. Each TSP in the ERCOT region shall periodically revise its transmission service rates to reflect changes in the cost of providing such services. Any request for a change in transmission rates shall comply with the filing requirements established by the commission under this section.

(h) Interim Update of Transmission rates.

(1) Frequency. Each TSP in the ERCOT region may apply to update its transmission rates on an interim basis not more than once per calendar year to reflect changes in its invested capital. Upon the effective date of an amendment to §25.193 pursuant to an order in Project Number 37909, *Rulemaking Proceeding to Amend P.U.C. Subst. R. 25.193, Relating to Distribution Service Provider Transmission Cost Recovery factors (TCRF)*, that allows a distribution service provider to recover, through its transmission cost recovery factor, all transmission costs charged to the distribution service provider by TSPs, each TSP in the ERCOT region may apply to update its transmission rates on an interim basis not more than twice per calendar year to reflect changes in its invested capital. If the TSP elects to update its transmission rates, the new rates shall reflect the addition and retirement of transmission facilities and include appropriate depreciation, federal income tax and other associated taxes, and the commission-authorized rate of return on such facilities as well as changes in loads. If the TSP does not have a commission-authorized rate of return, an appropriate rate of return shall be used.

(2) Reconciliation. An update of transmission rates under paragraph (1) of this subsection shall be subject to reconciliation at the next complete review of the TSP's transmission cost of service, at which time the commission shall review the costs of the interim transmission plant additions to determine if they were reasonable and necessary. Any amounts resulting from an update that are found to have been unreasonable or unnecessary, plus the corresponding return and taxes, shall be refunded with carrying costs determined as follows: for the time period beginning with the date on which over-recovery is determined to have begun to the effective date of the TSP's rates set in that complete review of the TSP's transmission cost of service, car-

rying costs shall be calculated using the same rate of return that was applied to the transmission investments included in the update. For the time period beginning with the effective date of the TSP's rates set in that complete review of the TSP's transmission cost of service, carrying costs shall be calculated using the TSP's rate of return authorized in that complete review.

(3) Future consideration of effect on TSP's financial risk and rate of return. For a TSP that has increased its rates pursuant to paragraph (1) of this subsection, the commission may, in setting rates in the next complete review of the TSP's transmission cost of service, expressly consider the effects of reduced regulatory lag resulting from the interim updates to the TSP's rates and the concomitant impact on the TSP's financial risk and rate of return.

(4) Commission processing of application. The commission shall process an application filed pursuant to paragraph (1) of this subsection in the following manner.

(A) Notice and intervention deadline. The applicant shall provide notice of its application to all parties in the applicant's last complete review of the applicant's transmission cost of service and all of the distribution service providers listed in the last docket in which the commission set the annual transmission service charges for the Electric Reliability Council of Texas. The intervention deadline shall be 21 days from the date service of notice is completed.

(B) Sufficiency of application. A motion to find an application materially deficient shall be filed no later than 21 days after an application is filed. The motion shall be served on the applicant by hand delivery, facsimile transmission, or overnight courier delivery, or by e-mail if agreed to by the applicant or ordered by the presiding officer. The motion shall specify the nature of the deficiency and the relevant portions of the application, and cite the particular requirement with which the application is alleged not to comply. The applicant's response to a motion to find an application materially deficient shall be filed no later than five working days after such motion is received. If within ten working days after the deadline for filing a motion to find an application materially deficient, the presiding officer has not filed a written order concluding that material deficiencies exist in the application, the application is deemed sufficient.

(C) Review of application. A proceeding initiated pursuant to paragraph (1) of this subsection is eligible for disposition pursuant to §22.35(b)(1) of this title (relating to Informal Disposition). If the requirements of §22.35 of this title are met, the presiding officer shall issue a notice of approval within 60 days of the date a materially sufficient application is filed unless good cause exists to extend this deadline or the presiding officer determines that the proceeding should be considered by the commission.

(5) Filing Schedule. The commission may prescribe a schedule for providers of transmission services to file proceedings to revise the rates for such services.

(6) DSP's right to pass through changes in wholesale rates. A DSP may expeditiously pass through to its customers changes in wholesale transmission rates approved by the commission, pursuant to §25.193 of this title (relating to Distribution Service Provider Transmission Cost Recovery Factors (TCRF)).

(7) Reporting requirements. TSPs shall file reports that will permit the commission to monitor their transmission costs and revenues, in accordance with any filing requirements and schedules prescribed by the commission.

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 22. EXAMINING BOARDS

### PART 9. TEXAS MEDICAL BOARD

#### CHAPTER 160. MEDICAL PHYSICISTS

##### 22 TAC §§160.1 - 160.5, 160.7 - 160.30

The Texas Medical Board (Board) adopts new Chapter 160, §§160.1 - 160.5 and 160.7 - 160.30, concerning Medical Physicists. Sections 160.1 - 160.5, 160.8, 160.9, and 160.12 - 160.30 are adopted without changes to the proposed text as published in the March 18, 2016, issue of the *Texas Register* (41 TexReg 2067). The rules will not be republished. Sections 160.7, 160.10, and 160.11 are adopted with non-substantial changes. The rules will be republished.

##### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR ADOPTED CHAPTER 160

Following a Sunset review of the Texas Department of Health Services (DSHS) and the Texas Board of Licensure for Professional Medical Physicists, the Texas legislature transferred the regulation of the licensing and discipline of the Medical Physicists to the Texas Medical Board through Senate Bill 202, 84th Legislature, Regular Session (2015). SB 202, which extensively revised Chapter 602 of the Texas Occupations Code authorized the Texas Medical Board to draft rules to implement Chapter 602.

Adopted new Chapter 160 is intended to implement the changes made to the structure of Occupations Code Chapter 602 as well as better align new adopted Chapter 160 with the existing rules and procedures of the Texas Medical Board, the agency charged with the regulation. The majority of the rules adopted in Chapter 160 are taken from the rules governing medical physicists in 22 Texas Administrative Code §601.1 et seq. without amendment and have simply been re-numbered for inclusion in Chapter 160. Once these rules are adopted by the Texas Medical Board it is expected that DSHS will repeal the original rules governing Medical Physicists in 22 TAC Chapter 601.

##### SECTION-BY-SECTION SUMMARY

Section 160.1. Purpose, describes the intended purpose of Chapter 160 and sets forth its statutory basis.

Section 160.2. Definitions, provides definitions for important terms and phrases used in Chapter 160. New terms and phrases defined include: "advisory committee," "armed forces of the United States," "license", "military service member," "military spouse," "military veteran," "physician," "submit," and "training license."

Section 160.3. Meetings, establishes procedural requirements for meetings of the Medical Physicist Licensure Advisory Committee.

Section 160.4, Specialty License, describes the requirement that a person may not practice medical physics without a license in one of the medical physics specialties listed in this section, and lists the four types of licensed specialties: (1) Diagnostic Radiological Physics; (2) Medical Health Physics; (3) Medical Nuclear Physics; (4) Therapeutic Radiological Physics.

New §160.5, Exemptions from License Requirement, sets forth the exemptions from licensing under the Texas Medical Physics Practice Act. This section was brought over from the original rules without change.

Section 160.7, Qualifications for License Requirement, sets forth requirements for licensing including requirements for: fees, good character, educational requirements, examination requirements, and alternative licensing requirements for military service members.

Section 160.8, Application Procedures, sets forth application procedures for applying for a medical physicist license, including procedures for appealing a determination of ineligibility through a contested case hearing at the State Office of Administrative Hearings ("SOAH").

Section 160.9, Licensure Documentation, sets forth specific requirements for the documentation required as part of a licensure application, including the requirement that all applicants for licensure submit finger prints for the purposes of the Board obtaining criminal history record information.

Section 160.10, Training License, sets forth the requirements for what was formerly referred to in the rules as a temporary license but is now referred to as a training license.

Section 160.11, Provisional License, sets forth the requirements, procedures and rules regarding provisional licenses.

Section 160.12, License Renewal, sets forth the requirement that medical physicists licensed by the Board register biennially and the rules and procedures regarding such registration and renewal of license. This section sets out rules for dealing with delinquent and expired registration permits.

Section 160.13, Criminal History Record Information Required for Renewal, requires that applicants renewing a license submit fingerprints so that the Board may order a criminal record check. This requirement does not apply to individuals submitting requests for renewal who have submitted fingerprints for the initial issuance of a license or as part of a prior renewal.

Section 160.14, Relicensure, describes the requirement that medical physicists whose licenses have been expired for one year or longer are required to re-apply and comply with the requirements for obtaining an original license.

Section 160.15, Licenses and License Holder Duties, sets forth basic requirements related to a license holders duties in regard to providing the license on demand and notifying the board of changes in mailing address and/or employment.

Section 160.16, Continuing Education Requirements, sets forth the continuing education requirements for medical physicists, types of acceptable qualifying education, and board procedures for auditing continuing education compliance of licensed medical physicists.

Section 160.17, Medical Physicist Scope of Practice, defines the parameters of the scope of practice for the practice of medical physics and all of the medical physicist specialties.

Section 160.18, Complaints and Complaint Procedure Notification, deals with the procedure for filing complaints against medical physicists and notifying medical physicists of such complaints.

Section 160.19, Subpoenas; Confidentiality of Information, addresses the subpoena authority of the executive director of the Board and subpoenas in general. This section also deals with the confidentiality of information and materials subpoenaed or compiled by the Board and explicitly exempts such information from publication under the Texas Public Information Act.

Section 160.20, Grounds for Denial of Licensure and Disciplinary Action, sets forth the board's authority to refuse to issue a license or to discipline a licensee for specified categories of actions.

Section 160.21, Disciplinary Guidelines, applies Chapter 190 of this title (relating to Disciplinary Guidelines), to the denial of a license or discipline of a licensed medical physicist. This section states that in cases of conflict with Chapter 190 of this title, that provision of Chapter 160 will apply.

Section 160.22, Procedural Rules for Hearings, applies Chapter 187 of this title to hearings involving medical physicists.

Section 160.23, Disciplinary Process or Discipline of Medical Physicists, sets forth the actions and sanction types available to the Board if the Board finds a medical physicist has committed any of the acts set forth in §§160.20, 160.24, and 160.25 of this chapter.

Section 160.24, Code of Ethics, sets out the detailed code of ethics and professional conduct to which medical physicists are bound and subject to discipline for their violation.

Section 160.25, Impaired Medical Physicists, sets out provisions regarding the Board's ability to require a mental or physical examination of a medical physicist whom the Board believes may be impaired. This section also states that Chapter 180 of this title (relating to Texas Physician Health Program and Rehabilitation Orders) shall apply to medical physicists.

Section 160.26, Compliance, applies Chapter 189 of this title (relating to Compliance Program) to medical physicists under Board disciplinary orders.

Section 160.27, Voluntary Relinquishment or Surrender of a License, applies Chapter 189 of this title to voluntary relinquishment or surrender of medical physicists' licenses.

Section 160.28, Administrative Procedure, states that Chapters 2201 and 2002 of the Act and board rules for contested case hearings apply to contested case proceedings brought by the Board and this chapter.

Section 160.29, Criminal Convictions Related to the Profession of Medical Physics, addresses the Board's ability to suspend, revoke or disqualify a person from receiving a license based on certain types of criminal convictions. The rule defines which types of criminal convictions will be considered to directly relate to the practice of medical physics and which felonies and misdemeanors indicate an inability or tendency to be unable to properly engage in the practice of medical physics. Additionally, the rule sets out mandatory revocation provisions following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision.

Section 160.30, Constructions, sets out provisions dealing with the interpretation of this chapter consistent with the statutory provisions of Medical Physicist Act and Medical Practice Act, and

dealing with conflict between this chapter and provisions of the Act.

No comments were received regarding adoption of the new rules. The Medical Physicist Advisory Committee met on May 16, 2016 and suggested changes to §§160.7, 160.10, and 160.11, which were adopted by the Board at its June 10, 2016 meeting. The Board's General Counsel has advised that the changes affect no new persons, entities, or subjects, other than those given notice through publication and do not materially alter the issues raised in the notice. Accordingly, republication for comment of the adopted rules is not required. These amendments were incorporated into the adopted rules as follows.

#### §160.7

The changes to §160.7, relating to Qualifications for Licensure, delete language from subsection (e)(1)(C), (2)(D), (3)(C), and (4)(E) relating to approved specialty examinations required to be completed to practice in therapeutic radiological physics, medical nuclear physics, and medical health physics specialties. The deleted language involves references to a specialty examination in general medical physics which is no longer offered by the Canadian College of Physicians in Medicine. Subsection (e)(4)(E) was removed in its entirety.

Language was added to subsection (e)(3)(C) adding the specialty examination in diagnostic radiological physics offered by the Canadian College of Physicians.

#### §160.10

The changes to §160.10, relating to Training Licensure, modify subsection (c) by increasing the number of annual renewals from three to four. The change eliminates the executive director's discretion to issue subsequent renewals beyond the maximum of four allowed by subsection (c), by deleting subsection (d)(1) - (3). The elimination of subsequent renewals was based on recommendations by the medical physicist advisory committee. The committee discussed the issue at length and determined that four renewals of the training license provided ample time and opportunity to pass the required specialty examination. The advisory committee also described a history of certain individuals with training licenses abusing the renewal process by making multiple renewals of the training license without making any progress toward passing the specialty examination. The Board accepted the recommended changes.

#### §160.11

The amendment to §160.11, relating to Provisional Licenses, amends the rule by deleting subsection (c) which required the Board to issue a provisional license if certain requirements were met. The remaining subsections were re-numbered accordingly. Subsection (c) which was a mandatory provision, conflicted with the discretionary standard for provisional licenses in the Medical Physicist Act, and was removed to achieve consistency between the rules and the statute.

The adoption of §§160.1 - 160.5 and 160.7 - 160.30 is intended to achieve consistency with the amended provisions of the Occupations Code transferring the primary responsibility for licensing and regulation of medical physicists to the Texas Medical Board and converting the Texas Board of Licensure for Professional Medical Physicists to an advisory committee to the Texas Medical Board. The rules will also align the policies and procedures related to licensing and regulation of medical physicists with the Board's current policies and procedures. The rules will also serve to insure the safe practice of properly trained and

qualified medical physicists. Additionally, the rules will provide an avenue for licensees to obtain treatment through the Texas Physician Health Program for health conditions that have the potential of impairing their practice of medical physics.

The new rules are adopted under the authority of Texas Occupations Code Annotated, §602.151, which authorizes the Board to adopt rules reasonably necessary to properly perform its duties under the Medical Physicist Act. The Board interprets §602.151 as authorizing the agency to adopt rules for the proper administration and enforcement of the Medical Physicist Act.

#### §160.7. *Qualifications for Licensure.*

(a) General. Except as otherwise provided, an individual applying for licensure must:

- (1) submit completed application on forms approved by the board;
- (2) pay the appropriate application fee;
- (3) certify that the applicant is mentally and physically able to function as a medical physicist; and
- (4) be of good moral character.

(b) Eligibility. To be eligible for a license, a person must:

- (1) have an earned master's or doctoral degree:
  - (A) from a program of study in medical physics that is accredited by the Commission on Accreditation of Medical Physics Education Programs (CAMPEP);
  - (B) from a regionally accredited college or university in physics, medical physics, biophysics, radiological physics, medical health physics or equivalent courses; or
  - (C) from a regionally accredited college or university:
    - (i) in physical science (including chemistry), applied mathematics or engineering; and
    - (ii) have twenty semester hours (30 quarter hours) of upper division semester hour credit or graduate level physics courses, if offered:

(I) by the faculty of a Department of Physics and would be acceptable in meeting undergraduate or graduate degree requirements in physics of the offering department; or

(II) by the faculty of a program accredited in medical physics by the CAMPEP; or

(III) by the faculty of another science department and acceptable to the board.

(2) have demonstrated, to the board's satisfaction, the completion of at least two years of full-time work experience in the medical physics specialty for which the application is made.

(3) have work experience in more than one specialty to include six additional months of full-time equivalent work experience in each additional medical physics specialty for which the application is made.

(c) Work experience. Full-time work experience shall be at least 32 hours per week in the specialty area. Part-time work experience may be aggregated in order to meet the minimum of 32 work hours per week. All work experience must have been completed in the five years preceding the date of application for licensure as a medical physicist, or training license in the medical physics specialty for which application is made.

(d) International academic credit. Degrees and course work received at international universities shall be acceptable only if such course work could be counted as transfer credit by regionally accredited universities. An applicant having an international degree(s) must furnish at the applicant's own expense a Foreign Educational Credentials Evaluation from the Office of International Education Services of the American Association of Collegiate Registrars and Admissions Officers (AACRAO) or an International Credential Evaluation from the Foreign Credential Service of America (FCSA), or another similar entity as approved by the board. The degree evaluation must be sent directly to the board by the evaluation service. An applicant must submit with the application complete certified copies of academic transcripts showing proof of the degree(s) awarded (masters or doctorate) and the date it was awarded. Documents written in languages other than English shall be accompanied by a certified English translation.

(e) Approved specialty examination. An applicant under this section must successfully complete one of the following examinations in each specialty for which application is submitted:

(1) for the therapeutic radiological physics specialty, the examination offered by:

(A) the American Board of Radiology or its successor organization in therapeutic radiological physics, radiological physics or therapeutic medical physics;

(B) the American Board of Medical Physics or its successor organization in radiation oncology physics; or

(C) the Canadian College of Physicists in Medicine or its successor organization in radiation oncology physics;

(2) for the medical nuclear physics specialty, the examination offered by:

(A) the American Board of Radiology or its successor organization in medical nuclear physics radiological physics or nuclear medical physics;

(B) the American Board of Medical Physics or its successor organization in nuclear medicine physics;

(C) the American Board of Science in Nuclear Medicine or its successor organization in physics and instrumentation or in molecular imaging science; or

(D) the Canadian College of Physicists in Medicine or its successor organization in nuclear medicine physics;

(3) for the diagnostic radiological physics specialty, the examination offered by:

(A) the American Board of Radiology or its successor organization in diagnostic radiological physics, radiological physics or diagnostic medical physics;

(B) the American Board of Medical Physics or its successor organization in diagnostic imaging physics or diagnostic radiology physics; or

(C) the Canadian College of Physicists in Medicine or its successor organization in diagnostic radiology health physics;

(4) for the medical health physics specialty, the examination offered by:

(A) the American Board of Radiology or its successor organization in radiological physics;

(B) the American Board of Health Physics or its successor organization in health physics or comprehensive health physics;

(C) the American Board of Medical Physics or its successor organization in medical health physics; or

(D) the American Board of Science in Nuclear Medicine or its successor organization in radiation protection.

(f) Jurisprudence Examination. Applicants for licensure must pass a jurisprudence examination ("JP exam"), which shall be conducted on the licensing requirements and other laws, rules, or regulations applicable to the medical physicist profession in this state. The jurisprudence examination shall be developed and administered as follows:

(1) Questions for the JP Exam may be prepared by board staff with input from the Advisory Committee and board, or contracted out to a third party vendor. Board staff shall make arrangements for a facility by which applicants can take the examination;

(2) Applicants must pass the JP exam with a score of 75 or better within three attempts, unless the Board allows an additional attempt based upon a showing of good cause. An applicant who is unable to pass the JP exam within three attempts must appear before the licensure committee of the board to address the applicant's inability to pass the examination and to re-evaluate the applicant's eligibility for licensure. It is at the discretion of the licensure committee to allow an applicant additional attempts to take the JP exam;

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

(4) Irregularities during an examination such as giving or obtaining unauthorized information or aid as evidenced by observation or subsequent statistical analysis of answer sheets, shall be sufficient cause to terminate an applicant's participation in an examination, invalidate the applicant's examination results, or take other appropriate action;

(5) A person who has passed the JP Exam shall not be required to retake the Exam for another or similar license, except as a specific requirement of the board.

(g) Alternative License Procedures for Military Service Members, Military Veterans, and Military Spouses.

(1) An applicant who is a military service member, military veteran, or military spouse may be eligible for alternative demonstrations of competency for certain licensure requirements. Unless specifically allowed in this subsection, an applicant must meet the requirements for licensure as specified in this chapter.

(2) To be eligible, an applicant must be a military service member, military veteran, or military spouse and meet one of the following requirements:

(A) holds an active unrestricted medical physicist license issued by another state that has licensing requirements that are substantially equivalent to the requirements for a Texas medical physicist license; or

(B) within the five years preceding the application date held a medical physicist license in this state.

(3) The executive director may waive any prerequisite to obtaining a license for an applicant described by this subsection after reviewing the applicant's credentials.

(4) Applications for licensure from applicants qualifying under this section shall be expedited by the board's licensure division. Such applicants shall be notified, in writing or by electronic means, as soon as practicable, of the requirements and process for renewal of the license.

(5) Alternative Demonstrations of Competency Allowed. Applicants qualifying under this section, notwithstanding:

(A) the one year expiration in §160.8(a)(2) of this title (relating to Application Procedures), are allowed an additional six months to complete the application prior to it becoming inactive; and

(B) the 20 day deadline in §160.8(a)(6) of this title, may be considered for permanent licensure up to five days prior to the board meeting.

(h) Applicants with Military Experience.

(1) For applications filed on or after March 1, 2014, the Board shall credit, with respect to an applicant who is a military service member or military veteran as defined in §160.2 of this title (relating to Definitions), verified military service, training, or education toward the licensing requirements, other than an examination requirement, for a license issued by the Board.

(2) This section does not apply to an applicant who:

(A) has had a medical physicist license suspended or revoked by another state or a Canadian province;

(B) holds a medical physicist license issued by another state or a Canadian province that is subject to a restriction, disciplinary order, or probationary order; or

(C) has an unacceptable criminal history.

#### §160.10. Training Licensure.

(a) To be eligible for a training license, a person must meet the educational requirements set out in §160.7 of this chapter (relating to Qualifications for Licensure).

(b) A training license shall be issued for each specialty for a one-year period.

(c) Each training license may be renewed annually up to four times. The licenses do not have to be for consecutive years.

(d) The application for renewal of a training license shall include information regarding the experience in the medical physics specialty completed by the renewal applicant during the previous one-year period.

(e) The work experience must be under the supervision of a licensed medical physicist holding a license in the specialty area. The work experience must be completed in accordance with a supervision plan approved by the board, signed by both the supervisor and the training license holder. The supervision plan shall describe the duration of personal, direct and general supervision with particular attention to the aspects of the work of the training licensee that could have the greatest effect on the safety of patients, personnel or the public. The board may audit supervision plans for compliance with this section.

(f) A supervisor shall supervise no more than two training license holders or their full time equivalents, unless approved by the board.

(g) A supervisor shall assume responsibility for all of the work conducted under his or her supervision. A supervisor shall approve and sign all formal work product of the training license holder, such as reports of machine calibrations, shielding designs, treatment plan

reviews, patient specific quality assurance measurements, treatment record reviews, and equipment evaluations.

(h) The application procedures set out in §160.8 of this chapter (relating to Application Procedures) shall apply.

#### §160.11. Provisional License.

(a) A provisional license may be issued to a person who is currently licensed or certified in another jurisdiction and who:

(1) has been licensed or certified in good standing as a practitioner of medical or radiological physics for at least two years in another jurisdiction, including a foreign county, that has licensing or certification requirements substantially equivalent to the requirements of the Act;

(2) has passed a national or other examination recognized by the board relating to the practice of medical or radiological physics;

(3) is sponsored by a person licensed as a medical physicist in Texas with whom the provisional license holder will practice under this section; and

(4) has submitted a complete and legible set of fingerprints for purpose of performing a criminal history check of the applicant for provisional license.

(b) Upon formal written request, the board may waive the requirement set out in subsection (a)(3) of this section if it is determined that compliance with subsection (a)(3) of this section would cause undue hardship to the applicant.

(c) The board must complete the processing of a provisional license holder's application for license within 180 days after the provisional license was issued. The board may extend the 180-day deadline to allow for the receipt of pending examination results.

(d) A provisional license is valid until the date the board approves or denies the provisional license holder's application for a license.

(e) A provisional license expires on the earlier of:

(1) the date the board issues the provisional license holder a full Texas medical physicist license or denies the provisional license holder's application for a license; or

(2) upon determination by the executive director that the provisional license holder is ineligible for licensure.

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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Mari Robinson, J.D.

Executive Director

Texas Medical Board

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For further information, please call: (512) 305-7016



## CHAPTER 163. LICENSURE

### 22 TAC §163.2, §163.5

The Texas Medical Board (Board) adopts amendments to §163.2, concerning Full Texas Medical License, and §163.5,

concerning Licensure Documentation, without changes to the proposed text as published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2660). The rules will not be republished.

The amendment to §163.2 corrects a citation in subsection (d)(3) related to a reference to an applicant's eligibility requirements for alternative license procedures for military service members, veterans, and spouses. The correction clarifies that the eligibility requirements are listed in additional numbered paragraphs of subsection (d).

The amendment to §163.5 changes language under subsection (d)(4) and (5) by eliminating an applicant's requirement to report having been treated on an in- or outpatient basis for certain mental or physical illnesses that "could" have impaired the applicant's ability to practice medicine, and replacing same with language that requires an applicant to report those physical or mental illnesses that have impaired or currently impair the applicant's ability to practice medicine.

No comments were received regarding adoption of the amendments.

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

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

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 170. PAIN MANAGEMENT

### 22 TAC §170.3

The Texas Medical Board (Board) adopts amendments to §170.3, concerning Minimum Requirements for the Treatment of Chronic Pain. The amendments are adopted with changes to the proposed text as published in the February 12, 2016, issue of the *Texas Register* (41 TexReg 1074). The changes are non-substantive. The rule will be republished.

The Board sought stakeholder input through Stakeholder Groups, which made comments on the suggested changes to the rule at a meeting held on November 4, 2015. The comments were incorporated into the proposed rule.

The amendment adds new language relating to limitations on the number of physicians who may prescribe to a patient dangerous and scheduled drugs for the treatment of chronic pain. The new language now allows a covering physician acting in compliance with Chapter 177, Subchapter E of this title (relating to Physi-

cian Call Coverage Medical Services) to prescribe dangerous and scheduled drugs for the treatment of chronic pain. New language also specifies that if a patient is treated for acute chronic pain by a physician other than the physician who is party to the pain management agreement or the covering physician, that the patient must notify the primary or covering physician, at the next date of service, about the prescription. The rule sets out specific requirements for the content of this notification.

The amendments to paragraph (4)(D) modify the exception to the one pharmacy requirement of pain management agreements by eliminating the requirement that the designated pharmacy be out of stock of the drug prescribed, and substituting broader language involving "circumstances for which the patient has no control or responsibility, that prevent the patient from obtaining prescribed medications at the designated pharmacy under the agreement." The amendment includes the requirement that if such circumstances apply and a prescription is filled at a pharmacy other than the designated pharmacy, the patient inform the primary or covering physician of the circumstances and the name of the pharmacy that dispensed the medication.

#### SUMMARY OF COMMENTS RECEIVED

The Board received public written comments from the Texas Pain Society (TPS).

COMMENT: For proposed §170.3, TPS expressed approval of the proposed rule, but added the suggestion that the term "primary" in paragraph (4)(C) and (D) be clarified by the insertion of the words "pain management physician" immediately after the word "primary."

BOARD RESPONSE: The Board agrees that this section would clarify that "primary" refers to the primary pain management physician. The Board will therefore insert the term "pain management physician" after the term primary in paragraph (4)(C) and (D). For the sake of consistency, the words "primary pain management" will be inserted before the word physician in earlier portions of paragraph (4)(C) and (D). Accordingly, the amendments are adopted with non-substantive changes described above, inserting the term "primary pain management" and language to the proposed text to §170.3 as published in the February 12, 2016, issue of the *Texas Register* (41 TexReg 1074).

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendments are also adopted under the authority of the Texas Occupations Code Annotated, Chapter 107.

#### §170.3. *Minimum Requirements for the Treatment of Chronic Pain.*

A physician's treatment of a patient's pain will be evaluated by considering whether it meets the generally accepted standard of care and whether the following minimum requirements have been met:

(1) Evaluation of the patient.

(A) A physician is responsible for obtaining a medical history and a physical examination that includes a problem-focused exam specific to the chief presenting complaint of the patient.

(B) The medical record shall document the medical history and physical examination. In the case of chronic pain, the medical record must document:

- (i) the nature and intensity of the pain;
- (ii) current and past treatments for pain;
- (iii) underlying or coexisting diseases and conditions;
- (iv) the effect of the pain on physical and psychological function;
- (v) any history and potential for substance abuse or diversion; and
- (vi) the presence of one or more recognized medical indications for the use of a dangerous or scheduled drug.

(C) Prior to prescribing dangerous drugs or controlled substances for the treatment of chronic pain, a physician must consider reviewing prescription data and history related to the patient, if any, contained in the Prescription Drug Monitoring Program described by §§481.075, 481.076, and 481.0761 of the Texas Health and Safety Code and consider obtaining at a minimum a baseline toxicology drug screen to determine the presence of drugs in a patient, if any. If a physician determines that such steps are not necessary prior to prescribing dangerous drugs or controlled substances to the patient, the physician must document in the medical record his or her rationale for not completing such steps.

(2) Treatment plan for chronic pain. The physician is responsible for a written treatment plan that is documented in the medical records. The medical record must include:

- (A) How the medication relates to the chief presenting complaint of chronic pain;
- (B) dosage and frequency of any drugs prescribed;
- (C) further testing and diagnostic evaluations to be ordered, if medically indicated;
- (D) other treatments that are planned or considered;
- (E) periodic reviews planned; and
- (F) objectives that will be used to determine treatment success, such as pain relief and improved physical and psychosocial function.

(3) Informed consent. It is the physician's responsibility to discuss the risks and benefits of the use of controlled substances for the treatment of chronic pain with the patient, persons designated by the patient, or with the patient's surrogate or guardian if the patient is without medical decision-making capacity. This discussion must be documented by either a written signed document maintained in the records or a contemporaneous notation included in the medical records. Discussion of risks and benefits must include an explanation of the:

- (A) diagnosis;
- (B) treatment plan;
- (C) anticipated therapeutic results, including the realistic expectations for sustained pain relief and improved functioning and possibilities for lack of pain relief;
- (D) therapies in addition to or instead of drug therapy, including physical therapy or psychological techniques;
- (E) potential side effects and how to manage them;
- (F) adverse effects, including the potential for dependence, addiction, tolerance, and withdrawal; and
- (G) potential for impairment of judgment and motor skills.

(4) Agreement for treatment of chronic pain. A proper patient-physician relationship for treatment of chronic pain requires the physician to establish and inform the patient of the physician's expectations that are necessary for patient compliance. If the treatment plan includes extended drug therapy, the physician must use a written pain management agreement between the physician and the patient outlining patient responsibilities, including the following provisions:

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

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

(C) only the primary pain management physician or another physician covering for the primary pain management physician in compliance with Chapter 177, Subchapter E of this title (relating to Physician Call Coverage Medical Services), may prescribe dangerous and scheduled drugs for the treatment of chronic pain. For any prescriptions issued for medications to treat acute or chronic pain by a person other than the primary pain management physician or covering physician, the terms of the agreement must require that at or before the patient's next date of service, the patient notify the primary pain management physician or covering physician about the prescription(s) issued. The terms of the agreement must require that such notice include at a minimum the name and contact information for the person who issued the prescription, the date of the prescription, and the name and quantity of the drug prescribed;

(D) only one pharmacy designated by the patient will be used for prescriptions for the treatment of chronic pain, with an exception for those circumstances for which the patient has no control or responsibility, that prevent the patient from obtaining prescribed medications at the designated pharmacy under the agreement. For such circumstances, the agreement's terms must require that at or before the patient's next date of service, the patient notify the primary pain management physician or covering physician of the circumstances and identify the pharmacy that dispensed the medication; and

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

(5) Periodic review of the treatment of chronic pain.

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

(B) Periodic review must assess progress toward reaching treatment objectives, taking into consideration the history of medication usage, as well as any new information about the etiology of the pain.

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

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

(E) A physician must base any continuation or modification of the use of dangerous and scheduled drugs for pain management on an evaluation of progress toward treatment objectives.

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

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

(iii) Objective evidence of improved or diminished function must be monitored. Information from family members or other caregivers, if offered or provided, must be considered in determining the patient's response to treatment.

(iv) If the patient's progress is unsatisfactory, the physician must reassess the current treatment plan and consider the use of other therapeutic modalities.

(v) The physician must periodically review the patient's compliance with the prescribed treatment plan and reevaluate for any potential for substance abuse or diversion. In such a review, the physician must consider reviewing prescription data and history related to the patient, if any, contained in the Prescription Drug Monitoring Program described by §§481.075, 481.076, and 481.0761 of the Texas Health and Safety Code and consider obtaining at a minimum a toxicology drug screen to determine the presence of drugs in a patient, if any. If a physician determines that such steps are not necessary, the physician must document in the medical record his or her rationale for not completing such steps.

(6) Consultation and Referral. The physician must refer a patient with chronic pain for further evaluation and treatment as necessary. Patients who are at-risk for abuse or addiction require special attention. Patients with chronic pain and histories of substance abuse or with co-morbid psychiatric disorders require even more care. A consult with or referral to an expert in the management of such patients must be considered in their treatment.

(7) Medical records. The medical records shall document the physician's rationale for the treatment plan and the prescription of drugs for the chief complaint of chronic pain and show that the physician has followed these rules. Specifically the records must include:

- (A) the medical history and the physical examination;
- (B) diagnostic, therapeutic and laboratory results;
- (C) evaluations and consultations;
- (D) treatment objectives;
- (E) discussion of risks and benefits;
- (F) informed consent;
- (G) treatments;
- (H) medications (including date, type, dosage and quantity prescribed);
- (I) instructions and agreements; and
- (J) periodic reviews.

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 171. POSTGRADUATE TRAINING PERMITS

### 22 TAC §171.3

The Texas Medical Board (Board) adopts amendments to §171.3, concerning Physician-in-Training Permits, without changes to the proposed text as published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2662). The rule will not be republished.

The amendments change language under subsection (c)(2)(D) and (E) by eliminating an applicant's requirement to report having been treated on an in- or outpatient basis for certain mental or physical illnesses that "could" have impaired the applicant's ability to practice medicine, and replacing same with language that requires an applicant to report those physical or mental illnesses that have impaired or currently impair the applicant's ability to practice medicine.

No comments were received regarding adoption of the amendments.

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

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

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 183. ACUPUNCTURE

### 22 TAC §§183.2, 183.4, 183.5, 183.18, 183.20

The Texas Medical Board (Board) adopts amendments to §183.2, concerning Definitions; §183.4, concerning Licensure; §183.5, concerning Annual Renewal of License; §183.18, concerning Administrative Penalties; and §183.20, concerning Continuing Acupuncture Education, without changes to the proposed text as published in the March 25, 2016, issue of the *Texas Register* (41 TexReg 2283). The rules will not be republished.

The amendment to §183.2 adds definitions for "Military service member," "Military spouse," "Military veteran," "Active duty," and "Armed forces of the United States." These amendments are in accordance with the passage of SB 1307 (84th Legislature, Regular Session) which amended Chapter 55 of the Texas Occupations Code.

The amendment to §183.4 adds language to subsection (a)(10), Alternative Licensing Procedure, expanding subsection (a)(10) to include military service members and military veterans. The amendment also includes language allowing the executive director to waive any prerequisite to obtaining a license for an applicant described in subsection (a)(10) after reviewing the applicant's credentials. These amendments are in accordance with the passage of SB 1307 (84th Legislature, Regular Session), which amended Chapter 55 of the Texas Occupations Code. Subsection (a)(10)(F) adds a provision for recognizing certain training for Applicants with military experience, based on the passage of SB 0162 (83rd Legislature, Regular Session). The change to subsection (c)(2)(A) deletes the word "either" to make the sentence grammatically correct.

The amendment to §183.5 adds new subsection (h) providing that military service members who hold a license to practice in Texas are entitled to two years of additional time to complete any other requirement related to the renewal of the military service member's license. This amendment is in accordance with the passage of SB 1307 (84th Legislature, Regular Session) which amended Chapter 55 of the Texas Occupations Code.

The amendment to §183.18 deletes subsection (g) due to redundancy, as Chapters 187 and 189 relating to Procedural Rules and Compliance already address Administrative Penalties.

The amendment to §183.20 adds new subsection (w) providing that an acupuncturist, who is a military service member, may request an extension of time, not to exceed two years, to complete any continuing education requirements. This amendment is in accordance with the passage of SB 1307 (84th Legislature, Regular Session) which amended Chapter 55 of the Texas Occupations Code.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §205.101, which provides authority for the Board to recommend rules to establish licensing and other fees and recommend rules necessary to administer and enforce this chapter.

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

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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Mari Robinson, J.D.

Executive Director

Texas Medical Board

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For further information, please call: (512) 305-7016



## CHAPTER 184. SURGICAL ASSISTANTS

### 22 TAC §§184.4 - 184.6, 184.8, 184.18, 184.25

The Texas Medical Board (Board) adopts amendments to §§184.4, 184.5, 184.6, 184.8, 184.18, and 184.25, concerning Surgical Assistants, without changes to the proposed text as

published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2664). The rules will not be republished.

The amendment to §184.4, concerning Qualifications for Licensure, corrects a citation in subsection (c)(3) related to a reference to an applicant's eligibility requirements for alternative license procedures for military service members, veterans, and spouses. The correction clarifies that the eligibility requirements are listed in additional numbered paragraphs of subsection (c).

The amendment to §184.5, concerning Procedural Rules for Licensure Applicants, amends subsection (b), clarifying the determination of licensure eligibility process related to an application for surgical assistant licensure. The amendments further clarify that the procedures outlined under Chapter 187 of this title (relating to Procedural Rules) concerning determinations of licensure ineligibility apply to applications for surgical assistant licensure.

The amendment to §184.6, concerning Licensure Documentation, deletes the word "medical" to correct a reference to the category of surgical assistant licensure.

The amendment to §184.8, concerning License Renewal, deletes the word "residence", as such information is not collected by the Medical Board in the process of renewing a surgical assistant's license.

The amendment to §184.18, concerning Administrative Penalties, eliminates subsection (f) due to the language's redundancy with Chapters 187 and 189 of this title (relating to Procedural Rules and Compliance Program) which sufficiently address the process related to imposition of administrative penalties.

The amendment to §184.25, concerning Continuing Education, deletes subsection (k), due to the language's redundancy with §184.18 of this title (relating to Administrative Penalties) and Chapter 187 of this title (relating to Procedural Rules) which sufficiently address the process related to imposition of administrative penalties.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The amendment is also adopted under the authority of Texas Occupations Code Annotated, §§206.101, 206.203, 206.209, 206.212, 206.313 and 206.351.

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

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 187. PROCEDURAL RULES SUBCHAPTER B. INFORMAL BOARD PROCEEDINGS

### 22 TAC §187.16, §187.19

The Texas Medical Board (Board) adopts amendments to §187.16, concerning Informal Show Compliance Proceedings (ISCs), and §187.19, concerning Resolution by Agreed Order, without changes to the proposed text as published in the April 1, 2016, issue of the *Texas Register* (41 TexReg 2386). The rules will not be republished.

The amendment to §187.16 adds clarifying language to the notice provision in order to clearly state that the notice provided to complainants differs from the notice provided to licensees, in that the latter contains the ISC evidence, which is confidential by statute and cannot legally be disclosed to the complainant.

The amendment to §187.19 eliminates subsection (e) relating to post-ISC negotiations, via telephone or in person, between panel members, Respondents and board staff, as this provision does not comport with our current process relating to post-ISC negotiations between board members and Respondents. Additionally, such negotiation between board members (directly) and Respondents is specifically reserved and provided for during the mediation process.

No comments were received regarding adoption of the amendments.

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

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

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 188. PERFUSIONISTS

### 22 TAC §§188.1 - 188.15, 188.17 - 188.24, 188.26, 188.28, 188.29

The Texas Medical Board (Board), and the Perfusionist Licensure Advisory Committee (Advisory Committee), adopts new §§188.1 - 188.15, 188.17 - 188.24, 188.26, 188.28 and 188.29, concerning Perfusionists. Sections 188.1, 188.3, 188.5, 188.7 - 188.15, 188.17 - 188.23, and 188.29 are adopted without changes to the proposed text as published in the March 25,

2016, issue of the *Texas Register* (41 TexReg 2288). The rules will not be republished. Sections 188.2, 188.4, 188.6, 188.24, 188.26, and 188.28 are adopted with non-substantive and minor grammatical changes. The rules will be republished.

The adopted rules establish qualifications, procedures, requirements and processes that enable the Board to regulate the practice of perfusion and perform the various functions, including licensing, compliance, and enforcement, as it relates to the practice of perfusion in Texas.

The Texas Legislature enacted Senate Bill 202 (S.B. 202), 84th Legislature, Regular Session (2015), which transferred the Perfusionist licensing program, under Chapter 603 of the Texas Occupations Code, from the Department of State Health Services (DSHS) to the Texas Medical Board (Board). The statutory amendments transferring regulation of Perfusionists from DSHS to the Board took effect on September 1, 2015.

The adopted new rules under 22 TAC Chapter 188 are adopted in accordance with the changes to Chapter 603 of the Texas Occupations Code, as enacted by S.B. 202, and are necessary to enable the Board to regulate the practice of perfusion and perform the various functions, including licensing, compliance, and enforcement relating the practice of perfusion.

No comments were received regarding adoption of the new rules.

The new rules are adopted under the authority of the Texas Occupations Code Annotated, §603.152, which provides authority for the Board to adopt rules as necessary to: regulate the practice of perfusion; enforce Chapter 603 of the Texas Occupations Code; and perform its duties under Chapter 603 of the Texas Occupations Code.

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

#### §188.2. Definitions.

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

(1) Act--The Licensed Perfusionists Act, Title 3, Subtitle K, Texas Occupations Code Annotated Chapter 603.

(2) Active duty--A person who is currently serving as full-time military service member in the armed forces of the United States or active duty military service as a member of the Texas military forces, as defined by §437.001, Government Code, or similar military service of another state.

(3) Address of record--The mailing address of each licensee or applicant as provided to the agency pursuant to the Act.

(4) Advisory committee--The Perfusionist Licensure Advisory Committee, an informal advisory committee to the board whose purpose is to advise the board regarding rules relating to the licensure, enforcement, and discipline of perfusionists.

(5) APA--Administrative Procedure Act, Texas Government Code, Chapter 2001 as amended.

(6) Applicant--A person seeking a perfusionist license from the board.

(7) Armed forces of the United States--Army, Navy, Air Force, Coast Guard, or Marine Corps of the United States or a reserve unit of one of those branches of the armed forces.

(8) Board--The Texas Medical Board.

(9) Delegating physician--A physician licensed by the board who delegates, to a licensed perfusionist, the practice of perfusion.

(10) Health care professional--A licensed perfusionist, provisional licensed perfusionist, or any person licensed, certified, or registered by the state in a health-related profession.

(11) Military service member--A person who is on active duty.

(12) Military spouse--A person who is married to a military service member.

(13) Military veteran--A person who served on active duty and who was discharged or released from active duty.

(14) Perfusion--The function necessary for the support, treatment, measurement, or supplementation of the cardiovascular, circulatory, or respiratory system, or a combination of those activities, and to ensure the safe management of physiologic functions by monitoring the parameters of the system under an order and under the supervision of a licensed physician, including:

(A) the use of extracorporeal circulation, cardiopulmonary support techniques, and other therapeutic and diagnostic technologies;

(B) counterpulsation, ventricular assistance, or autotransfusion (including blood conservation techniques), administration of cardioplegia, and isolated limb perfusion;

(C) the use of techniques involving blood management, advanced life support, and other related functions; and

(D) in the performance of the acts described in this subparagraph:

(i) the administration of:

(I) pharmacological and therapeutic agents; or

(II) blood products or anesthetic agents through the extracorporeal circuit or through an intravenous line as ordered by a physician;

(ii) the performance and use of:

(I) anticoagulation analysis;

(II) physiologic analysis;

(III) blood gas and chemistry analysis;

(IV) hematocrit analysis;

(V) hypothermia;

(VI) hyperthermia;

(VII) hemoconcentration; and

(VIII) hemodilution; and

(iii) the observation of signs and symptoms related to perfusion services, the determination of whether the signs and symptoms exhibit abnormal characteristics, and the implementation of appropriate reporting, perfusion protocols, or changes in or the initiation of emergency procedures.

(15) Perfusionist--A person licensed as a perfusionist by the board.

(16) Perfusion protocols--Perfusion-related policies and protocols developed or approved by a licensed health facility or a

physician through collaboration with administrators, licensed perfusionists, and other health professionals.

(17) Provisional licensed perfusionist--A person provisionally licensed as a perfusionist by the board.

(18) Submit--The term used to indicate that a completed item has been actually received and date-stamped by the board along with all required documentation and fees, if any.

(19) Supervision--Supervision of a provisionally licensed perfusionist by a licensed perfusionist or a physician who is licensed by the Texas Medical Board and certified by the American Board of Thoracic Surgery or certified in cardiovascular surgery by the American Osteopathic Board of Surgery. Supervision includes overseeing the activities of, and accepting responsibility for, the perfusion services rendered by a provisionally licensed perfusionist.

#### §188.4. *Qualifications for Licensure.*

(a) Except as otherwise provided in this section, an individual applying for licensure must:

(1) submit an application on forms approved by the board;

(2) pay the appropriate application fee;

(3) certify that the applicant is mentally and physically able to function safely as a perfusionist;

(4) not have a license, certification, or registration in this state or from any other licensing authority or certifying professional organization that is currently revoked, suspended, or subject to probation or other disciplinary action for cause;

(5) have no proceedings that have been instituted against the applicant for the restriction, cancellation, suspension, or revocation of certificate, license, or authority to practice perfusion in the state, territory, Canadian province, country, or uniformed service of the United States in which it was issued;

(6) have no prosecution pending against the applicant in any state, federal, or Canadian court for any offense that under the laws of this state is a felony;

(7) be of good professional character;

(8) not have violated any provision of any federal or state statute relating to confidentiality of patient communications or records;

(9) not have been convicted of a felony or a crime involving moral turpitude;

(10) not use drugs or alcohol to an extent that affects the applicant's professional competency;

(11) not have engaged in fraud or deceit in applying for a license;

(12) pass an independently evaluated perfusionist examination approved by the board;

(13) have successfully completed an educational program as set forth in subparagraphs (A) and (B) of this paragraph:

(A) a perfusion education program that is accredited by the Commission on Accreditation of Allied Health Education Programs (CAAHEP) at the time of graduation; and

(B) a substantially equivalent program with requirements as stringent as those established by the Accreditation Committee for Perfusion Education (AC-PE) and approved by the board.

(i) Degrees and course work received in international countries shall be acceptable only if the degree or coursework

has educational standards that are as stringent as those established by the AC-PE and approved by CAAHEP or their successors.

(ii) An international training program shall be acceptable only if it has educational standards as stringent as those established by the AC-PE and approved by the CAAHEP or their successors.

(14) submit a complete and legible set of fingerprints, on a form prescribed by the medical board, to the medical board or to the Department of Public Safety for the purpose of obtaining criminal history record information from the Department of Public Safety and the Federal Bureau of Investigation, as required by §603.2571 of the Act.

(15) submit to the board any other information the board considers necessary to evaluate the applicant's qualifications.

(b) Competency Examination. An individual applying for licensure must submit proof of passage of the required perfusion examination administered by the American Board of Cardiovascular Perfusion (ABCP).

(1) If an applicant has already successfully completed the required examination administered by the ABCP, the applicant shall not be required to be reexamined, provided that the applicant furnishes the board with a copy of the test results indicating that the applicant passed the examination and proof that he or she has been certified by the ABCP for some time period within three years immediately preceding date of application.

(2) An applicant who fails the required competency examination administered by the ABCP four times may not reapply as a provisional licensed perfusionist.

(3) The board shall waive the examination requirement for an applicant who, at the time of application:

(A) is licensed or certified by another state that has licensing or certification requirements that the board determines to be substantially equivalent to the requirements of this chapter; or

(B) holds a certificate as a certified clinical perfusionist issued by the ABCP before January 1, 1994, authorizing the holder to practice perfusion in a state that does not license or certify perfusionists.

(c) Jurisprudence Examination. Applicants for licensure must pass a jurisprudence examination ("JP exam"), which shall be conducted on the licensing requirements and other laws, rules, or regulations applicable to the perfusionist profession in this state. The jurisprudence examination shall be developed and administered as follows:

(1) Questions for the JP Exam shall be prepared by agency staff with input from the Advisory Committee and board and the agency staff shall make arrangements for a facility by which applicants can take the examination.

(2) Applicants must pass the JP exam with a score of 75 or better within three attempts, unless the board allows an additional attempt based upon a showing of good cause. An applicant who is unable to pass the JP exam within three attempts must appear before the Licensure Committee of the board to address the applicant's inability to pass the examination and to re-evaluate the applicant's eligibility for licensure. It is at the discretion of the committee to allow an applicant additional attempts to take the JP exam.

(3) An examinee shall not be permitted to bring books, compends, notes, journals, calculators or other help into the examination room, nor be allowed to communicate by word or sign with another examinee while the examination is in progress without

permission of the presiding examiner, nor be allowed to leave the examination room except when so permitted by the presiding examiner.

(4) Irregularities during an examination such as giving or obtaining unauthorized information or aid as evidenced by observation or subsequent statistical analysis of answer sheets, shall be sufficient cause to terminate an applicant's participation in an examination, invalidate the applicant's examination results, or take other appropriate action.

(5) A person who has passed the JP Exam shall not be required to retake the Exam for another or similar license, except as a specific requirement of the board.

(6) The JP examination must be taken and passed no more than two years prior to the date of the application for licensure.

(d) Alternative License Procedures for Military Service Members, Military Veterans, and Military Spouses.

(1) An applicant who is a military service member, military veteran, or military spouse may be eligible for alternative demonstrations of competency for certain licensure requirements. Unless specifically allowed in this subsection, an applicant must meet the requirements for licensure as specified in this chapter.

(2) To be eligible, an applicant must be a military service member, military veteran, or military spouse and meet one of the following requirements:

(A) holds an active unrestricted perfusionist license issued by another state that has licensing requirements that are substantially equivalent to the requirements for a Texas perfusionist license; or

(B) within the five years preceding the application date held a perfusionist license in this state.

(3) The executive director may waive any prerequisite to obtaining a license for an applicant described by this subsection after reviewing the applicant's credentials.

(4) Applications for licensure from applicants qualifying under this section, shall be expedited by the board's licensure division. Such applicants shall be notified, in writing or by electronic means, as soon as practicable, of the requirements and process for renewal of the license.

(5) Alternative Demonstrations of Competency Allowed. Applicants qualifying under this section, notwithstanding:

(A) the one year expiration in §188.5 of this chapter (relating to Procedural Rules for Licensure Applicants), are allowed an additional six months to complete the application prior to it becoming inactive; and

(B) the requirement to produce a copy of a valid and current certificate demonstrating completion of an educational program as described in this section and required in §188.6 of this chapter (relating to Licensure Documentation), may substitute certification from the ABCP if it is made on a valid examination transcript.

(e) Applicants with Military Experience.

(1) The board shall, with respect to an applicant who is a military service member or military veteran as defined in §188.2 of this chapter (relating to Definitions), credit verified military service, training, or education toward the licensing requirements, other than an examination requirement, for a license issued by the board.

(2) This section does not apply to an applicant who:

(A) has had a perfusionist license suspended or revoked by another state, territory, Canadian province or country;

(B) holds a perfusionist license issued by another state, territory, Canadian province or country that is subject to a restriction, disciplinary order, or probationary order; or

(C) has an unacceptable criminal history.

§188.6. *Licensure Documentation.*

(a) Original documents include, but are not limited to, those listed in subsections (b) and (c) of this section.

(b) Documentation required of all applicants for licensure.

(1) Birth Certificate/Proof of Age. Each applicant for licensure must provide a copy of a birth certificate and translation if necessary to prove that the applicant is at least 21 years of age. In instances where a birth certificate is not available the applicant must provide copies of a passport or other suitable alternate documentation.

(2) Name change. Any applicant who submits documentation showing a name other than the name under which the applicant has applied must present copies of marriage licenses, divorce decrees, or court orders stating the name change. In cases where the applicant's name has been changed by naturalization, the applicant should send the original naturalization certificate by certified mail to the board of office for inspection.

(3) Examination verification. Each applicant for licensure must have the appropriate testing service that administered the required perfusionist competency examination, described in §188.4 of this chapter (relating to Qualifications for Licensure), submit verification of the applicant's passage of the examination directly to the board or verification of current certification by the ABCP.

(4) Certificate from Educational Program or other State License. All applicants must submit:

(A) a certificate of successful completion of an educational program as described in §188.4 of this chapter, unless the applicant qualifies for the special eligibility provision regarding education under §188.4 of this chapter;

(B) If an applicant is or has been licensed, certified, or registered in another state, territory, or jurisdiction, the applicant must submit information required by the board concerning that license, certificate or registration on official board forms.

(5) Transcripts. Each applicant must have his or her educational program(s) submit a transcript of courses taken and grades obtained to demonstrate compliance with curriculum requirements under §188.4 of this chapter.

(6) Evaluations.

(A) All applicants must provide evaluations, on forms provided by the board, of their professional affiliations for the past three years or since graduation from an educational program, in compliance with §188.4 of this chapter, whichever is the shorter period.

(B) The evaluations must come from at least three supervisors or instructors who are either licensed perfusionists or licensed physicians and have each supervised the applicant's work experience.

(C) An exception to subparagraph (B) of this paragraph may be made for those applicants who provide adequate documentation that they have not been supervised by at least three licensed physicians or licensed perfusionists for the three years preceding the board's receipt of application or since graduation, whichever is the shorter period.

(7) License verifications. Each applicant for licensure who is licensed, registered, or certified in another state must have that state submit, directly to the board, proof that the applicant's license, regis-

tration, or certification is current and in full force and that the license, registration, or certification has not been restricted, suspended, revoked or otherwise subject to disciplinary action. The other state shall also include a description of any sanctions imposed by or disciplinary matters pending in the state.

(c) Applicants may be required to submit other documentation, which may include the following:

(1) Translations. Any document that is in a language other than the English language will need to have a certified translation prepared and a copy of the translation submitted with the translated document.

(A) An official translation from the school or appropriate agency attached to the foreign language transcript or other document is acceptable.

(B) If a foreign document is received without a translation, the board will send the applicant a copy of the document to be translated and returned to the board.

(C) Documents must be translated by a translation agency who is a member of the American Translation Association or a United States college or university official.

(D) The translation must be on the translator's letterhead, and the translator must verify that it is a "true word for word translation" to the best of his/her knowledge, and that he/she is fluent in the language translated, and is qualified to translate the document.

(E) The translation must be signed in the presence of a notary public and then notarized. The translator's name must be printed below his/her signature. The notary public must use the phrase: "Subscribed and Sworn this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_." The notary must then sign and date the translation, and affix his/her notary seal to the document.

(2) Arrest records. If an applicant has ever been arrested, the applicant must request that the arresting authority submit to the board copies of the arrest and arrest disposition.

(3) Inpatient treatment for alcohol/substance disorder or mental illness. An inpatient facility shall include a hospital, ambulatory surgical center, nursing home, and rehabilitation facility. Each applicant that has been admitted to an inpatient facility within the last five years for treatment of alcohol/substance disorder or mental illness (recurrent or severe major depressive disorder, bipolar disorder, schizophrenia, schizoaffective disorder, or any severe personality disorder), or a physical illness that impairs or has impaired the applicant's ability to practice perfusion, shall submit documentation must submit the following:

(A) applicant's statement explaining the circumstances of the inpatient treatment/hospitalization;

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

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

(D) a copy of any contracts signed with any licensing authority, professional society or impaired practitioner committee.

(4) Outpatient treatment for alcohol/substance disorder or mental illness. Each applicant that has been treated on an outpatient basis within the past five years for alcohol/substance disorder or mental illness (recurrent or severe major depressive disorder, bipolar disorder, schizophrenia, schizoaffective disorder, or any severe personality dis-

order), or a physical illness that impairs or has impaired the applicant's ability to practice perfusion, shall submit documentation to include, but not limited to the following:

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

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

(C) a copy of any contracts signed with any licensing authority, professional society or impaired practitioners committee.

(5) Malpractice. If an applicant has ever been named in a malpractice claim filed with any liability carrier or if an applicant has ever been named in a malpractice suit, the applicant must:

(A) have each liability carrier complete a form furnished by this board regarding each claim filed against the applicant's insurance;

(B) for each claim that becomes a malpractice suit, have the attorney representing the applicant in each suit submit a letter to the board explaining the allegation, relevant dates of the allegation, and current status of the suit. If the suit has been closed, the attorney must state the disposition of the suit and, if any money was paid, the amount of the settlement. If such letter is not available, the applicant will be required to furnish a notarized affidavit explaining why this letter cannot be provided; and

(C) provide a statement composed by the applicant, explaining the circumstances pertaining to patient care in defense of the allegations.

(6) Additional documentation. Additional documentation may be required as is deemed necessary to facilitate the investigation of any application for licensure.

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

#### §188.24. Continuing Education.

(a) Completion of continuing education (CE) requirements by licensee with current certification by the ABCP or its successor agency. Completion of continuing education requirements may be documented by demonstrating current certification by the ABCP annual license renewal.

(b) Completion of CE requirements by licensee without current certification by the ABCP. A licensee without current certification by the ABCP at the time of license renewal must meet the following criteria.

(1) Document a minimum of 30 continuing education credit (CEUs) every 24 months (24 month timeline is in relation to the biennial registration period, not the calendar year). A licensee must report during registration if she or he has completed the required CE. Documentation of CE courses shall be made available to the Board upon request, but should not be mailed with the registration payment. Random audits will be made to assure compliance. A minimum of 15 hours of CEU must be earned in Category I. The activity period covered in the professional activity report is from the date of licensure to the third licensure renewal date and every subsequent third license renewal date.

(2) Document a minimum of 40 clinical perfusion cases in a two-year period by submitting a clinical activity report upon renewal,

on the approved form, demonstrating completion of 40 cases each biennial as the Primary Perfusionist for Cardiopulmonary bypass (instructor or primary), ECMO, VAD, Isolated Limb Perfusion, or VENO-VENO bypass.

(3) One CEU or contact hour activity is defined as 50 minutes spent in an organized, structured or unstructured learning experience. Categories of CEU activities are:

(A) Category I--Perfusion Meetings and Other Perfusion Related Activity--Perfusion meetings are those programs and seminars in which a minimum of 75% of the contact hours consist of perfusion related material. Only those meetings approved by the ABCP will qualify for Category 1 hours. Examples:

(i) International, national regional, and state perfusion meetings.

(ii) Publication of perfusion related book chapter or paper in a professional journal.

(iii) Presentation at an international, national, regional or state perfusion journal.

(B) Category II--Non-Accredited Perfusion Meetings and Other Medical Meetings--This category includes international, national, regional, and state meetings that have not been approved by the ABCP, local perfusion meetings and all other medically related meetings. Examples:

(i) International, National, Regional, and State, perfusion meetings that have not been accredited by the ABCP.

(ii) Local perfusion meetings (do not require ABCP accreditation). Any perfusion meeting NOT EQUALLY ACCESSIBLE to the general CCP community, this includes manufacturer-specific and company-sponsored educational activities.

(iii) International, National, Regional, or Local medically-related meetings.

(C) Category III--Individual Education and Other Self-Study Activities Credit in this category is acquired on an hour for hour basis of the time spent in these non-accredited or non-supervised activities. Examples:

(i) Reading or viewing medical journals, audio-visual, or other educational material.

(ii) Participation in electronic forums.

(iii) Participation in a Journal Club.

(iv) Participation in degree-oriented, professional-related course work.

(v) Presentation of perfusion topic at a non-perfusion meeting.

(4) Documentation of activities. Licensees are responsible for reporting completion of their professional activities. This information must be reported to the board at the time of registration and renewal and documentation must be submitted to the board upon request. Credit will not be granted for activities that are not documented. The suitable documentation is outlined as follows:

(A) Category I--Perfusion meetings--Approved perfusion meetings held before June 30, 1998, may be documented by copies of registration receipts or official meeting name tags. For approved perfusion meetings held after June 30, 1998, an official document from the meeting sponsor documenting attendance and the number of hours received must be provided.

(i) Perfusion Publications must have complete reference of book or article (authors, title, journal and date/volume of journal).

(ii) Perfusion Presentations must have copy of program agenda.

(B) Category II--International, national, regional, and state perfusion meetings not accredited by the ABCP, local perfusion meetings and all other medical meetings--must provide an official document stating CEUs awarded and copy of the meeting program.

(C) Category III--All self-study activities will require an official record of completion or written summary of the activity.

(D) Submission of a clinical activity report upon renewal, on the approved form, demonstrating completion of 40 cases each biennial as the Primary Perfusionist for Cardiopulmonary bypass (instructor or primary), ECMO, VAD, Isolated Limb Perfusion, or VENO-VENO bypass.

(c) A licensee may request in writing an exemption for the following reasons:

(1) the licensee's catastrophic illness;

(2) the licensee's military service of longer than one year's duration outside the state;

(3) the licensee's residence of longer than one year's duration outside the United States; or

(4) good cause shown submitted in writing by the licensee that gives satisfactory evidence to the board that the licensee is unable to comply with the requirement for continuing education.

(d) Exemptions are subject to the approval of the executive director of the board and must be requested in writing at least 30 days prior to the expiration date of the license.

(e) An exception under subsection (c) of this section may not exceed one year but may be requested annually, subject to the approval of the executive director of the board.

(f) This section does not prevent the board from taking board action with respect to a licensee or an applicant for a license by requiring additional hours of continuing education or of specific course subjects.

(g) The board may require written verification of both formal and informal credits from any licensee within 30 days of request. Failure to provide such verification may result in disciplinary action by the board.

(h) Unless exempted under the terms of this section, a licensee's apparent failure to obtain and timely report the number of hours of CE as required annually and provided for in this section shall result in the denial of licensure renewal until such time as the licensee obtains and reports the required CE hours.

(i) CE hours that are obtained to comply with the CE requirements for the preceding year as a prerequisite for obtaining licensure renewal, shall first be credited to meet the CE requirements for the previous year. Once the previous year's CE requirement is satisfied, any additional hours obtained shall be credited to meet the CE requirements for the current year.

(j) A false report or statement to the board by a licensee regarding CE hours reportedly obtained shall be a basis for disciplinary action by the board pursuant to §603.401 of the Act. A licensee who is disciplined by the board for such a violation may be subject to the full range of actions authorized by the Act including suspension or revoca-

tion of the perfusionist's license, but such action shall not be less than an administrative penalty of \$500.

(k) A perfusionist, who is a military service member, may request an extension of time, not to exceed two years, to complete any CE requirements.

§188.26. *Exemption from Registration Fee for Retired Perfusionists Providing Voluntary Charity Care.*

(a) A retired perfusionist licensed by the board whose only practice is the provision of voluntary charity care shall be exempt from the registration fee.

(b) As used in this section:

(1) "voluntary charity care" means perfusion services provided for no compensation to:

(A) indigent populations;

(B) in medically underserved areas; or

(C) for a disaster relief organization.

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

(c) To qualify for and obtain such an exemption, a perfusionist must truthfully certify under oath, on a form approved by the board that the following information is correct:

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

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

(3) the perfusionist's practice does not include the provision of perfusion services to members of the perfusionist's family.

(d) A perfusionist who qualifies for and obtains an exemption from the registration fee authorized under this section shall obtain and report continuing education as required under the Act and §188.24 of this chapter (relating to Continuing Education), except that the number of credits of CE required shall be equal to two-thirds of the number of continuing education hours required for renewal for a licensed perfusionist.

(e) A retired perfusionist who has obtained an exemption from the registration fee as provided for under this section, may be subject to disciplinary action under the Act based on unprofessional or dishonorable conduct likely to deceive, defraud, or injure the public if the perfusionist engages in the compensated practice of perfusion or the provision of perfusion services to members of the perfusionist's family.

(f) A perfusionist who attempts to obtain an exemption from the registration fee under this section by submitting false or misleading statements to the board shall be subject to disciplinary action pursuant to the Act in addition to any civil or criminal actions provided for by state or federal law.

(g) A perfusionist may return to active status by applying to the board, paying an application fee equal to an application fee for a perfusionist license, complying with the requirements for license renewal under the Act, and submitting professional evaluations from each employment held before the license was placed on retired status, demonstrate any formal or informal continuing education obtained during the period of retired status, provide a description of all voluntary charity

care provided during the period of retired status, and complying with subsection (h) of this section.

(h) The request of a perfusionist seeking a return to active status whose license has been placed on official retired status for two years or longer shall be submitted to the Licensure Committee of the board for consideration and a recommendation to the full board for approval or denial of the request. After consideration of the request and the recommendation of the Licensure Committee, the board shall grant or deny the request. If the request is granted, it may be granted without conditions or subject to such conditions which the board determines are necessary to adequately protect the public including but not limited to:

- (1) completion of specified continuing education hours approved for Category 1 credits by a CE sponsor approved by the ABCP;
- (2) limitation and/or exclusion of the practice of the applicant to specified activities of the practice as a perfusionist;
- (3) remedial education; and/or
- (4) such other remedial or restrictive conditions or requirements which, in the discretion of the board are necessary to ensure protection of the public and minimal competency of the applicant to safely practice as a perfusionist.

(i) The request of a perfusionist seeking a return to active status whose license has been placed on retired status providing voluntary charity care for less than two years may be approved by the executive director of the board or submitted by the executive director to the Licensure Committee for consideration and a recommendation to the full board for approval or denial of the request. In those instances in which the executive director submits the request to the Licensure Committee of the board, the Licensure Committee shall make a recommendation to the full board for approval or denial. After consideration of the request and the recommendation of the Licensure Committee, the board shall grant or deny the request subject to such conditions which the board determines are necessary to adequately protect the public including, but not limited to, those options provided in subsection (h) of this section.

(j) In evaluating a request of a perfusionist seeking a return to active status whose license has been placed on retired status providing voluntary charity care, the Licensure Committee or the full board may require a personal appearance by the requesting perfusionist at the offices of the board, and may also require a physical or mental examination by one or more perfusionists or other health care providers approved in advance in writing by the executive director, the secretary-treasurer, the Licensure committee, or other designee(s) determined by majority vote of the board.

*§188.28. Exemption from Registration Fee for Retired Perfusionists.*

(a) The registration fee shall not apply to retired perfusionists. To become exempt from the registration fee due to retirement:

- (1) the perfusionist's current license must not be under an investigation or order with the board or otherwise have a restricted license; and
- (2) the perfusionist must request in writing on a form prescribed by the board for his or her license to be placed on official retired status.

(b) The following restrictions shall apply to perfusionists whose licenses are on official retired status:

- (1) the perfusionist must not engage in clinical activities or practice perfusion in any state; and
- (2) the perfusionist's license may not be endorsed to any other state.

(c) A perfusionist may return to active status by applying to the board, paying an application fee equal to an application fee for a perfusionist license, complying with the requirements for license renewal under the Act, and submitting professional evaluations from each employment held before the license was placed on retired status, demonstrate any formal or informal continuing education obtained during the period of retired status and complying with subsection (d) of this section.

(d) The request of a perfusionist seeking a return to active status whose license has been placed on official retired status for two years or longer shall be submitted to the Licensure Committee of the board for consideration and a recommendation to the full board for approval or denial of the request. After consideration of the request and the recommendation of the Licensure Committee, the board shall grant or deny the request. If the request is granted, it may be granted without conditions or subject to such conditions which the board determines are necessary to adequately protect the public including but not limited to:

- (1) completion of specified continuing education hours approved for Category 1 credits by a CE sponsor approved by the ABCP;
- (2) limitation and/or exclusion of the practice of the applicant to specified activities of the practice as a perfusionist;
- (3) remedial education; and/or
- (4) such other remedial or restrictive conditions or requirements which, in the discretion of the board are necessary to ensure protection of the public and minimal competency of the applicant to safely practice as a perfusionist.

(e) The request of a perfusionist seeking a return to active status whose license has been placed on official retired status for less than two years may be approved by the executive director of the board or submitted by the executive director to the Licensure Committee for consideration and a recommendation to the full board for approval or denial of the request. In those instances in which the executive director submits the request to the Licensure Committee of the board, the Licensure Committee shall make a recommendation to the full board for approval or denial. After consideration of the request and the recommendation of the Licensure Committee, the board shall grant or deny the request subject to such conditions which the board determines are necessary to adequately protect the public including but not limited to those options provided in subsection (d)(1) - (4) of this section.

(f) In evaluating a request to return to active status, the Licensure Committee or the full board may require a personal appearance by the requesting perfusionist at the offices of the board, and may also require a physical or mental examination by one or more physicians or other health care providers approved in advance in writing by the executive director, the secretary-treasurer, the Licensure Committee, or other designee(s) determined by majority vote of the board.

(g) A perfusionist applying for retired status under subsections (a) and (b) of this section may be approved for emeritus retired status, a subgroup of "official retired status," provided that the perfusionist has:

- (1) never received a remedial plan or been the subject of disciplinary action by the Texas Medical Board;
- (2) no criminal history, including pending charges, indictment, conviction and/or deferred adjudication in Texas; and
- (3) never held a license, registration or certification that has been restricted for cause, canceled for cause, suspended for cause, revoked or subject to another form of discipline in a state, or territory of the United States, a province of Canada, a uniformed service of the United States or other regulatory agency.

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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Mari Robinson, J.D.

Executive Director

Texas Medical Board

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For further information, please call: (512) 305-7016



## CHAPTER 190. DISCIPLINARY GUIDELINES SUBCHAPTER B. VIOLATION GUIDELINES

### 22 TAC §190.8

The Texas Medical Board (Board) adopts amendments to §190.8, concerning Violation Guidelines, with changes to the proposed text as published in the April 1, 2016, issue of the *Texas Register* (41 TexReg 2387). The rule will be republished. The change updates a reference in paragraph (1)(L)(ii).

The amendment to §190.8 adds the phrase "post-exposure prophylaxis" to language related to the type of treatment that may be provided by physicians for infectious diseases located under paragraph (1)(L)(iii)(II), so as to improve consistency and mirror other language under paragraph (1)(L)(iii)(I), pertaining to sexually transmitted diseases. The added phrase "post-exposure prophylaxis" (PEP) is intended to further clarify that the purpose of the exception is to potentially prevent infection and the furtherance of an outbreak. The amendments change the definition of a patient's "close contacts" so that the definition better reflects guidance published by the Centers for Disease Control and Prevention and local Texas health authority, so that the specific circumstances of a local communicable disease outbreak and possible drug shortages might be better addressed by physicians. Language under paragraph (1)(L)(iii)(II)(-a-), relating to Chicken Pox, and paragraph (1)(L)(iii)(II)(-f-), stating shingles, is deleted, and replaced with the addition of the term *Varicella zoster*, for the purpose of reorganizing the list and using scientific names. New language is added to paragraph (1)(L)(iii)(II) and (1)(L)(iii)(II)(-g-) providing language that would allow PEP to be administered by physicians providing public health medical services pursuant to a memorandum of understanding between the Department of State Health Services and the Texas Medical Board, and for any new or emergent communicable diseases not specifically listed under the rule that are determined to be a public health threat by state health authorities, thereby improving the state's ability to provide a quick public health response to communicable diseases affecting the health of Texans. The terms "infectious disease" and "communicable disease" are intended to be interchangeable.

No comments were received regarding adoption of the amendment.

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

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

#### §190.8. Violation Guidelines.

When substantiated by credible evidence, the following acts, practices, and conduct are considered to be violations of the Act. The following shall not be considered an exhaustive or exclusive listing.

(1) Practice Inconsistent with Public Health and Welfare. Failure to practice in an acceptable professional manner consistent with public health and welfare within the meaning of the Act includes, but is not limited to:

(A) failure to treat a patient according to the generally accepted standard of care;

(B) negligence in performing medical services;

(C) failure to use proper diligence in one's professional practice;

(D) failure to safeguard against potential complications;

(E) improper utilization review;

(F) failure to timely respond in person when on-call or when requested by emergency room or hospital staff;

(G) failure to disclose reasonably foreseeable side effects of a procedure or treatment;

(H) failure to disclose reasonable alternative treatments to a proposed procedure or treatment;

(I) failure to obtain informed consent from the patient or other person authorized by law to consent to treatment on the patient's behalf before performing tests, treatments, procedures, or autopsies as required under Chapter 49 of the Code of Criminal Procedure;

(J) termination of patient care without providing reasonable notice to the patient;

(K) prescription or administration of a drug in a manner that is not in compliance with Chapter 200 of this title (relating to Standards for Physicians Practicing Complementary and Alternative Medicine) or, that is either not approved by the Food and Drug Administration (FDA) for use in human beings or does not meet standards for off-label use, unless an exemption has otherwise been obtained from the FDA;

(L) prescription of any dangerous drug or controlled substance without first establishing a defined physician-patient relationship.

(i) A defined physician-patient relationship must include, at a minimum:

(I) establishing that the person requesting the medication is in fact who the person claims to be;

(II) establishing a diagnosis through the use of acceptable medical practices, which includes documenting and performing:

(-a-) patient history;

(-b-) mental status examination;

(-c-) physical examination that must be performed by either a face-to-face visit or in-person evaluation as defined in §174.2(3) and (4) of this title (relating to Definitions). The requirement for a face-to-face or in-person evaluation does not apply to mental health services, except in cases of behavioral emergencies, as defined by 25 TAC §415.253 (relating to Definitions); and

(-d-) appropriate diagnostic and laboratory testing.

(III) An online questionnaire or questions and answers exchanged through email, electronic text, or chat or telephonic evaluation of or consultation with a patient are inadequate to establish a defined physician-patient relationship;

(IV) discussing with the patient the diagnosis and the evidence for it, the risks and benefits of various treatment options; and

(V) ensuring the availability of the licensee or coverage of the patient for appropriate follow-up care.

(ii) A proper professional relationship is also considered to exist between a patient certified as having a terminal illness and who is enrolled in a hospice program, or another similar formal program which meets the requirements of clause (i)(I) - (IV) of this subparagraph, and the physician supporting the program. To have a terminal condition for the purposes of this rule, the patient must be certified as having a terminal illness under the requirements of 40 TAC §97.403 (relating to Standards Specific to Agencies Licensed to Provide Hospice Service) and 42 CFR 418.22.

(iii) Notwithstanding the provisions of this subparagraph, establishing a professional relationship is not required for:

(I) a physician to prescribe medications for sexually transmitted diseases for partners of the physician's established patient, if the physician determines that the patient may have been infected with a sexually transmitted disease; or

(II) a physician to prescribe dangerous drugs and/or vaccines for post-exposure prophylaxis of disease for close contacts of a patient if the physician diagnoses the patient with one or more of the following infectious diseases listed in items (-a) - (-g-) of this subclause, or is providing public health medical services pursuant to a memorandum of understanding entered into between the board and the Department of State Health Services. For the purpose of this clause, a "close contact" is defined as a member of the patient's household or any person with significant exposure to the patient for whom post-exposure prophylaxis is recommended by the Centers for Disease Control and Prevention, Texas Department of State Health Services, or local health department or authority ("local health authority or department" as defined under Chapter 81 of the Texas Health and Safety Code). The physician must document the treatment provided to the patient's close contact(s) in the patient's medical record. Such documentation at a minimum must include the close contact's name, drug prescribed, and the date that the prescription was provided.

- (-a-) Influenza;
- (-b-) Invasive Haemophilus influenzae Type

B;

- (-c-) Meningococcal disease;
- (-d-) Pertussis;
- (-e-) Scabies;
- (-f-) Varicella zoster; or
- (-g-) a communicable disease determined by

the Texas Department of State Health Services to:

(-1-) present an immediate threat of a high risk of death or serious long-term disability to a large number of people; and

(-2-) create a substantial risk of public exposure because of the disease's high level of contagion or the method by which the disease is transmitted.

(M) inappropriate prescription of dangerous drugs or controlled substances to oneself, family members, or others in which there is a close personal relationship that would include the following:

(i) prescribing or administering dangerous drugs or controlled substances without taking an adequate history, performing a proper physical examination, and creating and maintaining adequate records; and

(ii) prescribing controlled substances in the absence of immediate need. "Immediate need" shall be considered no more than 72 hours.

(N) providing on-call back-up by a person who is not licensed to practice medicine in this state or who does not have adequate training and experience.

(O) delegating the performance of nerve conduction studies to a person who is not licensed as a physician or physical therapist without:

(i) first selecting the appropriate nerve conduction to be performed;

(ii) ensuring that the person performing the study is adequately trained;

(iii) being onsite during the performance of the study; and

(iv) being immediately available to provide the person with assistance and direction.

(2) Unprofessional and Dishonorable Conduct. Unprofessional and dishonorable conduct that is likely to deceive, defraud, or injure the public within the meaning of the Act includes, but is not limited to:

(A) violating a board order;

(B) failing to comply with a board subpoena or request for information or action;

(C) providing false information to the board;

(D) failing to cooperate with board staff;

(E) engaging in sexual contact with a patient;

(F) engaging in sexually inappropriate behavior or comments directed towards a patient;

(G) becoming financially or personally involved with a patient in an inappropriate manner;

(H) referring a patient to a facility, laboratory, or pharmacy without disclosing the existence of the licensee's ownership interest in the entity to the patient;

(I) using false, misleading, or deceptive advertising;

(J) providing medically unnecessary services to a patient or submitting a billing statement to a patient or a third party payer that the licensee knew or should have known was improper. "Improper" means the billing statement is false, fraudulent, misrepresents services provided, or otherwise does not meet professional standards;

(K) behaving in an abusive or assaultive manner towards a patient or the patient's family or representatives that interferes with patient care or could be reasonably expected to adversely impact the quality of care rendered to a patient;

(L) failing to timely respond to communications from a patient;

(M) failing to complete the required amounts of CME;

(N) failing to maintain the confidentiality of a patient;

(O) failing to report suspected abuse of a patient by a third party, when the report of that abuse is required by law;

(P) behaving in a disruptive manner toward licensees, hospital personnel, other medical personnel, patients, family members or others that interferes with patient care or could be reasonably expected to adversely impact the quality of care rendered to a patient;

(Q) entering into any agreement whereby a licensee, peer review committee, hospital, medical staff, or medical society is restricted in providing information to the board; and

(R) commission of the following violations of federal and state laws whether or not there is a complaint, indictment, or conviction:

(i) any felony;

(ii) any offense in which assault or battery, or the attempt of either is an essential element;

(iii) any criminal violation of the Medical Practice Act or other statutes regulating or pertaining to the practice of medicine;

(iv) any criminal violation of statutes regulating other professions in the healing arts that the licensee is licensed in;

(v) any misdemeanor involving moral turpitude as defined by paragraph (6) of this section;

(vi) bribery or corrupt influence;

(vii) burglary;

(viii) child molestation;

(ix) kidnapping or false imprisonment;

(x) obstruction of governmental operations;

(xi) public indecency; and

(xii) substance abuse or substance diversion.

(S) contacting or attempting to contact a complainant, witness, medical peer review committee member, or professional review body as defined under §160.001 of the Act regarding statements used in an active investigation by the board for purposes of intimidation. It is not a violation for a licensee under investigation to have contact with a complainant, witness, medical peer review committee member, or professional review body if the contact is in the normal course of business and unrelated to the investigation.

(T) failing to timely submit complete forms for purposes of registration as set out in §166.1 of this title (relating to Physician Registration) when it is the intent of the licensee to maintain licensure with the board as indicated through submission of an application and fees prior to one year after a permit expires.

(3) Disciplinary actions by another state board. A voluntary surrender of a license in lieu of disciplinary action or while an investigation or disciplinary action is pending constitutes disciplinary action within the meaning of the Act. The voluntary surrender shall be considered to be based on acts that are alleged in a complaint or stated in the order of voluntary surrender, whether or not the licensee has denied the facts involved.

(4) Disciplinary actions by peer groups. A voluntary relinquishment of privileges or a failure to renew privileges with a hospital, medical staff, or medical association or society while investigation or a disciplinary action is pending or is on appeal constitutes disciplinary action that is appropriate and reasonably supported by evidence submitted to the board, within the meaning of §164.051(a)(7) the Act.

(5) Repeated or recurring meritorious health care liability claims. It shall be presumed that a claim is "meritorious," within the meaning of §164.051(a)(8) of the Act, if there is a finding by a judge or jury that a licensee was negligent in the care of a patient or if there is a settlement of a claim without the filing of a lawsuit or a settlement of a lawsuit against the licensee in the amount of \$50,000 or more. Claims are "repeated or recurring," within the meaning of §164.051(a)(8) of the Act, if there are three or more claims in any five-year period. The date of the claim shall be the date the licensee or licensee's medical liability insurer is first notified of the claim, as reported to the board pursuant to §160.052 of the Act or otherwise.

(6) Discipline based on Criminal Conviction. The board is authorized by the following separate statutes to take disciplinary action against a licensee based on a criminal conviction:

(A) Felonies.

(i) Section 164.051(a)(2)(B) of the Medical Practice Act, §204.303(a)(2) of the Physician Assistant Act, and §203.351(a)(7) of the Acupuncture Act, (collectively, the "Licensing Acts") authorize the board to take disciplinary action based on a conviction, deferred adjudication, community supervision, or deferred disposition for any felony.

(ii) Chapter 53, Texas Occupations Code authorizes the board to revoke or suspend a license on the grounds that a person has been convicted of a felony that directly relates to the duties and responsibilities of the licensed occupation.

(iii) Because the provisions of the Licensing Acts may be based on either conviction or a form of deferred adjudication, the board determines that the requirements of the Act are stricter than the requirements of Chapter 53 and, therefore, the board is not required to comply with Chapter 53, pursuant to §153.0045 of the Act.

(iv) Upon the initial conviction for any felony, the board shall suspend a physician's license, in accordance with §164.057(a)(1)(A), of the Act.

(v) Upon final conviction for any felony, the board shall revoke a physician's license, in accordance with §164.057(b) of the Act.

(B) Misdemeanors.

(i) Section 164.051(a)(2)(B) of the Act authorizes the board to take disciplinary action based on a conviction, deferred adjudication, community supervision, or deferred disposition for any misdemeanor involving moral turpitude.

(ii) Chapter 53, Texas Occupations Code authorizes the board to revoke or suspend a license on the grounds that a person has been convicted of a misdemeanor that directly relates to the duties and responsibilities of the licensed occupation.

(iii) For a misdemeanor involving moral turpitude, the provisions of §164.051(a)(2) of the Medical Practice Act and §205.351(a)(7) of the Acupuncture Act, may be based on either conviction or a form of deferred adjudication, and therefore the board determines that the requirements of these licensing acts are stricter than the requirements of Chapter 53 and the board is not required to comply with Chapter 53, pursuant to §153.0045 of the Act.

(iv) The Medical Practice Act and the Acupuncture Act do not authorize disciplinary action based on conviction for a misdemeanor that does not involve moral turpitude. The Physician Assistant Act does not authorize disciplinary action based on conviction for a misdemeanor. Therefore these licensing acts are not stricter than the requirements of Chapter 53 in those situations. In such situations,

the conviction will be considered to directly relate to the practice of medicine if the act:

- (I) arose out of the practice of medicine, as defined by the Act;
- (II) arose out of the practice location of the physician;
- (III) involves a patient or former patient;
- (IV) involves any other health professional with whom the physician has or has had a professional relationship;
- (V) involves the prescribing, sale, distribution, or use of any dangerous drug or controlled substance; or
- (VI) involves the billing for or any financial arrangement regarding any medical service;

(v) Misdemeanors involving moral turpitude. Misdemeanors involving moral turpitude, within the meaning of the Act, are those that involve dishonesty, fraud, deceit, misrepresentation, deliberate violence, or that reflect adversely on a licensee's honesty, trustworthiness, or fitness to practice under the scope of the person's license.

(C) In accordance with §164.058 of the Act, the board shall suspend the license of a licensee serving a prison term in a state or federal penitentiary during the term of the incarceration regardless of the offense.

(7) Violations of the Health and Safety Code. In accordance with §164.055 of the Act, the Board shall take appropriate disciplinary action against a physician who violates §170.002 or Chapter 171, Texas Health and Safety Code.

(8) For purposes of §164.051(a)(4)(C) of the Texas Occupations Code, any use of a substance listed in Schedule I, as established by the Commissioner of the Department of State Health Services under Chapter 481, or as established under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. §801 et seq.) constitutes excessive use of such substance.

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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Mari Robinson, J.D.  
Executive Director  
Texas Medical Board  
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For further information, please call: (512) 305-7016

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**PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS**

**CHAPTER 461. GENERAL RULINGS**

**22 TAC §461.10**

The Texas State Board of Examiners of Psychologists adopts an amendment to §461.10 without changes to the proposed text as published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2669). The rule will not be republished.

The amendment is being adopted to ensure the protection and safety of the public.

The amendment as adopted will increase licensure mobility, clarify exemption under the Psychologists' Licensing Act, and better ensure compliance with the letter and spirit of §501.004 of the Occupations Code. Individuals with doctoral degrees in psychology come to Texas from all over the United States and Canada to complete the clinical training required for licensure and/or board certification by providing psychological services in recognized training institutions and facilities. Many of these individuals plan on ultimately becoming licensed and practicing in states other than Texas. Since the postdoctoral fellowship is essentially a required or expected part of training, in spirit, it falls within the category of "course of study" as listed in Tex. Occ. Code Ann. §501.004(a)(2). Moreover, because these individuals may not be staying in Texas to practice, it may be considered unreasonable to expect them to start the licensure process by applying for the PLP, though such may be of financial benefit to the facility in which they obtain their training. In terms of the "course of study" issue, postdoctoral programs meeting national guidelines include didactics in addition to research and other nonclinical activities.

No comments were received regarding the adoption of the amendment.

The amendment is adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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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Darrel D. Spinks  
Executive Director  
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For further information, please call: (512) 305-7706

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**CHAPTER 469. COMPLAINTS AND ENFORCEMENT**

**22 TAC §469.13**

The Texas State Board of Examiners of Psychologists adopts an amendment to §469.13, concerning Non-Compliance with Professional Development Requirements, with changes to the proposed text as published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2670). The rule will be republished.

The amendment is being adopted to ensure the protection and safety of the public.

The amendment as adopted is necessary to resolve a conflict with the requirement set forth in Board rule §461.11(c)(5) that all professional development hours be obtained during the 12-month period preceding a licensee's renewal date.

No comments were received regarding the adoption of the amendment.

The amendment is adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

§469.13. *Non-Compliance with Professional Development Requirements.*

(a) The license of any licensee who fails to comply with the Board's mandatory professional development requirements pursuant to Board rule §461.11 of this title (relating to Professional Development), is on delinquent status as of the renewal date of the license.

(b) If professional development compliance is not proved within 45 days after the license renewal date, the licensee shall be subject to a complaint for violation of Board rule §461.11(a) of this title applies.

(c) A person may not engage in the practice of psychology with a delinquent license, as stated in Board rule §461.7(c) of this title (relating to License Statuses).

(d) If the license is not activated within one year of expiration and goes void, a new application must be filed to obtain active licensure, and the professional development complaint will be reinstated. The complaint must be resolved before a new license will be issued.

(e) Upon notice of professional development violation, the licensee may:

(1) Submit proof that professional development was obtained within the year preceding the renewal date. Upon receipt and approval, the complaint will be dismissed;

(2) For a first violation, submit proof of late compliance and pay an administrative penalty, which is not considered disciplinary action;

(3) Resign the license in lieu of adjudication by requesting an agreed order of resignation; or

(4) Appear before an informal settlement conference to resolve the matter.

(f) Any payment of an administrative penalty to resolve a complaint is in addition to any applicable renewal fee and late renewal fee assessed by the Licensing Division for late license renewal, pursuant to Board rule §473.4 of this title (relating to Late Fees for Renewals (Not Refundable)).

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 June 13, 2016.

TRD-201602981

Darrel D. Spinks

Executive Director

Texas State Board of Examiners of Psychologists

Effective date: July 3, 2016

Proposal publication date: April 15, 2016

For further information, please call: (512) 305-7706



## TITLE 28. INSURANCE

## PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

### CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

#### SUBCHAPTER C. MEDICAL FEE GUIDELINES

##### 28 TAC §134.202, §134.302

The Texas Department of Insurance, Division of Workers' Compensation (division) adopts the repeal of 28 TAC §134.202, concerning medical fee guideline, and 28 TAC §134.302, concerning dental fee guideline. The repealed sections are adopted without changes to the proposed text published in the March 18, 2016, issue of the *Texas Register* (41 TexReg 2117). No request for a public hearing was submitted to the division and the division did not receive written comments. The adoption of amended 28 TAC §134.204 and new 28 TAC §§134.209, 134.210, 134.215, 134.220, 134.225, 134.230, 134.235, 134.239, 134.240, and 134.250 is published elsewhere in this issue of the *Texas Register*.

The repeal is necessary because the sections are no longer effective. Identical requirements of 28 TAC §134.202 were adopted in 28 TAC §134.203 and §134.204, which superseded the section for professional services and workers' compensation specific services provided on or after March 1, 2008. Title 28 TAC §134.302 was superseded by 28 TAC §134.303 for dental services on or after June 15, 2005.

The division did not receive any comments on the published proposal for repeal.

The repeal is adopted under Labor Code §402.00111 and §402.061.

Labor Code §402.00111 requires the commissioner of workers' compensation to exercise all executive authority, including rule-making authority, under Title 5 of the Labor Code. Labor Code §402.061 requires the commissioner of workers' compensation to adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

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 June 17, 2016.

TRD-201603099

Nicholas Canaday III

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Texas Department of Insurance, Workers' Compensation Division

Effective date: July 7, 2016

Proposal publication date: March 18, 2016

For further information, please call: (512) 804-4703



28 TAC §§134.204, 134.209, 134.210, 134.215, 134.220, 134.225, 134.230, 134.235, 134.239, 134.240, 134.250

The Texas Department of Insurance, Division of Workers' Compensation (division) adopts non-substantive amendments to 28 Texas Administrative Code (TAC) §134.204 and adopts new 28 TAC §§134.209, 134.210, 134.215, 134.220, 134.225, 134.230, 134.235, 134.239, 134.240, and 134.250 concerning medical fee guidelines for workers' compensation. The amended and new sections are adopted without changes to the proposed text published in the March 18, 2016, issue of the *Texas Register* (41 TexReg 2118). A correction of error notice was published in the April 1, 2016, issue of the *Texas Register* (41 TexReg 2523) to correct errors in the preamble published in the March 18, 2016, issue of the *Texas Register* (41 TexReg 2118). No request for a public hearing was submitted to the division.

New 28 TAC §§134.209, 134.210, 134.215, 134.220, 134.225, 134.230, 134.235, 134.239, 134.240, and 134.250 include non-substantive changes to conform to current agency style, correct grammatical errors, and renumber or reletter subsections. The new sections become applicable for workers' compensation specific codes, services and programs provided on or after September 1, 2016 to allow system participants sufficient time to adjust to the reorganization. The adoption of the repeal of §134.202 and §134.302 is published elsewhere in this issue of the *Texas Register*.

In accordance with Government Code §2001.033, the division's reasoned justification for these rules is set out in this order, which includes the preamble. The following paragraphs include a detailed section-by-section description and reasoned justification of amendments to 28 TAC §134.204 and new 28 TAC §§134.209, 134.210, 134.215, 134.220, 134.225, 134.230, 134.235, 134.239, 134.240, and 134.250.

The amendments and new sections are necessary to reorganize existing 28 TAC §134.204 by adding its requirements to new 28 TAC §§134.209, 134.210, 134.215, 134.220, 134.225, 134.230, 134.235, 134.239, 134.240, and 134.250 for workers' compensation specific codes, services, and programs provided on or after September 1, 2016. The division clarifies that the reorganization is non-substantive and does not include new requirements for system participants. The new sections largely mirror existing 28 TAC §134.204 and include non-substantive changes. The reorganization creates a more comprehensive format by separating the billing and reimbursement requirements for multiple services into new sections. The reorganization is necessary to streamline compliance for system participants and streamline future amendments to the guidelines. The reorganization will improve the division's ability to make future amendments to the multiple services without resulting in one complex rule project. The division declines to repeal existing 28 TAC §134.204 at this time. The division clarifies that existing 28 TAC §134.204 will remain applicable for workers' compensation specific codes, services, and programs provided from March 1, 2008 until September 1, 2016.

Amended 28 TAC §134.204. Amended 28 TAC §134.204 addresses the medical fee guideline for workers' compensation specific codes, services, and programs provided from March 1, 2008 until September 1, 2016. Amended 28 TAC §134.204(a)(2) deletes the phrase "on or after" and adds the word "from" and the phrase "until September 1, 2016." These amendments are necessary to prevent the applicability of existing 28 TAC §134.204 from running concurrently with new 28 TAC §§134.209, 134.210, 134.215, 134.220, 134.225, 134.230, 134.235, 134.239, 134.240, and 134.250. The new sections replace existing 28 TAC §134.204 for workers' compensation

specific codes, services, and programs provided on or after September 1, 2016. The division clarifies that existing 28 TAC §134.204 and the new sections will not be applicable for workers' compensation specific codes, services, and programs at the same time. The delayed applicability date of September 1, 2016 will allow system participants sufficient time to adjust to the reorganization before the new sections become applicable for workers' compensation specific codes, services, and programs.

New 28 TAC §134.209. New 28 TAC §134.209 addresses the applicability for the medical fee guideline for workers' compensation specific codes, services, and programs outlined in new §§134.210, 134.215, 134.220, 134.225, 134.230, 134.235, 134.239, 134.240, and 134.250. New 28 TAC §134.209 largely mirrors existing 28 TAC §134.204(a), with non-substantive changes. New 28 TAC §134.209 does not include the title "Medical Fee Guideline for Workers' Compensation Specific Services" and instead includes the title "Applicability." The title "Applicability" better reflects the content of the new 28 TAC §134.209. The new section also does not include the phrase "applicability of this rule is as follows:" because the new section title is "Applicability" therefore including the phrase is redundant.

New 28 TAC §134.209(a)(1) - (5) largely mirrors existing 28 TAC §134.204(a)(1)(A) - (E), with non-substantive changes. New 28 TAC §134.209(a) does not include the phrase "This section applies" and instead includes the phrase "Sections 134.209, 134.210, 134.215, 134.220, 134.225, 134.230, 134.235, 134.239, 134.240, and 134.250 of this title apply" to specify the new citation numbers applicable to workers' compensation specific codes, services, and programs.

New 28 TAC §134.209(a) does not include subparagraphs (A) - (E) and instead includes paragraphs (1) - (5). The renumbering is necessary because the phrase "applicability of this rule is as follows:" is excluded.

New 28 TAC §134.209(a)(1) does not include the title of the referenced rule citation in existing 28 TAC §134.204(a)(1)(A) "(relating to Medical Fee Guideline for Professional Service)" to conform to current agency style.

New 28 TAC §134.209(b) largely mirrors existing 28 TAC §134.204(a)(2), with non-substantive changes. New 28 TAC §134.209(b) does not include the phrase "this section applies" and instead includes the phrase "Sections 134.209, 134.210, 134.215, 134.220, 134.225, 134.230, 134.235, 134.239, 134.240, and 134.250 of this title apply" to specify the new citation numbers applicable to workers' compensation specific codes, services, and programs.

New 28 TAC §134.209(b) does not include the date "March 1, 2008" and instead includes the date "September 1, 2016." This is necessary because the new sections will have a delayed applicability date. The delayed applicability date allows time for system participants to adjust to the reorganization and new sections before the new sections become applicable for workers' compensation specific services. The division expects the new sections to become applicable to workers' compensation specific codes, services, and programs provided on or after September 1, 2016.

New 28 TAC §134.209(c) includes a severability clause. The inclusion is necessary to ensure that any invalidity of the rules will not affect parts of the rules given effect without the invalid provision or application.

New 28 TAC §134.209(d) largely mirrors existing 28 TAC §134.204(m), with non-substantive changes. New 28 TAC

§134.209(d) does not include the introductory sentence "the following shall apply to Treating Doctor Examination to Define the Compensable Injury" to conform to current agency style.

New 28 TAC §134.209(d) does not include the phrase "this type of" because the phrase is no longer necessary without the introductory sentence "the following shall apply to Treating Doctor Examination to Define the Compensable Injury."

New 28 TAC §134.209(d) does not include the title of the referenced rule citation in existing 28 TAC §134.204(m) "(relating to Treating Doctor Examination to Define Compensable Injury)" to conform to current agency style.

New 28 TAC §134.209(d) includes the phrase "a treating doctor" and the phrase "to define the compensable injury" because the phrases are necessary to specify the type of examination.

New 28 TAC §134.210. New 28 TAC §134.210 addresses general provisions applicable to the medical fee guideline for workers' compensation specific services.

New 28 TAC §134.210 largely mirrors existing 28 TAC §134.204(a)(5), (b) - (d), and (n), with non-substantive changes. New 28 TAC §134.210 includes the title "Medical Fee Guideline for Workers' Compensation Specific Services" because the title reflects the content of the section.

New 28 TAC §134.210 does not include existing 28 TAC §134.204(a)(3) and (4) because the paragraphs contain rule citations that are no longer effective.

New 28 TAC §134.210(a) largely mirrors existing 28 TAC §134.204(a)(5), with non-substantive changes. New 28 TAC §134.210(a) does not include the phrase "the Texas Department of Insurance, Division of Workers' Compensation (Division)," and instead includes the word "division" to conform to current agency style.

New 28 TAC §134.210(a) does not include the title of the referenced rule citation in existing 28 TAC §134.204(a)(5) "(relating to MDR of Medical Necessity Disputes by Independent Review Organizations)" to conform to current agency style.

New 28 TAC §134.210(b)(1) - (3) largely mirrors existing 28 TAC §134.204(b)(1) - (3), with non-substantive changes. New 28 TAC §134.210(b) does not include unnecessary capitalization to conform to current agency style.

New 28 TAC §134.210(b)(1) does not include the introductory word "Billing" to conform to current agency style.

New 28 TAC §134.210(b)(1) includes the phrase "Current Procedural Terminology" before the abbreviation "CPT". The non-substantive change is necessary for clarity.

New 28 TAC §134.210(b)(1) does not include the word "codes" because the word is used twice to describe Level I and Level II Healthcare Common Procedure Coding System codes and the second use is repetitive.

New 28 TAC §134.210(b)(1) does not include the abbreviation "HCPs" and instead includes the phrase "health care providers." The non-substantive change is necessary for clarity.

New 28 TAC §134.210(b)(1) does not include unnecessary capitalization to conform to current agency style.

New 28 TAC §134.210(b)(2) does not include the introductory word "Modifiers" to conform to current agency style.

New 28 TAC §134.210(b)(2) includes the word "insurance" before the word "carriers" to conform to current agency style.

New 28 TAC §134.210(b)(2) does not include subsection "(n)" and instead includes subsection "(e)" because new 28 TAC §134.210(e) contains division-specific modifiers.

New 28 TAC §134.210(b)(3) does not include the introductory phrase "Incentive Payments" to conform to current agency style.

New 28 TAC §134.210(b)(3) does not include the phrase "subsections (d), (e), (g), (i), (j), and (k)" and instead includes the phrase "§§134.220, 134.225, 134.235, 134.240, and 134.250 of this title and subsection (d)" because the new sections reflect the content of existing 28 TAC §134.204(e), (g), (i), (j), and (k).

New 28 TAC §134.210(b)(3) does not include the title of the referenced rule citation in existing 28 TAC §134.204(b)(3) "(relating to Incentive Payments for Workers' Compensation Underserved Areas)" to conform to current agency style.

New 28 TAC §134.210(c) mirrors existing §134.204(c).

New 28 TAC §134.210(d)(1) - (3) largely mirrors existing 28 TAC §134.204(d)(1) - (3), with non-substantive changes. New 28 TAC §134.210(d) does not include the phrase "of the Labor Code" after the citation and instead includes the phrase "Labor Code" before the citation to conform to current agency style.

New 28 TAC §134.210(d)(2) does not include unnecessary capitalization to conform to current agency style.

New 28 TAC §134.210(d)(3) does not include the title of the referenced rule citation "(relating to Medical Reimbursement)" to conform to current agency style.

New 28 TAC §134.210(e)(1) - (24) largely mirrors existing 28 TAC §134.204(n)(1) - (24), with non-substantive changes. New 28 TAC §134.210(e) does not include unnecessary capitalization to conform to current agency style.

New 28 TAC §134.210(e), (e)(1), and (18) do not include the abbreviation "HCP" and instead include the phrase "health care provider." The non-substantive change is necessary for clarity.

New 28 TAC §134.210(e)(14) and (15) do not include the word "of" in the phrase "of at least" to conform to current agency style.

New 28 TAC §134.210(e)(20) does not include the phrase "maximum medical improvement" and instead includes the abbreviation "MMI." The non-substantive change is necessary for consistency.

New 28 TAC §134.215. New 28 TAC §134.215 addresses the medical fee guideline for home health services. New 28 TAC §134.215 largely mirrors existing 28 TAC §134.204(f), with non-substantive changes. New 28 TAC §134.215 includes the title "Home Health Services" because the title reflects the content of the section.

New 28 TAC §134.215 does not include subsection "(f)" because new 28 TAC §134.215 is an independent section that contains an implied subsection and the lettering is no longer necessary to conform to Texas Register requirements.

New 28 TAC §134.215 does not include unnecessary punctuation because of the change to sentence structure.

New 28 TAC §134.215 includes the phrase "the maximum allowable reimbursement (MAR)" for clarity. New 28 TAC §134.215 does not include the phrase "to determine the MAR" because the MAR provided for home health services is 125% of the Texas

Medicaid fee schedule. New 28 TAC §134.215 also does not include the phrase "the MAR" because the phrase "maximum allowable reimbursement (MAR)" is included and the phrase "the MAR" is repetitive.

New 28 TAC §134.220. New 28 TAC §134.220 addresses the medical fee guideline for case management services. New 28 TAC §134.220 largely mirrors existing 28 TAC §134.204(e), with non-substantive changes. New 28 TAC §134.220 includes the title "Case Management Services" because the title reflects the content of this section.

New 28 TAC §134.220 does not include a subsection "(e)" because new 28 TAC §134.220 is an independent section that contains an implied subsection and the lettering is no longer necessary to conform to Texas Register requirements.

New 28 TAC §134.220 does not include unnecessary capitalization to conform to current agency style.

New 28 TAC §134.220 does not include the word "is" and instead includes the word "are". The non-substantive change is necessary to correct a grammatical error.

New 28 TAC §134.220 does not include the abbreviation "HCP" and instead includes the phrase "health care provider." The non-substantive change is necessary for clarity.

New 28 TAC §134.225. New 28 TAC §134.225 addresses the medical fee guideline for functional capacity evaluations. New 28 TAC §134.225 largely mirrors existing 28 TAC §134.204(g), with non-substantive changes. New 28 TAC §134.225 includes the title "Functional Capacity Evaluations" because the title reflects the contents of this section.

New 28 TAC §134.225 does not include a subsection "(g)" because new 28 TAC §134.225 is an independent section that contains an implied subsection and the lettering is no longer necessary to conform to Texas Register requirements.

New 28 TAC §134.225 does not include unnecessary capitalization to conform to current agency style.

New 28 TAC §134.230. New 28 TAC §134.230 addresses the medical fee guideline for return to work rehabilitation programs. New 28 TAC §134.230 largely mirrors existing 28 TAC §134.204(h), with non-substantive changes. New 28 TAC §134.230 includes the title "Return to Work Rehabilitation Programs" because the title reflects the content of this section.

New 28 TAC §134.230 does not include a subsection "(h)" because new 28 TAC §134.230 is an independent section that contains an implied subsection and the lettering is no longer necessary to conform to Texas Register requirements.

New 28 TAC §134.230 does not include unnecessary capitalization to conform to current agency style.

New 28 TAC §134.230 includes the word "insurance" before the word "carrier" to conform to current agency style.

New 28 TAC §134.230(1)(A) includes the phrase "maximum allowable reimbursement (MAR)." The non-substantive change is necessary for clarity.

New 28 TAC §134.230(3)(B) does not include the numeral "8" and instead includes the word "eight" for consistency and to conform to current agency style.

New 28 TAC §134.235. New 28 TAC §134.235 addresses the medical fee guideline for return to work/evaluation of medical care examinations. New 28 TAC §134.235 largely mirrors ex-

isting 28 TAC §134.204(k), with non-substantive changes. New 28 TAC §134.235 includes the title "Return to Work/Evaluation of Medical Care Examinations" because the title reflects the content of this section.

New 28 TAC §134.235 does not include a subsection "(k)" because new 28 TAC §134.235 is an independent section that contains an implied subsection and the lettering is no longer necessary to conform to Texas Register requirements.

New 28 TAC §134.235 does not include unnecessary capitalization to conform to current agency style.

New 28 TAC §134.235 includes the phrase "maximum medical improvement/impairment rating (MMI/IR)." The non-substantive change is necessary for clarity.

New 28 TAC §134.235 does not include the phrase "subsection (i) of this section" and instead includes the phrase "§134.240 of this title." The non-substantive change is necessary because new 28 TAC §134.240 reflects the content of existing 28 TAC §134.204(i).

New 28 TAC §134.239. New 28 TAC §134.239 addresses billing for work status reports conducted separately from designated doctor examinations, maximum medical improvement evaluations, or impairment rating examinations. New 28 TAC §134.239 largely mirrors existing 28 TAC §134.204(l), with non-substantive changes. New 28 TAC §134.239 includes the title "Billing for Work Status Reports" because the title reflects the content of this section.

New 28 TAC §134.239 does not include a subsection "(l)" because new 28 TAC §134.239 is an independent section that contains an implied subsection and the lettering is no longer necessary to conform to Texas Register requirements.

New 28 TAC §134.239 does not include the sentence "the following shall apply to work status reports" because the sentence is no longer necessary to separate subsections.

New 28 TAC §134.239 does not include unnecessary capitalization to conform to current agency style.

New 28 TAC §134.239 does not include the phrase "subsections (i) and (j) of this section" and instead includes the phrase "§134.240 and §134.250 of this title" because new 28 TAC §134.240 and §134.250 reflects the content of existing 28 TAC §134.204(i) and (j).

New 28 TAC §134.239 does not include the title of the referenced rule citation in existing 28 TAC §134.204(l) "(relating to Work Status Reports)" to conform to current agency style.

New 28 TAC §134.240. New 28 TAC §134.240 addresses the medical fee guideline for designated doctor examinations. New 28 TAC §134.240 largely mirrors existing 28 TAC §134.204(i), with non-substantive changes. New 28 TAC §134.240 includes the title "Designated Doctor Examinations" because the title reflects the content of this section.

New 28 TAC §134.240 does not include a subsection "(i)" because new 28 TAC §134.240 is an independent section that contains an implied subsection and the lettering is no longer necessary to conform to Texas Register requirements.

New 28 TAC §134.240 does not include unnecessary capitalization to conform to current agency style.

New 28 TAC §134.240(1)(A) - (B) does not include the phrase "subsection (j) of this section" and instead includes the phrase

"§134.250 of this title" because new 28 TAC §134.250 reflects the content of existing 28 TAC §134.204(j).

New 28 TAC §134.240(1)(C) - (F) and (2)(A) - (C) do not include the phrase "subsection (k) of this section" and instead includes the phrase "§134.235 of this title" because new 28 TAC §134.235 reflects the content of existing 28 TAC §134.204(k).

New 28 TAC §134.240(2) does not include the word "subsection" and instead includes the word "section" because new 28 TAC §134.240 is an independent section.

New 28 TAC §134.250. New 28 TAC §134.250 addresses the medical fee guideline for maximum medical improvement evaluations, and impairment rating examinations. New 28 TAC §134.250 largely mirrors existing 28 TAC 134.204(j), with non-substantive changes. New 28 TAC §134.250 includes the title "Maximum Medical Improvement/Impairment Rating Examinations" because the title reflects the content of this section.

New 28 TAC §134.250 does not include a subsection "(j)" because new 28 TAC §134.250 is an independent section that contains an implied subsection and the lettering is no longer necessary to conform to Texas Register requirements.

New 28 TAC §134.250 does not include unnecessary capitalization to conform to current agency style.

New 28 TAC §134.250(1) includes the phrase "maximum allowable reimbursement (MAR)." The non-substantive change is necessary for clarity.

New 28 TAC §134.250(1)(D) does not include unnecessary punctuation to conform to current agency style.

New 28 TAC §134.250(1)(E) does not include the phrase "Act and Division rules in" and instead includes the phrase "Labor Code and" to conform to current agency style.

New 28 TAC §134.250(1)(E) does not include the title of the referenced rule citation in existing 28 TAC §134.204(j)(1)(E) "(relating to Impairment and Supplemental Income Benefits)" to conform to current agency style.

New 28 TAC §134.250(2) does not include the phrase "An HCP" and instead includes the phrase "A health care provider." The non-substantive change is necessary for clarity.

New 28 TAC §134.250(2) does not include the phrase "Act and Division rules in" and instead includes the phrase "Labor Code and" to conform to current agency style.

New 28 TAC §134.250(2)(A) - (C) and (3)(B)(i) - (ii) does not include the word "subsection" and instead includes the word "section" because new 28 TAC §134.250 is an independent section.

New 28 TAC §134.250(3)(A)(ii) corrects punctuation to conform to current agency style.

New 28 TAC §134.250(3)(B) and (3)(B)(i) do not include unnecessary punctuation to conform to current agency style.

New 28 TAC §134.250(4)(A) does not include the abbreviation "HCP" and instead includes the phrase "health care provider." The non-substantive change is necessary for clarity.

New 28 TAC §134.250(4)(B) does not include the citation §130.6 because the citation 28 TAC §130.6 is obsolete.

New 28 TAC §134.250(4)(B) does not include the title of the referenced rule citation in existing 28 TAC §134.204(j)(4)(B) "(relating to Designated Doctor Examinations for Maximum Medical

Improvement and/or Impairment Ratings)" to conform to current agency style.

New 28 TAC §134.250(4)(C)(ii)(l) does not include the numeral "4th" and instead includes the word "fourth" to conform to current agency style.

New 28 TAC §134.250(4)(C)(iv) does not include the title of the referenced rule citation in existing 28 TAC §134.204(j)(4)(C)(iv) "(relating to Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment)" to conform to current agency style.

New 28 TAC §134.250(4)(C)(v) does not include the abbreviation "HCP" and instead includes the phrase "health care provider." The non-substantive change is necessary for clarity.

New 28 TAC §134.250(5) does not include the word "subsection" and instead includes the word "section" because new 28 TAC §134.250 is an independent section.

New 28 TAC §134.250(6) does not include the phrase "Act and Division Rules" and instead includes the phrase "Labor Code and" to conform to current agency style.

#### SUMMARY OF COMMENTS AND AGENCY RESPONSE.

##### General

Comment: A commenter requests the division consider increasing reimbursements for participating designated doctors as necessary to safekeep the current process. The commenter also requests the division consider a fee of \$100.00 for no-show appointments when an injured employee fails to show for a designated doctor exam. The commenter states that there are a lot of hours and sacrifice involved to do a competent and complete job.

Agency Response: The division declines to make the suggested change. The commenter's request is considered substantive and outside the scope of the non-substantive reorganization of 28 TAC §134.204.

Comment: A commenter states that part of 28 TAC §127.10(a)(3) (regarding General Procedures for Designated Doctor Examinations) does not read as intended and requests the division to delete the phrase "within one working day of the examination" and add the phrase "at least one working day prior to the examination."

Agency Response: The division declines to make the suggested change. The commenter's request relates to 28 TAC Chapter 127 and is outside the scope of the non-substantive reorganization of 28 TAC §134.204.

##### 28 TAC §134.204 and 28 TAC §134.210

Comment: A commenter requests a CPT code in the division-specific modifiers section of 28 TAC §134.204(n)(5) and 28 TAC §134.210(e)(5) be changed.

Agency Response: The division appreciates the comment but declines to make the suggested change at this time because the request is considered a substantive change and outside the scope of the non-substantive reorganization 28 TAC §134.204.

##### 28 TAC §134.250

Comment: A commenter questions why a \$50.00 reimbursement for incorporating a specialist's report in the final assignment of an impairment rating is allowed only for non-musculoskeletal body areas. The commenter requests that a desig-

nated doctor be reimbursed when incorporating the findings of all types of additional testing into the maximum medical improvement and/or impairment rating report, and requests the division remove "non-musculoskeletal" from the rule.

Agency Response: The division declines to make the suggested change. The commenter's request is considered substantive and outside the scope of the non-substantive reorganization 28 TAC §134.204.

#### NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL

For: None

For with changes: None

Against: None

Neither for nor against: Two individuals

The amendments and new sections are adopted under Labor Code §§402.00111, 402.061, 408.021, 408.0252, 413.002, 413.007, 413.011, 413.012, 413.013, 413.014, 413.015, 413.016, 413.017, 413.019, 413.031, and 413.0511.

Labor Code §402.00111 requires the commissioner of workers' compensation to exercise all executive authority, including rule-making authority, under Title 5 of the Labor Code. Labor Code §402.061 requires the commissioner of workers' compensation to adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act. Labor Code §408.021 provides that an injured employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Labor Code §408.0252 permits the commissioner to identify areas of this state in which access to health care providers is less available and may adopt appropriate standards, guidelines, and rules regarding the delivery of health care in those areas. Labor Code §413.002 requires the division to monitor health care providers, insurance carriers, independent review organizations, and workers' compensation claimants who receive medical services to ensure the compliance of those persons with rules adopted by the commissioner relating to health care, including medical policies and fee guidelines. Labor Code §413.007 requires the division to maintain a statewide database of medical charges, actual payments, and treatment protocols that may be used in adopting and administering the medical policies and fee guidelines. Labor Code §413.011 requires the commissioner to adopt health care reimbursement policies and guidelines that reflect the standardized reimbursement structures found in other health care delivery systems and the fee guidelines must be fair and reasonable and designed to ensure the quality of medical care and to achieve effective medical cost control. The guidelines may not provide for payment of a fee in excess of the fee charged for similar treatment of an injured individual of an equivalent standard of living and paid by that individual or by someone acting on that individual's behalf. Labor Code §413.012 requires the division to review and revise the medical policies and fee guidelines at least every two years to reflect fair and reasonable fees and to reflect medical treatment or ranges of treatment that are reasonable or necessary at the time the review and revision is conducted. Labor Code §413.013 requires the commissioner to establish programs related to health care treatments and services for dispute resolution monitoring and review to ensure compliance with medical policies or guidelines. Labor Code §413.014 requires the commissioner to specify which health care treatments and services require preauthorization or concurrent re-

view by insurance carriers. Labor Code §413.015 requires the commissioner to review and audit insurance carriers payments of charges for medical services to ensure compliance of medical policies and fee guidelines adopted by the commissioner. Labor Code §413.016 requires the division to order a refund of charges paid to a health care provider in excess of those allowed by the medical policies or fee guidelines and investigate the potential violation. Labor Code §413.017 provides for a presumption of reasonableness for medical services consistent with the medical policies and fee guidelines. Labor Code §413.019 provides for payment of interest on delayed payments, refunds, or overpayments. Labor Code §413.031 provides for medical dispute resolution for a medical service provided. Labor Code §413.0511 requires the medical advisor to make recommendations regarding the adoption of rules and policies to develop, maintain, and review guidelines as provided by Labor Code §413.011.

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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TRD-201603100

Nicholas Canaday III

General Counsel

Texas Department of Insurance, Workers' Compensation Division

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For further information, please call: (512) 804-4703



## TITLE 31. NATURAL RESOURCES AND CONSERVATION

### PART 10. TEXAS WATER DEVELOPMENT BOARD

#### CHAPTER 371. DRINKING WATER STATE REVOLVING FUND

The Texas Water Development Board ("TWDB" or "Board") adopts without changes amendments to 31 Texas Administrative Code ("TAC") §§371.1, 371.2, 371.10 - 371.18, 371.20 - 371.24, 371.30 - 371.35, 371.40 - 371.42, 371.60 - 371.62, 371.70 - 371.74, 371.80 - 371.82, and 371.85 - 371.88, relating to the TWDB's administration of the Drinking Water State Revolving Fund ("DWSRF"). TWDB adopts new §§371.3, 371.4, 371.36, and 371.43 - 371.52 without changes. Repeals of existing §§371.3, 371.4, and 371.43 - 371.51 are simultaneously adopted elsewhere in this issue of the *Texas Register*. These changes were proposed in the April 1, 2016, issue of the *Texas Register* (41 TexReg 2397).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED AMENDMENTS AND NEW RULES.

The TWDB adopts revisions to numerous provisions in 31 TAC Chapter 371. Various revisions are adopted to provide greater clarity in this chapter of TWDB rules or to update rule provisions pursuant to TWDB practice. The specific provisions being revised and the reasons for the revisions are discussed in more detail below.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS AND NEW RULES.

*Subchapter A. General Program Requirements.*

*Section 371.1. Definitions.*

The definition of "Acquisition" is added to discuss eligible project costs and to describe a phase of the project.

The definition of "Applicant" is revised for clarity to focus on the repayment of the debt rather than ownership of the project.

The definition of "Application" is revised to expand the focus from solely 'forms' to 'forms and other information' that is submitted to the Board.

The definition of "Authorized representative" is revised to provide greater clarity.

The definition of "Bypass" is revised to incorporate the specific reasoning for passing over a higher ranked project in favor of lower ranked project.

The definition of "Commitment" is revised for clarity to refer directly to the Board resolution that constitutes the commitment rather than to the applicant's fulfillment of the conditions.

The definition of "Commitment term" is deleted because it is no longer needed with the added definition of "Expiration date," which provides more clarity.

The definition of "Construction" is deleted because it is no longer necessary.

The definition of "Construction phase" is added to provide greater clarity.

The definition of "Corporation" is deleted because it is not necessary.

The definition of "Design" is revised for clarity.

The definition of "Disadvantaged community" is revised to incorporate unemployment rates and population trends into the affordability criteria that currently consider only the income level.

The definition of "Disaster" is revised to add extreme heat.

The definition of "Eligible applicant" is revised to include a privately-owned community water system, which is currently eligible, as one of the eligible entities listed in the rule.

The definition of "Environmental affirmation" is deleted because it is no longer needed.

The definition of "Expiration date" is added to provide greater clarity regarding the Board's offer of financial assistance and is used to clarify the timeframe allowed for the applicant to submit a request to extend the Board's commitment.

The definition of "Financial assistance" is revised to provide greater clarity.

The definition of "Invited Projects List" is retitled "Initial Invited Projects List" to be consistent with the terminology used in the Board's Intended Use Plan.

The definition of "Lending rate" is revised for greater clarity to distinguish between financial assistance, which must be repaid and accrues interest, and principal forgiveness, which is not repaid and does not accrue interest.

The definition of "Nonprofit noncommunity (NPNC water system)" is revised to focus on the operation of the system rather than ownership by a non-profit organization.

The definition of "Person" is revised to align more closely to the definition in Chapter 15, Subchapter J, of the Texas Water Code.

The definition of "Planning" is added to reference a particular phase or aspect of the project.

The definition of "Population" is revised to specify that the data used must be the latest data available from the U.S. Census Bureau, such as the American Community Survey data released annually, rather than the decennial census.

The definition of "Principal forgiveness" is added to specify the type of additional subsidization that is being offered for the program.

The definition of "Project" is revised to provide greater clarity.

The definition of "Project information form" is retitled as "Project Information Form (PIF)" and is revised to clarify that the information submitted must conform to the agency's requirements.

The definition of "Project Priority List" is revised for clarity to reference the specific list found in the Intended Use Plan that contains the projects eligible for funding ranked according to their rating criteria score.

The definition of "Ready to proceed" is revised for clarification purposes.

The definition of "Subsidy" is revised to reference only a reduction in the interest rate from the market interest rate rather than principal forgiveness.

The definition of "Utility Commission" is added to delineate between the Public Utility Commission of Texas and the Texas Commission on Environmental Quality because of new powers and duties of the Public Utility Commission.

Other non-substantive, grammatical changes are made for clarification and grammatical purposes. Subsections are renumbered to reflect added and removed definitions.

*Section 371.2. Projects and Activities Eligible for Assistance.*

Section 371.2 is revised to include a list of all eligible project categories, eligible project-related costs, and ineligible projects in accordance with the Federal Safe Drinking Water Act ("FSDWA") (42 U.S.C. §§300f *et seq.*). While all projects and activities eligible under federal law are listed, the specific projects and activities eligible for assistance under the Texas DWSRF program for a particular funding year will be established annually in the DWSRF's Intended Use Plan. This will allow greater flexibility to adjust the program based on needs and capacity.

*Section 371.3. Other Authorized Activities: Source Water Protection and Technical Assistance.*

New §371.3 is added. Language from previously numbered §371.3 and §371.4 is added and revised to align the language more closely to the federal regulations. The reference to limitations on the use of funds for these purposes includes the percentages specified in the federal regulations.

*Section 371.4. Federal Requirements.*

A new §371.4 is added to discuss the federal requirements currently applicable to DWSRF projects. The applicability of the American Iron and Steel requirement currently established an-

nually through the federal appropriations for the program will be specified in the Intended Use Plan.

*Subchapter B. Financial Assistance.*

*Section 371.10. Type of Financial Assistance.*

Section 371.10 is revised to state that the executive administrator shall determine the type of financial assistance in accordance with the types of financial assistance authorized by the Act.

*Section 371.11. Financing of Planning, Acquisition, and Design Phases.*

Section 371.11 is revised to reflect a change in terminology regarding the phases of projects. It is revised to state that applicants may request financial assistance for planning, acquisition, and design without a determination that the project is ready to proceed. It also deletes the reference to applicants who have completed the planning, acquisition, and design for a proposed project within three years of the closing date for financial assistance receiving priority for construction phase funding of the project in the next available IUP if the project is ready to proceed. This priority is retained elsewhere in §371.21(d). The title is revised from "Planning, Acquisition, and Design Funding" to "Financing of Planning, Acquisition, and Design Phases."

*Section 371.12. Construction Phase Funding.*

Section 371.12 is revised to reflect a change in terminology regarding the phases of projects. The title is revised from "Construction Funding" to "Construction Phase Funding."

*Section 371.13. Pre-Design Funding Option.*

Section 371.13 is revised to reflect a change in terminology regarding the phases of projects.

*Section 371.14. Lending Rates.*

Section 371.14 is revised to make private and taxable entities eligible for the interest rate reduction. As part of the revision to clarify eligibility for the reduction, TWDB is revising the method of establishing the fixed rate scale and determining the amount of adjustment from the market interest rate. TWDB is not altering the interest rate reduction a borrower would have received under the current program practices. For consistency, the point in time for determining the total fixed lending rate reduction will be set at 30 days from the proposed date the application will be presented to the Board for approval. Other wording changes were made to provide greater clarity. In addition, references to the maximum reduction level have been removed to allow greater flexibility in establishing a significant interest rate reduction consistent with projections of the long-term financial health of the DWSRF. The interest rate reduction will instead be established annually in DWSRF's Intended Use Plan.

*Section 371.15. Fees for Financial Assistance.*

Section 371.15 is revised to allow greater flexibility to make annual adjustment to the DWSRF program based on needs and projected financial conditions. To accomplish this, the amount of any administrative loan origination fee, up to the maximum specified amount, will be established in the DWSRF's Intended Use Plan. The title is revised from "Fees of Financial Assistance" to "Fees for Financial Assistance."

*Section 371.16. Term of Financial Assistance.*

Section 371.16 is revised to incorporate a reference to the Federal Safe Drinking Water Act with respect to the expected design life of extended term financing offered to a disadvantaged

community and extended financing through the purchase of debt obligations of a municipality.

*Section 371.17. Principal Forgiveness.*

Section 371.17 is revised to substitute "principal forgiveness" for "subsidies" in the title and text. As explained under Definitions, principal forgiveness is a type of additional subsidization offered in the program. The term "subsidy" now refers only to a reduction in the interest rate from the market interest rate rather than principal forgiveness.

*Subchapter C. Intended Use Plan.*

*Section 371.20. Submission of Project Information Forms.*

Section 371.20 is revised to clarify the requirements for submission of project information forms. It specifically references submission of Project Information Forms to be included on an amended Project Priority List within the Intended Use Plan. It also establishes that the required information that must be in a Project Information Form will be specified in Board guidance. It clarifies that a registered engineer must properly affix the engineer's seal, signature, and date of execution to the project information form if the amount requested from the program is equal to or greater than \$100,000.

*Section 371.21. Rating Process.*

Section 371.21 is revised to incorporate a consideration of effective management in the rating factors for the program. A new subsection (f) is added to discuss the selection process for urgent need financial assistance, including the ability to bypass higher rated projects to provide funding to urgent need projects.

*371.22. Public Notice.*

Section 371.22 is revised to better reflect TWDB processes whereby the executive administrator, not the Board members, hold public hearings. The rule will state that the executive administrator may make amendments to the Project Priority List after a 14-day public comment period without any public hearing.

*Section 371.23. Criteria and Methods for Distribution of Funds.*

Section 371.23 is revised to reflect a change in terminology and to provide greater clarity. It revises "Subsidy" or "subsidies" to "principal forgiveness" and "Invited Projects List" to "Project Priority List" to be consistent with other sections as well as the terminology in the Intended Use Plan. The reference to small communities is clarified to mean small water systems.

*Section 371.24. Changes to Project.*

Section 371.24 is revised to adjust permitted changes in a proposed project listed in the Intended Use Plan without requiring a re-ranking of the project. First, the applicant for a proposed project may change provided the project itself does not change. Second, the fundable amount of a proposed project may not increase by more than 10% of the amount listed in the approved IUP. The rule is revised to allow the executive administrator to waive the 10% limit to not only incorporate additional elements to the project, but also increased project costs. Further, the section is revised to specify that any principal forgiveness awarded may not exceed the amount in the original Intended Use Plan.

*Subchapter D. Application for Assistance.*

*Section 371.30. Pre-Application Conferences.*

Section 371.30 is revised to allow individuals to participate in the conference without being in attendance.

*Section 371.31. Timeliness of Application and Required Application Information.*

Section 371.31 is revised to base the due date for curing a deficiency on the date of the notice to the applicant rather than the date the applicant receives the notice. This will allow enhanced tracking for program administration. This section specifies that the application must include a copy of any actual or proposed contracts covering revenues for the project for a duration specified by the agency. To allow additional flexibility to the agency, the rule will permit an alternative method of establishing a reliable accounting of the financial records of the applicant if approved by the executive administrator. The rule will clarify the listing within the application of all the funds used for the project. This section is revised to require private applicants to submit an affidavit stating that the decision to apply for financial assistance was done so in accordance with the Applicant's bylaws or charter, instead of submitting an affidavit stating the Applicant sent written, 72-hour notice to all customers, to allow Applicants to follow their established notice requirements. The provisions regarding required documentation from private applicants are revised to also cover sole proprietorships. Other non-substantive and grammatical changes were made for clarification purposes.

*Section 371.32. Review of Applications for Financial Assistance.*

Section 371.32(c) is deleted because it is no longer necessary. New §371.32(c) is added to establish commitment timeframes for projects that qualify and have been designated to receive principal forgiveness. Due to the high demand and limited availability of subsidized funding, it is imperative that applicants offered principal forgiveness proceed in a timely manner.

*Section 371.33. Refinancing.*

Section 371.33 is revised to require the project to meet programmatic requirements.

*Section 371.34. Required Water Conservation Plan and Water Loss Audit.*

Section 371.34 is revised to incorporate new statutory requirements. According to §16.0121(g), Water Code, a retail public utility providing potable water that receives financial assistance from the TWDB is required to use a portion of that financial assistance, or any additional financial assistance provided by TWDB, to mitigate the utility's system water loss if, based on a water audit filed by the utility, the water loss meets or exceeds the threshold established by TWDB rule. In accordance with §16.0121(g), Water Code, as amended by H.B. 949, 84th Legislative Session, §371.34 is revised to allow the TWDB, at the request of the retail public utility, to waive this requirement. TWDB rules regarding this waiver are located in 31 TAC §358.6.

*Section 371.35. Board Approval of Funding.*

Section 371.35 is revised to remove the commitment expiration timeframes from the rules and establish the expiration timeframes through the annual Intended Use Plan applicable to the project in order to provide greater flexibility in administering the program. Section 371.35 will allow multiple extensions instead of one extension and the language is revised to better instruct applicants on the procedure for requesting an extension.

*Section 371.36. Multi-year Commitments.*

New section 371.36 is added to implement multi-year commitments to provide a reliable source of capital based on a commitment structure that meets the annual capital requirements of the project. In order to provide a reliable source of capital based on a commitment structure that meets the annual capital requirements of the project, the TWDB may offer multi-year commitments. Multi-year commitments should assist entities that need to fund large projects over a period of time. Further, to assist in providing for long-term financial planning, the minimum interest rate reduction for the multi-year commitments will be established and locked for the five year period based on the interest rate reduction prescribed in the IUP for the first year's commitment.

*Subchapter E. Environmental Reviews and Determinations.*

Subchapter E is revised to provide greater clarity on the environmental review process through a reorganization of this subchapter. Repeals of existing §§371.43 - 371.51 are simultaneously adopted elsewhere in this issue of the *Texas Register*.

*Section 371.40. Definitions.*

The definition of "Affected community" is revised to clarify its meaning in the context of its use within the subchapter.

The definitions of "Categorical Exclusion," "Environmental Assessment," "Environmental Impact Statement," "Environmental Information Document," "Finding of No Significant Impact," "Record of Decision," and "Statement of Finding" are added to provide greater clarity on what is included in these various documents, which party prepares the documents, and their use.

The definitions of "Federal Environmental Cross-cutters" and "Human environment" are added to clarify terminology utilized within the subchapter.

The definition of "Mitigation" is revised to better reflect the federal definition by adding fuller explanations of the avoidance, minimization, and rectification aspects of mitigation. Therefore, because it is no longer necessary to retain separate definitions of "Avoidance" and "Minimization," they have been deleted.

The definition of "Emergency Relief Project" is revised to include natural disasters as an emergency condition or incident.

*Section 371.41. Environmental Review Process.*

Section 371.41 is revised to delete references to avoidance and minimization, which are both included in the definition of mitigation. In addition, disbursement of funds information was removed as this information is already provided in §371.72, relating to Disbursement of Funds. Section 371.41 is further revised to add more details on the timing and preparation of different environmental documents in order to provide greater clarity. Certain terminology is revised in order to avoid confusion between state and federal environmental documents. Other non-substantive and grammatical changes are made for clarification purposes.

*Section 371.42. Board's Environmental Finding: Categorical Exclusions.*

The title of §371.42 is revised from "Types of Environmental Determinations: Categorical Exclusion" to "Board's Environmental Finding: Categorical Exclusion" in order to provide greater clarity on which party is responsible for evaluating eligibility and issuing the Categorical Exclusion. It is further revised to clarify when a project can be categorically excluded from a full environmental review. Subsection (f) is deleted in order to move this information

to new §371.43 in order to further separate and clarify Applicant versus TWDB responsibilities.

*Section 371.43. Applicant Requirements: Categorical Exclusions.*

New §371.43 is added in order to delineate between the Applicant's and the TWDB's responsibilities regarding a Categorical Exclusion. New §371.43 contains the Applicant's responsibilities. This change was made to provide greater clarity.

*Section 371.44. Board's Environmental Finding: Finding of No Significant Impact.*

New §371.44 is added to reorganize and revise previous provisions on the Finding of No Significant Impact in order to provide greater clarity on each party's responsibilities regarding this document. Language from previous §371.43 is added here and is revised to remove the statement that an environmental assessment is required for proposed projects involving new construction. This is because some minor new construction elements are eligible for a CE, which does not require an environmental assessment. The previous language is further revised to reflect the fact that an environmental assessment is not required if the action is categorically excluded or if the executive administrator has decided that an environmental impact statement is required. It is revised to require that all contracts, plans, specifications, or other applicable documents used during the design and construction of the project include reference to or descriptions of the mitigation measures. References to avoidance and minimization were deleted because both are included in the definition of mitigation. Other minor revisions were made to provide greater clarity.

*Section 371.45. Applicant Requirements: Environmental Information Document.*

New §371.45 is added to reorganize and revise previous provisions on the Environmental Information Document in order to provide greater clarity on each party's responsibilities regarding this document. Language from previous §371.44 is added here and revised to provide greater clarity. An Applicant must prepare an Environmental Information Document for projects that have potential environmental impacts and the significance of those impacts is unknown. New §371.45 provides greater clarity on when an Environmental Information Document is needed, which party prepares the document, and what the document must include.

*Section 371.46. Environmental Impact Statements.*

New §371.46 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.47 is added here and non-substantive changes to that language are made for clarity purposes.

*Section 371.47. Decision to Prepare an Environmental Impact Statement: Notice of Intent.*

New §371.47 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.45 is added here and non-substantive changes to that language are made for clarity purposes.

*Section 371.48. Board's Environmental Finding: Record of Decision.*

New §371.48 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.46 is added here and non-substantive changes to that language are made

for clarity purposes. That language is revised to delete references to avoidance and minimization because both are included in the definition of mitigation. The language is further revised to clarify that the TWDB may provide written notification regarding the outcome of the mitigation measures rather than issue a statement of findings.

*Section 371.49. Applicant Requirements: Environmental Impact Statement.*

New §371.49 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.48 is added here and non-substantive changes to that language are made for clarity purposes.

*Section 371.50. Proposed Project Alterations.*

New §371.50 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.49 is added here and revised to state that the executive administrator's review of proposed project alterations may result in a notation to the file when the alterations are minor. It is further revised for clarity to explain the process of confirming that project alterations are within the scope of the original environmental finding.

*Section 371.51. Use of Previously Prepared Environmental Findings.*

New §371.51 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.50 is added here and revised to allow the executive administrator to adopt previous environmental findings issued by other agencies, not just federal agencies, provided that the finding is compliant with NEPA. It is also revised to clarify that only mitigation measures from the previous findings that are applicable to the proposed project components will be applied as conditions of the financial assistance. It is revised to state that the executive administrator may provide written notification of the outcome of the mitigation measure proposed in an environmental finding to interested agencies and public groups. References to avoidance and minimization were deleted because both are included in the definition of mitigation. Certain wording from previous language is revised in order to provide greater clarity.

*Section 371.52. Emergency Relief Project Procedures.*

New §371.52 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.51 is added here and non-substantive changes to that language are made for clarity purposes. Certain references to the Board are removed to provide greater flexibility in the emergency relief project procedures.

*Subchapter F. Engineering Review and Approval.*

*Section 371.60. Engineering Feasibility Report.*

Section 371.60 is revised to require the engineering feasibility report to show how the project will remedy the drinking water issues and problems instead of simply that they will remedy the problems and issues. Other non-substantive changes are made for clarity purposes.

*Section 371.61. Contract Documents: Review and Approval.*

Section 371.61 is revised to provide greater clarity on what the term "contract documents" include for the purposes of this section and to reference the TWDB's authority to audit project files.

*Section 371.62. Advertising and Awarding Construction Contracts.*

Section 371.62 is revised to extend the required notification period for pre-construction conferences from five to ten days to ensure TWDB staff will be able to attend if desired.

*Subchapter G. Loan Closings and Availability of Funds.*

*Section 371.70. Financial Assistance Secured by Bonds or Other Authorized Securities.*

Section 371.70 is revised to require the ordinance or resolution adopted by the governing body authorizing the issuance of debt to be sold to the Board to include a statement that all payments, including the origination fee, are made to the Board via wire transfer at no cost to the Board. Further, §371.70(a)(5) is revised to still require assurances that the Applicant will comply with any special conditions specified by the Board's environmental finding, but to delete the requirement that this assurance last until all financial obligations to the state have been discharged. Subsection (d) is added to provide greater clarity on which documents are required and which are not in the case of 100 percent principal forgiveness. Other non-substantive and grammatical changes are made for clarification purposes.

*Section 371.71. Financial Assistance Secured by Promissory Notes and Deeds of Trust.*

Section 371.71 is revised to clarify that a deed of trust, security agreement, and title insurance policy is not required in the situation of 100 percent principal forgiveness. It is also revised to change "Commission" to "Utility Commission" because of new powers and duties of the Public Utility Commission.

*Section 371.72. Disbursement of Funds.*

Section 371.72 is revised to eliminate the environmental affirmation by the Board but still require the environmental review to be completed before release of funds for design.

*Section 371.73. Remaining Unused Funds.*

Section 371.73 is revised to use "unused funds" instead of "surplus funds" for consistency.

*Section 371.74. Surcharge.*

Section 371.74 is revised to remove "as those terms are defined" because those terms are not defined. It is also revised to reflect new powers and duties of the Public Utility Commission.

*Subchapter H. Construction and Post-Construction Requirements.*

*Section 371.80. Inspection During Construction.*

Section 371.80 is revised to eliminate the reference to "sound engineering principles" for consistency with §17.185 of the Texas Water Code. Further, on-site observations were added to the scope of inspections as part of TWDB's actions to confirm ongoing compliance with all applicable requirements. Other minor revisions were made to provide greater clarity.

*Section 371.81. Alterations During Construction.*

Section 371.81 is revised to include the requirement in §17.186 of the Texas Water Code that the Texas Commission on Environmental Quality must give its approval before any substantial or material changes are made in any previously approved plans for facilities required to have commission approval of plans and specifications.

*Section 371.85. Final Accounting.*

Section 371.85 is revised to specify that remaining surplus funds may be used as specified in any applicable bond ordinance for certain purposes.

*Section 371.87. Release of Retainage.*

Section 371.87 is revised to clarify that the TWDB must issue a Certificate of Approval prior to approving the full release of retainage on a contract.

Non-substantive or grammatical changes are made to the following sections for clarification and grammatical purposes: §§371.18, 371.82, 371.86, and 371.88.

**REGULATORY IMPACT ANALYSIS**

The Board 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 Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or 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 intent of the rulemaking is to provide greater clarity regarding the DWSRF and to follow federal and state requirements for that fund.

Even if the adopted rulemaking were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 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. This rulemaking does not meet any of these four applicability criteria because it: 1) does not exceed the Federal Safe Drinking Water Act or any other federal law; 2) does not exceed an express requirement of state law; 3) does not 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; and 4) is not adopted solely under the general powers of the agency, but rather it is also adopted under authority of Texas Water Code §15.605. Therefore, these adopted rules do not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

**TAKINGS IMPACT ASSESSMENT**

The Board evaluated these adopted rules and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these rules is to make clarifying changes that align with state statutes and federal requirements related to the DWSRF. The adopted rules would substantially advance this stated purpose by clarifying rules related to the DWSRF, incorporating applicable language from state and federal laws and rules, and reflecting the current state and federal requirements for the DWSRF.

The Board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because

this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The Board is the agency that administers the DWSRF for the State of Texas.

Nevertheless, the Board further evaluated these adopted rules and performed an assessment of whether they constitute a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rulemaking requires compliance with state and federal laws and rules regarding the DWSRF. These requirements will not burden, restrict, or limit an owner's right to property. Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

#### PUBLIC COMMENT

No comments were received.

### SUBCHAPTER A. GENERAL PROGRAM REQUIREMENTS

#### 31 TAC §§371.1 - 371.4

##### STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §15.605.

The adopted rulemaking affects Chapter 15 of the Texas Water Code.

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 June 14, 2016.

TRD-201602993

Les Trobman

General Counsel

Texas Water Development Board

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Proposal publication date: April 1, 2016

For further information, please call: (512) 463-7686



### SUBCHAPTER B. FINANCIAL ASSISTANCE

#### 31 TAC §§371.10 - 371.18

##### STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §15.605.

The adopted rulemaking affects Chapter 15 of the Texas Water Code.

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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Les Trobman

General Counsel

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### SUBCHAPTER C. INTENDED USE PLAN

#### 31 TAC §§371.20 - 371.24

##### STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §15.605.

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### SUBCHAPTER D. APPLICATION FOR ASSISTANCE

#### 31 TAC §§371.30 - 371.36

##### STATUTORY AUTHORITY

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### SUBCHAPTER E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS

**31 TAC §§371.40 - 371.52**

**STATUTORY AUTHORITY**

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**SUBCHAPTER F. ENGINEERING REVIEW AND APPROVAL**

**31 TAC §§371.60 - 371.62**

**STATUTORY AUTHORITY**

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**SUBCHAPTER G. LOAN CLOSINGS AND AVAILABILITY OF FUNDS**

**31 TAC §§371.70 - 371.74**

**STATUTORY AUTHORITY**

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**SUBCHAPTER H. CONSTRUCTION AND POST-CONSTRUCTION REQUIREMENTS**

**31 TAC §§371.80 - 371.82, 371.85 - 371.88**

**STATUTORY AUTHORITY**

This rulemaking is adopted under the authority of Texas Water Code §15.605.

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**CHAPTER 371. DRINKING WATER STATE REVOLVING FUND**

The Texas Water Development Board ("TWDB" or "Board") adopts the repeal of 31 Texas Administrative Code (TAC) §§371.3, 371.4, and 371.43 - 371.51 as proposed in the April 1, 2016, issue of the *Texas Register* (41 TexReg 2428).

**BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED REPEALS.**

The TWDB adopts the repeal of provisions of 31 TAC Chapter 371 in order to reorganize certain information to provide greater clarity and to streamline TWDB processes for implementation of the Drinking Water State Revolving Fund (DWSRF). The specific provisions being repealed and the reasons for the repeals are discussed in more detail below.

**SECTION BY SECTION DISCUSSION OF ADOPTED REPEALS.**

Section 371.3 and §371.4 are repealed in order to combine relevant language and delete language that is no longer necessary. These changes are made to provide greater clarity and to ensure consistency with state and federal DWSRF requirements.

Sections 371.43 - 371.51 are repealed in order to provide greater clarity regarding the environmental requirements for the DWSRF. These changes will provide greater clarity on which

documents are prepared by the Applicant, which documents are prepared by the TWDB, and which documents are prepared by a third party. These changes will also provide greater clarity on the timing of required environmental documentation. The repeal of these sections is adopted in order to reorganize and renumber this subchapter for greater clarity.

#### REGULATORY IMPACT ANALYSIS

The Board reviewed the adopted repeals in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the repeals are not subject to Texas Government Code, §2001.0225, because they do not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or 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 intent of these repeals is to provide greater clarity regarding the DWSRF and ensure consistency with state and federal requirements for that fund.

Even if the adopted repeals were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to these repeals because Texas Government Code, §2001.0225 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. This repeal rule-making does not meet any of these four applicability criteria because it: 1) does not exceed the Federal Safe Drinking Water Act or any other federal law; 2) does not exceed an express requirement of state law; 3) does not 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; and 4) is not adopted solely under the general powers of the agency, but rather it is also adopted under authority of Texas Water Code §15.605. Therefore, these adopted repeals do not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

#### TAKINGS IMPACT ASSESSMENT.

The Board evaluated these adopted repeals and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these repeals is to more closely align the TWDB's rules related to the DWSRF to state statutes and federal requirements and to provide greater clarity. The adopted repeals would substantially advance this stated purpose by reflecting the current state and federal requirements for the DWSRF.

The Board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these adopted repeals because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The Board is the agency that administers the DWSRF for the State of Texas.

Nevertheless, the Board further evaluated these adopted repeals and performed an assessment of whether they constitute a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of these adopted repeals would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulation does not affect a landowner's rights in private real property because these repeals do not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, these repeals require compliance with state and federal laws and rules regarding the DWSRF. These requirements will not burden, restrict, or limit an owner's right to property. Therefore, the adopted repeals do not constitute a taking under Texas Government Code, Chapter 2007.

#### PUBLIC COMMENTS

No comments were received.

### SUBCHAPTER A. GENERAL PROGRAM REQUIREMENTS

#### 31 TAC §371.3, §371.4

##### STATUTORY AUTHORITY.

This repeal is adopted under the authority of Texas Water Code §15.605.

The adopted repeal affects Chapter 15 of the Texas Water Code.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Les Trobman

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### SUBCHAPTER E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS

#### 31 TAC §§371.43 - 371.51

##### STATUTORY AUTHORITY.

This repeal is adopted under the authority of Texas Water Code §15.605.

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## CHAPTER 375. CLEAN WATER STATE REVOLVING FUND

The Texas Water Development Board ("TWDB" or "Board") adopts without changes amendments to 31 Texas Administrative Code (TAC) §§375.1, 375.2, 375.10 - 375.19, 375.30 - 375.34, 375.40 - 375.44, 375.60 - 375.62, 375.81 - 375.83, 375.90, 375.91, 375.101 - 375.104, 375.106 - 375.109, 375.201, 375.203, and 375.206 relating to the TWDB's administration of the Clean Water State Revolving Fund (CWSRF). TWDB adopts new §§375.3, 375.45, 375.63 - 375.71, and 375.92 - 375.94 without changes. Repeals of existing §§375.50 - 375.56, 375.63 - 375.70, 375.92, and 375.93 are simultaneously adopted elsewhere in this issue of the *Texas Register*. These changes were proposed in the April 1, 2016, issue of the *Texas Register* (41 TexReg 2430).

### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED AMENDMENTS AND NEW RULES.

Pursuant to the Water Resources Reform and Development Act of 2014 (WRRDA), the TWDB adopts revisions to numerous provisions in 31 TAC Chapter 375. Various revisions are adopted to implement changes to the federal requirements for the CWSRF. Various other revisions are adopted to provide greater clarity in this chapter of TWDB rules or to update rule provisions pursuant to TWDB practice. The specific provisions being revised and the reasons for the revisions are discussed in more detail below.

### SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS AND NEW RULES.

#### *Subchapter A. General Program Requirements.*

##### *Section 375.1. Definitions.*

The definition of "Acquisition" is added to discuss eligible project costs and federal requirements regarding acquisition of land. It is also used to describe a phase of the project.

The definition of "Applicant" is revised for clarity to focus on the repayment of the debt rather than ownership of the project.

The definition of "Application" is revised to expand the focus from solely forms to forms and other information that is submitted to the TWDB.

The definition of "Authorized representative" is revised to provide greater clarity.

The definition of "Bypass" is revised to incorporate the specific reasoning for passing over a higher ranked project in favor of a lower ranked project.

The definition of "Commitment" is revised for clarity to refer directly to the Board resolution that constitutes the commitment rather than to the applicant's fulfillment of the conditions.

The definition of "Commitment term" is deleted because it is no longer needed with the added definition of "Expiration date," which provides more clarity.

The definition of "Construction" is revised to match the definition found in 33 U.S.C. §1292(1).

The definition of "Construction phase" is added to provide greater clarity.

The definition of "Cost and Effectiveness Analysis" is added to implement provisions of WRRDA. The term "analysis" includes both the study and evaluation of the cost and effectiveness of the processes, materials, techniques, and technologies for carrying out the proposed project or activity and the final selection, to the maximum extent practicable, of a project or activity that maximizes the potential for efficient water use, reuse, recapture, and conservation, and energy conservation.

The definition of "Design" is revised for clarity.

The definition of "Disadvantaged Community" is revised to incorporate the affordability criteria required in WRRDA.

The definition of "Disaster" is revised to add extreme heat.

The definition of "Eligible Applicant" is revised to implement provisions of WRRDA, explicitly mention eligibility of a special purpose district that finances on behalf of its members' waste disposal projects, and provide greater clarity.

The definition of "Environmental affirmation" is deleted because it is no longer needed.

The definition of "Expiration date" is added to provide greater clarity regarding the TWDB's offer of financial assistance and is used to clarify the timeframe allowed for the applicant to submit a request to extend the Board's commitment.

The definition of "Financial assistance" is revised to provide greater clarity.

The definition of "Fiscal Sustainability Plan" is added to implement provisions of WRRDA.

The definition of "Invited Projects List" is retitled "Initial Invited Projects List" to be consistent with the terminology used in the TWDB's Intended Use Plan.

The definition of "Lending rate" is revised for greater clarity to distinguish between financial assistance, which must be repaid and accrues interest, and principal forgiveness, which is not repaid and does not accrue interest.

The definition of "Municipality" is revised to better reflect the definition in federal law.

The definition of "Non-equivalency project" is revised to provide clarity through a reference to equivalency projects.

The definition of "Planning" is added to implement provisions of WRRDA.

The definition of "Political subdivision" is revised to conform to the Texas Water Code.

The definition of "Population" is revised to specify that the data used must be the latest data available from the U.S. Census Bureau, such as the American Community Survey data released annually, rather than the decennial census.

The definition of "Principal forgiveness" is added to specify the type of additional subsidization that is being offered for the program.

The definition of "Project" is revised to reference the language in the Federal Water Pollution Control Act and provide greater clarity.

The definition of "Project information form" is retitled as "Project Information Form (PIF)" and is revised to clarify that the information submitted must conform to the agency's requirements.

The definition of "Project Priority List" is revised for clarity to reference the specific list found in the Intended Use Plan that contains the projects eligible for funding ranked according to their rating criteria score.

The definition of "Ready to proceed" is revised for clarification purposes.

The definition of "Small and Medium-sized Publicly Owned Treatment Works" is added to implement provisions of WRRDA.

The definition of "Subsidy" is revised to reference only a reduction in the interest rate from the market interest rate rather than principal forgiveness.

The definition of "Treatment works" is added to implement provisions of WRRDA.

The definition of "Utility Commission" is added to delineate between the Public Utility Commission of Texas and the Texas Commission on Environmental Quality because of new powers and duties of the Public Utility Commission.

Other non-substantive, grammatical changes are made for clarification and grammatical purposes. Paragraphs are renumbered to reflect added and removed definitions.

#### *Section 375.2. Projects and Activities Eligible for Assistance.*

Section 375.2 is revised to add new projects and activities that are eligible under the Federal Water Pollution Control Act in accordance with WRRDA. While all projects and activities eligible under federal law are listed, the specific projects and activities eligible for assistance under the Texas CWSRF program for a particular funding year will be established annually in the CWSRF's Intended Use Plan. This will allow greater flexibility to adjust the CWSRF program based on needs and capacity.

#### *Section 375.3. Federal Requirements.*

Section 375.3 is added to list the new federal requirements for the CWSRF instituted or made permanent through WRRDA. Also, TWDB is proposing to include EPA's new policy on providing "signage" options to enhance public awareness for equivalency projects.

#### *Subchapter B. Financial Assistance.*

##### *Section 375.10. Types of Financial Assistance.*

Section 375.10 is revised to state that the executive administrator shall determine the type of financial assistance in accordance with the types of financial assistance authorized by the Federal Water Pollution Control Act ("the Act").

##### *Section 375.11. Refinancing.*

Section 375.11 is revised to require the project to meet programmatic requirements.

##### *Section 375.12. Financing of Planning, Acquisition, and Design Phase.*

Section 375.12 is revised to reflect a change in terminology regarding the phases of projects. It is revised to state that applicants may request financial assistance for planning, acquisition, and design without a readiness to proceed determination. It also deletes the reference to applicants who have completed the planning, acquisition, and design for a proposed project within

three years of the closing date for financial assistance receiving priority for construction phase funding of the project in the next available IUP if the project is ready to proceed. This priority is retained elsewhere in §375.31(c).

#### *Section 375.13. Construction Phase Funding and Section 375.14. Pre-Design Funding Option.*

Section 375.13 and §375.14 are revised to reflect a change in terminology regarding the phases of projects.

#### *Section 375.15. Lending Rates.*

Section 375.15 is revised to make private and taxable entities eligible for the interest rate reduction. As part of the revision on eligibility for the reduction, TWDB is consolidating and revising the method of establishing the fixed rate scale and determining the amount of adjustment from the market interest rate for both the equivalency and non-equivalency borrowers. TWDB is not altering the interest rate reduction a borrower would have received under the current program practices. For consistency, the point in time for determining the total fixed lending rate reduction is set at 30 days from the date the application will be presented to the Board for approval. Other wording changes were made to provide greater clarity. In addition, references to the maximum reduction level have been removed to allow greater flexibility in establishing a significant interest rate reduction consistent with projections of the long-term financial health of the CWSRF. The interest rate reduction will instead be established annually in CWSRF's Intended Use Plan.

#### *Section 375.16. Fees for Financial Assistance.*

Section 375.16 is revised to allow greater flexibility to make annual adjustment to the CWSRF program based on needs and projected financial conditions. To accomplish this, the amount of any administrative loan origination fee, up to the maximum specified amount, will be established in the CWSRF's Intended Use Plan. The title is revised from "Fees of Financial Assistance" to "Fees for Financial Assistance." Other non-substantive changes are made.

#### *Section 375.17. Term of Financial Assistance.*

Section 375.17 is revised to be consistent with the requirement of WRRDA. The TWDB is revising the requirement that the term offered may not exceed the "expected design" life of an eligible project to the "projected useful" life.

#### *Section 375.18. Principal Forgiveness.*

Section 375.18 is revised based on new requirements established through WRRDA.

#### *Subchapter C. Intended Use Plan.*

##### *Section 375.30. Submission of Project Information Forms.*

Section 375.30 is revised to clarify the requirements for submission of project information forms. It specifically references submission of Project Information Forms to be included on an amended Project Priority List within the Intended Use Plan. It also establishes that the required information that must be in a Project Information Form will be specified in TWDB guidance. It clarifies that a registered engineer must properly affix the engineer's seal, signature, and date of execution to the project information form if the amount requested from the program is equal to or greater than \$100,000.

##### *Section 375.31. Rating Process.*

Section 375.31 is revised to amend the rating criteria to incorporate additional projects and activities that are eligible based on WRRDA. In addition, consistent with the overall goals of the Federal Water Pollution Control Act, TWDB is considering enforcement action, innovative or alternative technology or approaches, and effective management as rating criteria. It is further revised for greater clarity.

*Section 375.32. Public Notice.*

Section 375.32 is revised to better reflect TWDB processes whereby the executive administrator, not the Board members, hold public hearings. The rule states that the executive administrator may make amendments to the Project Priority List after a 14-day public comment period without any public hearing.

*Section 375.33. Criteria and Methods for Distribution of Funds.*

Section 375.33 is revised to reflect a change in terminology and to provide greater clarity. It revises "subsidies" to "principal forgiveness" and "Invited Projects List" to "Project Priority List" to be consistent with other sections as well as the terminology in the Intended Use Plan. Other non-substantive changes are made.

*Section 375.34. Changes to Project.*

Section 375.34 is revised to adjust permitted changes in a proposed project listed in the Intended Use Plan without requiring a re-ranking of the project. First, the applicant for a proposed project may change provided the project itself does not change. Second, the fundable amount of a proposed project may not increase by more than 10% of the amount listed in the approved IUP. The rule is revised to allow the executive administrator to waive the 10% limit to not only incorporate additional elements to the project, but also increased project costs. Further, the section is revised to specify that any principal forgiveness awarded may not exceed the amount in the original Intended Use Plan. Other non-substantive changes are made.

*Subchapter D. Application for Assistance.*

*Section 375.40. Pre-Application Conferences.*

Section 375.40 is revised to allow individuals to participate in the conference without being in attendance.

*Section 375.41. Timeliness of Application and Required Application Information.*

Section 375.41 is revised to base the due date for curing a deficiency on the date of the notice to the applicant rather than the date the applicant receives the notice. This will allow enhanced tracking for program administration. This section specifies that the application must include a copy of any actual or proposed contracts covering revenues for the project for a duration specified by the agency. To allow additional flexibility to the agency, the rule will permit an alternative method of establishing a reliable accounting of the financial records of the applicant if approved by the executive administrator. The rule will clarify the listing within the application of all the funds used for the project. It is revised to include the Public Utilities Commission in the list of agencies in relation to the Applicant's affidavit. This section is revised to list the application requirements for eligible private applicants.

*Section 375.42. Review of Applications.*

Section 375.42(c) is deleted because it is no longer necessary. New §375.42(c) is added to establish commitment timeframes for projects that qualify and have been designated to receive

principal forgiveness. Due to the high demand and limited availability of subsidized funding, it is imperative that applicants offered principal forgiveness proceed in a timely manner.

*Section 375.43. Required Water Conservation Plan and Water Loss Audit.*

Section 375.43 is revised to incorporate new statutory requirements. According to §16.0121(g), Water Code, a retail public utility providing potable water that receives financial assistance from the TWDB is required to use a portion of that financial assistance, or any additional financial assistance provided by TWDB, to mitigate the utility's system water loss if, based on a water audit filed by the utility, the water loss meets or exceeds the threshold established by TWDB rule. In accordance with §16.0121(g), Water Code, as amended by H.B. 949, 84th Legislative Session, §375.43 is revised to allow the TWDB, at the request of the retail public utility, to waive this requirement. TWDB rules regarding this waiver are located in 31 TAC §358.6. In accordance with §16.0121(h), Water Code, the TWDB shall adopt rules regarding the use of financial assistance from the TWDB as required by §16.0121(g) to mitigate system water loss. Section 375.43 is revised to incorporate the statutory requirements of §16.0121, Water Code, and to specify that use of financial assistance must be in accordance with the Act and the applicable Intended Use Plan.

*Section 375.44. Board Approval of Funding.*

Section 375.44 is revised to remove the commitment expiration timeframes from the rules and establish the expiration timeframes through the annual Intended Use Plan applicable to the project in order to provide greater flexibility in administering the program. Section 375.44 will allow multiple extensions instead of one extension and the language is revised to better instruct applicants on the procedure for requesting an extension.

*Section 375.45. Multi-year Commitments.*

Section 375.45 is added to implement multi-year commitments to provide a reliable source of capital based on a commitment structure that meets the annual capital requirements of the project. In order to provide a reliable source of capital based on a commitment structure that meets the annual capital requirements of the project, the TWDB may offer multi-year commitments. Multi-year commitments should assist entities that need to fund large projects over a period of time. Further, to assist in providing for long-term financial planning, the minimum interest rate reduction for the multi-year commitments will be established and locked for the five-year period based on the interest rate reduction prescribed in the IUP for the first year's commitment.

*Subchapter E. Environmental Reviews and Determinations.*

*Section 375.60. Definitions.*

The definition of "Affected community" is revised to clarify its meaning in the context of its use within the subchapter.

The definitions of "Categorical Exclusion," "Environmental Assessment," "Environmental Impact Statement," "Environmental Information Document," "Finding of No Significant Impact," "Record of Decision," and "Statement of Finding" are added to provide greater clarity on what is included in these various documents, which party prepares the documents, and their use.

The definitions of "Federal Environmental Cross-cutters" and "Human environment" are added to clarify terminology utilized within the subchapter.

The definition of "Mitigation" is revised to better reflect the federal definition by adding fuller explanations of the avoidance, minimization, and rectification aspects of mitigation. Therefore, because it is no longer necessary to retain separate definitions of "Avoidance" and "Minimization," they have been deleted.

*Section 375.61. Environmental Review Process.*

Section 375.61 is revised to add subsection (e) to establish a key difference in the environmental review process between equivalency and non-equivalency projects. For equivalency projects, TWDB will inform EPA when consultation or coordination by EPA with other federal agencies is necessary to resolve issues regarding compliance with applicable federal authorities. Section 375.61 is revised to delete references to avoidance and minimization, which are both included in the definition of mitigation. In addition, disbursement of funds information was removed as this information is already provided in §375.93, relating to Disbursement of Funds. Section 375.61 is further revised to add more details on the timing and preparation of different environmental documents in order to provide greater clarity. Certain terminology is revised in order to avoid confusion between state and federal environmental documents. Other non-substantive and grammatical changes are made for clarification purposes.

*Section 375.62. Board's Environmental Finding: Categorical Exclusions.*

The title of §375.62 is revised from "Types of Environmental Determinations: Categorical Exclusion" to "Board's Environmental Finding: Categorical Exclusion" in order to provide greater clarity on which party is responsible for evaluating eligibility and issuing the Categorical Exclusion. It is further revised to clarify when a project can be categorically excluded from a full environmental review. Subsection (f) is deleted in order to move this information to new §375.63 in order to further separate and clarify Applicant versus TWDB responsibilities.

*Section 375.63. Applicant Requirements: Categorical Exclusions.*

New §375.63 is added in order to delineate between the Applicant's and the TWDB's responsibilities regarding a Categorical Exclusion. New §375.63 contains the Applicant's responsibilities. This change was made to provide greater clarity.

*Section 375.64. Board's Environmental Finding: Findings of No Significant Impact.*

New §375.64 is added to reorganize and revise previous provisions on the Finding of No Significant Impact in order to provide greater clarity on each party's responsibilities regarding this document. Language from previous §375.63 is added here and is revised to remove the statement that an environmental assessment is required for proposed projects involving new construction. This is because some minor new construction elements are eligible for a CE, which does not require an environmental assessment. The previous language is further revised to reflect the fact that an environmental assessment is not required if the action is categorically excluded or if the executive administrator has decided that an environmental impact statement is required. It is revised to require that all contracts, plans, specifications, or other applicable documents used during the design and construction of the project include reference to or descriptions of the mitigation measures. References to avoidance and minimization were deleted because both are included in the definition of mitigation. Other minor revisions were made to provide greater clarity.

*Section 375.65. Applicant Requirements: Environmental Information Document.*

New §375.65 is added to reorganize and revise previous provisions on the Environmental Information Document in order to provide greater clarity on each party's responsibilities regarding this document. Language from previous §375.64 is added here and revised to provide greater clarity. An Applicant must prepare an Environmental Information Document for projects that have potential environmental impacts and the significance of those impacts is unknown. New §375.65 provides greater clarity on when an Environmental Information Document is needed, which party prepares the document, and what the document must include.

*Section 375.66. Environmental Impact Statements.*

New §375.66 is added here to reorganize Subchapter E for greater clarity. The language from previous §375.67 is added here and non-substantive changes to that language are made for clarity purposes.

*Section 375.67. Decision to Prepare an Environmental Impact Statement: Notice of Intent.*

New §375.67 is added here to reorganize Subchapter E for greater clarity. The language from previous §375.65 is added here and non-substantive changes to that language are made for clarity purposes.

*Section 375.68. Board's Environmental Finding: Record of Decision.*

New §375.68 is added here to reorganize Subchapter E for greater clarity. The language from previous §375.66 is added here and non-substantive changes to that language are made for clarity purposes. That language is revised to delete references to avoidance and minimization because both are included in the definition of mitigation. The language is further revised to clarify that the TWDB may provide written notification regarding the outcome of the mitigation measures rather than issue a statement of findings.

*Section 375.69. Applicant Requirements: Environmental Impact Statement.*

New §375.69 is added here to reorganize Subchapter E for greater clarity. The language from previous §375.68 is added here and non-substantive changes to that language are made for clarity purposes.

*Section 375.70. Proposed Project Alterations.*

New §375.70 is added here to reorganize Subchapter E for greater clarity. The language from previous §375.69 is added here and revised to state that the executive administrator's review of proposed project alterations may result in a notation to the file when the alterations are minor. It is further revised for clarity to explain the process of confirming that project alterations are within the scope of the original environmental finding.

*Section 375.71. Use of Previously Prepared Environmental Findings.*

New §375.71 is added here to reorganize Subchapter E for greater clarity. The language from previous §375.70 is added here and revised to allow the executive administrator to adopt previous environmental findings issued by other agencies, not just federal agencies, provided that the finding is compliant with NEPA. It is also revised to clarify that only mitigation measures from the previous findings that are applicable to the proposed

project components will be applied as conditions of the financial assistance. It is revised to state that the executive administrator may provide written notification of the outcome of the mitigation measure proposed in an environmental finding to interested agencies and public groups. References to avoidance and minimization were deleted because both are included in the definition of mitigation. Certain wording from previous language is revised in order to provide greater clarity.

*Subchapter F. Engineering Review and Approval.*

*Section 375.81. Engineering Feasibility Report.*

Section 375.81 is revised to require the engineering feasibility report to show how the project will remedy the drinking water issues and problems instead of simply that they will remedy the problems and issues. Other non-substantive changes are made for clarity purposes.

*Section 375.82. Contract Documents: Review and Approval.*

Section 375.82 is revised to provide greater clarity on what the term "contract documents" include for the purposes of this section and to reference the TWDB's authority to audit project files.

*Section 375.83. Advertising and Awarding Construction Contracts.*

Section 375.83 is revised to extend the required notification period for pre-construction conferences from five to ten days to ensure TWDB staff will be able to attend if desired.

*Subchapter G. Loan Closing and Availability of Funds.*

*Section 375.90. Applicability.*

Section 375.90 is revised to correct a past drafting error that failed to specify that this subchapter applies to both equivalency and non-equivalency projects.

*Section 375.91. Financial Assistance Secured by Bonds or Other Authorized Securities.*

Section 375.91 is revised to require the ordinance or resolution adopted by the governing body authorizing the issuance of debt to be sold to the Board to include a statement that all payments, including the origination fee, are made to the Board via wire transfer at no cost to the Board. Further, §375.91(a)(5) is revised to still require assurances that the Applicant will comply with any special conditions specified by the Board's environmental finding, but to delete the requirement that this assurance last until all financial obligations to the state have been discharged. Other non-substantive and grammatical changes are made for clarification purposes.

*Section 375.92. Financial Assistance Secured by Promissory Notes and Deeds of Trust.*

Section 375.92 is added to establish closing requirements for water supply corporations, eligible private Applicants, and other Applicants that are not authorized to issue bonds or other securities.

*Section 375.93. Disbursement of Funds.*

Section 375.93 is added and the language of former §375.92 is revised to amend subsection (b), describing the current method of releasing funds to the recipient's construction account for principal forgiveness. These revisions are made to provide greater clarity. It is also revised to eliminate the environmental affirmation by the Board but still require the environmental review to be completed before release of funds for design.

*Section 375.94. Remaining Unused Funds.*

Section 375.94 is added and the language of former §375.93 is revised to use the term "unused funds" instead of "surplus funds" for consistency purposes.

*Subchapter H. Construction and Post Construction Requirements.*

*Section 375.101. Inspection During Construction.*

Section 375.101 is revised to eliminate the reference to "sound engineering principles" for consistency with §17.185 of the Texas Water Code. Further, on-site observations were added to the scope of inspections as part of TWDB's actions to confirm ongoing compliance with all applicable requirements. Other minor revisions were made to provide greater clarity.

*Section 375.102. Alterations During Construction.*

Section 375.102 is revised to include the requirement in §17.186 of the Texas Water Code that the Texas Commission on Environmental Quality must give its approval before any substantial or material changes are made in any previously approved plans for wastewater treatment plants or other facilities.

*Section 375.106. Final Accounting.*

Section 375.106 is revised to specify that remaining surplus funds may be used as specified in any applicable bond ordinance for certain purposes.

*Section 375.108. Release of Retainage.*

Section 375.108 is revised to clarify that the TWDB must issue a Certificate of Approval prior to approving the full release of retainage on a contract. Other non-substantive changes are made.

Non-substantive or grammatical changes are made to the following sections for clarification and grammatical purposes: §§375.19, 375.103, 375.104, 375.107, 375.109, 375.201, 375.203, and 375.206.

**REGULATORY IMPACT ANALYSIS**

The Board 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 Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or 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 intent of the rulemaking is to provide greater clarity regarding the CWSRF and to implement changes to federal requirements for that fund.

Even if the adopted rulemaking were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 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. This rulemaking does not meet any of these four applicability criteria because it: 1) does not exceed the Federal Water Pollution Control Act or any other federal law; 2) does not exceed an express requirement of state law; 3) does not 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; and 4) is not adopted solely under the general powers of the agency, but rather it is also adopted under authority of Texas Water Code §15.605. Therefore, this adopted rulemaking does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

#### TAKINGS IMPACT ASSESSMENT.

The Board evaluated this adopted rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to more closely align the TWDB's rules related to the CWSRF to state statutes and federal requirements. The adopted rulemaking would substantially advance this stated purpose by clarifying rules related to the CWSRF, incorporating applicable language from state and federal laws and rules, and reflecting the current state and federal requirements for the CWSRF.

The Board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The Board is the agency that administers the CWSRF for the State of Texas.

Nevertheless, the Board further evaluated this adopted rulemaking and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this adopted rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rulemaking requires compliance with state and federal laws and rules regarding the CWSRF. These requirements will not burden, restrict, or limit an owner's right to property. Therefore, the adopted rulemaking does not constitute a taking under Texas Government Code, Chapter 2007.

#### PUBLIC COMMENT

No comments were received.

### SUBCHAPTER A. GENERAL PROGRAM REQUIREMENTS

#### 31 TAC §§375.1 - 375.3

##### STATUTORY AUTHORITY.

This rulemaking is adopted under the authority of Texas Water Code §15.605.

The adopted rulemaking affects Chapter 15 of the Texas Water Code.

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 June 14, 2016.

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Les Trobman  
General Counsel  
Texas Water Development Board  
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### SUBCHAPTER B. FINANCIAL ASSISTANCE

#### 31 TAC §§375.10 - 375.19

##### STATUTORY AUTHORITY.

This rulemaking is adopted under the authority of Texas Water Code §15.605.

The adopted rulemaking affects Chapter 15 of the Texas Water Code.

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### SUBCHAPTER C. INTENDED USE PLAN

#### 31 TAC §§375.30 - 375.34

##### STATUTORY AUTHORITY.

This rulemaking is adopted under the authority of Texas Water Code §15.605.

The adopted rulemaking affects Chapter 15 of the Texas Water Code.

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### SUBCHAPTER D. APPLICATION FOR ASSISTANCE

#### 31 TAC §§375.40 - 375.45

STATUTORY AUTHORITY.

This rulemaking is adopted under the authority of Texas Water Code §15.605.

The adopted rulemaking affects Chapter 15 of the Texas Water Code.

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**SUBCHAPTER E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS**

**31 TAC §§375.60 - 375.71**

STATUTORY AUTHORITY.

This rulemaking is adopted under the authority of Texas Water Code §15.605.

The adopted rulemaking affects Chapter 15 of the Texas Water Code.

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**SUBCHAPTER F. ENGINEERING REVIEW AND APPROVAL**

**31 TAC §§375.81 - 375.83**

STATUTORY AUTHORITY.

This rulemaking is adopted under the authority of Texas Water Code §15.605.

The adopted rulemaking affects Chapter 15 of the Texas Water Code.

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 G. LOAN CLOSINGS AND AVAILABILITY OF FUNDS**

**31 TAC §§375.90 - 375.94**

STATUTORY AUTHORITY.

This rulemaking is adopted under the authority of Texas Water Code §15.605.

The adopted rulemaking affects Chapter 15 of the Texas Water Code.

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 H. CONSTRUCTION AND POST CONSTRUCTION REQUIREMENTS**

**31 TAC §§375.101 - 375.104, 375.106 - 375.109**

STATUTORY AUTHORITY.

This rulemaking is adopted under the authority of Texas Water Code §15.605.

The adopted rulemaking affects Chapter 15 of the Texas Water Code.

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 I. NONPOINT SOURCE POLLUTION LINKED DEPOSITS PROGRAM

### 31 TAC §§375.201, 375.203, 375.206

#### STATUTORY AUTHORITY.

This rulemaking is adopted under the authority of Texas Water Code §15.605.

The adopted rulemaking affects Chapter 15 of the Texas Water Code.

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 375. CLEAN WATER STATE REVOLVING FUND

The Texas Water Development Board ("TWDB" or "Board") adopts the repeal of 31 Texas Administrative Code (TAC) §§375.50 - 375.56 in Subchapter E, Division 1; §§375.63 - 375.70 in Subchapter E, Division 2; and §375.92 and §375.93, as proposed in the April 1, 2016, issue of the *Texas Register* (41 TexReg 2461).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED REPEALS.

The TWDB adopts the repeal of various sections of 31 TAC Chapter 375 in order to implement new federal requirements imposed by the Water Resources Reform and Development Act of 2014 (WRRDA), to provide greater clarity, and to streamline TWDB processes for implementation of the Clean Water State Revolving Fund (CWSRF). The TWDB adopts the repeal of provisions that are no longer needed and the repeal of other provisions in order to relocate them in other locations of 31 TAC Chapter 375 for clarification purposes. The specific provisions being repealed and the reasons for the repeals are discussed in more detail below.

#### SECTION BY SECTION DISCUSSION OF ADOPTED REPEALS.

##### *Subchapter E, Environmental Reviews and Determinations, Division 1, State Projects.*

Division 1 (State Projects) of Subchapter E (Environmental Reviews and Determinations), which includes §§375.50 - 375.56, is repealed. In accordance with WRRDA, National Environmental Policy Act (NEPA)-like environmental reviews are now required for all CWSRF assistance for the construction of treatment works, not just the equivalency projects. Therefore, TWDB is proposing to delete Division 1 of Subchapter E covering environmental reviews and determinations for state projects that was previously applied to the non-equivalency projects. The "Divi-

sion 2 Federal Projects" title is therefore no longer necessary for the remaining provisions of the subchapter.

##### *Subchapter E, Environmental Reviews and Determinations, Division 2, Federal Projects.*

Sections 375.63 - 375.70 are repealed in order to provide greater clarity regarding the environmental requirements for the CWSRF. These changes will provide greater clarity on which documents are prepared by the Applicant, which documents are prepared by the TWDB, and which documents are prepared by a third party. These changes will also provide greater clarity on the timing of required environmental documentation. The repeal of these sections is adopted in order to reorganize and renumber this subchapter for greater clarity.

##### *Section 375.92. Disbursement of Funds and Section 375.93. Remaining Unused Funds*

Section 375.92 and §375.93 are repealed in order to relocate them within 31 TAC Chapter 375 for greater clarity.

#### REGULATORY IMPACT ANALYSIS

The Board reviewed the adopted repeals in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the repeals are not subject to Texas Government Code, §2001.0225, because they do not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or 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 intent of this repeals is to provide greater clarity regarding the CWSRF and to implement changes to federal requirements for that fund.

Even if the adopted repeals were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to these repeals because Texas Government Code, §2001.0225 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. This repeal rulemaking does not meet any of these four applicability criteria because it: 1) does not exceed the Federal Water Pollution Control Act or any other federal law; 2) does not exceed an express requirement of state law; 3) does not 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; and 4) is not adopted solely under the general powers of the agency, but rather it is also adopted under authority of Texas Water Code §15.605. Therefore, these adopted repeals do not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

#### TAKINGS IMPACT ASSESSMENT.

The Board evaluated these adopted repeals and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these repeals is to more closely align the TWDB's rules related to the CWSRF

to state statutes and federal requirements. The adopted repeals would substantially advance this stated purpose by reflecting the current state and federal requirements for the CWSRF.

The Board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these adopted repeals because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The Board is the agency that administers the CWSRF for the State of Texas.

Nevertheless, the Board further evaluated these adopted repeals and performed an assessment of whether they constitute a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of these adopted repeals would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulation does not affect a landowner's rights in private real property because these repeals do not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, these repeals require compliance with state and federal laws and rules regarding the CWSRF. These requirements will not burden, restrict, or limit an owner's right to property. Therefore, the adopted repeals do not constitute a taking under Texas Government Code, Chapter 2007.

#### PUBLIC COMMENT

No comments were received.

### SUBCHAPTER E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS DIVISION 1. STATE PROJECTS

#### 31 TAC §§375.50 - 375.56

##### STATUTORY AUTHORITY.

This repeal is adopted under the authority of Texas Water Code §15.605.

The adopted repeal affects Chapter 15 of the Texas Water Code.

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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Les Trobman

General Counsel

Texas Water Development Board

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### DIVISION 2. FEDERAL PROJECTS

#### 31 TAC §§375.63 - 375.70

##### STATUTORY AUTHORITY.

This repeal is adopted under the authority of Texas Water Code §15.605.

The adopted repeal affects Chapter 15 of the Texas Water Code.

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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Les Trobman

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### SUBCHAPTER G. LOAN CLOSINGS AND AVAILABILITY OF FUNDS

#### 31 TAC §§375.92, §375.93

##### STATUTORY AUTHORITY.

This repeal is adopted under the authority of Texas Water Code §15.605.

The adopted repeal affects Chapter 15 of the Texas Water Code.

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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Les Trobman

General Counsel

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### TITLE 34. PUBLIC FINANCE

### PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

#### CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)

#### SUBCHAPTER B. PAYMENT PROCESSING-- ELECTRONIC FUNDS TRANSFERS

#### 34 TAC §5.12

The Comptroller of Public Accounts adopts an amendment to §5.12, regarding processing payments through electronic funds transfers, without changes to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3243).

The amendment to subsection (g)(1) updates the email address to which any questions, comments, or complaints may be sent concerning the comptroller's electronic funds transfer system as it relates to Government Code, §403.016 and concerning §5.12.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Government Code, §403.016, which requires the comptroller to adopt rules regarding an electronic funds transfer system.

This amendment implements Government Code, §403.016.

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 June 16, 2016.

TRD-201603066

Lita Gonzalez

General Counsel

Comptroller of Public Accounts

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Proposal publication date: May 6, 2016

For further information, please call: (512) 475-0387



## TITLE 37. PUBLIC SAFETY AND CORRECTIONS

### PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

#### CHAPTER 2. CAPITOL ACCESS PASS

##### 37 TAC §§2.1, 2.2, 2.7, 2.8, 2.13

The Texas Department of Public Safety (the department) adopts amendments to §§2.1, 2.2, 2.7, 2.8, and 2.13, concerning Capitol Access Pass. These sections are adopted without changes to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3246) and will not be republished.

These amendments are necessary in part to implement House Bill 910, enacted by the 84th Texas Legislature, to reflect changes in the name of the license to carry a handgun. In addition, the expiration date on the Capitol Access Pass is to be extended to provide a five-year period of validity.

No comments were received regarding the adoption of these amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and §411.0625, which requires the department adopt rules necessary to administer the program.

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 June 17, 2016.

TRD-201603075

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

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For further information, please call: (512) 424-5848



## CHAPTER 10. IGNITION INTERLOCK DEVICE

### SUBCHAPTER A. GENERAL PROVISIONS

#### 37 TAC §§10.1 - 10.4

The Texas Department of Public Safety (the department) adopts new §§10.1 - 10.4, concerning General Provisions. These sections are adopted without changes to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3247) and will not be republished.

These new sections are filed simultaneously with the repeal of current Subchapter B of Chapter 19, consisting of §§19.21 - 19.29. New Subchapter A of Chapter 10 is intended to reorganize and consolidate the rules governing the Ignition Interlock Device program and to generally improve the clarity of the related rules.

No comments were received regarding the adoption of these new sections.

The new rules are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §521.247 and §521.2476, which authorize the department to adopt rules relating to the approval of ignition interlock devices and the authorization of ignition interlock device vendors to conduct business in the state.

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 June 17, 2016.

TRD-201603076

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

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For further information, please call: (512) 424-5848



### SUBCHAPTER B. VENDOR AUTHORIZATION

#### 37 TAC §§10.11 - 10.16

The Texas Department of Public Safety (the department) adopts new §§10.11 - 10.16, concerning Vendor Authorization. These sections are adopted without changes to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3248) and will not be republished.

These new sections are filed simultaneously with the repeal of current Subchapter B of Chapter 19, consisting of §§19.21 - 19.29. New Subchapter B of Chapter 10 is intended to reorganize and consolidate the rules governing the Ignition Interlock Device program and to generally improve the clarity of the related rules.

No comments were received regarding the adoption of these new sections.

The new rules are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §521.247 and §521.2476, which authorize the department to adopt rules relating to the approval of ignition interlock devices and the authorization of ignition interlock device vendors to conduct business in the state.

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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D. Phillip Adkins

General Counsel

Texas Department of Public Safety

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For further information, please call: (512) 424-5848



### SUBCHAPTER C. MILITARY SERVICE MEMBERS, VETERANS, AND SPOUSES - SPECIAL CONDITIONS FOR VENDOR AUTHORIZATIONS

#### 37 TAC §§10.21 - 10.24

The Texas Department of Public Safety (the department) adopts new §§10.21 - 10.24, concerning Military Service members, Veterans, and Spouses- Special Conditions For Vendor Authorizations. These sections are adopted without changes to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3250) and will not be republished.

New Subchapter C of Chapter 10 is intended to implement the requirements of Occupations Code, Chapter 55, as amended by Senate Bill 1307, enacted by the 84th Texas Legislature. The bill requires the creation of exemptions and extensions for occupational license applications and renewals for military service members, military veterans, and military spouses.

No comments were received regarding the adoption of these new sections.

The new rules are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Occupations Code, §55.02 which authorizes a state agency that issues a license to adopt rules to exempt an individual who holds a license issued by the agency from an increased fee or other penalty imposed by the agency for failing to renew the license in a timely manner if the individual establishes

to the satisfaction of the agency that the individual failed to renew the license in a timely manner because the individual was serving as a military service member.

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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D. Phillip Adkins

General Counsel

Texas Department of Public Safety

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### SUBCHAPTER D. IGNITION INTERLOCK DEVICE APPROVAL

#### 37 TAC §10.31, §10.32

The Texas Department of Public Safety (the department) adopts new §10.31 and §10.32, concerning Ignition Interlock Device Approval. These sections are adopted without changes to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3251) and will not be republished.

These new sections are filed simultaneously with the repeal of current Subchapter B of Chapter 19, consisting of §§19.21 - 19.29. New Subchapter D of Chapter 10 is intended to reorganize and consolidate the rules governing the Ignition Interlock Device program and to generally improve the clarity of the related rules.

No comments were received regarding the adoption of these new sections.

The new rules are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, §521.247 and §521.2476, which authorize the department to adopt rules relating to the approval of ignition interlock devices and the authorization of ignition interlock device vendors to conduct business in the state.

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 15. DRIVER LICENSE RULES

## SUBCHAPTER K. INTERAGENCY AGREEMENTS

### 37 TAC §15.172

The Texas Department of Public Safety (the department) adopts amendments to §15.172, concerning Issuance by Counties. This section is adopted without changes to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3252) and will not be republished.

These amendments are necessary to remove the pilot program designation and statutory reference to Texas Transportation Code, §521.008, as a result of legislation passed by the 84th Texas Legislature.

No comments were received regarding the adoption of these amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, §521.009, which authorizes the department to enter into agreements with certain counties for issuance of duplicate and renewal driver licenses, election identification certificates, and personal identification certificates.

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 18. DRIVER EDUCATION SUBCHAPTER A. ISSUANCE AND EXAMINATION REQUIREMENTS FOR LEARNER AND PROVISIONAL LICENSES

### 37 TAC §18.4

The Texas Department of Public Safety (the department) adopts amendments to §18.4, concerning Examinations Administered by a Driver Education School or Parent Taught Driver Education Course Provider. This section is adopted without changes to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3264) and will not be republished.

These amendments are necessary to remove information related to driver education program administration transferred to the Texas Department of Licensing and Regulation (TDLR) by the 84th Texas Legislature.

No comments were received regarding the adoption of these amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission

to adopt rules considered necessary for carrying out the department's work; Texas Education Code, §1001.052 which authorizes the Texas Commission of Licensing and Regulation to adopt comprehensive rules governing driving safety courses and §§1001.201 - 1001.214.

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 June 17, 2016.

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D. Phillip Adkins

General Counsel

Texas Department of Public Safety

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Proposal publication date: May 6, 2016

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## CHAPTER 19. BREATH ALCOHOL TESTING REGULATIONS

### SUBCHAPTER B. TEXAS IGNITION INTERLOCK DEVICE REGULATIONS

#### 37 TAC §§19.21 - 19.29

The Texas Department of Public Safety (the department) adopts the repeal of §§19.21 - 19.29, concerning Texas Ignition Interlock Device Regulations. This repeal is adopted without changes to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3265) and will not be republished.

The repeal of this subchapter is filed simultaneously with proposed new Chapter 10, concerning Ignition Interlock Device. The proposed new chapter is intended to reorganize and consolidate the rules governing the Ignition Interlock Device program and to generally improve the clarity of the related rules.

No comments were received regarding the adoption of this repeal.

The repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, §521.247 and §521.2476, which authorize the department to adopt rules relating to the approval of ignition interlock devices and the authorization of ignition interlock device vendors to conduct business in the state.

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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